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Consultation

The new PhonepayPlus Code of Practice

Submission

From

Square1 Communications Ltd

Square1 Communications Ltd

SQ1 is one of the UK's largest independent Service and Technology Providers in the interactive media and entertainment industry in the UK. We have clients that promote PRS Services on web Print Media and Broadcast. We provide both fixed line IVR and also sms platform services including numbering and sms billing services via its chosen Network partners.

Introduction

SQ1 welcomes the opportunity to respond to this consultation on the new PhonepayPlus (PPP) Code of Practice.

We agree with the main thrust of the new Code and are specifically pleased with many parts that we have campaigned for over the years:

- The establishment of a principles-based core Code supported by flexible Guidelines.

- Responsibility for compliance aimed at those within the value chain who are responsible for the breach.
- The commitment to make more use of the informal procedure in dealing with possible breaches of the code.
- The establishment of an Industry Registration Scheme for all in the value chain.

Strategic concerns

This is clearly an important and monumental moment in the regulation of the PRS industry in the UK and many issues are raised in this response, all of which are important while some, are key to the future development and success of PRS and go beyond the specific questions listed in the consultation document. We have taken this opportunity to raise them and they are outlined below.

1 Coping with Change

SQ1 agree with the comments of AIME on this point.

- **Culture Change**

SQ1 agree with the comments of AIME on this point.

- **11th to 12th Code**

SQ1 agree with the comments of AIME on this point.

2 Regulatory Process

The PRS industry must have confidence in the regulatory process that sets and applies the rules by which it operates and is occasionally judged.

For this to happen there needs to be open and honest dialog between industry and PPP.

We feel that this has started and look forward to more dialog in the coming future.

3 Regulatory Costs

SQ1 agree with the comments of AIME on this point.

4 Objective Compliance Assessments

- **Compliance Advice**

We are highly concerned with the proposal that PPP's own Compliance Advice should not be regarded as binding on decisions by Tribunals as to whether a breach of the Code has occurred.

As a minimum, we would expect any sanction on such a breach to be waived. Where a company has in good faith followed official PPP guidance and specific advice it seems unfair for the same regulator to hold that its own actions and or advice are in breach of their own Code.

Copy . compliance advice should be binding on PPP and if later to be found in breach – No breach should be levelled at the promoter and or SP.

- **Interpretation & Subjectivity**

SQ1 agree with the comments of AIME on this point.

5 Proportionate Liability

With possible sanctions for Code infringements of £250,000 per breach it is clear that the potential liability to SQ1 has greatly increased over recent years. The severity of fines has also grown in recent years beyond any measure of the seriousness of breaches. We believe this has had an adverse impact on confidence levels within our industry. As a result we can see the levels of investment in the UK market.

6 Due Diligence

SQ1 agree with the comments of AIME on this point.

Responses to questions

Q1 – Do you agree with the proposals around how Governance arrangements are taken forward? If not, why not?

Yes, but these should also incorporate the Formal Framework Agreement with Ofcom.

Q2 – Do you agree with these proposed terms and definitions? If not, why not?

No. We have major concerns about the proposed definition of Level 2 providers because it arbitrarily shifts regulatory responsibility from Level 1 providers to Level 2 for the operation of a service. This conflicts with reality as a promoter will not always control the technology platform.

Examples of this are many but a specific would be SQ1 providing IVR and 09 PRS numbering via its chosen network provider, service content provided by broadcaster and promoted by the Broadcaster.

The current proposal erroneously groups responsibility under Level 2 for 'promotion, operation and content' whereas in reality these are frequently different.

We believe that it is important to assess each service dynamic in an objective manner on a case by case basis.

Q3 – Are you aware of any premium rate delivery chains where the proposed distinction between Level 1 and Level 2 providers will be problematic? Are there other factors that we need to consider in relation to the distinction between Level 1 and Level 2 providers in a premium rate delivery chain?

We suggest that responsibility for Level 1 and Level 2 activities needs to be determined on a case-by-case basis to reflect the realities of any specific service.. A 'one size fits all' approach would not work and will give rise to unjust Tribunal outcomes..

