



## **Consultation by PhonepayPlus on the Draft 13<sup>th</sup> Code of Practice for Premium Rate Services**

### **Response from the Mobile Broadband Group**

The Mobile Broadband Group (MBG), whose members are the UK businesses of EE, Telefonica (O2), Three, and Vodafone, welcomes the opportunity to respond to PhonepayPlus' ('PP+') consultation on the draft 13<sup>th</sup> Code of Practice.

#### **Summary of main points**

Taken as a whole, the 12<sup>th</sup> Code has been successful. Nevertheless, in a fast moving market, PP+ is right to review its code regularly. While we welcome some proposed changes (set out below), we make the following main points:

- The proposals for 'vulnerable' consumers effectively reverse the burden of proof and create far too much legal uncertainty for the providers.
- It is potentially a good idea to place caps in an Annex, so that they can be reviewed more regularly and not be so open to 'fiscal drag' – i.e. remaining unchanged over long periods
- PP+ should take the chance to raise the caps on children's services. At £3, the limit is no longer fit for purpose (i.e. relevant for the price points for children's services) and only encourages providers not to use PRS as a method of payment – thus, in the long run, providing less protection.
- Providing an early warning system for potentially serious breaches of the Code could raise cost and fine collection rates, providing there are proper safeguards to protect providers' rights to justice and financial stability
- PP+ provides insufficient evidence for their proposed changes to the hearings process. In a number of ways they appear to offend natural justice. In the absence of stronger arguments from PP+, the MBG does not fully support the proposed changes

## **Responses to questions**

*Q1. Do you agree with our graduated approach to caps on live services and the proposed points of intervention? Please evidence your response.*

While having no comment of the extra implementation costs of the graduated approach, (as these are a matter for the L1 and L2 providers) the MBG is potentially supportive of the idea of keeping the limits outside the Code in an Annex, as this would offer greater flexibility to review and amend the limits, as necessary, in the light of market conditions. As a further development, PP+ should consider creating a framework for reviewing in the future, so as to engender a certain amount of legal certainty. Of itself, keeping the limits outside the Code will not protect them from the 'fiscal drag' that has led to the limits being maintained at the same level for that last 16 years.

Protection for consumers under the PRS regime is more sophisticated and targeted than that offered under other payment mechanisms and so erring on the side of caution can have the unintended effect of pushing providers towards those less regulated mechanisms and consumers actually being less protected in the long run.

*Q2. Do you agree with the new consolidated mechanism being introduced at 3.12 to govern spending caps and our proposal to sit the monetary values outside the Code? Please evidence your response.*

Comments set out in Q1

*Q3. Do you have any comments regarding the changes being proposed to the definitions listed above in response to Ofcom's NGCS review?*

No comments

*Q4. Do you agree with our proposed changes to Rule 2.2.1? Please evidence your response.*

No comments

*Q5. Do you agree with our proposed change to Rule 2.2.7? Do you agree with our intention to retain the level at which point this requirement is triggered at £3.83 plus VAT? Please evidence any response.*

Comments as before – there will be advantages in taking specific caps out of the Code but it will be helpful for providers to know the principles for triggering reviews of the cap, for examples trends in customer complaints.

*Q6. Do you agree with our proposed change to the vulnerability provision? Please evidence your response.*

The MBG supports the *status quo* in 2.3.10. While PP+ may contend that it is difficult to prove that a provider deliberately sets out to take advantage of a vulnerable consumer, reversing, effectively, the burden of proof creates far too much uncertainty for the provider. General consumer law is geared towards the ‘average consumer’ and PP+ should follow suit. It is impossible for providers of even the best designed services to foresee how some vulnerability – and there are many potential vulnerabilities – might result in the service being misused. We fear that the proposed amendment will create a ‘catch-all’ situation, where the provider may be accountable for an almost infinite array of ‘vulnerabilities’ (e.g. sight, language, dyslexia). This will create far too much legal uncertainty as to how the provider is meant to comply.

PP+ has asked respondents to evidence their response. On this occasion, the boot is on the other foot. PP+ should be evidencing the need for the proposed change and it has provided no compelling evidence to support the reasoning that lies behind its proposed change or appear to have considered the potential difficulties that will be presented to those that responsible for compliance and for compliance monitoring

*Q7. Do you agree with our intention to amend Rule 2.6.2 to make it more flexible and outcomes-focused? Please evidence your response.*

Great efforts have been made over the years to persuade services providers to make available calling help lines, in order for them to respond promptly to customer complaints and queries. Nevertheless, providing the emphasis is on effective (i.e. the customer can achieve simple and timely resolution), we recognise that alternative modes of communication are currently used for customer contact. Perhaps PP+ should insist that at least some form of electronic communication is available. It would be retrograde if postal based complaints systems were to be allowed.

