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31 July 2009

Dear Mark,

Developing the next Phonepay Plus Code of Practice

Please find enclosed our response to the discussion paper, 'Developing the next Phonepay Plus Code of Practice'. As the discussion paper acknowledges, debate on the content of the 12th Code takes place against the backdrop of the Ofcom Premium Rate Services scope review. It is four years since 3UK first requested, and Ofcom agreed to undertake, a review of the scope services to which premium rate regulation should apply, and 3UK welcomes the opportunity to engage with Ofcom on the definition of what constitutes a Premium Rate Service.

Our response to the Scope Review is broken down into two parts. Sections 1-5 of the review examines the question of scope, whilst section 6 looks at potential new regulatory provisions. We believe these are most appropriately considered not as part of a scope review but in the discussions on the 12th Code and we note that PhonepayPlus' correctly examine a number of these issues in the discussion document. It is critical to separate regulatory mechanisms from a policy debate on scope and we trust PhonepayPlus will reflect this distinction in its consultation on the 12th code and seek to avoid references to particular services and instead focus on the generic regulatory provisions of the code.

Yours sincerely,

Julie Minns
Head of Regulatory & Public Policy



Hutchison 3G UK Limited (“3UK”)

Response to

Developing the next

PhonepayPlus Code of Practice

July 2009

Background

1. Hutchison 3G UK Ltd (“3UK”) was the UK’s first 3G network offering national coverage for calls and texts, and has over 90% population coverage for 3G services. As we consolidate our radio access network with T-Mobile we expect to reach 98% UK population coverage for 3G by the end of 2009. 3UK have over 4 million mobile and mobile broadband customers in the UK. Mobile broadband usage on 3UK’s network has grown rapidly and handset traffic has shown a similarly distinctive upward trend. Since September 2007, 3UK has seen an increase in data traffic across its network from 600GB per day to 32TB per day.
2. 3UK are driving forward the expansion of mobile broadband infrastructure and growth in the range of mobile internet options available to consumers, and have been at the forefront of many key sector developments. It is 3UK’s focus on data and internet services that informs our concern about the application of Premium Rate Regulation (PRS) to internet based content services charged directly to the customer’s communications account. This type of service is markedly different to traditional PRS which relied on charges being generated by a call or text to/from a number, and where pricing was determined by a multiple of minutes or texts thereby giving rise to concerns about pricing transparency.
3. 3UK believes that premium rate regulation should therefore only apply to ‘traditional’ PRS, and our response to the discussion paper is based on an assumption that the 12th Code will regulate only these services. 3UK notes that the discussion document focuses on the value chains for ‘traditional PRS’ (pages 15 & 16).



Overview

1. 3UK welcomes the proposed new approach to principle based regulation and commits to work with PhonepayPlus to develop detailed rules and guidelines where these are required to aid those entities which form part of the value chain.
2. There is concern that lack of prescription will lead to subjective interpretation by the PhonepayPlus Executive and Code Compliance Panel (CCP) on services that may be designed to appeal to a particular audience and thus sit on the edge of common acceptability. This may result in a higher number of cases being raised to the CCP thereby increasing the cost of regulation.
3. 3UK would like to understand what measures will be put in place to enable independent industry expertise to be utilised when a code breach is being investigated and what routes of low cost appeal will be available when the CCP has adjudicated on a marginal case.
4. If PhonepayPlus moves to a principles code, 3UK believes it will be necessary to have more comprehensive guidance available to PRS providers and recommends that the guidelines to accompany the 12th code are drawn up in conjunction with and with the agreement of the Industry Liaison Panel (ILP).
5. 3UK is aware that in the past two years, the premium rate industry has declined dramatically, some of it being due to economic situation but some of it being due to lack of innovation and market stimulation. We would like to see the 12th Code giving equal emphasis to the role of the regulator in growing and developing PRS and its consumer protection role.



Q1 Do you agree with our broad assessment of the range of harms that may impact upon consumers? If not, why not?

We agree with the broad assessment, but are concerned by the potential subjectivity of any future tests of "Inconvenience" and "Loss of Reputation or Dignity" in assessing the conduct of a service. It is vital that any principles led Code is also supported by changes to the measures that are applied when a perceived Code breach has occurred. We would like to see reforms to the approach by the Executive and CCP proposed as part of this code review and would welcome the opportunity to discuss this further.

Q2 Do you agree with our assessment and definition of Outcomes and supporting themes? If not, why not?

