

## **Introduction**

Action 4 welcomes the opportunity to respond to the PhonepayPlus (PpP) consultation on Code of Practice (12<sup>th</sup> Edition) Review.

We welcomed the move towards an outcomes based Code which sought to get rid of the difficulty of setting absolutes, which disreputable providers will look to avoid, and should avoid the problem of PPP trying to set down technical standards for compliance in an industry which is constantly evolving. We believe that this reflects the fact that the industry is stable and there are established and long-term players in it, who wish to see it grow and flourish.

### **Q.1: Do you agree with our overall approach to this Code review? If not, why not?**

Yes we agree with the overall approach to the code, however would reinforce that ambiguity will lead to issues.

### **Q.2. Is there anything else we should be considering?**

Yes the role of market affiliates whilst we appreciate the Telecommunications Act makes no specific reference to these individuals their effect is being felt in the industry and therefore it would seem wise to address their activities in the code. Perhaps in the same way the radio authority code does by simply saying the Market affiliates must not...

We would also welcome PpP re-considering its general policy towards levying administrative charges. In particular, it does not seem at all fair that parties who are successful the Oral Hearing stage in reducing the level of fines are still liable for the totality of PpP's administrative charges. Particularly as their only recourse in those circumstances is to the Chair of the CCP who will have made the original order regarding the admin charges. We would recommend some independence in this part of the process.

Alongside of the above request, Action 4 commissioned an analysis re administrative charges. We have the full information on that analysis. A snap of that review highlight the following points:-

#### **“Sanctions**

- Significant fines are imposed even where compliance advice is sought, although the fines tend to be smaller
- There is an inconsistent approach to sanction
- Fines and bans are used in conjunction with each other (not taking into account the fact that a ban is a substantial financial penalty in itself)

- Mitigation makes only a limited difference to sanction, although immediate co-operation and voluntarily refunding complainants is likely to reduce the level of the fine
- The mechanism for punishing non-payment of fines is severe

#### **Conduct causing repeated concern**

- Typo-squatting
- Concealed subscription services
- Collecting personal data without consent
- Failing to ensure spending caps

#### **Aggravating features**

- Deliberate conduct
- Reckless conduct
- High cost of service
- Service of little value

*Query how the aggravating features relate to sanction – similar levels of fine are imposed whether the conduct is deliberate or reckless (the latter would normally attract a lesser penalty)*

The above is by no means an exhaustive list but gives a flavour of some of the recurring issues.

Under the new code surely administration charges should only be imposed if there is a breach of the code. We have certainly noticed that substantial administrative charges are awarded even where there is a significant fine or ban imposed. It is not apparent on the face of the decisions whether or not the Panels:

- i) Apply any test when determining whether to impose administrative charges (for example a ‘just and reasonable’ test);
- ii) Carry out any means assessment;
- iii) Consider the proportionality of imposing administrative charges alongside the imposition of a fine or ban”

#### **Q.3. Have we considered all implications of Ofcom’s proposed NGCS changes on the Code of Practice? If no, please detail what we may have overlooked.**

We believe that you have taken account of the specific likely impact that the NGCS will have. A review of spending caps across the piece is needed for instance with tarot where you can spend one amount on credit card and another via PRS.

#### **Q.4. In light of new service charge caps being introduced on the 09 number range, what views and evidence do you have around the application and level of spending caps to certain PRS services to protect consumers?**

Spending caps should be consistent with the service. Why should tarot and chat have different spending caps and why can a consumer not give positive affirmation to continue with a call if they so want? Differences in call caps may lead to confusion on behalf of the industry and the consumer.

**Q5. Are there areas or provisions within the Code that are not fit for new market innovations and emerging trends that we have not identified in this document?**

As PpP are know doubt aware BIS recently defined that no PRS telephone number could be basic rate and therefore using certain tariffs for consumer complaint lines will become increasingly difficult. It may be better to state that all customer complaint lines must be on the lowest price point available, or on a pre-fix no higher than a specific price point for example 10 ppm.

**Q6. Do you agree with our overall approach to continue to make the Code even less prescriptive and increasingly outcomes-based? Do you agree with our approach to the issues we have identified?**

We agree re making the code less prescriptive but would still reiterate the role of market affiliates whilst we appreciate the Telecommunications Act 2003 makes no specific reference to these individuals. Their effect is being felt in the industry and therefore it would seem wise to address their activities in the code. Perhaps in the same way the radio authority code does by simply saying the Market affiliates must not...

We agree with a less prescriptive and more outcomes based code.

**Q 7. Do you agree with our proposal to review the Track 1 and Track 2 procedures? Do you have any further suggestions as to how PhonepayPlus might amend them to reflect current usage, ensure consumer protection and optimise the principle of polluter pays?**

We have no issue with you reviewing your procedures however, you mention the figure of £1,950 to go through an adjudicated case how many cases are brought against tier 1 or 2's that actually have no case to answer? We agree with the polluter pays theory but how can the polluter pay when there is no official stance on market affiliates?

How do you class what is harm here and what will be less harmful and therefore require smaller fines or sanctions?

**Q.8. Do you agree with our general approach under the enforcement and technical review theme? Do you have any comments on the areas for consideration that we have identified? Are there potential amendments that we should consider but have not? If so, please detail the issue and provide relevant information if available.**

We believe reviewing why you bring a potential breach and how the company or operator is then treated through out the process to be worthwhile. Balance and checks at all stages are helpful.

**Q9. Do you agree with the issues we are considering as part of the polluter pays theme? Are there any areas that we have missed?**

We agree that the polluter should pay. However capping charges is fine as long as a company has the money to defend themselves if they do not this seems injustice. £30,000 for an Appeal and £25,000 for a Tribunal is in today's commercial environment a lot of spare cash to find. These costs could be disproportionate in relation to a fine.

We thank you for the opportunity for allowing us to respond to this document.