

Guidance Development

STATEMENT FOLLOWING PUBLIC CONSULTATION

Issued by PhonepayPlus on 20 July 2016

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Summary

- 1.1 PhonepayPlus is the independent regulator of premium rate services (PRS) in the UK. Our aim is to provide effective and proportionate regulation that builds consumer trust and confidence in a healthy and innovative market. We seek to achieve this through the development and enforcement of the PhonepayPlus Code of Practice (the “Code”), along with assistance to industry through published Guidance and the availability of compliance advice on request.
- 1.2 The process of guidance development is ongoing and just as the market is dynamic the regulator needs to be ready to respond when circumstances change and industry members need additional support. In assessing consultation feedback, PhonepayPlus has observed strong support for the current suite of Guidance following our review, which has considered both:
 - the expectations set by PhonepayPlus within its regulatory framework; and
 - the manner in which Guidance and compliance advice is presented on our website.
- 1.3 PhonepayPlus amended or developed afresh five pieces of Guidance for consultation and is now in a position to publish the following three of those pieces of Guidance:
 - i. Advice services;
 - ii. Digital marketing and promotions;
 - iii. Enabling consumer spend control.
- 1.4 These three pieces of Guidance have been updated in light of the feedback we received. Since we consulted on the remaining two pieces of Guidance, *Subscription services* Guidance and *Method of exiting a service*, we have started to develop a new project looking more broadly at our regulatory framework and we have concluded that these pieces of Guidance, revised to reflect feedback received, would be more appropriate for publication alongside a policy paper and consultation planned for later in the summer. The feedback in response to all 12 questions posed in the consultation paper has been helpful in shaping our proposals and future strategy for guidance development.
- 1.5 This statement sets out the background to the further amendments made to our proposals and gives insight into the ongoing work being undertaken prior to publication of the final two pieces of Guidance. Where feedback requested additional clarity around the purpose and content of Guidance, we have clarified the purpose of the guidance within this statement and, where necessary, we have modified text to further improve its accessibility and impact.
- 1.6 This statement sets out how further stakeholder engagement has been undertaken since the consultation closed on Monday, 11 April 2016. Our thanks to those who have provided additional insight and helped to further improve the Guidance for all those who seek to use it in future.

Background

- 2.1. The consultation paper set out the breadth of review that led to current proposals. The two-stage review has enabled PhonepayPlus to fully assess and introduce appropriate Guidance in keeping with the objectives set out in paragraphs 1.5.1 and 1.5.2 of the Code.
- 2.2. All current Guidance is kept under review over time to ensure it is clear, fit for purpose, and effective in assisting the development of PRS and the delivery of high compliance standards in the industry. As part of this ongoing process we welcome further input from industry relating to any Guidance not considered at this time. This input may provide evidence that current Guidance is fit for purpose, or highlight questions or doubts as to the strength of particular pieces of Guidance that may warrant further attention in due course.
- 2.3. In 2015, relevant Guidance was developed so as to be in alignment with the non-geographic call services policy developments and new tariff structure introduced by Ofcom, which took effect on 1 July 2015. Since then, in the last year, five pieces of Guidance had been amended or developed afresh following further review, which related to:
 - i. Advice services¹;
 - ii. Digital marketing and promotions;
 - iii. Enabling consumer spend control;
 - iv. Method of exiting a service;
 - v. Subscription services.
- 2.4. The proposals set out in our consultation paper bring the full suite of Guidance to 20 items. The table found at **Annex A** to that paper outlined our thinking on the question of whether to update the current Guidance now in relation to all 20 items.
- 2.5. Our review looked at Sector Specific Guidance – PhonepayPlus considers there must be a strong rationale for the adoption, and retention, of such Guidance. We have looked at what might lead to such a determination in accordance with paragraph 1.5.1 of the Code, which indicates Guidance is to assist PRS providers in relation to “*how the required rules will be expected to apply*” to them and the services they operate.
- 2.6. We considered the following warning indicators establish a strong basis for assessing whether Sector Specific Guidance would be appropriate:
 - a. There is perceived complexity within the regulatory framework for any given sector of the PRS industry, highlighted by the rules themselves or by industry feedback; and / or

¹ Previously PhonepayPlus had withdrawn Guidance on this topic when the new Special conditions took effect on 1 July 2015. However, on further review it was decided to introduce new amended guidance on this topic to assist PRS providers in this sector of the market.

