Phone-paid Services Authority's Consultation: Draft 15th Code of Practice

Response from Mobile UK

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About Mobile UK

1. Mobile UK is the trade association for the UK's mobile network operators - EE, Telefonica UK (O2), Three and Vodafone. Our goal is to realise the power of mobile to improve the lives of our customers and the prosperity of the UK.
2. Mobile UK welcomes the opportunity to respond to the Phone-paid Services Authority's consultation on its draft 15th Code of Practice. 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 response will focus on those points where we feel a rethink, change of emphasis or more clarity is needed.

Proposed Regulatory Approach

3. The definition of a Premium Rate Service is set out in the Communications Act 2003. The remit of the PSA is further defined by Ofcom's Controlled Premium Rate Services condition. The underlying rationale for the PRS condition is to protect consumers in a situation where there is a split value chain for the consumer: one relationship with the connectivity provider delivering/enabling the service and another with the content or service provider themselves.
4. Value-added services supplied directly to consumers by communications providers (such as a mobile operator's 'own portal' services) fall outside the definition and scope of PRS.
5. There is text within the draft 15th Code that suggests that PSA is bringing into scope its own portal services, which would be beyond the definition of PRS (and SPRS).
6. For example, section 6.2.12 states: *If a network operator provides any part of a PRS which has a direct impact on consumers, whether in respect of its promotion or otherwise, the network operator shall be responsible for compliance with this Code in relation to the functions it performs in respect of that PRS.*
7. OR: *7.5.1 Network operators must provide to the PSA such financial transaction information as the PSA from time to time determines to be necessary in order to enable it to calculate estimated and actual income for the purposes of the levy. This information will include (but will not be limited to) revenues and outpayments, including those relating to a network operator's own service.*
8. Mobile operators should only need to declare revenue for services that fall within the remit of regulated services.
9. Mobile UK seeks clarity about what PSA is trying to achieve and assurance that no aspect of non-PRS services will be subjected to any aspect of the 15th Code requirements.

Due Diligence

10. The Draft Code sets out the standard on due diligence: *Organisations and individuals must perform*

effective due diligence on any person or organisation with whom they contract in relation to PRS…

11. Mobile UK agrees that carrying out due diligence on contracted parties is an essential safeguard. We welcome the PSA statement (at para 351) in the consultation document that "*it is our view that providers would only be liable for those elements which are within their control and for which we would expect them to undertake effective due diligence and have in place effective ongoing risk assessment and control processes.*"

12. That said, there are several places in the text of the draft Code where obligations seem to stretch beyond immediately contracted parties. Mobile UK seeks confirmation that this is not the intention or the effect of the 15th Code.

13. For example, section 3.9.11 states, "*Network operators and intermediary providers must take reasonable steps to satisfy themselves that any contracting party involved in the provision of a PRS meets the DDRAC Standard and Requirements in respect of any other person in the value chain with whom that party contracts.*" This provision, albeit restricted to 'reasonable steps', is a requirement that overreaches itself and places an unreasonable regulatory burden on mobile operators, which would not be practical to enforce. The PSA sets the DDRAC rules (which unavoidably entail an element of subjectivity); the PSA enforces those rules and does not require third parties to second guess the subjective views of the PSA. Mobile operators are required to carry out DDRAC on the parties with which they contract, and that must be the extent of their obligation.

14. Furthermore, Annex 2 states, *"PRS providers must collect the information set out under paragraph 2.3 below"*. Again, it must be clearer that PRS providers (a general term set out in paragraph 1.3) only have to do the appropriate due diligence on their directly contracted partners. Annex 2 cannot create a general requirement on PRS providers to collect all information about everything in their respective value chains. Just the sheer volume of information would make this unworkable. The responsibility needs to sit with those who have the direct contractual relationship.

15. The same principle must read across to the App stores, where any DDRAC requirement must lie with the App stores to apps they enable for sale.

16. Clarity on this point is fundamental to the whole structure of the 15th Code and everything that flows from it.

Customer Care

17. At paragraphs 3.4.4 & 3.4.5, the Code should make clear that other than where contracted otherwise, the default entity with primary responsibility for customer care is the merchant provider (the term 'primary responsibility' is introduced into the text without explanation or definition, and this should be explained). Mobile UK recognises that merchant providers contract other parties in the chain to provide this service, and that should remain permissible.

18. Section 3.4.9 requires that *"Network operators and intermediary providers that interact with consumers in relation to a PRS must provide clear information to them about how to contact the merchant provider, including the merchant provider's:*

    (a) name as registered with the PSA and details of the service the consumer has been charged for;

19. This is not a practical requirement to place on a network operator. While Mobile UK agrees that network operators must be able to put consumers in touch with merchant providers when asked, network operators would not always have any way of knowing 'the details of the service the

consumer has been charged for' – it is the role of the merchant provider to supply this to the consumer.

20. The PSA should confirm how customer care rules apply to newer App Store business models and the company ultimately providing the service to end-customers. At present, App Stores generally assume responsibility for customer care instead of the merchant or app developer. Customer care responsibilities in respect of end-customers should be defined to ensure consistent customer journeys and good customer experiences.

21. It must be noted it is not always practical for network operators to update billing information in line with a service name that a merchant provider is using, or indeed the 'name as registered' in the event that the merchant provider makes changes without giving network operators adequate notice.

22. This requirement is also not applicable to App Stores, whose merchants are exempt from registration and where related billing information is limited to the name of the App Store.

