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Guidance to support the proposed new Code of Practice

Draft for Consultation

Submission by mBlox

1. Introduction

mBlox is pleased to have the opportunity to comment on the PhonepayPlus (PpP) consultation on the Guidance to support the new PpP Code of Practice.

mBlox wishes to register its support for the AIME submission to this public consultation.

Where possible, Guidance Notes should have footnotes referring to Tribunal decisions to clarify the thinking behind the notes.

To provide a measure of 'future-proofing', any references to prices should be expressed as excluding VAT.

We suggest that Guidance should also be provided on:

- Applications & PRS (in-app billing)
- Sexual entertainment services.

2. mBlox

mBlox is the world's largest mobile transaction network specializing in providing operator connectivity and mobile billing capabilities to businesses around the globe. We are the intermediary between businesses and mobile operators managing the delivery and billing of mobile content and mobile services. Mblox does not directly contract with end users for mobile content services and does not create or provide the premium SMS/MMS message.

3. Consultation Questions

Before turning to the specific questions asked in the Consultation, we would like to address the point made in para 3.11 of the document. We urge PpP to look at this issue again. Having referred back to the original 2007 Consultation that established the current separation between PpP and the CCP, it is clear the principle behind this move was to allow Board members to step away from the adjudicatory work of PpP and to focus on setting strategic direction, policy-making and supervising the work of the Executive. This being the case, we believe it is fully within PpP's power, as a matter of policy, to mandate that the CCP be bound by Guidance Notes. As per the statement in the original Consultation, the CCP can inform the Board of relevant enforcement issues, areas of ambiguity or

other concerns that have arisen with the application of the existing Code and these can be fed into amended Guidance Notes.

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.

Please see individual Guidance Notes below.

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

Please see individual Guidance Notes below.

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?

Please see individual Guidance Notes below.

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

Please see individual Guidance Notes below.

General Guidance

1) Due diligence and risk assessment and control on clients

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.

In general we do not believe that the level of risk assessment and monitoring of Level 2 clients is disproportionate to the level of risk. However, we do have some concern over the exact requirements for an 'action plan' and suggest that further guidance be given around this area. We also note that this requirement may add a significant burden for smaller providers, and may result in lower revenue generating clients being prevented from entering the market, as it would be uneconomical to service them considering the additional overhead.

We request that the Guidance take a proportionate approach to the requirements on risk assessment and monitoring by recognising the different levels of risk associated with different service types and clients. The higher the risk, the higher the level of scrutiny demanded.

Para 6.2 of the Guidance places responsibility on Level 1 providers to assess the risk of promotion, marketing and content of services and to monitor advertising. Although it is reasonable for Level 1 providers to make an initial risk assessment, including scrutiny of likely promotional material, it is not feasible to monitor advertising output on a continuous basis. We seek clarification that the expectations placed on Level 1 providers will not be unrealistic or impracticable.

Further consideration should also be given to the requirements for due diligence and risk assessment on non-Level 2 clients. The fourth bullet under Para 5.1 may not be viable in reality, considering commercial sensitivities. We suggest that it would be reasonable for the entity carrying out the assessment to ensure that the non-Level 2 client understands the requirements on them in respect of assessing and monitoring their own clients, in addition to taking action where any issues arise.

Finally, the Guidance needs to take account of the fact that when MNOs undertake due diligence on Level 1 providers, the records will include the breach history of all their contracted parties under the pre-existing regime.

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.

We do not believe that this would be appropriate. Aside from the fact that for large multinational corporations this request would be pointless, the checking of passports does not add real value to the actual risk assessment of a client one way or another. For smaller, unknown clients from aboard there can be value where other checks are not as readily available.

2) Lower-cost services (including 0871/2/3)

We believe that this Note should cover only 087x controlled PRS as other low-cost services are beyond the remit of PpP.

We would welcome an explanation of why international call routing services require prior permission as they cost only 3-5p/min.

3) The conduct of live services

We suggest that this material should either be added to the relevant parts of Service Specific Guidance or that all the live service rules should be placed in this General Guidance. It is confusing to have them split.

Whichever approach is followed, the Note should recognise the position of consumers who have given positive auditable consent to continue a call beyond the £30 cap as permitted under the prior permission regime.

4. The avoidance of undue delay

The provision at para 3.19 that goods should be 'delivered promptly' represents regulatory creep as goods ordered in other ways, e.g. by credit card, are not subject to such a proviso. Stipulations that goods may take up to 21 or 28 days to arrive are commonplace in the wider mail order market and services paid for by premium rate should not be disadvantaged in this way.

We believe that there must be an objective test to decide whether a delay can be considered undue. There may well be service specific reasons why delivery has to be delayed, e.g. tickets for a concert may not even be printed until just before event etc. Overall, this area should be governed by the European Distance Selling Regulations.

Section 5 should be deleted and coverage moved to the Note on live services as it is not relevant to this topic.

5. The appropriate use of number ranges

No comments.