- b. There is evidence of issues affecting a specific market sector that warrants consideration of an industry response to improve standards and reduce actual and potential consumer harm; and / or
 - c. The current suite of Guidance does not appear to be effective in addressing such market issues or improving compliance standards; and / or
 - d. During an investigation or series of cases associated with a market issue, there may be reason to develop Guidance to respond to the matters raised; and / or
 - e. Previous enforcement action has not been effective in reducing consumer harm and / or improving compliance standards; and / or
 - f. There is evidence of a lack of clarity or understanding of compliance standards and PhonepayPlus expectations, including but not restricted to repeat requests for compliance advice relating to a specific service type.
- 2.7. The approach set out in our consultation paper was welcomed by industry stakeholders and in future PRS providers are invited to raise issues or enquiries with our Industry Services staff using the compliance@phonepayplus.org.uk email account. Alternatively issues may be raised through the Industry Liaison Panel or one of our Industry Forum events.
- 2.8. Indeed as we have been developing Sector Specific Guidance on *Subscription services*, the market sector has been subject to wider industry dialogue instigated as a result of disproportionately high numbers of contacts from consumers to their phone providers and the regulator. In late 2015, industry stakeholders asked for further research and consideration of an industry response to improve standards and reduce actual and potential harm in the market. This research has given greater visibility of the issues in this market sector. PhonepayPlus has also embarked on a wider project to ensure that our regulatory framework remains fit for purpose and supports growth and innovation, while continuing to provide strong consumer protection. We are looking at the scope within our regulatory framework to use the flexibility of the Code to introduce Special conditions for high risk services and/or exemptions from Code provisions where appropriate. Alongside this PhonepayPlus is undertaking further work to improve the Guidance for both *Subscription services* and for *Method of exiting a service*.
- 2.9. The consultation paper identified two specific market sectors that had been subject to review yet current Guidance was deemed effective and up-to-date. Industry welcomed the certainty established through maintaining Guidance that remains effective and was supportive of the assessment of both *Application based payments* and *Live services*. Alongside this statement, PhonepayPlus is publishing a series of three short fact sheets for new entrants to the market seeking to develop live services paid for using premium rate numbers or facilities.

Proposal development

- 3.1 In this section of our statement we briefly set out the responses to our proposals and how they have led to further work to develop finalised Guidance.

Guidance on advice services

- 3.2 Since issuing the consultation in February 2016, the British Association of Counselling Professionals (BACP) has completed its first stage of a review of its own guidelines. PhonepayPlus has sought to incorporate elements of the new Ethical Framework for Counselling Professionals launched by the BACP on 1 July 2016. This has not had a significant impact on our guidance proposals, yet we have provided a link to the new BCAP guidance for practitioners and supervisors within our guidance to raise awareness of the help offered to PRS providers in this sector.
- 3.3 Clarity was sought at a number of points in the Guidance. The Communications Consumer Panel (CCP) welcomed the recommendation made at paragraph 2.1 of the Guidance relating to qualifications being set out in promotional material. It was suggested that the principle behind this could be clearer and we have added an introductory sentence at 2.1 to indicate the service itself should offer advice that is reliable, trustworthy and accurate. This provides clear underlying principles and leads naturally to the requirement in some circumstances for qualifications to be clearly set out.
- 3.4 At paragraph 4.1 of the Guidance, on reflection PhonepayPlus considered more clarity could be given as to the source of the definition of legal advice services, so we amended the footnote to improve this.
- 3.5 At paragraph 3.3 of the Guidance, PhonepayPlus offers guidance to professional advice providers, throughout which we highlight what “*should*” be done to achieve requisite standards, protect consumers, and mitigate risks associated with these services. This is premised on the fact guidance seeks to equip businesses and is not intended to be a set of binding provisions going beyond the Code.
- 3.6 The CCP suggested we could go further and state these safeguards “*must*” be in place. On consideration we judged “*should*” to be the appropriate language for guidance of this nature. However, considering part of paragraph 3.3 deals with Professional Indemnity Insurance, PhonepayPlus has changed the stipulation to “*must*” based on the fact that businesses are free to consider what level of insurance is necessary for their business needs, but some insurance must be established.
- 3.7 Finally, language around the provision of information to counselling service users has been changed to incorporate standard terms that industry are familiar with for ease of understanding – previous reference to “*confirmation*” was confusing and wording has been improved at Guidance paragraph 5.3.8c). Stakeholder feedback varied as to the timing and frequency of information being supplied to service users. On consideration we have decided not to recommend that information is given both in promotional material and at the beginning of the service. However, this may be appropriate in some