*Q8. Do you support the intention to maintain a one-off cap on children’s services at £3? Please evidence your response.*

This section of the Code is becoming increasingly problematic. When the 1<sup>st</sup> Code was published, it would have been far clearer than it is today the distinction between general services and ‘children’s services’. With the widespread market penetration of on-line games, such as Candy Crush, that are played by children and adults alike, it is worth considering whether the category is worth preserving. PP+ does not appear to consider the option of abolishing the category or present any evidence that it is worth preserving. Other payment mechanisms do not.

On the proviso that PP+ does present evidence that the category is worth preserving and that it has an important role in protecting children, it would be proportionate and useful to raise the transaction limit, perhaps in conjunction with a spend limit. The £3 limit has been in force for 16 years and is becoming progressively more limiting in terms of the available price points for premium rate services that are primarily for children.

In our Call for Evidence, the MBG cited the Halifax Annual Pocket Money survey<sup>1</sup> as a relevant benchmark. However our interpretation of how it is best be used in this context differs somewhat from PP+. 16 years ago (1997), average weekly pocket money was £1.67, roughly half the £3 transaction limit. In 2012, average pocket money is estimated at £5.98. On a *pro rata* basis, this data would support a transaction limit of £10 (enough, for example, to purchase a digital download of Cinderella from a content portal) and so adjusting the limit to around £5 or £6 would be quite in line with this benchmark.

If PRS are to remain an attractive option for providers of children's services, limits must be set that are realistic and competitive with other mechanisms.

It should be further noted that parents that are concerned about the spending habit of their children can (and very many do) purchase prepay mobile phones, which provide a completely rigid method of limiting all mobile phone expenditure on calls, data and value added services.

*Q9. Do you support the introduction of a cumulative cap on children's services? And if so, should this be set at £12, £20 or an alternative amount per month? Please evidence your response.*

A cumulative total for a children's service of £20 would be in line with the transaction spend limits proposed above.

*Q10. Do you agree with the proposed changes to allow for greater flexibility to exempt services or providers from registration? Please evidence your response.*

Yes.

The PP+ is a very detailed consumer protection regime. The MBG is supportive of its role in engendering confidence in the PRS market. Nevertheless, any opportunities to reduce compliance costs and requirements that can be achieved in a proportionate manner should be grasped.

The MBG therefore supports the possibility for exemptions from registration to different classes of registrant, where the basis for exemption is objective, consistent and proportionate. Consumers using PRS are well protected, and it is important for PP+ to maintain a certain flexibility so as to avoid the stifling of innovation and ensuring that PRS is a competitive payment mechanism.

*Q11. Do you agree with our proposed change to Paragraph 3.3.3 (b)? Please evidence your response.*

The MBG believes the change to rule 3.3.3 (b) requires some additional context to clarify the "relevant terms". We therefore propose it should read "the term(s) of that contract relevant to Rule 3.3.3(a)." MBG supports the principle of the changes to paragraph 3.3.3 (b).

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<sup>1</sup> [http://www.lloydsbankinggroup.com/media/pdfs/halifax/2012/0809\\_Pocket.pdf](http://www.lloydsbankinggroup.com/media/pdfs/halifax/2012/0809_Pocket.pdf)

*Q12. Do you agree with our proposed change to the requirement to register numbers? Please evidence your response.*

The MBG agrees that the number checker must be kept up to date. It should also be possible for L2s to register numbers just prior to services launching. The consultation document is not clear as to whether this is possible.

*Q13. Do you agree with the changes we propose to the Track 1 and 2 procedures? Please evidence your response.*

With respect to both procedures we believe that is of great importance that PP+ ensures it provides the relevant provider with all necessary information in a timely manner. At a minimum this should include the specific details of any alleged defaults. This is of crucial importance in minimising consumer harm and enabling efficient use of the procedures by all parties.

With respect to Track 2, we fully support the notion that PP+ should formally notify the providers that a Track 2 investigation has started before a full breach letter has been issued.

As the MBG understands it, once this notice has been sent, a further notice can be sent at any point to a network operator or L1 to withhold funds under section 4.4.7 of the Code.

The MBG supports this new ‘early warning’ process and believes that it could have significant effects in reducing consumer harm and ensuring a greater fine collection rate and thus a greater element of ‘polluter pays’. Nevertheless, please see comments following in Q14.

*Q14. Do you agree with the proposed change to 4.4.6 (now 4.4.7) to ensure the effective retention of revenue made from harmful services and prevent abuse of the review and oral hearing processes? Please evidence your response.*

The MBG agrees with PP+ that the present rate of fine collection is inadequate and that there is little point in levying fines if there is no prospect of payment. One way of improving the rate of fine and administrative charge collection is to garner funds that have been paid to networks and aggregators for the offending service and are destined for the service provider but which have not yet flowed down the payment pipeline.

