

Response to *'The Thirteenth Edition of the Code of Practice - A PhonepayPlus Consultation'*

on behalf of The Number UK Ltd (118 118)

10 September 2014

Introduction

TNUK agrees with PPP that its Code of Practice does not require fundamental change and that we are at a point of evolution, rather than revolution.

However, there is one significant issue about which we do have major concerns which is therefore the sole focus of this response. It relates to former Rule 2.2.7, that is now being slightly rewritten as new paragraph 3.12.3, which for simplicity we refer to in the remainder of this response as 'the Rule'. PPP will be aware that this is the rule which requires price information to be spoken during television adverts, if the cost generally exceeds £3.83+VAT. TNUK is extremely concerned about how PPP is handling this Rule within its Code.

We believe that the Rule is extraordinarily disproportionate to a degree which is almost difficult to conceive and as such, it runs contrary to the principles of both good regulation and European Administrative Law, to which PPP should have due regard.

We can find no comparable obligation anywhere within either the PPP Code or broadcast-specific regulation written to govern exactly the same form of advertising. That is particularly the case, in view of the very low spend limit at which the Rule applies. As the Rule has apparently remained unaltered, whilst technology, services and other regulation have all developed, it stands alone as an idiosyncratic and anachronistic requirement at odds with everything else around it.

Whilst recognising that the Rule has been in place for some time, TNUK is most concerned at PPP's intention simply to roll it forward into its new Code, without having undertaken any form of policy process to determine its appropriateness. There has been no research to assess the demand for it, no calculation of its costs or benefits and no consideration of its proportionality.

Yet the impact of the Rule is effectively to prohibit television advertising of any service to which it applies because it would simply not be practical, let alone cost effective, to adhere to its requirements. The consequences are therefore enormous and cannot simply be overlooked or dismissed.

TNUK views this matter extremely seriously and therefore urges PPP to review its position. If it does not do so or the Rule ultimately remains unchanged, TNUK will be obliged to consider all possible options in order to maintain its ability to advertise its services effectively and thereby operate its business.

Aside from this core issue, TNUK views most of the changes that PPP is proposing as sensible tweaks and clarifications that we support. In particular, we welcome PPP's long overdue proposal to tidy up the Prior Permission regime which has become a somewhat confusing and unwieldy adjunct to an otherwise fairly clear and precise Code. We hope that PPP's introduction of Special Conditions will provide clarity and remove the unnecessary complexity and duplication which have become inherent in the Prior Permission regime as it has developed iteratively.

The Practical Impact of the Rule

Consumer information on the cost of calling PRS is important. In the case of TNUK's services, it is both widely available and transparent and will become even more so, as a result of Ofcom's extensive changes to non-geographic numbering and the introduction of unbundling – a process that TNUK has strongly supported for many years and which we discuss in slightly greater detail below.

We note from complaint figures provided by PPP that complaints about DQ in general (and 118 118 in particular) constitute a tiny percentage of total complaints received by PPP. It is clear that awareness of price is not a significant problem which requires additional regulation to address. We recognise that relevant call charges are currently below the level of the Rule, but there is obviously no pent up harm which the Rule is required to address.

Aside from the anachronistic and disproportionate nature of the rule (which we explain below), TNUK's principal objection to the Rule is the practical impact which it would have on our ability to advertise our service to consumers, which it appears PPP may not have considered.

An efficient approach to TV advertising is to begin a new campaign with a longer advert to explain a story, which is followed by short formats to remind people of the story. TNUK typically adopts this approach by using longer formats for a few weeks, before replacing them with reduced 10 second versions of the same adverts, which run for the remainder of the year, in order to keep costs lower.

However, it takes approximately 10 seconds clearly to read-out a standard DQ price message, as currently appears in text format in our television adverts:-

"Calls cost X pence per call plus Y pence per minute from BT landlines for a minimum of sixty seconds. Other providers vary. Mobiles may cost much more."