6. Promotions and promotional material (including pricing information)

We welcome the removal of the requirement to publish company addresses, PO Box numbers, etc. 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, not possible for audio media and we would welcome

commonsense recognition in the Guidance that the Code should be interpreted with these technical issues in mind.

With regard to excluding the use of GBP in para 4.2, there are technical barriers that prevent the use of "£" within the SMSCs of all mobile networks. Until these barriers have been addressed we do not believe that the use of "£" should be required. GBP has benefits over "pounds" due to limitations on the number of characters. We would also suggest that GBP is a well understood by the general public and therefore would create an consumer confusion. We do accept, that different standards could apply to different consumer sectors, e.g. children.

On para 4.3, we agree that 50p/msg or 50p/min is clearer than 50ppm.

On point of principle we disagree with the inclusion of a statement that data charges may apply. This is an issue between mobile networks and their customers and merging the issues of network charges and premium content conflicts with the thinking of Ofcom's NTS review and the separation of access charges from content charges. It also places a burden on the PRS industry that is not replicated in other industries.

In the box of section 4.5 we believe that total cost rather than number of messages (for Premium rate texts) would be clearer for consumers.

In terms of proximate and prominent, we believe that an objective test should be utilised. The test should be whether a reasonable consumer, (at whom the call to action was aimed), would be expected to appreciate the cost from the information presented. In our view, prominence is most likely to be helpful to a consumer, but a balance needs to be struck between the two criteria. Strict adherence to the letter of the new Code provision could produce a flood of alleged breaches where there is no evidence of actual consumer harm and no indication that pricing is not perfectly clear. It would also be helpful for the Guidance to feature examples of presentations of pricing information that would be regarded as acceptable and unacceptable, with explanations as to why this is the case. As in all areas of regulation it would also minimise confusion, if network codes and Payforit rules were consistent with PpP guidance.

Where WAP push is concerned, the Note should add that you need to click on a link to get to the website.

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

In the third / fourth bullet of para 6.2, the prohibition of cross-promotion should be restricted to advertising adult services to children or people who do not already use other adult services and to taking advantage of people who are vulnerable. It should not be regarded as inappropriate, for example, to promote a score update service to someone not interested in sport.

We would welcome an explanation as to why the exemption in para 5.7.5 of the 11th Code has been withdrawn.

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.

As long as promotional material is clear, in this instance including the length of the free trial period there should be no need to re-send for further opt-in request. This is in-line with practice with other consumer products, e.g. LOVEFilm and subscriptions to magazines such as Which? We note, however, that under Mobile Best Practice a confirmation text with relevant details is sent at the outset which the consumer may retain as a record or reminder.

7. Privacy and consent to charge

Unfortunately, we do not feel that this Guidance Note offers the required level of guidance to Industry. In order to avoid any potential confusion we believe that it should be split in to two distinct Notes: 1.) consent for marketing and 2.) consent to charge. We would welcome the opportunity to work with PpP to achieve the required clarity in this area.

With regard to consent for marketing, we consider it sufficient to either restate or refer to the Privacy and Electronic Communications Regulations, including coverage of the soft opt-in. We accept, however, that six months is the appropriate maximum gap between last interaction and further contact, except in a few cases such as seasonal services or birthday alerts. For services such as chat, there needs to be a clear threshold between the continuation of a service after a lull and a fresh marketing message with all the provisions about FreeMsg, pricing, etc.

In terms of consent to charge, an MO is preferred where it is suitable from user flow and conversion perspectives. Alternatively, an alternative could be that the end user is sent a free MT with a PIN, which is then entered into the website. The point here is that the PIN is sent through an independent Level 1 provider so that there is an audit trail making it possible for PpP to confirm that the PIN was indeed sent to the user. It should also not have information in it to allow anyone other than the intended recipient to continue the opt-in process e.g. no mention of the website address. If there is a consumer dispute about consent, PpP can ask the Level 1 provider when the PIN was sent, and then ask the Level 2 provider when the MSISDN and PIN were entered (two time stamps). The Level 1 PIN dispatch will of course need to fall between the two. There is no reason why the party responsible for independent verification should have to be outside PRS value chain, e.g. it could be a Level 1 provider. Payforit services should be exempt from any additional verification requirements.

In the context of interactive chat services, it should not be possible for a consumer to claim they did not consent to charges if they was clearly informed of the price and nature of the service, and then actively engaged with the service by sending chat messages. In this case, the logs showing interaction should be sufficient proof of consent.

8. Method of exit from a service

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?

STOP is now firmly established in mobile consumers' vocabulary and this should remain the standard, undiluted method of exit. The words 'or any combination thereof' should be added at the end of para 4.1. On para 4.2, we 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 consumer has a clear understanding of where the STOP command has to be sent, both via the initial sign up material and the spend reminder messages. Para 4.3 should be deleted. It is disproportionate to expect providers to develop systems that interpret variations on the STOP command from consumers. Where customers have tried and failed to cancel a service for any reason it is a normal pragmatic business practice to make refunds.

