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Response to PhonepayPlus'

Guidance to support the proposed

12th Code of Practice

on behalf of Wireless Information Network Limited ("WIN")

Wireless Information Network Limited ("WIN") is a dynamic enabler of entertainment, information and interaction services. WIN help leading content owners, mobile operators, corporate enterprises and media & entertainment corporations engage customers through mobile broadcasting, create brand loyalty, maximise revenues and reduce costs. WIN was acquired by IMI Mobile in 2010.

WINs wireless data services, whilst mobile centric, embrace mobile, fixed telephony, Internet, mobile broadcasting and on-demand technologies.

Executive Summary

WIN recognises the proposed 12th Code of Practice, together with the proposed Guidance and supporting Registration Scheme represents a fundamental change of approach to the regulation in the UK.

WIN has played a material part in supporting the industry (of which it considers PhonepayPlus ("PP+") a part) in over coming issues of exploitation and bad practice of participants. Such practices have undermined the great utility of phoned paid services. WIN welcomes the new approach to regulation proposed by the New Code and accompanying Guidelines but asks that PP+ address in detail the concerns raised by this response and that of the Association of Interactive Media and Entertainment to which WIN has also made significant contribution and firmly supports.

Most important to the success of the new regulatory regime are:

- Proportionate regulatory responsibility. It is no longer acceptable for service providers to remain liable for the actions and omissions of content promoters, application providers or other participants in the supply chain;
- The polluter must pay (and be directly accountable for i.e. not merely through contractual indemnity) for losses incurred by the consumer and the broader market;
- Premium rate services must be placed under no greater regulatory burden than the law requires or that imposed on any other form of media i.e. regulatory Code and Guidance should not be used to 'gold plate' service unreasonably;
- Regulation must be technology neutral;
- Regulatory enforcement must be objectively applied;
- Regulatory enforcement must be delivered with clarity, certainty and professionalism in a timely manner in order to deliver consumer protection and effective regulation;
- The cost of regulation should operate in proportion to industry economics;
- The cost of regulatory enforcement and sanctions must be proportionate to the known level of consumer harm.
- Consumer protection must be leveled at the reasonable response of a reasonable consumer in receipt of the service.

WIN welcomes the opportunity to respond to the consultation of PhonepayPlus' proposed Guidance to the proposed 12th Code of Practice.

Questions

Q1 – Will the language used in the Guidance be clear to the majority of those involved in PRS provision? If not, why not? Please include any specific suggestions you have for clearer drafting.

The Guidance definitions are helpful where the Code is addressing generalised terms and broad obligations. The definitions however should be expressly stated as being indicative in scenarios where no fixed definition can consistently be applied to a given party. This is particularly the case with regards to the distinction between Level 1 and Level 2 providers as proposed.

The Guidance acknowledges that certain organisations can meet multiple definitions in respect of either single or multiple services. It is wrong therefore to attempt to apply fixed definitions, particularly when considering alleged non-compliance of the Code and any resulting enforcement action. The crucial relevance of Level 1 and 2 providers, is not what definition they fulfill but rather what technologies or aspects of the services they had control over and responsibility for. PP+ must conclude accountability only to such parties that directly caused the resulting consumer harm. This process will require a detailed assessment of each case and the supply chain delivering the service. Only by undertaking such scrutiny will any enforcement action be considered at all proportionate and fair and thereby achieve effective regulation.

Q2 – Is the level of information provided in the Guidance sufficient? If not, why not? Please include any specific suggestions you have.

Considerations of the adequacy of the Guidance are provided below with regards to specific Guidance recommendations.

Q3 – In your opinion, will any of the expectations set out in the Guidance be likely to cause difficulty to the majority of providers, or cause confusion? If so, please give any reasons or evidence you have. In particular are there technical barriers to following Guidance we have not already acknowledged?

