

For the attention of

Mr. Geoff Brown

Ofcom

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3d of September 2014

Response to OFCOM "Approval of the PhonepayPlus Code of Practice (thirteenth Edition)" Consultation

Submission by
NebuPAY Holdings Limited

Introduction

Nebupay welcomes the opportunity to respond to OFCOM Consultation on the proposed draft edition of the PhonepayPlus new 13th Code of Practice.

Nebupay is an innovative company which provides mobile payments and billing in 20+ locations all over the world. We consider UK Premium market to be one of the key ones in Europe and globally. Based on our experience the regulation of the UK market has always played a major role in its growth and change, so we place high hopes that the continuous development of the Code of Practice and overall regulation regime will improve the market further in the interests of both consumers and the industry stakeholders.

Nebupay is concerned over developments in the last year which have brought a number of issues in the cooperation and mutual trust between the PhonepayPlus and industry (the Emergency procedures issued Summer 2013, the current progress of the legal case against the PhonepayPlus, etc.). We believe that a better level of understanding and cooperation should be achieved to relieve the pressure from the market and allow all its key players to reach their goals – safe and value-rich services for consumers, perfectly self-regulated market where need for punitive action is low or nonexistent for the Regulator and prosperous and innovative market for industry stakeholders.

Our continuous involvement in the Consultations of OFCOM, PhonepayPlus, AIME and other major regulation and self-regulation bodies have always served towards this idea. Nebupay is always eager to share any help or advice that might be beneficial for the said idea with the Regulator and the industry stakeholders.

Response

List of OFCOM Consultation Questions ref. "Approval of the PhonepayPlus Code of Practice (thirteenth Edition)"

Question 1: Do you consider Ofcom should approve the draft PPP thirteenth Code of Practice in its current form? Please provide an explanation to support your response.

Nebupay considers the current draft of the PPP 13th Code of Practice unready for the general approval in its current form. Nebupay considers that major part of the changes proposed in the draft are beneficial to the further development of the regulation regime over the Premium market, however some of the changes seem to be controversial.

Nebupay recognizes the vast experience in the field of regulation that PhonepayPlus possess and have expressed over the last years in its work. The current draft of the 13th Code of Practice continues the tradition of improving regulation and should be approved once all controversial issues have been resolved, while the said process of resolving is still ongoing in our opinion.

The draft of 13th Code has improved a number of issues of the 12th Code Edition and such changes are well accepted within the industry. However some of the proposed changes are seen as controversial and need further consultation before they should be approved within the 13th Code of Practice.

Please find some examples below which in our opinion deem the current 13th Code draft unready for approval by OFCOM on the grounds of some of the proposed changes to be unready and controversial or in breach with section 121 of the Communications Act 2003.

Funding arrangements.

Nebupay has concerns over the process of lessening or removal the OFCOM's budget oversight powers over the PhonepayPlus, as proposed in the 3.2 Rule of the Annex 1 of 13th Code draft. The PhonepayPlus operates under the OFCOM mandate expressed via the section 121 of the Communications Act 2003 and is not a subject to market developments or hardships, nor is it accountable to the industry stakeholders.

Recent years show a steady tendency of fines collected from the industry members becoming a major source of PPP budget. The percentage of fines from industry members in total budget has accounted for more than half of the operational budget of PhonepayPlus, as seen from its the Annual reports - 21% (2011/2012), 53% (2012/2013), 54% (2013/2014).

The said circumstances which define the planning of the PPP budget are of great concern to the industry stakeholders. Nebupay believes that, should the removal of the OFCOM signing-off powers be intentional by OFCOM, it would be more beneficial and transparent to the market to delegate such power to 3d party organization – the Industry Liaison panel or any such organization which would have full approval by the OFCOM, PhonepayPlus and industry stakeholders. We think that this matter should be resolved before the OFCOM lessens its control over the PPP budget.

Based on the above we consider the current proposed change to rule 3.2 of the Annex 1 to be in breach of the section 121.(2).(g) (*that, in relation to what those provisions are intended to achieve, they are transparent.*) of the Communications Act 2003, therefore rendering the current change in the 13th Code draft unsuitable for OFCOM approval.

Vulnerability definition.

Nebupay has concerns over the proposed changes to the vulnerability provision. Although we consider that both the Regulator and the stakeholders should pay great attention to protecting the interests of the vulnerable groups of the customers, the said change in vulnerability provision will, in our opinion, place all responsibility for any such issues on the stakeholders. The provided change in definition, “...be promoted or provided in such a way that it results in an unfair advantage being taken” does clearly eliminate any considerations on whether or not was the intent malicious and any possibilities that a consumer might abuse the service are disregarded.