Section 5 should follow or refer to MNO Codes on the STOP command.

9. Definitions of those involved in providing PRS

We welcome the move to place the responsibility for services wit the provider who contracts with the consumer as this reflects the general approach of consumer law and practice.

We agree with the AIME contention that it is disproportionate and inappropriate to place all responsibility for regulatory compliance at level 2 as proposed since, behind the point of sale, there exists a service chain of various contracted accountabilities positioned to jointly provide the total

service experience and it is entirely possible for a Merchant Promoter to be wholly or partly blameless for a failure to meet consumer expectations. There are numerous examples available where a Merchant Promoter does not actually control or manage the operation of the services it takes to market.

We do not believe that this Guidance Note provides sufficiently clear scope as to what functions will result in a provider being considered a Level 1 or Level 2 provider in terms of bearing responsibility for a breach of the Code. The Note discusses at paras 5.7 and 5.8 situations where a Level 1 provider controls certain operations aspects of a service and states that '*In these cases, where the failure of such an operational component has led to a Code breach, we would regard the Level 1 provider as the party responsible for the technical failure, and so the breach itself.*' Whereas under para 5.6 the actions of a party who is subcontracted to conduct only one or two of the functions of promotion, operation and content are to attributed to the Level 2 provider who will retain responsibility for their 'affiliate's' actions. We fail to understand the distinction between the two scenarios. It would appear that the an action carried out by a Level 1 provider could lead to the Level 1 provider being held in breach; and yet the exact same action, if carried out by an 'affiliate', would result in the Level 2 provider being held in breach – this is somewhat arbitrary and disproportionate. A distinction must be drawn between functions that are carried out in their own right by a provider and functions that are carried out by a provider on a contractual basis for the Level 2 provider.

The Guidance also needs to reflect the position of 'virtual money', where a single PRS transaction can lead to multiple credit transactions dispersed across multiple Level 2 providers. This should fall outside the remit of PpP as it no longer constitutes telecommunications money, once converted from PRS into virtual money.

10. Consumer refunds

We agree with the aim of this Guidance Note but request that it makes clear that it only applies to refunds required under sanction by a Tribunal.

11. Complaint-handling process

We support this Guidance Note. The obligation for a Level 1 provider to step in where the Level 2 provider is failing in their duty must be proportionate to their position in the value chain.

Service Specific Guidance

1. Competitions and other games with prizes

We believe that this Guidance Note would be better served by referencing the guidance of the Gambling Commission – as the specialists in this area, together with a warning for providers to comply with the provisions of the Gambling Act.

2. Virtual chat services

We believe that para 3.1 requires further explanation as to what constitutes 'all reasonable steps' to prevent under-age usage. We consider that once a MSISDN has been age-verified, no further age verification should be required. If the adult who age-verified the MSISDN, allows a minor to use it, this is done with the understanding that it allows access to content that would be deemed unsuitable for a minor.

In para 3.10, the words 'adult in nature' should be replaced by 'sexual entertainment services' as the 69, 79 or 89 shortcodes are restricted to the latter.

3. Subscription Services

The Guidance Note should refer to the exemptions for Payforit services (subject to the Ofcom review of controlled PRS)

In para 4.1, the reference to £20 spend reminders should reflect the fact that MNOs have some exemptions from monthly spends reminders, e.g. football alerts and messages costing no more than 50p under para 5.7.5 of the 11th Code.

Q9 – Should Guidance on 'Subscription services' contain a recommendation to send an initiation message containing stipulated information, as per Paragraph 7.12.4 of the 11th Code? If not, why not?

Yes, this allows the Level 1 provider to see that the consumer has been sent confirmation of the basic terms and conditions of the subscription service in advance of any charges.

Q10 – Should Guidance on 'Subscription services' be in line with requirements around text and font size contained in providers' contractual obligations with Mobile Network Operators?

No. While we value consistency we would not wish to see regulation moving down such a prescriptive path. This question also highlights the tension between the principles based Code that PpP is introducing and the prescriptive and sometimes restrictive approach that is taken by MNOs. We would welcome some confirmation from PpP as to how they will work with MNOs to create an environment which will allow the new principles based Code to work in practice. One set of rules that are publicly consulted on by the Regulator would be in the best interests of all parties within the value chain.

4. Children's services

We believe that para 3.3 requires further explanation as to how the forced release process is to interplay with repetitive one-off purchases, for example of credits for an online game.

4. Conclusion

mBlox is committed to working closely with PpP to ensure that there is a proportionate, appropriate and effective regulatory regime in place for the provision of Premium Rate Service in the UK and our comments are made constructively. Whilst every effort has been made to incorporate the comments of clients who are to become Level 2 providers, some of the specific comments above are based on our experience in handling the Level 2 responsibilities that are attributed to aggregators under the current Code.

If any clarification to our response is required or if we can be of any further assistance please contact Martin Romer at +44 (0)7906 625 276 or martin.romer@mblox.com