cases and the guidance as it stands will encourage PRS providers to think about when and how information is presented to users.

Guidance on digital marketing and promotions

- 3.8 There was a mixed reaction to the revised Guidance with support given to the structural shift, shortening the main body of guidance and the use of an annex for examples; however, various respondents expressed concern at the tone of the Guidance across both the main section and the annex. PhonepayPlus held a workshop on 15 June 2016 that was especially useful at understanding how to retain the structure while establishing an effective tone to improve usage and indeed the impact the Guidance may have on a broad range of PRS.
- 3.9 We have made a small change to paragraph 1.1 of the Guidance in response to the feedback on the tone. We have removed any reference to harm in the market and focus justification for the Guidance solely on ‘digital marketing’ being the popular and common set of tools for attracting consumers, especially new consumers, to PRS. It is understood that there are risks that need to be considered by PRS providers, and businesses should be encouraged to develop digital marketing campaigns with a means of addressing those risks.
- 3.10 We have also changed the title of the annex, removing reference to “*bad practice*” and instead focussing on the purpose behind the examples given within the annex. The Guidance is set up to equip PRS providers to recognise the risks, including the prospect of regulatory intervention where a breach of the Code occurs, and to enable providers to reduce, if not eradicate, the chance of consumer harm occurring. Along with the change in title, a new paragraph introducing the purpose of the annex helps frame the examples given throughout the annex. At the workshop, this was recognised as having a positive impact on the overall tone.
- 3.11 There is a further change to paragraph 1.4 of the Guidance which highlights the change in title of the annex.
- 3.12 Various respondents commented on the list of practices included at paragraph 1.3 of the Guidance suggesting the introductory wording was too unequivocal with reference to “*always misleading*” and that the practices themselves needed to be viewed in a proper context. PhonepayPlus has added clarity to the Guidance as a whole by improving the bulleted list of practices with a description of each one in turn.
- 3.13 Furthermore, it has been recognised that the Guidance is designed to encourage PRS providers to consider the digital marketing campaign and assess risk (see section 2 of the Guidance). While the word “*always*” is very effective in pointing people to carefully consider these practices, it is acknowledged that problems may be avoided as part of this process. The new introductory wording now encourages providers to treat these practices “*with caution and control*”.
- 3.14 The Association of Interactive Media Entertainment (AIME) and the BMCM Group, a consortium of Level 2 providers, identified the description of privacy issues in the last

bullet of paragraph 1.6 over-simplified the law as to unsolicited electronic communications. This meant the Guidance was inaccurate and in conflict with the broader Privacy Guidance published by PhonepayPlus in July 2015. We want to retain the level of detail set out in the bullets at paragraph 1.6 and have therefore removed the inaccurate statement instead of attempting to explain the position more specifically. The bullet achieves the aim of flagging the privacy issues, and the section on unsolicited electronic communications found in the annex then signposts readers to the Privacy Guidance for more information.