It would not be possible to comply with the Rule within the limitations of a 10 second advert. That would suggest that affected advertisers would have to switch from 10 second adverts to 30 second adverts, which TNUK calculates would double our annual advertising costs from £6 million to £12 million. However, in reality, even the use of 30 second adverts is unlikely to be practical because a third of the advert (and therefore a third of the cost of advertising) would be taken up by a price announcement. Not only would that create a very unappealing advert, but it would also generate huge wasted advertising costs, which neither TNUK, nor any other business could sustain.

In addition, it is not practical to communicate any product / brand messages at the same time as verbal pricing information is being provided, because the announcement would detract from and confuse what was being displayed visually. The pictures would also generally require their own accompanying audible information. The practical effect therefore, is that even a 30 second advert is unlikely to be sufficient.

In all likelihood, the impact of the Rule would be quite simply to prevent television advertising of any PRS to which it applies. The significance of this restriction should not be underestimated or quickly dismissed. As PPP must surely be aware, the awareness of TNUK's DQ services have largely been built on a very successful advertising campaign, with television as its principal medium. This is important not merely to TNUK commercially, but also in the increased awareness that it has brought to the DQ market (and 118 XXX

number range) more generally. Ironically, it is this very investment in brand-building via television that is one of the reasons why TNUK takes its obligations to consumers and the market so seriously, and why we have such low levels of complaints.

For over 10 years, we believe that our advertising has played a hugely important role in helping consumers to understand and remember that 118 XXX is the number to call for DQ. Without it, it is highly probable that the market and related call volumes would be much reduced. That awareness is built on television advertising, which is now under threat as a result of PPP's (unjustified) regulation. As we discuss below, TNUK cannot simply accept a restriction of this type being imposed (and the massive impact which it will have on our business), without a clear and evidence-based justification as to why it is required and the consumer harm that it is designed to combat. We have seen no such justification to date.

But of course, the rule does not apply only to television, but also to "*any other audio/visual format*". Here we note that the reference to "*audio/visual*" rather than "*audiovisual*", is potentially important, but perhaps unintended. 'Audiovisual' refers to mediums which have both an audio and a visual component, most obviously television. But "audio/visual" implies a medium that has either an audio *or* a visual component, most obviously radio or a moving (but silent) online advert. TNUK assumes that PPP had intended to apply the standard meaning of 'audiovisual' and thereby exclude radio adverts, but this important point needs to be clarified.

At the very least, as it is totally impractical to include a spoken price announcement in any television/cinema advert or online equivalent, the Rule will prevent all such advertising. It may just as well say:-

"PhonepayPlus may specify the cost of a service above which promotion on television or in any other audio/visual format is prohibited."

Although TNUK assumes that PPP would regard such a rule as disproportionate, unwarranted and excessive, the effect is identical to what it is actually implementing. We would strongly urge PPP to reconsider its position.

PhonepayPlus and the ASA/BCAP

In order to consider the appropriateness of the Rule, it is necessary to look first at the Broadcast Committee of Advertising Practice (BCAP) and the Advertising Standards Authority (ASA), to determine how their regulation relates (or contrasts) with that of PPP. This gives an understanding of how well the Rule fits within the entirety of broadcast regulation.

The role of BCAP is to set the standards for broadcast advertising in the UK. It does so through the writing and maintenance of the BCAP Code. The role of the ASA is to administer and enforce the BCAP Code. Unlike the CAP Code, it does so with the authority provided under formal contract from Ofcom and therefore this is not an example of industry 'self-regulation'.

The BCAP and the ASA are therefore the recognised and appointed experts in broadcast regulation. The current BCAP Code runs to 143 pages of extremely detailed rules setting out the precise requirements for

TV/radio advertising. It includes both general rules that apply to all adverts, as well as specific rules which apply to particular industries or their products/services (including PRS). All of those rules are designed explicitly to provide the necessary consumer protection for those viewing the adverts.