We are fully in agreement with the Outcomes of Legality, Transparency, Privacy, Technical Quality and Complaint Handling. We do however have concerns about the use of "Appropriateness". Certain services are designed for a specific audience but may be considered offensive or inappropriate by the Executive or CCP who may have differing views as to what is or is not appropriate. The law already defines harm and offence, and the new Audio Visual Media Services Directive lays down further regulation on this issue. It should therefore be sufficient for PhonpayPlus to rely on 'lawful' when determining whether a service is acceptable.

With regard to the supporting themes, significant changes to mobile services give consumers the opportunity to browse through products prior to making purchases. This changes the scope of promotion to more of an inducement to browse instead of an inducement to purchase and therefore may not have pricing or other supporting information (similar to any ecommerce web service). PhonpayPlus should acknowledge these changes and as long as clear information is available to consumers prior to making the purchase decision this should be acceptable.

The nature of service promotion is also changing and there is less opportunity for mandatory information to be contained in the promotion. In these circumstances, the requirement should focus on the provision of mandatory information to the consumer prior to purchase rather than a requirement to provide such information in the promotional material. This is similar to a great deal of advertising in other markets where the product is generically promoted but a price provided at the point of sale.

We would like to see the theme "services must not take advantage of any vulnerable group..." only applicable if that service was aimed at the vulnerable group. A broadly promoted service,



used by a vulnerable person is not under the control of the promoter.

Theme “Services must have a simple method of permanent exit. prior to incurring a charge...” is impossible for some PRS when the point of entry becomes the point of charge. It was this unique mechanism that defined – and in 3UK’s view should continue to define – what a PRS is and why the PRS mechanism gives rise to harm.

Privacy theme: This theme should support and mirror PECR and its interpretation by the OIC.

We are broadly supportive of methods to improve consumer complaint handling and improvements have to be consumer focussed, which may mean PhonepayPlus forgoing potential breach information. However, this is consistent with other consumer complaint handling in retail systems. Current PhonepayPlus attempts to improve complaint handling as they are focussed primarily on the gathering of breach data.

Q3 Can you identify any Outcomes for consumer that you consider we may have overlooked?

No.

Q4 Do you agree with our Outcome and supporting themes about complaints handling? Do you have any other suggestions?

3UK believes there are improvements that can be made at industry level in the information provided to consumers such as on-bill information, MNO customer care and the phased removal of the need for shared shortcodes.

PhonepayPlus should look to work with all parts of the industry to help improve complaint handling. In areas where the industry cannot collaborate for fear of competition law breaches, PhonepayPlus could assist in facilitating discussions.

Industry shares the regulators desire to stamp out and report bad practices. However, the current investigation and adjudication process acts as a disincentive to Service Providers to report bad practice, because they fear they will become the subject of the investigation and may ultimately face regulatory action.

PhonepayPlus needs to develop processes whereby players in the value chain can report bad practice and 3UK would encourage PhonepayPlus to examine the introduction a whistle blowing policy.



Q5 Do you agree that PhonepayPlus is right to suggest that it should be able to revoke permission or consent where it is proven that Conditions have been breached and where such an action would be justified and proportionate? If not, why not?

Prior Permission has become increasingly used in recent years and runs the risk of becoming a stop gap which is used for a short time fix when gaps in regulation are identified. Whilst Prior Permission and Prior Authorisation have a use, they should be used sparingly and only in instances where guidance might not offer sufficient protection.

Q6 Do you agree that PhonepayPlus is right to consider allowing parties along the value-chain to apply for prior permission when in a contractual relationship to provide a service?

These proposals appear to be more flexible than the current regime. Where a SP has a blanket prior permission, they should not lose this Prior Permission based on the activities of one of the parties it has contracted with. Instead the SP should be required to take responsibility for closer monitoring and ultimately removal of the offending service.

Q7 Do you agree that PhonepayPlus is right to suggest that an applicants previous breach record is a factor that it is entitled to consider as part of a consideration of an application for permission or consent? If not, why not?

Where the applicant is the Information/Merchant Promoter or has associations with parties who have a breach history, then previous breaches should be considered.

Q8 Do you agree with our assessment that ALL participants in the value chain for delivery of phone-paid services have responsibilities for compliance? If not, why not?

All parties have a role to play and those roles differ per party. Each party contributes towards compliance but should not be held responsible for the activities of the non-compliant parties. It may however be proportionate and reasonable to take action against other parties in the chain if evidence is found that they failed to take action in respect of a service despite being in possession of information that indicated the service was in breach of the regulations.

Q9 Such a change in approach may have differential impacts on different providers in the value-chain What are these impacts likely to consist of and what business or consumer benefits do you think will arise?

