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Dear Jeff,

### **Approval of the PhonepayPlus Code of Practice (12th Edition)**

Three UK welcomes the opportunity to comment on Ofcom's approval of the PhonepayPlus 12<sup>th</sup> Code of Practice.

As Ofcom is aware Three believes that the scope of Premium Rate Services ('PRS') is in urgent need of review, and is disappointed that the work begun by Ofcom in 2007 to address this issue remains incomplete. As such Three finds itself in the position – as it was when it responded to Ofcom's consultation on the 11<sup>th</sup> Code in 2006 - of having to comment on a draft code and its approval without clarity as to which services the code will formally apply to.

We do not intend to rehearse here our detailed views on the draft 12<sup>th</sup> Code as these are contained in the Mobile Broadband Group's response to PhonepayPlus' consultation; instead we wish to make some general points on the scope of Premium Rate Regulation and the ability of Ofcom to approve the Code at this time.

Three first raised questions as to the scope of premium rate regulation in 2005. At that time Three was concerned about PhonepayPlus' extension – without consultation – of regulation to Three's internet based portal services.

Three questioned whether S120 of The Communications Act, covered services where the access mechanism and the charging mechanism were separate. Unlike traditional PRS where the 'call' and the charge for the service are made by the same event, i.e. a call to a chatline, internet based services involve two separate actions. First the customer browses and selects the content they wish to consume. On confirming the selection a charge is made directly to the customer's communications bill, the mechanism that effects the charge is separate from the mechanism for accessing the service.

Since then a number of fixed line communications providers have begun to offer portal services, however PhonepayPlus has yet to extend regulation to these services. Indeed

PhonepayPlus recently confirmed in a letter to the Broadband Stakeholder Group that whilst it would appear that broadband enabled on demand services that are charged to a communications account would be PRS, it had not engaged in discussion with Ofcom as to whether these services should fall within their regulatory remit.

In the meantime services such as Sky Sports are available on both mobile and fixed portals, but with the former being regulated by PhonepayPlus and the latter not. In addition both mobile and fixed communications providers now offer facilities that enable their customers to charge off portal content services directly to their communications bill, however again only the mobile facility is currently being regulated as PRS by PhonepayPlus.

We recognise that although Ofcom has published an analytical framework to support its determination of the scope of PRS regulation, it has yet to begin the process of applying the framework to those services both PhonepayPlus and Ofcom deem fall within S120 of The Communications Act.

Three therefore finds it difficult to understand how Ofcom can approve a code to regulate Controlled PRS without first having established clearly and consistently what is and is not a CPRS. For these reasons we would reiterate the same view we advanced in our response to Ofcom's consultation on the 11<sup>th</sup> Code in 2006 *".....that it would be more appropriate for Ofcom to consider the.....code in conjunction with its proposed review of scope. We remain of the view that there is a risk of undermining the basis for co-regulation of this key market if Ofcom now proceeds to.....approve the 11th code without stakeholders and regulators fully understanding what is meant by PRS"*.

Three further believes the Impact Assessment contained within Ofcom's consultation is fundamentally flawed as without determining which services the Code may extend to as a result of its on going exercise on scope, Ofcom cannot accurately assess the impact of the Code.

In response to the questions posed by Ofcom's consultation Three does not believe Ofcom can approve the current draft of the 12<sup>th</sup> Code for the above reason. If Ofcom decides to approve the Code it should only do so after it has been amended to take account of the comments raised by MBG in its response to PhonepayPlus' consultation. Lastly should Ofcom decide to approve the code, it should only come into effect after Ofcom has determined which PRS the Code should formally apply to, namely after Ofcom has completed its scope review.

Yours sincerely,



Julie Minns  
Head of Regulatory & Public Policy