Q4 – Do you agree with the proposal to convert Section 7 of the 11th edition of the Code into Service-Specific Guidance and to allow the creation of new Service-Specific Guidance, subject to appropriate consultation? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q5 – Do you have any comments on the draft Service-Specific Guidance attached at Annex C? Please set out any comments you have and the reasoning behind them.

SQ1 agree with the comments of AIME on this point.

Q6 – Do you agree with the proposal to convert Statements of Expectation that support the 11th edition of the Code into General Guidance to industry, and to allow the creation of new General Guidance subject to appropriate consultation? If not, why not?

Yes, due to the fact that Guidance notes can be changed and re-issued quickly to reflect changing circumstances . Their use should reduce dependency on a prior permissions regime.

Statements of expectation are useful provided that:

- PPP seek full industry consultation prior to publication and adoption;
- they do not increase the legal requirements relating to services by dictating mandatory technology – for example mandatory (or ‘strongly recommended’) MO opt-in;
- they are objectively prepared taking account the nature of the services, its intended audience, cost and other relevant parameters (see test criteria above);
- they are not used to facilitate ‘policy creep’.

It is important that in order to support the recovery of the industry, the development of new services and investment recovery that there is certainty in the industry.

Q7 – Do you have any comments on the draft General Guidance to industry regarding due diligence, risk assessment and control attached at Annex C? Please set out any comments you have and the reasoning behind them.

We are seriously concerned with the provision that expects Level 1 providers to **ensure** that Level 2 providers have the financial strength to meet potential sanctions. We feel this is due to PPP’s concern that fines levied will not be paid by the level 2 and it seems to be a way to pass the liability back to the Level 1 provider and therefore negate many of the principles of the new code.

We accept that a Level 1 provider has obligations in terms of due diligence under the new Code. We feel that further clarification is required in terms

of what level of **evidence** a Level 1 provider should be able to show to PPP in relation to any particular case.

Is getting the Level 2 to sign an agreement with specific mention to financial strength enough?

Q8 – Do you agree with the proposal to convert the Help Notes and Tribunal notifications that support the 11th edition of the Code into Compliance Advice (or “compliance updates”)? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q9 – Are there any other areas where Service-Specific Guidance or General Guidance to industry is necessary? Please state any areas you have identified.

General Guidance is needed on the use of the words ‘free’ and ‘bonus’ as they continue to give rise to confusion. We also feel that if a mobile MO message can be seen as a consumers acceptance to “opt in / join” then so should a call to 09 or entry from a web site. To limit this to MO is restrictive, however we agree that a full data trail should be provided if required.

Q10 – Do you agree with the proposals around how responsibility for Part Two of the Code would be applied? If not, why not?

The regulatory regime needs to recognise the individual structure of the value chain for each and every service and identify responsibilities accordingly rather than shoe-horn different processes into standard definitions.

Q11 – Do you agree with the proposed Outcome and supporting Rules around Legality? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q12 – Do you agree with the proposed Outcome and supporting Rules around Transparency and Pricing? If not, why not?

We believe that the Outcome would be better expressed as follows:

“Consumers of premium rate services should be clearly informed of ‘any key’ information likely to influence the decision to purchase, prior to any commitment to accept a charge.

For 2.2.1 we prefer:

“Consumers of premium rate services must be fully and clearly informed of ‘any key’ information likely to influence the decision to purchase.

The main point here is that escalation of the requirement from ‘key’ information to ‘all’ information affecting a decision to participate would make many promotions impracticable. As you are aware terms and conditions can be very long, the publication of full terms and conditions would mean so much print that consumers would be confused further.

There is also a concern that including all information could make it possible to hide key information e.g. subscription charges from consumers in a proliferation of text.

For 2.2.2 we favour:

“Promotional material must contain the name or brand of the Level 2 provider of the relevant premium rate service and the non-premium rate UK contact or help line telephone number of that provider.”

Where SMS marketing is used we would argue that the information required above should be allowed to be abbreviated where limitations on the number of characters make it impractical to render in full. It would then be logical to allow this in promotions in other media **EG: Square1 Communications Limited would become SQ1**, to achieve consistency, particularly in the case of small ads. The over-arching requirement is that consumers should be given a clear way of contacting the relevant promoter, and this should not be clouded by extraneous information.