The proposed change to the definition if rule 2.3.10 will place all responsibility in this situation on the stakeholders, since it was the service that was promoted and brought consumed harm. Thus instead of resolving any case like this via refund negotiations, the stakeholder might be charged with breach of the 2.3.10 Rule due to the alleged consumer harm, which will no longer need to include intent to seek unfair advantage. We also think that a distinct and transparent definition of vulnerability should be stated and defined for each major service type.

Based on the above we consider the current proposed change to rule 2.3.10 to be in breach of the sections 121.(2).(d) (*that the provisions of the code are objectively justifiable in relation to the services to which it relates*) and 121.(2).(g) (*that, in relation to what those provisions are intended to achieve, they are transparent.*) of the Communications Act 2003, therefore rendering the current change in the 13th Code draft unsuitable for OFCOM approval.

We think that the proposed change should not be implemented until a different definition is discussed with the industry in order to avoid the miscarriage of justice due to the unclear definition. We would also comment that we consider that presence of malicious intent should remain a main principle in definition of “taking the unfair advantage of the vulnerability” in any regulations aimed to lessen consumer harm and it should not be removed so easily from the Code as it was proposed. Should that fail it could be considered that a possibility and grounds for unjust treatment are present in the regulation document.

Oral hearings.

Nebupay has major concerns over the proposed changes to Oral Hearings accessibility. The Oral Hearing is a procedure which provides the L2 with an ability to defend its case and to explain any questions on which the Tribunal might be unsure or need detailed evidence or declaration of intent. We think that in the absence of the ability to apply for Oral Hearing from the start, many L2 might consider that their case should then be handled by the extensive use of the external legal

professionals, which will surely provide a large increase in the administrative costs to both the L2 and the PhonepayPlus.

The restriction of Oral Hearing to be only possible after the paper-based Tribunal does put an L2 in the position where the Oral Hearing will heavily draw its conclusions from the results of the Tribunal and remove the L2 right for presumption of innocence.

We therefore consider this proposed change to be in breach of section 121.(2).(e) (*that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;*) of the Communications Act 2003, therefore rendering the current change in the 13th Code draft unsuitable for OFCOM approval.

Track 2 Procedures and Judicial Review against PhonepayPlus.

Nebupay considers that Tribunal process currently employed by the PhonepayPlus requires a thorough review due to the concerns raised within the recent Judicial Review against PhonepayPlus. Given the seriousness of the available sanctions that the Tribunal possess it could be expected that in the absence of the review of the said process the number of civil cases or judicial reviews is likely to grow to the dissatisfaction of both the PhonepayPlus and the Industry.

Based on the disclosed above it is our opinion that the adjudication process and all changes related to it should be excluded from the current draft of 13th Code and be subject to a wider Industry consultation in Q1 2015 when the current Judicial Review should reach its conclusions.

Question 2: If the draft Code were to be approved by Ofcom, what period of time do you consider would be appropriate before the thirteenth Code of Practice became enforceable by PPP? Please provide an explanation to support your response.

Nebupay considers that the current draft Code is still a subject for adjustment and some of its changes to discussion with the industry stakeholders. It is our opinion that should some of the issues raised within or response to consultation prove to be shared by the industry members, such issues should be taken to a separate Industry Code consultation and settled within Industry workshops. Should these issues still raise concerns by the end of Q1 2015 they are to be excluded from the 13th Code and be resolved within Q2 – Q3 2015.

Conclusion

The development of 13th Code of Practice comes during the times of change. The impact of the still declining revenue of the Premium market, the change in the PhonepayPlus leadership, the ongoing judicial processing against PhonepayPlus, the changes to the EU Data protection and Premium regulation legislations, the concerns within the industry regarding the recent use of Emergency procedures and the overall rapid growth of technologies and the emergence of new services and value chains demands the changes within the regulation regime.

The current state of the 13th Code Draft in our opinion has a number of severe issues which should be addressed before the Draft is approved by OFCOM. We are aware that this opinion is widely shared within the industry which would surely provide all necessary help for the purpose of creating a more transparent and just 13th Code.

This consultation and the ongoing process of shaping the future grounds of the market within the 13th Code shows that it is the cooperation of the Regulator and the Industry that will define the market and its prospects. The well-received and successful tradition of close cooperation between PhonepayPlus and the Industry Stakeholders should ensure the continuation of the development of one of the world's best Premium markets, both within the regulation regime and in consumer satisfaction and trust in the Industry.

We at Nebupay Holdings Limited hope that this tradition will again prove beneficial to all participants of the market and will allow the creation of a better 13th Code and a better future of the market.

Further contact

The comments provided within this reply to Consultation are of constructive nature, aimed to help the process of improvement of the regulation regime of the UK Premium market and ensuring a close cooperation of its participants.

If any detailed clarifications, comments or other information might be needed – please contact Andrew Vinnichenko, Compliance Manager at Nebupay Holdings Limited at [✉]and [✉], or our Compliance Team directly via [✉].