PPP has agreed a Memorandum of Understanding with the ASA. That MoU describes the ASA/BCA as “a single regulator for [broadcast] advertising – a one-stop shop ...” By contrast, the MoU describes PPP as “the enforcement authority for PRS”. It also states that complaints “about ads which sit neatly with the Advertising Codes” should be dealt with by the ASA and not PPP.

Inevitably, there is the potential for some overlap between the ASA and PPP, as regards the advertising of PRS, but it is self-evident from their respective roles and responsibilities (as well as the contents of the MoU) that advertising is a matter for the ASA and not PPP.

We explain below the existing requirements of the BCAP Code, but TNUK strongly contends that the highly prescriptive nature of the Rule is clearly at odds with how the ‘new’ format of the PPP Code was intended to operate and it should have been addressed in the drafting of the 12th Code. That is, the Code was intended to specify outcomes (rather than prescriptive rules) and allow providers flexibility as to how those outcomes should be achieved. However, the Rule is clearly entirely at odds with that approach, as it contains a very prescriptive requirement, in relation to which there is no flexibility. This is obviously a legacy of previous Codes which should have no place in the ‘new’ regime and runs contrary to the outcomes-based approach that PPP has set out to achieve with the Code.

The PPP Code should therefore do as was intended and simply specify the outcome that consumers “*must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.*” To the extent to which any more prescriptive rules may be required, that should be left to the ASA/BCAP as the expert regulators in that area. As we shall see, to date, they have not seen fit to impose any such rules, but we are prepared to accept their judgement in that regard, if their view should change. In that context, it is relevant to note that the BCAP Code contains a specific section on PRS, where any such rules would perfectly sit. The perfect opportunity therefore exists for BCAP to include an obligation equivalent to PPP’s Rule, if it considers it necessary or appropriate to do so.

The requirements of the BCAP Code

Setting aside for a moment any potential conflict in regulatory responsibilities, it is worth considering how the requirements of the Rule compare with the requirements contained in the BCAP Code.

The first point to note is that the BCAP Code does not contain any requirements that the price of any product or service be verbally spoken during an advert, when that price reaches a certain level. To be clear, the expert regulators in broadcast advertising do not believe that spoken announcements for any product at any price are necessary or desirable.

In fact, the entire BCAP Code contains only one single obligation in relation to the price of a product. It is Rule 5.12 in relation to the advertising of children’s products and states:-

“Television only - Advertisements for a toy, game or comparable children's product must include a statement of its price or, if it is not possible to include a precise price, an approximate price, if that product costs £30 or more.”

There are a couple of points to note. Firstly, the rule applies only to children's products and PPP's own Code of Practice also imposes significantly greater restrictions in relation to children's services, due to the increased potential for exploitation. BCAP does not believe that any 'price sensitive' obligations are required for non-children's services. Secondly, this obligation only applies to children's products costing at least £30, whereas PPP's regulation applies to services costing just £4.60 i.e. less than one sixth of the BCAP limit. Thirdly, the BCAP Code only requires that the price be displayed on the screen (rather than verbally announced) which the PPP Code already requires for all PRS, at any price, in any promotion.

This example effectively highlights the apparent absurdity of the PPP Rule which is so obviously out of step with all of the other regulation designed specifically to protect consumers of broadcast advertising.

The Anachronistic Rule

We outlined above the respective roles and the regulations imposed by PPP and BCAP/ASA and why it is the latter which has both the far greater expertise, as well as regulatory responsibility for broadcast advertising. Set within this wider context, it is clear that PPP's proposed new paragraph 3.12.3 is an idiosyncrasy. In all of the 62 pages of PPP's proposed 13th edition of the Code of Practice, it appears to be the only measure intended to apply specifically to broadcast adverts. By contrast, the BCAP Code contains 143 pages of rules intended to apply specifically to broadcast adverts.

TNUK does not know the origin of the rule (previously Rule 2.2.7) and we understand that PPP itself appears not to know either. However, the first BCAP Code in its current form was created in 2010 and BCAP itself only came into existence in 2004. By contrast, PPP's predecessor ICSTIS was established in 1986, nearly 20 years before BCAP/ASA took responsibility for regulating broadcast advertising. Consequently, it seems quite feasible that the origins of Rule 2.2.7 actually pre-date the regulatory framework which has now been established to address precisely the same issues.