We feel that that brand names and abbreviated names used as above would need to be entered on the number checker for customer care purposes.

On 2.2.4 we request a rewording that makes it clear that what is at issue is the promotion of a PRS service, not the medium of the promotion.

We strongly believe that the proposed provision for pricing information to be proximate to the access number will lead to trouble and possible breaches on numerous services where pricing is already perfectly clear, even if not situated adjacent. There will also be arguments about how proximate is proximate.

The criteria of **'prominent, clearly legible and visible'** have served the industry and its regulator well for many years but if there is a case for change we would favour a provision that pricing information should be:

*"...displayed in a way that is **prominent, clearly legible and that** the average consumer is likely to see together with any call to action."*

We recommend that 2.2.7 be omitted as two major applications would fall foul of it: STOP messages and the need for two messages to pay for a £3 service.

On 2.2.8 we believe that the requirement for visual **and** spoken information for services generally exceeding £2 should now be dropped as it is too prescriptive and too woolly a threshold in a multi-price environment.

On Part 2

SQ1 agree with the comments of AIME on this point.

Q13 – Do you have a view as to whether there is a need to issue Guidance that interprets how Rule 2.2.6 (around pricing proximity to the means of access) is applied where secure mechanisms for phone-payment are used to purchase a PRS?

See above comments on pricing and proximity.

Q14 – Do you agree with the proposed Outcome and supporting Rules around Fairness? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q15 – Do you agree that the spending caps and thresholds for reminder messages, set out at Rule 2.3.12a-d, are appropriate? If not, then please suggest alternative levels, and please provide the evidence you have to support them.

We are disappointed that the opportunity has not been taken to remove the arbitrary and outdated rule that consumers must be cut off after spending £30 and obliged to reconnect to continue to enjoy a service. It should be enough to advise consumers what they have spent £30 and give them an option to continue (they do, of course, have the option to disconnect at any point). We feel that on services such as Live Chat that are already covered by Live Licences that the limit should be moved to £50 before termination of the call is required.

With the passage of time the compulsory provision for a reminder with each £10 spent seems unnecessary and out of kilter with the over-riding £30 disconnect rule. These provisions are outdated and should be changed.

Q16 – Do you agree with the proposed Outcome and supporting Rules around Privacy? If not, why not?

We believe that the STOP command should remain universal, easy to utilise and uncomplicated and that where this is technically not possible there should be available an alternative method that provides the required outcome.

Where the proposal at the fourth bullet point of para 5.74 of the consultation document is concerned, we believe the provision should reference PECR, which permits a mobile number entered on a website to constitute a soft opt-in so long as the user is notified of that opt-in and is given an opportunity to opt-out. It would not be acceptable for PPP to apply restrictions more onerous than current law. See above also.

Q17 – Do you agree with our assessment that consumers benefit from being clearly informed that their data may be used for marketing and being given an opportunity to opt in to this? If not, why not?

We do not advocate going beyond anything required by the law in this area. However, we see benefit in referencing the excellent guidance that the ICO provides from its web site for marketers.

Q18 – Will Rules 2.4.4 and 3.6.2 of the proposed new Code deliver clarity to consumers when they opt in to a service? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q19 – Do you agree with the proposed Outcome and supporting Rules around Avoidance of harm? If not, why not?

We suggest amending the Outcome to read:

“That premium rate services do not cause a ‘significant level of’ harm or unreasonable offence to consumers or to the general public.”

We need to be objective and use common sense particularly in relation to the intended audience of a specific service. We would use the example as was the case with OFCOM in relation to Adult services (*babe chat services*) it was proven by OFCOMS own consumer research that these services did not cause any undue consumer harm and most viewed them as entertaining and harmless fun. Most consumers can take offence at something so we need to look at the promotional context also.

2.5.4 should be omitted as prostitution *per se* is not illegal and whatever restrictions apply in this area should be for the law, not the Code.

2.5.6 should be omitted as its meaning is completely opaque (inappropriate to whom?).

