

Mark Collins,  
Head of Industry Affairs,  
PhonepayPlus Ltd,  
Clove Building,  
4 Maguire Street,  
London SE1 2NQ

15<sup>th</sup> July, 2010

Dear Mr Collins

## **The New PhonepayPlus Code of Practice**

Magrathea is grateful for the opportunity to comment on your proposals for a new Code of Practice. On the whole we welcome the proposals set out in the draft Code, in particular the simplicity and flexibility of the new definitions and framework. We do, however, continue to have concerns about the degree of due diligence and ongoing risk assessment that is to be required of Network Operators such as ourselves.

### **Definitions**

It is proposed that there will be four types of entity potentially in the chain:

- Lead network
- Network operator
- Level 1 provider
- Level 2 provider

Level 1 providers are not networks but sub-contract to other parties for the purposes of revenue share – resellers being an example. There may be multiple Level 1 providers in a chain and the Level 1 provider may be the same as the network operator and indeed the lead network.

Level 2 providers are responsible for the promotion, operation and content of the premium rate service. There will only ever be one Level 2 provider in a chain.

We agree that the use of the terms “information provider” and “service provider” in the 11<sup>th</sup> Code were unhelpful, confusing and unnecessarily restrictive. We think that the new terms of Level 1 and Level 2 providers are more useful and flexible.

We would point out the presence of a typo in paragraph 5.3.1 of the draft Code. In transcribing the provisions of Section 120 (8) of the Act, the word "or" has been omitted in error from the end of sub-paragraph (e).

We would suggest that the Definitions section should be moved forward, to Part 2 of the Code (immediately after the introduction), because the definitions are not necessarily easy to find for someone coming to the Code for the first time. We think that it makes more sense to set out the legal framework and explain who the various links in the chain of delivery are at the outset, before going on to explain the respective obligations of each of the parties.

## **Outcomes to deliver consumer protection**

In general, we agree that it should be the responsibility of Level 2 providers to ensure compliance with the "Outcomes", i.e. the rules about the use and marketing of premium rate services.

**Rule 2.3.6** requires Level 2 providers "to take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage". Level 2 providers would not normally have sight of such usage until they received their regular usage report from the Level 1 provider or Network Operator.

We would welcome clarity from PhonepayPlus as to what the obligations are on the Network Operator in this regard. How frequently would usage reports need to be provided and/or would they need to be provided in real time? The latter may not be technically feasible. Do Network Operators need to provide information on a proactive basis, or wait until it is requested? And what responsibility does the Level 1 provider have, if he sits between the Network Operator and the Level 2 provider?

## **General Responsibilities**

### **Do you agree with the proposals around the level of responsibility Network Operators and Level 1 providers should take in regard to their direct clients' handling of consumer complaints (paragraph 3.1.1d of the draft Code)?**

It may depend how far up the delivery chain the Network Operator or Level 1 provider is. If you contract directly with a Level 2 provider, then you can expect to have some influence over how a particular complaint is handled and progressed. But if you are, for example, a Network Operator who contracts with a Level 1 provider, you would conceivably be too far removed from the Level 2 provider to be of any practical assistance.

We do accept that the Network Operator in such a case should do whatever is required of him in practical terms to assist with progressing and resolving the complaint. For example, he should provide call detail records promptly if that is required or give details of the party with whom he has contracted. We welcome PhonepayPlus' plans to produce Guidance on best practice in this area.

## Due Diligence and Risk Assessment

The draft Code proposes that Network Operators and Level 1 providers should perform due diligence on their clients before contracting with them, and then conduct ongoing risk assessment by monitoring the client's services. Paragraph 3.1.7 imposes a requirement to "carry out reasonable monitoring of premium rate services provided by any Level 1 or Level 2 provider with which they have contracted".

We welcome PhonepayPlus' comments in paragraphs 6.28 and 6.29 of the consultation. We do indeed contract with a number of Level 1 providers who in turn contract with a large number of Level 2 providers and we would have difficulty in continually monitoring the services offered by all of those parties. PhonepayPlus has therefore considered whether Network Operators should be exempted to some degree from the need to perform ongoing risk assessment and control and be required only to perform due diligence on their clients.

The options proposed are:

- a) Network operators are exempted from the need to perform risk assessment and control where they do not contract directly with a Level 2 provider;
- b) Network operators are required to perform risk Assessment and control to a reasonable degree on all their clients, with PhonepayPlus' expectations varying dependent on whether that client is a Level 1 or Level 2 provider;
- c) Network operators are exempted from the need to perform risk assessment and control on any of their clients, but, as with options a) and b), will have to perform due diligence on their clients.

In our view, the steps set out in Annex C of the draft risk assessment that a Network Operator would be required to take (especially with regard to clients who are not Level 2 providers) are unduly onerous. The risk of consumer harm from a Level 1 provider in particular is relatively low and the measures proposed are probably disproportionate to the benefit that could be gained. We refer in particular to the requirement to scrutinise rulings of the OFT and the requirement to investigate whether the directors have been subject to rulings from other regulators such as Ofcom, the FSA and the ICO.

We would recommend either option a) or option c) above.

## Contracts

Paragraph 3.3.2 requires that parties must only contract with other parties who are registered with PhonepayPlus. We would appreciate further guidance from PhonepayPlus as to how to apply this to existing customers. (Most of our clients and customers will already be registered as service providers, but not necessarily all.) Is there to be a period of grace during which existing providers can apply for registration? What action should Network Operators take in the event that an existing customer fails to register with PhonepayPlus?

## **Registration**

We agree in principle with the proposed registration scheme for non-exempt providers. Our only concern is with respect to the administrative charge PhonepayPlus will impose, as described in paragraph 3.4.7. We ourselves impose a charge on our Level 1 and Level 2 clients to cover our administrative costs for performing due diligence. If those providers are obliged to pay a further annual registration charge to PhonepayPlus, this could act as a disincentive or barrier to entry for smaller providers.

We note the information which PhonepayPlus is proposing to gather at registration, set out in paragraph 6.55. This is similar, but not identical, to the information which Network Operators and Level 1 providers are expected to gather in their due diligence exercise (as proposed in Annex C).

We suggest that the two lists might be more closely aligned so that the amount of work required to be undertaken by the Network Operator or Level 1 provider is kept to a minimum in order to minimise costs to the participants and the industry as a whole. We welcome the proposal to make the registration information available on a database in order to minimise duplication of work.

We believe that £100 should be the upper limit of the eventual registration fee. We believe that, unless the registration process can reduce the work (and consequent cost) involved in due diligence, then there is some merit in funding it instead from the general industry levy.

## **Do you agree that 087 services should be exempt from the requirement to register?**

Yes, we believe that risk of consumer harm in respect of 087 numbers is sufficiently low to allow them to be exempt from registration.

## **Withhold and Retention**

We agree with the proposals in paragraphs 3.5.1 to 3.5.4 with regard to withholding and retaining outpayments should apply to both Network Operators and Level 1 providers.

## **Responsibilities specific to individual parts of the delivery chain**

We agree with the proposed obligations that are specific to Network Operators, Level 1 Providers and Level 2 providers, respectively.

If you would like to discuss any aspect of this response, please do not hesitate to contact me by email or on 07796 834006.

Yours sincerely

*For and on behalf of Magrathea Telecommunications Limited*

Louise Lancaster