

[x] July 2020

Jo Prowse
Chief Executive
Payment Services Authority
40 Bank Street
Canary Wharf
London E14 5NR

Dear Jo

Payment Service Authority's discussion document for the development of the 15th Code

Mobile UK welcomes the chance to respond to the Payment Service Authority's discussion document, which has been published as part of the development of the 15th Code of Practice.

We agree that effective regulation to support a fair marketplace cannot be static. (Indeed Mobile UK and its predecessor organisation MBG have been involved with equivalent consultations since the 9th Code). This is a timely moment to assess how the PSA can improve its regulation to keep pace with change and we support many of the changes that PSA is proposing. Our letter, though, will focus on those points where we feel a rethink, change of emphasis or more clarity is needed.

All our points, of course, are subject to seeing the detail in the consultation document, in due course.

Our comments on the document can be summarised as follows:

1. "Moving from broad outcomes to a regulatory approach based on raising market standards"

On page 45, PSA headlines a section 'moving from broad outcomes...'. While no-one could argue against the desirability of raising standards, Mobile UK is very concerned that there has been a failure of corporate memory and that the PSA is not recognising why it moved to a principles based approach in the first place (the transition from the 11th Code to 12th Code). No regulatory system can hope to anticipate every way in which rogue actors will seek to work round rules – that was why the principles based approach was developed. The regulator found the prescriptive rules were too inflexible to change when found wanting.

The fact that bad behaviour still goes on in the market does not mean that the rules are wrong, or that the whole regulatory framework has to be reworked to cope with the actions of a very small minority.

It merely means that proportionate regulatory steps should be taken to minimise the risk of rogue actors being in the market; and some of the steps proposed in the discussion document could achieve this (e.g. increased focus on prevention rather than cure).

2. The over arching principles for ‘pre-operational’

Mobile UK supports the PSA in wanting to prevent bad actors from even entering the market. It makes sense that those with a track record of mis-selling and trading standards offences are not given access to the phone-paid payment network. Merchants, should have adequate technical infrastructure to protect customer data etc., where it is relevant.

That said, there is a balance to be struck between excluding miscreants and blocking innovative new providers from market entry by creating a regulatory closed shop. The telecom market was liberalised through a ‘general authorisation’ regime and it would be preferable to maintain a generally permissive approach. For example, requirements to deposit bonds could present over-burdensome market entry criteria.

Probationary periods might be more workable, depending on what ‘full acceptance’ into the market entailed and what benefits and privileges it conferred. Mobile UK recognises that some measures are required to increase the rate at which fines are collected.

3. Effectiveness of enforcement procedures

In paragraph 216, the PSA reflects on options for changing enforcement and procedures. There is an implied question as to whether a £250k fining power is adequate. Mobile UK believes that it is (bearing in mind that this is already more than double the previous level). As the PSA itself explains, it is not so much the level of the fine, it is the fact that so many are able to evade fines by liquidating their companies without paying. This is the core problem to be addressed. The industry would like to discuss further whether a more sophisticated variant of the ‘30 day rule’ could be developed for ‘probationary’ companies.

It is Mobile UK’s strong contention that merchants who intend to defraud consumers are not making the calculation that the fine is just a ‘cost of business’; their calculation is to evade the fine altogether, and so the level of maximum fine is not particularly relevant. We are unlikely to support increased fining powers, as our strong preference is to focus on ways of improving the collection rates for the fines that are imposed.

Mobile UK is also concerned by the term ‘more flexible information gathering’, where we would like to see much more detail. Responding to requests for information is very resource intensive and time consuming. While Mobile UK’s members very much wish to support the PSA in discharging their regulatory functions, we also wish to see an information gathering regime that is proportionate and targeted at the point(s) in the value chain giving rise to a given problem. ‘Fishing trips’ should be very clearly and explicitly excluded.

4. Responsibility across the value chain

Mobile UK recognises that a chain is only as strong as its weakest link, including a PRS value chain.

However, we are concerned by some of the language (in particular paragraph 237) such as “exploring more effective ways to hold the whole value chain to account” and “extending liability to other parties in the value chain (networks/Level 1 providers)”.

The regulatory system cannot overlook a) the reality that leverage can (and should) only be exercised where there is a direct commercial relationship and b) that sanctions should be targeted at the wrongdoer, and only once wrongdoing has been established, through a fair enforcement

process. Sanctions cannot be scattered across the value chain and providers held to account for the poor trading practices of businesses of whom they hold no direct knowledge or responsibility.

Mobile operators currently do as much as is feasible to ensure that the L1s (those immediately along the value chain) are operating in the best interests of customers. But there are limits (particularly as mobile operators are much larger businesses than L1s) on what powers can be exercised through commercial negotiations and control. It is principally the role of the regulator to hold L1s to account, if any falls short in discharging their compliance role and duty of care.

As the PSA develops its thoughts further, it would not be appropriate for measures to be proposed for consultation, whereby members of a value chain shared responsibility and liability across the value chain for a non-compliant service, or where operators were expected to exert undue control in discharging their perceived responsibilities.

To conclude, Mobile UK looks forward to engaging with the consultation on the draft 15th Code and trust that the comments made in this letter are taken into account as your approach develops. We would be happy to discuss in more detail any of the points raised.

Yours sincerely,



Hamish MacLeod
Director