

Via e-mail to consultations@phonepayplus.org.uk

To:	Mark Collins
From:	Fabian Bloem
CC:	
Date:	12 October 2016
Subject:	Answers (A1 till A11) to the Questions in PRS development through outcomes-focussed regulation: A Review of PhonepayPlus' regulatory framework
Specials:	A PUBLIC CONSULTATION issued by PhonepayPlus on 17 August 2016 Deadline for responses Wednesday 12 October 2016

Dear Mark,

Thank you for the opportunity to give feedback on the questions that were raised in the consultation mentioned above.

Please don't hesitate to contact me if further information or a clarification is needed.

Best wishes,



Fabian Bloem

Senior legal manager – R&D Media

In summary:

- The flexibility of the current Code of Practice is at the same time a weakness because interpretation differs per code owner within the framework of the Code of Practice.
- A change would be necessary by removing the artificial distinction between online and offline use of competition services and by setting in motion a pre-clearance model, see page 6.
- 'Uninformed Consent' is herewith used solely from the consumer perspective and/or complaint perspective rather than the regulatory and/or general accepted market perspective.
- Until now the individual assessments lead to investigation and enforcement procedures where the name of the Level 2 Provider was submitted to the local authorities when the Level 2 Provider is established within the European Union.
- This is made known to the Level 2 Provider in accordance with an enforcement-based solution, but works contra-productive to the idea of a market-based solution

and a (monitoring) plan of action to review the current market limits and achieve an adequate level of compliance on the market level.

- In both cases there were developments shown in regulation that would mean that the conditions within these regimes show duplicate similar requirements set out by other regulators.
- As there is also a draft version of the Special Conditions, it is unclear which authority will have the 'primary authority' to create and maintain a level playing field in the market.
- It would be of great interest when the network operators in the UK unite and are having a single portal in which online competition services are monitored and then audited on the basis of a 'one-stop-shop' portal for a selected group of preferred Level 2 Providers who need to self-certify themselves with the Level 1 Provider or the network operator.
- The map of the digital payments regulatory landscape setting out the different (self-) regulators and their legal backstops is of value because of the overlap on duplicate and similar obligations.
- If the working group could be joined by the compliance contact(s) of the Level 2 Provider or a selection of preferred Level 2 providers, then there is the opportunity to build common ground for addressing issues that need to be resolved.
- ASA could play a role in adjudicating the promotional flow on the basis of a number of similar complaints for similar ads. For instance, a procedural relationship could be agreed between PhonepayPlus and ASA in which the complaints are forwarded to ASA in order to adjudicate if the promotional flow has been misleading and to what extent.
- By offering PhonepayPlus the opportunity to register the main features of the promotion in advance, the concept of a *pre-clearance model* can be set-up.

Please see herewith below the responses to the questions for further context of the summary.

Q1: Do you agree with our view that the current Code of Practice offers sufficient flexibility to address barriers to growth in the PRS market, without reducing consumer protection?

The current Code of Practice offers sufficient flexibility. However, a regulatory overlap with other requirements for online competition services creates (legal) uncertainty. Currently there is an unequal level playing field in the market for online competition services, as the interpretation of the requirements differs per code owner.

A result of this (legal) uncertainty is that the market for ads who promote online competition services is determined by the mobile network operators. The operator's interpretation makes a distinction between online and offline use of the online competition services. Current status is that per 1 November 2016 all online competition services need to be used in combination with the Payforit payment service. The mobile network operator's definition of 'online' is when the SMS message contains a link with online access to the content competition quiz-portal.

There is no clear argumentation why the Payforit payment service would bring the necessary improvement. The current Payforit payment service lacks the necessary awareness and recognition amongst consumers and is therefore not preferred by the Level 2 Providers, apart from the question whether it is right to not allow the use of an existing payment channel via SMS anymore and give subjective qualifications to the online use of competition services which are distributed via SMS messages.