This rule may perhaps have had a valid purpose at the time at which it was created (in the absence of any other broadcast specific advertising regulation). But that time has now clearly passed, as a result of which the rule is left as an anachronistic oddity, which is no longer useful or relevant. TNUK understands that PPP's natural inclination appears to be to leave the rule in place, just because it has always been there. However, we would view such an approach as an example of very poor regulatory practice.

As a regulator, PPP must be willing and able to justify the need for and purpose of any regulation which it imposes as well as (as we discuss below) the level at which it applies. That is particularly the case where (as explained above) the limitations on advertising which it imposes and the adverse consequences which this creates are so significant that they will effectively prevent the service from being advertised on television.

Furthermore, TNUK is not making this request at any arbitrary point in time. Rather, we are making it in response to the only consultation which PPP is conducting during its review of its Code of Practice for the

first time in 4 years – there is no better or more appropriate time. It would be quite wrong for PPP simply to roll-forward all of the measures contained within its previous Code of Practice, into its new Code of Practice, without considering valid points (raised in response to its own consultation) as to why that may not be appropriate. As we outline below, PPP must consider the proportionality of each provision when it re-issues the Code.

Good Regulation

In the next section, we address the specific level at which the Rule applies, but here we outline our broader concerns about PPP's regulatory approach to imposing any rule which requires that pricing information must be spoken in a television advert and the tests which PPP must pass before doing so.

We mentioned at the start, that Ofcom has recently concluded its review of non-geographic call services, the outcomes of which are due to be implemented next year. In conducting its review, Ofcom recognised that consumers currently struggle to understand the true cost of calling PRS, because they are only given information about the cost of calling from BT landlines, with the meaningless rider that "*other networks may vary*". As a result, Ofcom spent 4 years trying to resolve this (and other) issues and has re-structured the entire non-geographic calling market in order to ensure that consumers have a better and clearer understanding of the cost of calling different services from different networks.

The additional regulation which Ofcom has imposed in order to increase pricing transparency for non-geographic services is highly relevant to the continuing need for the Rule. In assessing the appropriateness of the rule, PPP appears not to have considered that the entire manner in which PRS charges are communicated to consumers is changing. As a result, rules which have existed in the past will be out of date or no longer needed.

It is a basic requirement of good regulation for PPP to be mindful and take into account other regulatory changes that may impact on its own. By ignoring or overlooking the wider regulatory regime in which it operates, PPP has failed an essential test, which fundamentally undermines the regulation which it seeks to impose.

Furthermore, we have already explained above that the BCAP Code does not contain any requirements that the price of any product or service be verbally spoken during an advert, when that price reaches a certain level. Although TNUK does not have significant knowledge or experience of any sector specific advertising rules which apply in other industries, we have undertaken some anecdotal research in order to make some comparisons with the PPP Rule.

TNUK has not been able to find a single example of the price of any other product or service in any other industry having to be verbally announced in a television advert. We would be very interested to know if PPP is aware of any such examples.

The heavily regulated financial services sector provides perhaps the most compelling comparable. Neither mortgage providers, credit card companies or personal lenders are required to provide spoken pricing information, despite the significant financial commitments which their products involve. The Financial

Conduct Authority (FCA) has recently introduced extensive new regulation to the payday loan industry, including obligations related to advertising and the imposition of 'health warning'. Yet despite the huge public concern and obvious consumer harm generated by their charging interest rates of up to 6000% to the most vulnerable in society, payday lenders are not required to provide spoken price information in their television adverts.

In this context, PPP must surely realise how completely out of step its Rule appears when judged against the standards imposed by regulators in other industries. It is disproportionate to a degree which is almost difficult to contemplate.