- 3.15 There were a small number of comments relating to section 2 of the Guidance exploring the types of checks PRS providers across the value chain could make to manage the risks associated with digital marketing campaigns. These assisted PhonepayPlus in improving the clarity around criteria for consideration at paragraphs 2.4, 2.5 and 2.6.
- 3.16 In relation to paragraph 2.6a) of the Guidance, there was some concern that the original wording could encourage a 'check-list' mentality from PRS providers in the value chain in that it focussed on a snap-shot in time. We have amended the Guidance here to outline the intention behind these checks so the process used is fit for purpose. It recognises that PRS providers need to be capable of undertaking their own investigation of issues that arise from time to time.
- 3.17 During the consultation, the majority of comments received focussed on the clarity of the various examples given in the annex, and a range of changes to the text were made to increase clarity. We seek to explain how Code breaches may arise and how to avoid them.
- 3.18 Some examples were criticised as being unrelated to PRS – this was discussed further at the workshop and it was agreed that some difficulties materialising from digital marketing are not born out of PRS, but affect a range of digital products and services that are monetised. Having examples that go beyond the PRS payment mechanism may be helpful in recognising the breadth of the issue, before PhonepayPlus explores the impact within the PRS market.
- 3.19 However, PhonepayPlus acknowledges that the example given in relation to 'clickjacking' at Annex para 2.1 may have been confusing. By modifying the example we point to the breadth of the issue without confusion about the purpose behind it. As a result of these changes, the remainder of this section is easier to follow as it shifts focus onto the impact clickjacking has on the PRS market and what risks require mitigation.
- 3.20 Feedback to the section on 'Likejacking' (Annex para. 3.1) suggested we should clearly identify associated concerns, such as the personal element relied upon to spread the marketing virally. It was suggested that some confusion arose from the close link made between clickjacking and likejacking. The final version sets out both similarities and distinctions between these two practices, making the Guidance clearer.

3.21 As well as some changes to the text to increase clarity in relation to content locking, we have removed the original Annex para. 6.1, which sought to build a link between other practices and this one. This was considered unhelpful when seen in the light of the new introduction to the Annex. The emphasis shifts to concerns arising from content locking and how these can be avoided.

Guidance on enabling consumer spend controls (excessive use)

3.22 Rule 2.3.6 of the Code states:

2.3.6

Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage.

3.23 This new piece of Guidance has been welcomed as it gives greater insight into expectations under Rule 2.3.6 of the Code. However, a number of respondents, including AIME, all highlighted concerns with the way the Guidance set out those expectations. PhonepayPlus intended for the Guidance to set out a means of considering factors that were relevant to compliance with Rule 2.3.6, introducing concepts such as “excessive use” and the process for informing relevant service users.

3.24 Feedback during the consultation period was very constructive and involved discussions between PRS providers and PhonepayPlus in advance of the subsequent written submissions. These discussions highlighted the need for the Guidance to explore service types and understand how service mechanics could build in safeguards so that fairness was achieved without onerous additional burdens being added in relation to Rule 2.3.6. The Guidance was criticised for being too narrow, regardless of the apparent flexibility it implied.

3.25 PhonepayPlus recognised that the Guidance required further clarity and it has sought to address these concerns directly. A workshop was held with Broadcast PRS providers based on an updated version of the Guidance – this was held on 14 June 2016.

3.26 The solution was seen to be two-fold:

- i. Examples were necessary to highlight different outcomes from the same process of service review required to achieve compliance with Rule 2.3.6;
- ii. The objective of Rule 2.3.6 needed to be clearly stated in order to frame expectations and plan suitable actions when “excessive use” was potentially identified.