Fairness

23. At 3.3.11, the PSA is introducing a new requirement that: *"For all subscription services, the consent required to be established through an authentication method set out under paragraphs 3.3.8 and 3.3.9 above must be obtained by the merchant provider every 12 months."*

24. In the pre-consultation period and in the consultation document itself, the PSA presents no evidence that this is a necessary measure or would be justified.

25. Our strong contention is that 3.3.11 is not justified. It is inconvenient and potentially confusing for consumers. The proposed 12-month opt-in rules would act as a barrier to entry for new Charge-to-bill merchants, or alternatively, cause some App Stores to exit the market due to the cost of updating systems for only one jurisdiction. We have indeed had a clear indication from one large App Store that they would exit the market. This could ultimately have an adverse impact on consumer choice and enjoyment of services.

26. Suitable opt-out mechanisms already exist for consumers. The new Code includes a requirement that means consumers have to be able to exit a PRS immediately under 3.2.17.

27. This approach is in line with the revised General Condition auto-prolongation rules, which come into force in December 2021, and does not require express customer consent for rolling 30-day contracts after the expiry of the fixed commitment term, providing the customer can terminate at any time without paying an early termination charge.

28. The proposed 12-month opt-in rule puts PRS services at a competitive disadvantage to other payment mechanisms. It would be much more proportionate, convenient and eliminate the primary sources of harm, if re-authentication was only required where the customer had not actively set up an account with the provider and, via the provider's processes, verified that the account holder's e-mail address is their correct contact point. Once a customer has been through such a proactive process, there should be no question that he or she has been inadvertently opted into the service.

29. This would be a much better approach than the proposals in the draft Code, although even this version will have a detrimental impact on innovation and on the charities that use regular PRS donations for fundraising.

Supervision

30. The PSA at Section 4 sets out its proposed approach to supervision, including measures to request information and measures to inspect and assess levels of security.

31. While Mobile UK acknowledges that the PSA will conduct "targeted information-gathering", there are insufficient checks on when such requests can be made. We suggest an addition of the limitations set out in S.137 of the Communications Act 2003 (which sets boundaries on Ofcom's information gathering powers).

32. We also have concerns about PSA's ability (under 4.6.4) to appoint someone to carry out a skilled persons report. Mobile networks are regarded as critical national infrastructure and are in the process of acquiring significant obligations under the Telecoms Security Requirements. These involve strict protocols about who and how network security is developed and maintained. We are very concerned that the PSA's proposals will not be consistent with our enhanced responsibilities (allowing third parties to audit security can, of itself, introduce vulnerabilities.)

33. This aspect must be discussed further.

Organisation and Service Information

34. Paragraph 3.8.5 requires that "*Network operators and intermediary providers must each ensure that all PRS and associated access numbers are registered with the PSA before enabling a service to become accessible to consumers.*"

35. Mobile UK does not understand the scope and extent of this requirement. At first sight, it is a very onerous and all-encompassing requirement, unless it refers only to the first time a PRS access number is enabled on the network. The PSA should also confirm that this requirement is only applicable to voice services regulated by the PSA, and does not extend to MNO direct billing services which do not use access numbers. We request further discussion on where network operators' responsibilities lie and the PSA's expectations.

Systems

36. Paragraph 3.10.13 requires that "*All network operators and intermediary providers must implement a coordinated vulnerability disclosure scheme and act upon any issues reported*"

37. Clarity is required to confirm the requirements of such a "disclosure scheme" and how this is intended to operate.

38. Paragraph 3.10.7 requires that the results of intermediary platform security tests must be provided under Section 4 or 6.1 of the Code. In line with comments set out in paragraph 32, we wish to confirm the requirement does not extend to network operators security tests, as such results would typically only be disclosed via jointly initiated regulated security activity and under strictly controlled parameters, e.g. Ofcom's TBEST scheme.

Reporting and notification requirements

39. Paragraph 4.5.1 contains wide drafting requiring a PRS provider to report on a range of data and information that the PSA may require periodic reports on. We seek confirmation that there is flexibility drafted into this paragraph to allow for the different systems and varying levels of reports/data available. Whilst specific reporting can be built to comply with regulatory

requirements, the data, format required, and time to implement need to be specified in advance (the latter may take up to 12 months and need to be agreed)?

Changes to the Code

40. Mobile UK does not agree with the text in paragraph 6.4.5 which allows the PSA to introduce changes to the Code as 'minor clarifications' without prior consultation or due process.

41. If a matter is of sufficient importance that a change to the text of the Code is required, due process should be followed. If 'minor clarifications' are thought to be beneficial or necessary, some other route, such as guidance, should be found to deliver them.

Level of maximum fine

42. For the avoidance of doubt Mobile UK's view remains that the level of maximum fine should remain at £250,000 (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.

43. 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.

Information Connection and Sign-posting Services

44. The PSA recognises ICSS as a service causing harm and which is presently the most complained about service type. Despite the introduction of Code 14 special conditions in December 2019 and a partial Google advertising ban in March 2020, ICSS levels of harm remain unacceptably high.

45. Mobile UK continues to question the legitimacy of ICSS where freephone numbers are widely available and given customers rarely benefit from any additional services, e.g. voice recording where these are offered. We are concerned the proposed Code 15 Transparency rules will not address the harm from ICSS given the low levels of awareness for ICSS and the tendency for consumers to bypass key information and pricing irrespective of signposting. The risk of uninformed consent therefore remains high as does the potential for financial harm under the proposed framework. We urge the PSA to evaluate the full range of options to address the harm caused by ICSS, including restrictions on some or all types of onward connect, the introduction of a price cap or a comprehensive search engine advertising ban, some of which may require support from Ofcom or DCMS to enact.