The most significant Guidance note that requires a full rewrite is the provision regarding the marketing and the payment mechanisms of services and associated consents (see below).
This Guidance is unworkable as written and further industry consultation is required in order to resolve this matter and bring the Guidance note in line with general legal requirements.

Q4 – Do you have any other specific comments on the content of the Guidance notes? Please clearly state the title of the Guidance and page references where appropriate.

Specific comments are provided below in respect of specific Guidance notes.

Q5 – In your view, would the current requirement for risk assessment and monitoring of Level 2 clients, contained within draft Guidance on 'Due diligence and risk assessment and control', be disproportionate to the level of risk involved? Please provide evidence of current practice in relation to identifying and controlling risk with direct clients.

There remains confusion in the draft Guidance between Due Diligence and Risk Assessment.

The obligation regarding due diligence, in principle, is entirely accepted by WIN. However, WIN has reviewed the proposal in regard to Level 1 providers and considers that the ongoing obligation with regards to Level 2 providers advertising and promotional activities as unachievable in practice. It does not reflect the premise that the proposed Code will hold those who directly manage and control the service as having direct accountability. The continuing obligation to monitor ongoing advertising, marketing and promotion is (and has historically been proven to be) unworkable and unscaleable for Level 1 organisations. Level 1 providers today conduct a degree of pro-active monitoring of the service and this includes proactive monitoring of advertising and associated promotion. However, there continues to be non-compliance in the consumer facing media.

A purpose of the new proposed Code and the Registration Scheme is to provide the requisite transparency and accountability for that aspect of the service that is generally under the Level 2 (or its contracted parties) control. Residual and vague potential liability for the Level 1, in the absence of negligent or wilful misconduct, undermines this primary responsibility and acts as a potential hook on which to hang unrecovered damages. There should be no ongoing liability for misdemeanours in an environment over which the Level 1 has no control. It is this threat of liability decoupled with the requisite control that has stifled investment of Level 1 providers in the UK. Accountability should be coupled with control in a meaningful respect. We are in WINs view, in danger of perpetuating the short-comings of the existing regulatory regime.

Level 1 providers should have an obligation for express due diligence prior to contracting and should act in accordance with best practice and in accordance with the Code. The Guidance should not impose a higher standard or increase the liability of the providers in the market.

It should be noted also that in addition to compliance with the Code most Level 1's in the UK subscribe to AIME Best Practice Guide which imposes further specific requirements. Industry self-regulation should be the tool used to improve standards over and above legal standards.

The Guidance notes also need to reflect the fact that due diligence on some companies is rather obsolete when it comes to determining liability for non-compliance. Due diligence on multi-national companies is rather generic and has little relevance when considering the ability to infringe the PP+ Code. Level 1's cannot be penalised for this.

The legacy compliance history of companies will need to be recognised in any Guidance regarding risk assessment. Clearly historically this has been principally maintained (by PP+ and MNO's) at Level 1's. Only in the last few years have Level 2's been recorded in any respect.

Q6 – At present, the 'Due diligence' Guidance does not contain any requirement or recommendation to check passports of directors of prospective clients. Is it appropriate to recommend this in some form? If so, please provide any view you have as to what form.

No. The decision as to whether or not to require copies of passports is a matter of commercial risk assessment and should be a decision for the Level 1's.

Q7 – Should the section around free trial periods, contained within Guidance on 'Promotions and promotional material' be revised so that, if the consumer is clearly informed at the beginning of a trial period, then it is acceptable to charge without further opt-in as long as charging commences as soon as the free trial is over? Please provide any evidence you have.

Promotions and Promotional Material – General Note

- Para 2.2.5 of the Code (referred to in para 4.1 of the Note) requires that pricing information 'in any medium' must be legible and visible. This is technically specific as it presuppose print media or a visual format. In radio this will not be possible.