3.27 Other changes made throughout the text offer additional clarity to the Guidance.

Provision of examples

- 3.28 PhonepayPlus highlights early in the Guidance, at paragraph 2.2, “*what may be deemed excessive use can vary depending on context and the characteristics of the service in question*”. A footnote in the Guidance points then to the new paragraph 2.7. This recognises the premise for improving the Guidance set out by the various respondents to the consultation.
- 3.29 The examples given in paragraph 2.7 point towards the same process for assessing a PRS and how it is used by consumers. This assessment involves consideration of the data-sets produced during the operation of the service, an understanding as to what can be learnt from that data either in realtime or retrospectively, and on reflection how that may point towards “*excessive use*”. PhonepayPlus recognises that this process may be the same for any given PRS, but the outcome or conclusions may vary greatly and demand different mechanisms for “*informing consumers*” of their spending levels.
- 3.30 In discussions with the various stakeholders during consultation, PhonepayPlus made it clear the goal of the Guidance was not to point to a one-size-fits-all solution. During the workshop, discussions led to the final version being more effective at equipping businesses to comply with Rule 2.3.6 of the Code.

Objective of Rule 2.3.6 – fairness from informing consumers

- 3.31 Rule 2.3.6 sits under the outcome of fairness – “*That consumers of PRS are treated fairly and equitably*”. The Rule itself then sets out the circumstances to watch out for and the necessary response when those circumstances arise. The response is set out in the Code with a view to that action – informing consumers of spending levels – achieving the requisite level of fairness and equity for the consumer.
- 3.32 The Guidance recognises that by so informing the consumer they are empowered to question the spending levels or make a complaint. While this may result from the action set out at Rule 2.3.6, this provision does not require any additional response in relation to redress, or otherwise. Following discussions with stakeholders, a new paragraph 4.1 has been added to the Guidance to clearly set out the expectations under the Code.

Guidance on ‘Method of exit from a service’ & ‘Subscription services’

- 3.33 As noted above, during the course of our consultation with industry, other policy and strategic work has developed in a way which demands further consideration of both of these pieces of Guidance. The policy developments are being led by PhonepayPlus, in partnership with industry members, which include a wider review of our regulatory framework which is currently being undertaken. A statement on the progress of this work is due out in summer 2016.
- 3.34 The consultation feedback on these pieces of Guidance is very helpful and will be taken into consideration as we finalise them ahead of publication in due course.

Our impact assessment

- 3.35 The consultation feedback did not change our impact assessment on the three pieces of Guidance being published alongside this statement. We will do a further impact assessment on Guidance relating to '*Method of exit from a service*' and '*Subscription services*' as appropriate when they are published in due course.
- 3.36 PhonepayPlus considers the consultation to have been very constructive and led to further improvements across the three pieces of Guidance. We will continue to work with industry members to make sure the full suite of Guidance is easily accessible and compliance standards are consistently achieved across the PRS market. Where individual PRS providers would like assistance from us in understanding expectations set out in the Code they can contact us on compliance@phonepayplus.org.uk.

Original impact assessment

Title	Potential impact on compliance	Possible cost and resource implications
Advice services	Increased levels of compliance through additional clarity around applicability of Special conditions and information required to be given to consumers during the promotion, operation and provision of content of an advice service.	No significant additional or further costs to industry members; potential minimal cost for some providers in updating promotional materials, if necessary.
Digital marketing	Minimal impact, compliance levels may increase as the restructure should make it clearer and more accessible.	Minimal impact as expectations remain the same.
Enabling consumer spend control	Increased levels of compliance achieved through clarification of expectations in the application of Rule 2.3.6, and subsequent customer care linked to section 2.6 of the Code. This should reduce incidents of bill shock and contribute to a reduction in complaint levels.	Many providers will already have processes and systems in place to address this issue, so no significant costs foreseen. Possible minor additional cost incurred through contacting consumers in examples of perceived excessive use, if they were not being contacted directly previously.

List of annexes to this statement

Guidance is published alongside this statement on the following topics:

- Advice services
- Digital marketing & promotions
- Enabling consumer spend control

Three factsheets on live services are published alongside this statement:

- Advice when setting up a live entertainment service consumers access via PRS
- Providing adequate introductory messages to consumers of live services via PRS
- Understanding Special conditions apply to Live Entertainment and Chat Services