On 2.5.7 we suggest the following more realistic redraft:

“Level 2 (or the merchant promoter) must use all reasonable endeavours to ensure that promotional material is not targeted at those for whom it, or the service which it promotes, is likely to be regarded as being offensive or harmful.”

2.5.9 Should be relegated to Guidance.

Q20 – Do you agree with the proposed Outcome and supporting Rules around Complaint handling? If not, why not?

We agree with the Outcome. Square1 work to a best practice policy already.

On 2.6.5 we prefer the following wording as it is more consistent with the Ofcom consultation on complaints handling:

“Consumers who ‘express dissatisfaction’ with the handling of their complaint must be informed that they may ‘refer it’ to PhonepayPlus and must be provided with its contact details.”

The broadcast arena has concerns over whether they will deal with unresolved complaints via Ofcom, PPP or both and there will be a need for clarification on this.

Q21 – 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)? If not, why not?

We accept that a level 2 provider should take responsibility in appropriate circumstances for directing customers to a Level 1 provider or Network operator if it is unable to resolve the matter. A Level 1 or Network operator, however, may be unaware of a complaint lower down the chain and should not incur responsibility for ultimate resolution.

On 3.1.5 we request the deletion of the word 'internal' as providers may outsource some elements of their obligations under the Code.

Q22 – Do you agree with the proposals around technical quality? If not, why not?

We would like clarification on PPP's definition of what exactly constitutes technical quality. We are happy to use 'all reasonable endeavours'. It does not however equate to a guarantee of technical perfection. ***It is not possible to offer a fault free service 100% of the time.***

A unintentional lapse or fault should not incur a heavy penalty. We have a commercial incentive to achieve high technical quality on all services.

As an example an unforeseen network congestion or total loss of internet connectivity would generally be beyond the influence or control of Level 1 and/or Level 2 providers.

Q23 – Do you agree with the proposals around internal risk control (paragraph 3.1.5 of the draft Code)? If not, why not?

SQ1 agree with the comments of AIME on this point.

The cost of this could become out of reach for some or many Level1 or 2 providers

Q24 – Do you agree with the proposals in regard to due diligence, risk assessment and control (paragraphs 3.1.1a, 3.1.7 and 3.3.1 of the draft Code)? If not, why not?

SQ1 agree with the comments of AIME on this point.

Q25 – Do you agree with the draft General Guidance around due diligence, risk assessment and control set out at Annex C? If not, why not?

We agree with the aim of this in general but would like to know what PPP consider to be thorough due diligence. Also the additional work placed on Networks and Level 1 provider in this area is costly and will be a barrier to entry for some. We would like to seek further information from PPP on what they consider to be acceptable forms of risk assessment and due diligence.

Q26 – If you have a preferred option (a, b, or c) in regard to the application of risk assessment and control to Network operators, then please state that preference, along any reasoning you may have.

We favour b.

We already follow a set of standard procedures when contracting new clients and managing existing clients:

- 1) Pre-contract due diligence. We check the ppp web site for any past breach; we request them to inform us if they have been involved in PRS before if so with whom. Company details are checked on line with companies' house. If they are a private individual we ask for proof of ID and Address.
- 2) Initial service approval / specification – we get a full spec and or create this with the client, and check it against the code.
- 3) Service testing – done by Development and checked with the code.
- 4) We do spot checks at the moment as with over 500 clients and thousands of services and many thousands of numbers to do a check on every service / number every month is not possible.

Q27 – Do you agree with the proposals about Directions? If not, why not?

We believe these proposals would benefit from clarification.

There is also a specific issue relating to refunds from retained revenue. If there is a general instruction to refund all customers the full cost of their call, how is the Network operator to apportion or ration this where the retained revenue is insufficient?

Q28 – Do you agree with the proposals about Contracts? If not, why not?

Yes we agree with this.

Q29 – Do you agree with the proposed Code rules around the Registration Scheme? If not, why not?

Yes. There are one or two points that need clarification.

Q30 – Do you agree that these are the appropriate risk factors and measures to use when drawing up a framework for assessing which services should be required to register? Do you have any further suggestions on criteria we should consider?

We believe that **all** providers of controlled PRS services should be required to register.

Q31 – Do you agree that 087 services should be exempt from the requirement to register? If not, why not?