- Para 4.2 the proposal to prohibit the use of GBP in preference for the £ sign is not technically possible as still some mobile network operators cannot transpose this character. Similarly in relation mobile services character limitations would prevent the use of 'pounds' as an acceptable alternative. Guidance should avoid being overly prescriptive in this regard and rely on Code provisions regarding clarity and transparency of pricing. Transparency of pricing in particular in relation to premium rate 090 (etc) services remains a significant concern.

- Para 4.3,WIN supports the use of 50p/msg or 50p/min over 50ppm.

- Para 4.4, WIN does not agree with the principle that it should oblige Level 2 providers to state the cost or application of transit charges. This is a matter for MNO and consumer. For many data access charges will not apply. L1 and L2 do not provide data and network access. Facebook sites/social networking sites do not have this obligation. Principles of technology neutrality would apply so that this would not be a requirement for L1 and L2's. Billing and content and connectivity are separate and discreet services. In practice however industry will probably continue to a phrase stating that data charges may apply but this is conducted in the absence of

regulatory consistency and in the interests of transparency and consumer confidence, not regulatory imposition.

- Para 4.5 ‘network extras’ is meaningless and does nothing to clarify or enhance the obligation that pricing must be legible and transparent.

- 4.6 Proximity of pricing should be considered (expressly) in the context of the service as a whole – the reasonable consumer should have sight of and understand the pricing.
Prominence is more important than proximate (meaning adjacent). One page of multiple promotions should be able to have one price statement that is clear and prominent. Provided the price is consistent across all individual promotions. In recent weeks we have seen PP+ compliance advice requiring proximation of pricing, even though the pricing in fact has been clear, prominent and transparent. PP+ have conceded this point recognising that prominent pricing meets the express obligations of the Code. The Guidance should not enhance and increase the burden of regulatory compliance in this regard or indeed confuse the interpretation of the proposed Code.

- Prescriptive requirements such as font size etc is inappropriate as it is a relative concept. Other regulatory environments are not prescriptive in this regard. The Gambling Act for example requires that cost should ‘come to the attention’ of the consumer.

- With regards to premium texts then WIN supports that the total cost of the content or service should be the costs statement provided to the end consumer rather than the cost per message. The latter in practice causes unnecessary confusion and complex wording within the message body.

- Para 4.15 should be deleted as the Guidance should cover achievement of compliance with the Code, not best practice.

Q7 – There is no regulatory basis for requiring further notification of the end of a free trial period and the commencement of the chargeable service. Other media subscriptions do not require this and to impose a regulatory obligation in this regard would be creating an anti-competitive and unnecessarily restrictive burden on the PRS industry.

Q8 – At present, Guidance does not recommend that providers take steps to be able to recognise a consumer’s intent to exit, even when they have not sent ‘STOP’ or another correct keyword. Should this be the case and, if yes, how might this be achieved?

WIN firmly supports the universal adoption of the use of the word STOP to cease mobile content services and/or promotions. This terminology is now recognised by consumers and industry alike both in the UK and several other international markets. It has been a significant success and excellent example of self-regulation working. WIN supports the AIME view that any obligation to recognise an ‘intent to stop’ is unworkable and unnecessary and too vague to be useful. Furthermore it would risk infringing data privacy rights of consumers to determine and may dilute the effectiveness of the STOP command.

Method of Exit of Service

- Para 4.2, WIN do not agree that it is confusing for consumers to send STOP to a

different shortcode. There are circumstances where it is costly for industry to do otherwise. All that matters is that the STOP destination shortcode is clear.
- Para 4.3 should be deleted as it is unworkable. Errors in this regard can be corrected via a refund policy and is standard practice.
- The MNO policy regarding STOP functionality should be referenced here also. Para 4.5 should be deleted as voice shortcodes and video do not support recurring charges.

Consumer refunds

WIN broadly supports the Guidance note regarding consumer refunds. WIN recognises the requirement that PP+ may expressly mandate refunds as a sanction. However, refunds recommended by PP+ as 'gestures of good will' are beyond the scope of PP+ and the proposed Code.
In the event a L2 wishes to make a refund they should have the discretion to do so. In addition, refunds rendered unprompted by a L2 or L1 should be a material mitigating factor.