Indeed, it is the obvious disproportionality of the Rule which is TNUK's greatest concern as regards PPP not applying good regulation. The need to ensure that regulation is proportionate is an essential requirement of European Administrative Law, which PPP is not entitled to overlook. PPP is required to consider the proportionality of each and every provision within its Code of Practice when it undertakes a review and publishes a new edition. That has clearly not occurred in this case, because PPP has provided no evidence of its assessment of proportionality.

Furthermore, TNUK believes that the Rule fails four out of the five principles of good regulation which Ofcom is required to adopt. Specifically:-

- It is not proportionate
- It is not evidence-based
- It is not consistent
- PPP has (at least to date) appeared reluctant to be accountable for it, being both unaware of its origins, but also unwilling either to justify it or consider its removal

Whilst acknowledging that PPP is not explicitly bound by the same regulatory principles as Ofcom, it would clearly be very poor practice for it simply to disregard them. Similarly, Ofcom is also required always to "*seek the least intrusive regulatory mechanisms to achieve its policy objectives*". From the evidence that we have provided throughout this response about the lack of any other equivalent provision applying in any other industry sector, it is clear that PPP has not followed this approach. Had it done so, TNUK believes that PPP would have concluded that it would be sufficient for clear pricing information to be included in text format on the advert.

The Level at which the Rule applies

As we have already outlined, TNUK objects strongly to the imposition of a Rule which is so obviously disproportionate and out of step with the regulation that exists in other industries. But aside from our objection in principle, we are particularly concerned about the level at which the Rule applies and PPP's apparent reluctance not to consider reviewing it.

Why £3.83 + VAT?

In addition to not knowing the origin of the rule, TNUK is also unaware why the trigger limit is set at £3.83+VAT. It appears that PPP may not know either, but if it does, we would welcome explanation on that point. What relevant benchmark was used, what research was undertaken or evidence collected and what process was followed in order to impose regulation at that particular level?

As we explained when discussing the rule more generally, it is incumbent upon PPP as a regulator to be able to explain and justify the level at which it imposes regulation, rather than simply relying on the fact that 'it has always been like that' and therefore there is no need to change it.

As matters now stand, PPP is only consulting on a rule which allows it to "*specify the advertised cost of a service*" It is not considering or consulting upon what that cost may be, but rather it is stating:-

"The monetary value at which point 3.12.3 is triggered will be detailed in a notice to industry published on our website."

In preparing and issuing that notice, PPP must therefore undertake a further regulatory process through which it sets the necessary value. Even if PPP ultimately decides to retain the level at £3.83+VAT, there must be a process by which it makes that decision before it issues the notice. That is quite different simply to allowing an existing regulation in an existing Code of Practice to remain unaltered. It is not clear that PPP understands or acknowledges the importance of that distinction and the additional responsibilities which it is under as a result.

Why is £3.83 + VAT not being reviewed?

In our response to PPP's Code of Practice Review Update, we addressed in some detail the inconsistent approach which PPP appeared to be taking to the myriad of financial limits contained both within the Code of Practice and Prior Permission Notices. We proposed that PPP impose a uniform 50% increase in line with its proposals for live services, following the research which it had conducted. Whilst we do not intend to repeat all of those arguments in this response, we are disappointed that PPP has neither adopted the proposal nor even responded to the points which we made as they apply to this Rule.

Instead, PPP simply states:-

"At this juncture, we are not minded to amend the monetary level at which this pricing information must be clearly stated orally and visually on television."

There is no justification or indeed explanation as to why the level is not being reviewed in line with other financial limits which PPP is increasing. PPP has not undertaken any research or information-gathering which might suggest that consumers require the limit to stay at this level or indicate any concern if it were to be increased. It seems clear that PPP has neither asked the question externally whether £3.83+VAT is the correct level or even considered the matter internally itself. This is not a sound basis upon which to make policy decisions, even where those are 'no change' decisions.

PPP explicitly requests "*appropriately evidenced views*" and states that "*should there be sufficient evidence to warrant a change to the monetary value*" it will subsequently consult on the matter. This is despite the fact

that it has not attempted to provide any evidence to support its own position. Indeed, it is not clear that PPP knows why the limit was set at £3.83+VAT, let alone has evidence to support it.