As 087 services are deemed to be controlled PRS then their providers should be required to register. As many providers offer both 09 as well as 087 then this should not cause the majority any issues, it would also add to those funding the scheme and reduce the registration scheme cost for all.

Q32 – Have we captured the correct mandatory information to include on the Registration Scheme to meet our regulatory objectives and assist businesses in carrying out due diligence on their contracted partners? Is there other mandatory information we should require registrants to provide?

We believe that the mandatory information is adequate and we see no reason for additional information such as passport and bank account details, however we do feel that details of any associate companies should be registered if involved in any part of the value chain of PRS.

Q33 – Do you agree that the publication of breaches should be limited by a period of time? Do you agree that three years for a Track 2 breach and five years for an Emergency procedure are appropriate timeframes?

We agree that time limits are appropriate, any upheld breaches should be listed we suggest a two year for Track 2 and three-year for EP

Q34 – Do you have a view on whether breaches from the 11th edition of the Code should be matched across to the proposed registration database, and/or how this could be best achieved? If so, please provide it, along with any supporting evidence.

To avoid confusion there should be a clean start under the new Code. Breaches under each edition should be separated and clearly identified according to the applicable Code. Those falling under the old Code clearly identified as such and supported by a hyperlink to the published adjudication.

Q35 – Do you have a view on whether open investigations against Level 2 providers should be flagged to other parties registered with PhonepayPlus, and/or how this can be best achieved? If so, please provide it, along with any supporting evidence you have.

The alleged breach should be flagged at the point when the breach letter is sent by PPP and receipt is confirmed by. Where a provider is using more than one aggregator or fixed line TCP all should be informed directly. We would also like to see a guarantee from PPP to remove the alert / flag within one working day if the breach is not upheld. An Alleged breach should only be flagged to networks and Level 1 providers.

Q36 – Do you support mandatory registration of all Network operators, Level 1 providers and Level 2 providers of eligible services? If not, why not?

Yes. A supplier in to a value chain who can materially affect the compliance/outcome/technical quality of a service or whose function can affect or cause harm should be required to register

Alternatively, it is arguable that not every party should have to register as long as the contracted company elects to take the regulatory risk as discussed with you at our last meeting.

Q37 – What do you consider to be an appropriate fee for registration? Do you agree that the Registration Scheme should be funded by fees or should its cost be incorporated into the general industry levy that funds PRS regulation?

It is far too early to fix costs of registration when no financial model or specification for the database exists or has been finalized.

The specification of the database also needs to take account of whether the information is proactively verified or taken on trust. If PPP undertakes no validation exercise the information is of no additional use to what a Network operator might obtain via its own due diligence exercise. There should be some added value from PPP.

Any charge should be balanced with the possibility of this charge being a barrier to entry for new comers to the market. We did discuss different levels of charges for Networks, Level 1's and Level 2 providers. **A one man band with one 09 number generating £200 a month on a help line is not as capable as paying as maybe a multi million pound Network.**

Q38 – Do you agree with the proposals around registration of service details? If not, why not?

The Number Checker should contain the data required for a consumer to understand what it is they are or have used :- (i.e. Help Line contact number and Brand name or Level 1 Name or Acronym) It should be possible to include a service name or programme name that would be more helpful to the consumer, e.g. who wants to be a millionaire or Live 960. We believe that flexibility is needed to deal with different business models. This should be optional not mandatory.

Q39 – Do you agree with the proposals around withhold and retention of payments? If not, why not?

Square1 is strongly opposed to the extension of the 30-day rule throughout the value chain ! This would mean that companies such as Square1 Communications Ltd who are already factoring payments to clients will be prevented from so doing so.

whereas Merchant Promoters (Level 2 providers) may still be able to secure factoring arrangements with other financial institutions.

It is not for PPP to regulate our commercial terms with clients. It should be left to a company's commercial judgment if it wants to help finance the growth of a partner's business in this way and hence carry the risk of meeting the cost of any fine. As long as we are carrying out risk assessments and due diligence we take the commercial decision to do this and also any financial fall out or benefit.

The 30 day requirement for charities where the risk of harm is clearly very low should be removed.

