

Geoff Brown
Consumer Affairs
Ofcom
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BY EMAIL ONLY

12 September 2014

Dear Geoff

Consultation on the Approval of the PhonepayPlus Code of Practice (13th Edition)

I am writing on behalf of The Number UK (TNUK) in order to respond to the above consultation and I apologise for the slight delay in doing so, as its importance to our position has only very recently become apparent.

PhonepayPlus proposed 13th Edition Code of Practice

This response addresses a single issue which is relevant to both the 12th and 13th Editions of the Code. Rule 2.2.7 of the 12th Edition states as follows:-

“Where promotional material is transmitted on television or in any other audio/visual format, pricing information must be clearly visually presented and spoken if the advertised cost of the service generally exceeds £3.83 plus VAT.”

PPP has proposed that this be slightly amended in the 13th Edition, such that paragraph 3.12.3 will state:-

“PhonepayPlus may specify the advertised cost of a service that is promoted on television or in any other audio/visual format, above which pricing information must be clearly visually presented and spoken.”

It has further proposed to specify the level of the specified cost outside of the Code, but it has stated:-

“At this juncture, we are not minded to amend the monetary level at which this pricing information must be clearly stated orally and visually on television.”

It is apparent from the PPP consultation (as well as discussions which TNUK has had directly with the Executive), that PPP has given no active policy consideration to either of these questions:-

- 1) Whether or not this rule should be included within the 13th Edition of the Code

2) If it is to be included, what is the appropriate level of cost at which it should apply

In issuing a new edition of its Code, PPP should have assessed whether it was in fact appropriate to include each of the provisions which it proposed to include. It should not have relied simply upon the fact that a provision might have been included in an earlier Edition, particularly in circumstances where that provision had not previously been triggered, but it was reasonable to expect that it may be triggered during the lifetime of the new Edition (as a result of increases in PRS caps).

In particular, PPP should have considered whether the rule itself, or the level of cost at which it applies is: proportionate; objectively justifiable; non-discriminatory; evidence-based; or consistent. For reasons outlined briefly below, TNUK submits that it clearly meets none of those requirements.

Furthermore, by having not considered these issues and instead relying solely on the fact that the rule was contained in the 12th Edition (and quite possibly many previous Editions), PPP has shown itself to be unwilling to be accountable for its decision to include the Rule in the 13th Edition. PPP's refusal to engage in any assessment of these issues is despite TNUK having previously highlighted them in both our response to PPP's Code of Practice Call for Inputs dated 24 October 2013 and more particularly in our response to its Code of Practice Update dated 26 March 2014.

TNUK has therefore now highlighted its concern about the inclusion of this rule once again (and in some detail) in response to PPP's current Code of Practice, 13th Edition consultation. For convenience, we attach a copy of that response to this letter, as we do not intend to repeat all of the points here.

Ofcom's Consultation and Legal Duties

We note that Ofcom's own consultation is focussed entirely on the changes which have been made in the 13th Edition and does not consider any of the provisions which remain largely unamended. Its position is best summarised at paragraph 3.5 (with similar references made throughout section 4, when considering individual legal tests):-

"As other provisions of the draft Code make what we consider lesser changes to the twelfth Code, we focus less on these in this document. Likewise, those many provisions unchanged from the twelfth Code. We are not aware of any reasons to suggest circumstances have changed significantly since we approved the twelfth Code so as (in our provisional view) to mean that Ofcom may not and/or that it would be inappropriate for us to approve the draft Code containing all these provisions."

Whilst we understand the practical reasons for only highlighting the changed provisions within its consultation, Ofcom's legal duties obviously require it to consider whether all of the provisions in the 13th Edition meet the tests contained section 121(2), not merely the new or changed provisions. Ofcom is required to consider all of the provisions of the proposed new Code on their merits. It is not entitled to approve the Code by relying solely on the fact that similar provisions may have existed in a previous Code (regardless of whether or not it believes that circumstances have materially changed).

TNUK considers that proposed paragraph 3.12.3 fails to meet at least three of the tests contained within section 121(2). Detailed reasoning and background is contained within our attached response to the PPP consultation, which we summarise as follows:-

(d) that the provisions of the code are objectively justifiable in relation to the services to which it relates;

TNUK does not believe that there is any objective justification for the requirements contained within proposed paragraph 3.12.3. At a basic level, they are obviously a legacy of previous prescriptive and rule-based Editions of the Code, which run entirely contrary to the outcomes-based approach which was meant to have been introduced by the 12th Edition. Whilst PPP has taken steps to remove other legacy rule-based obligations from the 13th Edition (most obviously the Prior Permissions regime), it has chosen not to do so in this case.

We have identified in our response to the PPP consultation that we can find no equivalent (or even similar) provision either in broadcast advertising regulation or PPP's own Code. PPP has made no attempt to provide any objective justification for the imposition of this obligation, as it has simply sought to rely on the fact that it was contained in the 12th Edition. Indeed, it is not clear that PPP even knows when or why the obligation was first imposed, let alone conducted any form of policy making process in order to determine whether it is still required. It has not identified why this particular provision is the most appropriate or effective means of addressing whatever consumer harm it believes might otherwise occur.

In addition, PPP has also made no attempt to justify the cost level at which it intends to impose the obligation and it is apparent that it is entirely inconsistent with other financial limits which it is setting, most obviously the £15, £30 and £45 limits which will apply to live services.

(e) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;

The provisions of proposed paragraph 3.12.3 will apply equally to all PRS providers, but self-evidently they will apply uniquely to those providers who choose to promote their services on television ("*or in any other audio/visual format*"). In reality, that is a very small proportion of all PRS providers.

Crucially, the means by which the service is promoted has no possible relevance to or impact upon the level of consumer harm which may be caused. Consumers will suffer no greater harm by virtue of the fact that the service is promoted on television than they would if the service was promoted in a newspaper. Providers not advertising on television who charge the same (or even a higher) cost for supplying an identical PRS will not be subject to an equivalent increased level of regulation and the very considerable costs which it imposes. Furthermore, there is nothing inherent in the audiovisual format which in any way requires this different and additional level of regulation. Price information can be displayed via on-screen text exactly as it is in print or online adverts.

On this basis, proposed paragraph 3.12.3 clearly discriminates against PRS providers whose business and marketing models are based upon using a certain form of promotion and there is no objective justification for any such discrimination.

(f) that those provisions are proportionate to what they are intended to achieve;

For reasons outlined briefly above (and in far greater detail in response to the PPP consultation), TNUK believes that proposed paragraph 3.12.3 is extraordinarily disproportionate both in its core requirement and particularly with regards to the cost level at which it will apply.

In demonstrating this point, we would highlight once again that we have been unable to identify any equivalent (or even similar) obligation elsewhere in broadcast advertising regulation which requires pricing

information to be spoken when the cost of a product or service reaches a certain level, let alone a cost as low as £4.60. This extremely onerous provision stands completely alone despite the myriad of regulation which applies to many forms of advertising. We would also reiterate that for higher risk live services, PPP proposes to impose a far less onerous form of regulation (spend reminders) applying at a far higher cost (£15).

TNUK therefore submits that Ofcom cannot be satisfied that paragraph 3.12.3 of the proposed 13th Edition of the Code meets the requirements of section 121(2)(d), (e) and (f). On that basis, Ofcom is not entitled to approve the draft Code in its current form.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Simon Grossman', with a long horizontal flourish extending to the right.

Simon Grossman
Director of Government, Regulatory & Business Affairs (Europe)