That said, such a process has to be balanced against natural justice and the risk of pushing providers into severe financial difficulties, in the event of a mistake on the part of PP+.

The MBG is therefore inclined to support the observations made by AIME in this regard:

*AIIME would therefore support this policy only if:*

- i) *There is an initial review of the case by a Tribunal member with a formal published Withhold test to assess that sufficient *prima facie* evidence exists.*
- ii) *All evidence and arguments (even though they are provisional and skeletal) are made available to the provider in the form of an indicative breach letter so that errors and misunderstandings can be spotted and corrected.*
- iii) *There is a right to reply, a process for an appeals and regular reviews of the need for revenue withhold.*
- iv) *There is an agreed firm timetable for the conclusion of the investigation, beyond which the case should progress immediately to adjudication or the funds released. This could include time-bound withhold.*
- v) *There is a facility for a provider who is subject to withhold to request a release of emergency funds for business-critical expenses.*

*AIIME has concern over the use of the word “harmful” as this pre-judges the outcome of a review and therefore indicates to industry the futility of the review. AIIME has no objection to the principle of the change to rule 4.4.6 if the wording were changed so that it does not “criminalise” the provider and therefore breach their human rights.*

*Q15. Do you support the changes proposed to 4.5.3? Please evidence your response.*

PP+ has presented little reasoning and no evidence as to why this change would benefit consumers and/or the PRS ecosystem as a whole. In the absence of such evidence, it is difficult to make an informed comment either way.

PP+ procedures must follow a due and just process and ensure that the ‘accused’ has all the available evidence against them and is in a position to make a legitimate challenge to an EP.

*Q16. Do you agree with the changes being proposed to reviews? Please evidence your response.*

It seems sensible to make access to review simpler to achieve. However, it is not clear how this can be left to the chair of CCP, if he or she was party to the original decision; this would not be seen as fair or practical. The updated arrangements must make clear that a matter of this nature would be looked at afresh.

*Q17. Do you support our intended changes to oral hearings? Please evidence your response.*

Even if there is some evidence of the system being ‘gamed’ (and, again, PP+ is very unspecific on this), all providers must be confident that they are getting fair access to justice. The MBG’s preference is for the *status quo*.

*Q18. Do you agree with the changes to the appeals process? Please evidence your response.*

No comments

*Q19. Do you agree with the changes planned to 1.7.2, 5.2.1 and 5.3.8 (c)? Please evidence your response.*

The MBE supports the changes.

*Q20. Do you agree with our proposed change to Annex, paragraph 3.1? Please evidence your response.*

Ofcom should continue to approve the PP+ budget. PhonepayPlus regulates premium rate services in the UK on behalf of Ofcom and is therefore still answerable to Ofcom.

*Q21. Do you agree with our new approach to existing prior permissions regimes? Please evidence your response.*

As a general principle the MBG supports moves that will streamline the administration of regulation and reduce unnecessary burden. Removal of the administrative hurdle of obtaining prior permission is potentially a positive step.

The MBG also notes that, in the absence of an emergency, there will be consultation with stakeholders prior to the imposition of special conditions.

In the fullness of time, it may be possible to reduce further the need for special conditions but PP+ is probably correct, through the device of special conditions, to withdraw from the prior permission regime cautiously. Our support, though, is given on the proviso that providers can launch and operate high risk services with less bureaucracy, not more.

*Q22. Is the process of implementing the new regime clear?*

Response as for Q20

*Q23. Do the three illustrative examples attached to this consultation at Annex 2 help explain how we intend to implement this new system?*

Response as for Q20

*Q24. Are the 24 special conditions fit for purpose? Have we missed anything?*

No comments

*Q25. Do you agree with the insertion of this Rule at 2.1.4? Please evidence your response.*

This should be qualified to make clear that the need to hold licences and permissions etc. must be relevant to/ancillary to the provision of the PRS in question.

*Q26. Do you agree with the changes to 4.8.2? Please evidence your response.*

Yes.

*Q27. Do you agree with the change being proposed to the naming of individuals provision? Please evidence your response.*

Yes

*Q28. Do you agree with the proposed change to 4.9.3? Please evidence your response.*

This is another example of where it would be more appropriate for PP+ to evidence its proposal. On the face of it, increasing the period from three to four months seems a reasonable suggestion. However, why not six months? What are the potential costs and benefits arising from extending the period? Why is a one month extension preferred to a longer period?

*Q29. Are there other areas of change that we have not considered here but should? If so, please provide appropriate evidence of the likely impact of the change.*

No comments

*Q30. Do you agree with our assessment of the potential impact of the changes proposed to the Code in this consultation? Please provide appropriate evidence to support any assertion.*

Comments on potential impacts made in reply to each of the detailed questions on these various topics.

*Q31. Do you have any comments about the contents of this document? To you agree with our overall approach to the thirteenth edition of the Code? Have we neglected anything?*

No comments