Q40 – Do you agree with the proposals around Data Protection? If not, why not?

Companies already have an obligation to abide by the law, It should be enough that law and data protection are referenced in the code.

Any CCP findings should be that a service is 'non-compliant' with the Code of Practice – not in breach as a matter of law.

Q41 – Do you agree with the proposals around Network operator responsibilities? If not, why not?

Yes.

Q42 – Do you agree with the proposals around Level 1 and Level 2 provider responsibilities? If not, why not?

We need to make clear that Level 1 providers will often have responsibility for compliance on some aspects of a service and there are examples where a Level 1 provider has responsibility for an entire service and that a Level 2 would not always be liable for all parts of the Breach. As we have said before each case should be looked at on a case by case basis to ascertain where the breach is and who in the value chain is responsible for this part, if they are all registered and contracted this should be a simple task.

Q43 – Do you agree with the proposals around Prior Permission? If not, why not?

We agree with AIME on this point.

Q44 – Do you agree with the proposals around PhonepayPlus' investigations? If not, why not?

We agree with AIME on this point.

Q45 – Do you agree with the proposals around the Track 1 procedure? If not, why not?

We agree with AIME on this point.

Q46 – Do you agree with the proposals around the Track 2 procedure? If not, why not?

We agree with AIME on this point.

Q47 – Do you agree with the proposals around the Emergency procedure? If not, why not?

No, We fully agree and support AIME on this point.

Q48 – Do you agree with the proposals around adjudications? If not, why not?

We agree with AIME on this point.

Q49 – Do you agree with the proposals around reviews? If not, why not?

We agree with AIME on this point.

Q50 – Do you have an opinion on what time limit should be imposed (except in exceptional circumstances) for seeking a review after publication of a Tribunal's decision? If so, please state it.

We are content with the 30-day limit.

Q51 – Do you agree with the proposals around sanctions and refunds? If not, why not?

We agree with AIME on this point.

Q52 – Do you agree with the proposals around the administrative charge? If not, why not?

We agree with AIME on this point.

Q53 – Do you agree with the proposals around oral hearings and appeals? If not, why not?

We agree with AIME on this point.

Q54 – Do you agree with the proposals around publication of decisions? If not, why not?

We agree with AIME on this point.

Q55 – Do you agree with the proposals around delegation of powers? If not, why not?

Yes.

Q56 – Do you agree with the proposals around definitions? If not, why not?

We agree with AIME on this point.

Q57 – Do you agree with the proposals around Annexes? If not, why not?

Yes.

Q58 – Do you agree with this assessment of parts of the 11th edition of the Code that should be withdrawn completely going forward? Please list any specific provisions that you feel should be preserved in some form, and provide your reasons.

We agree with AIME on this point.

Q59 – Do you agree with PhonepayPlus' assessment and proposals around how the new Code will be interpreted in respect of 087 services? If not, why not?

We agree with AIME on this point.

Q60 – Do you agree with our assessment that now is not the right time to review our funding model? If not, why not?

We agree that now is not the time but we want to establish a timetable for early examination of funding and costs, particularly as a new process and culture should emerge with the new Code. We also expect to see costs falling back into line with industry turnover rather than comprising a growing overhead. We also feel it is time to review the maximum charge as we feel this is far too high and a hang over from a past era.

Q61 – Are there any other areas of change within the proposed new Code that carry an impact that you feel we should consider? If so, please provide them, along with any evidence you have of the likely impact.

We agree with AIME on this point.

Q62 – Do you agree with our assessment of the potential impact caused by the proposed new Code? If not, then please provide any areas of consideration you feel we have missed, and any supporting evidence for them.

Yes.

Statement of representation.

Square1 confirms that this response has been compiled following a process of internal discussion and distribution of the relevant Consultation documentation to all Directors of Square1 Communications Ltd.

Please see www.sq1.co.uk for Directors details.

The views expressed in this response are a fair representation of all Directors of Sq1.

Conclusion

Our comments are made constructively and with the intent of achieving an effective, fair and proportional regulatory regime for Square1, its clients and the industry.

If any clarification to our response is required or if we can be of any further assistance please contact Mark Birkett. markl@sq1.co.uk