As PPP will be aware, the PRS cap is being increased from £1.53 per minute or per call to £3.60 per minute and £6 per call. There are many reasons why Ofcom decided to make these significant increases, but inflationary factors were a major impetus, as the PRS cap had remained unaltered for many years. They also took account of a significant shift in demand and opinion and the fact that the nature of PRS were changing and consumers were content to spend more money on them. In reaching its conclusions, Ofcom took significant account of the possibility for consumer harm to occur at higher prices, but concluded that the risk was insufficient to prevent it from increasing the cap.

All of this should have led PPP to conclude that the £3.83+VAT limit should be increased in line with inflationary pressures and shifting consumer expectations as to the cost of PRS. The only reason not to have done so would be if PPP has stronger contrary evidence (most obviously from consumer research) as to why the £3.83+VAT limit should be maintained. At the very least Ofcom's decisions should have been sufficient to initiate a policy-making process within PPP to consider whether the limit should be increased. TNUK believes that it is clearly inadequate for PPP to state that it is "*not minded to amend the monetary value*" without having conducted any policy-making process (or even internal thinking) before reaching that view.

By way of comparison, PPP may recall that in its consultation of 25 July 2012 entitled "*Service Charge Caps for 09 and 118 Services*", Ofcom proposed to impose caps on DQ prices at the same level as the new caps for 09 services. In our response to the consultation, TNUK highlighted that Ofcom had no evidence to support that proposal, which had just been tagged on to its 09 proposals without adequate evidence or policy consideration. Ofcom accepted the point and duly reversed the proposal for which it had no sound basis.

TNUK believes that PPP risks placing itself in the same position of 'passive policy-making', without collecting or analysing any evidence relevant to its decision. Like Ofcom, we hope that PPP will recognise the inappropriateness of this approach and we would implore PPP to take a step back and reconsider.

A more consistent approach?

If the Rule is to remain in place, we would once again urge PPP to adopt a more consistent, logical and evidence-based approach to setting the limit at which the Rule applies. We previously proposed that the limit should be increased by 50% in line with other limits.

An alternative approach would be to use the actual limits imposed in those cases. Specifically, PPP has proposed that the lowest limit at which live services will require additional consumer protection measures is when the cost of the call reaches £15 (at which point a spend reminder will be required). It is therefore both illogical and inconsistent to require that much more onerous (yet far less effective) advertising restrictions are imposed on calls which cost less than a third of that amount, namely £4.60.

The consumer is clearly suffering far less potential harm at £4.60 than at £15 and the only difference is how the service may have been promoted. The effect and inconsistency in PPP's proposed regulation therefore

simply has the effect of discriminating against services which are advertising on television, but with no resulting increase in protection for consumers. There is no logical or rational basis for that approach.

In fact, PPP will be aware that the £15 spend reminder does not in fact apply to all calls, but rather only to categories of services for which PPP has identified a “*need to protect vulnerable consumers*”. To put it another way, PPP has determined that a spend reminder at £15 represents a special higher level of consumer protection than is required for the vast majority of PRS. By contrast, the consumer protection measure which it imposes at £4.60 is required for all calls, with no limitations or requirements as to the vulnerability of the consumers. The only requirement for the measure to be activated is that the service happens to be promoted on television.

TNUK hopes that PPP will recognise that this is not a sensible or justified approach. Once again, it is clear that the Rule represents an exception, which is clearly out of step with other forms of regulation. In this case, that is not the BCAP Code or other television advertising regulation, but rather it is out step with PPP’s own regulation being imposed as part of the same Code of Practice review. We would urge PPP to reconsider whether it genuinely believes that this is an appropriate approach.

All queries in relation to this response should be to Simon Grossman, Director of Government, Regulatory & Business Affairs, The Number, Whitfield Court, 30-32 Whitfield Street, London W1T 2RG – simon.grossman@118118.com – 07971 050 001