Refunds should only be required as a sanction where there is - as at the date of the adjudication - outstanding and/or continuing consumer harm that may be remedied through the mechanism of a refund. Where there is no consumer harm continuing as at the date of the adjudication and no outstanding refunds to be made then the refund sanction should be unnecessary.

Cl 3.2 should be removed.

PP+ should, where requested by the L2 ,disclose the MSISDN in order to give effect to a refund, whether prior to or subsequent to any adjudication.

The avoidance of undue delay

The requirement of 'prompt' delivery is regulatory creep and unnecessary and should be deleted. The Distance Selling Regulations adequately cover the obligations in this regard and PRS services are already required to meet the standards of that law.

Privacy and consent to charge
WIN support the view expressed by AIME with regard to this Guidance note.

Given the importance of this specific Guidance we would like PP+ to rework this document in its entirety in consultation with an industry working group.

WIN support the need for differentiation between the need to obtain consent to market as distinct from the consent to charge.

Consent to Market, WIN supports the application of the Privacy and Electronic Communications Regulations, including soft opt-in. Neither the Code nor the tribunal should enhance the regulatory requirement through Guidance or through precedent. This results in a lack of clarity, inconsistency and regulatory uncertainty. Both PP+ should avoid prescribing technical requirements in order to evidence consent to market. Compliance with PECR should be the sole test.

With regard to the time period over which marketing data may be considered valid, the nature of the services has to be considered together with any pertinent and

specific, prevailing circumstances. For example annualised services may be marketed less frequently than monthly services. Similarly exceptional circumstances such as disaster recovery programmes may result in a reasonable delay in marketing. Also PP+ should look to other media environments to test industry practice. Typically WINs view regarding an appropriate latency period for a marketing response would be six to twelve months. It would be unnecessarily prescriptive to mandate specifically for all services.

Consent to Charge – There is a real and understandable temptation to regulate on a technically specific basis. However it must be remembered that technical protocols now transcend equipment and (for example) what is acceptable regarding web services should be acceptable for WAP. Equally, just because there is the possibility to generate network operator data from the handset should not mean that there is a requirement to do so. Regulation needs to reflect how the consumer in practical terms utilises a service and should implement appropriate checks and balances (that are, where possible, technically neutral) to safe guard the consumer in the use of such services.

To this end where MO is part of the consumer experience and reasonable within a service then it is of course the preferred means of indicating consumer consent to a purchasing decision. If MO does not "work" then a user can be sent a free MT with a PIN, which is then entered into the website or WAP site. WIN agrees with AIME that the priority is to achieve independent verification via a Level 1. Web and WAP pin flow hosted by an independent Level 1 provider provides an audit trail making it possible for PP+ to confirm that the PIN was indeed sent to the user. If there is a consumer dispute about consent, PP+ can ask the Level 1 for verification. This effectively reflects what has been agreed with regards to Payforit albeit the PP+ has no remit over this product. WIN support the availability of Payforit and agree that it resolves many of the consumer protection issues experienced with WAP services. There should be no reason however from a regulatory perspective why a similar auditable routing should not be acceptable to PP+. The importance is to preserve consumer choice with regards to its equipment of interaction (pc, mobile, TV etc) and payment mechanism. Both aspects are only going to become increasingly complex and varied in the future.

Remainder of Guidance Notes

With regards to the remaining Guidance provisions, WIN has actively contributed to and therefore agrees with the response submitted by AIME.

Conclusion

WIN are very grateful of the opportunity to respond to PP+'s consultation and we hope that collectively we will achieve proportionate, fair and transparent regulation that effectively protects the consumers of the UK whilst encouraging innovation and the development of valued services.

If you have any queries regarding this consultation please do not hesitate to contact either myself or Sally Weatherall.

Yours sincerely

Mike Jefferies
Finance Director

Wireless Information Network Limited