Where the majority of consumer harm occurs from the activities of the promoters of the services, the application of regulation and the penalties for non-compliance should correctly be moved further down the value chain. This will only be affective with an environment where



the promoter is named and known and subsequently tagged with a record of their wrongdoing.

The effect on the industry and consumers will be positive; allowing the environment to grow with increased trust, but may have an effect of reducing speed to market for innovative services. On balance, the 3UK are supportive of the proposals.

PhonepayPlus may wish to consider the impact these new measures may have on the cost of providing the regulation. At the same time some of the proposed new measures may reduce the number of breaches and thereby reduce fines applied by PhonepayPlus. We would encourage PhonepayPlus as part of its review of the 12th Code to consider where savings might be made, and like Ofcom aim for a reduction in its budget.

Q10 Do you agree with our analysis of the outcomes of Assessment and Control? If not, why not?

Yes.

Q11 What thoughts do you have on our suggested approach to a registration scheme?

3UK is pleased to see the proposals for the registration scheme. We believe that the registration database can be put together by the industry and run by an independent party with PhonepayPlus feeding into and taking output from the database and being a key stakeholder. However, we believe further analysis on the costing of any alternative proposals is required.

Q12 What other suggestions do you have for how we could create greater incentives for providers to co-operate with PhonepayPlus in the event of investigations?

As previously indicated, PhonepayPlus operates an environment where reporting of the consumer harm and of the perpetrator may result in a fine applied to the reporting party and thus acts as a disincentive to report bad practice. Applying appropriate regulatory definition and enforcement to the role that each party plays in the value chain will aid improvement to the co-operation that PhonepayPlus desires, however this will require a the formulation of a whistle blowing policy that incentivises correct reporting.

Q13 Do you agree with our proposed approach to reforming the Informal procedure? If not, why not?



3UK believes that informal procedures can be very beneficial in supporting the regulatory framework. However they can only work effectively where all parties recognise the informal procedure as a warning rather than a punishment. 3UK would therefore urge PhonepayPlus to develop and enhance the use of informal procedures so that players in the value chain understand that they are being warned and given a chance to correct their behaviour. Any move to use informal procedures to 'punish' players in the value chain will degrade its effectiveness and should be avoided.

Q14 Do you agree with our proposal that our arrangements for Standard and Emergency procedures should be retained? If not, why not?

We believe the Standard (SP) and Emergency procedures (EP) should be retained, but a review of the EP is needed as there has been at least one case in 2009 where this was applied without apparent justification cause. The ILP and other industry stakeholders would welcome the opportunity work with PhonepayPlus to develop guidelines on the use of EP.

Q15 Do you agree with our approach and what regulatory impacts, costs and benefits do you foresee?

Please refer to our answer to Q9. 3UK is broadly supportive as long as the application of regulation is targeted, proportionate, transparent and informed.

Q16 What would be the costs and business impacts associated with such proposals? What consumer benefits do you think would accrue?

3 believes that at the moment, consumers who have been exploited by premium rate services, find difficulty in getting refunds and take second place to the regulatory fine. However more discussion with industry is required before detailed proposals can be consulted on. One option might be for PhonepayPlus to assess whether just the complainants or the whole affected base of consumers are due a refund dependant on the case and the severity of the issue. The fine applied could then cover consumer refunds, cost of administering the refunds and the regulatory "polluter pays" payment. If the consumer wishes to gain the refund, then they can apply to the regulator or the regulator can ask the Originating Communications Providers to affect refunds (where this is technically possible). The refund policy should take great care with the circumstances where all consumers would be entitled to refund. Further discussion is needed here to get the balance right.

Q17 What thoughts do you have about improving PhonepayPlus' effectiveness of fine collection and do you have any specific proposals for how we could better secure fine collection through changes to the Code?



Fine collection should be targeted at the perpetrator of the issue, but this will mean an increasing volume of unpaid fines due to voluntary liquidity. By increasing early awareness of potential issues to the upstream value chain, revenue flow can be suspended thus increasing the opportunity for fine collection. To date, Service Providers have had to underwrite the fines that their customers have received out of their own profit line.

Increasing information on merchant promoters including unpaid fine history, in the registration database will enable SP's to make informed choices.

Q18 Do you agree with PhonepayPlus' proposals for new terms in respect of the current terms "Service Provider" and "Information Provider"? If not, can you suggest alternative terms?

We believe that the value chain in fixed line and mobile premium rate service provision, while seemingly complex can be defined into a number of named roles with a definition of that role; regulation can then be targeted to the role that each named party plays in the provision of PRS. AIME has proposed new naming conventions and these should be considered as part of the Code review.