The flexibility of the Code of Practice should be used to create an acceptable level playing field. **The flexibility of the current Code of Practice is at the same time a weakness because interpretation differs per code owner within the framework of the Code of Practice.** In my view the mobile network operators should adhere to the technical-neutral Code of Practice which gives sufficient flexibility to have an adequate level of protection to consumers and certainty to responsible users of the Code of Practice such as Level 2 Providers.

Q2: Are there barriers to growth which exist in legislation and regulation other than the PhonepayPlus Code? Please identify them along with any arguments or evidence you have as to why a change would be desirable.

The barriers depend on the presence of and taking responsibility for an adequate level of compliance. As stated above, currently the barriers to growth are mainly defined by the mobile network operators who apply a restrictions-based market approach. The distinction between online and offline in this approach is not recognized as such by laws and regulations and therefore creates barriers which can be avoided. **A change would be necessary by removing the artificial distinction between online and offline use of competition services and by setting in motion a pre-clearance model, see page 6.**

Q3 – Do you agree with the Taxonomy of Risk Characteristics proposed above as objective assessment criteria? Please give reasons, including for any changes or additions you would like to propose.

The proposed 'Taxonomy of Risk Characteristics' are:¹

Risk Characteristic	Examples
Financial Harm	<ul style="list-style-type: none"> • High one-off cost • High cumulative cost
Passing Off	<ul style="list-style-type: none"> • Unauthorised use of trusted brands or marks • Misleading representation of trusted brands or marks • Lack of Professional Qualifications or Membership
Uninformed Consent	<ul style="list-style-type: none"> • Confusing consumer journey • Complexity of proposition • Overall presentation lacks clarity
Unauthorised Consent	<ul style="list-style-type: none"> • Lack of appropriately robust consent to charge • Lack of appropriately robust consent to data use • Inadequate technical systems lead to charge without consent
Vulnerable Groups	<ul style="list-style-type: none"> • Underage access • Lack of allowance for needs of vulnerable • Targeting of vulnerable
Unreasonable Offence	<ul style="list-style-type: none"> • Indecent – e.g. sexual • Offensive or menacing – e.g. disability, gender, race, religion, sexuality • General – e.g. pro-anorexia

'Uninformed Consent' is herewith used solely from the consumer perspective and/or complaint perspective rather than the regulatory and/or general accepted market perspective.

If 'consent' is used in circumstances where it is not appropriate, because the elements that constitute a valid consent are present, this would lead to (legal) uncertainty. In practice this would *weaken* the position of the Code of Practice as the meaning of the binding term 'informed consent' is ignored.

I agree that a 'Confusing consumer journey', the 'Complexity of proposition' and the 'Overall presentation lacks clarity' are concepts that affect the constitution of a valid informed consent. It is therefore important to clarify the limits of consent and make sure that only consent, which is construed in a way according to the law, is deemed as such. An 'uninformed consent' is not appropriate for that purpose, as an (informed) consent may be present and supported by evidence based on the law and regulations. For instance when the informational requirements for concluding an agreement are met, then qualifying it by using the stamp 'Uninformed Consent' would not be appropriate.

¹ <'PRS development through outcomes-focussed regulation: A review of PhonepayPlus', Page 12>.

The distinction between 'Uninformed Consent' and 'Unauthorized Consent' seems unnecessary complex as the 'Informed Consent' should be the main reference.

The term-characteristics such as 'Passing Off', 'Vulnerable Groups' and 'Unreasonable Offence' are concepts that affect the constitution of an 'Informed Consent' and gives the consumer the strongest position.

Q4 – Do you agree with our proposed Risk Assessment Process? Please give reasons, including for any changes or additions you would like to propose.

The four-step approach in the Risk Assessment Process (Step 1 – Identify risks; Step 2 – Evidence risks; Step 3 - Identify risks; Step Four – Appropriate response) is understandable but its success depends on the involvement of all industry stakeholders, also Level 2 Providers that are not based in the UK. Especially 'Step Three – Identify mitigations' is essential to create a level playing field in the market.

A market-based solution for online competition services has until now been work in progress by Trading Standards and the Craft report. There is however already a draft Special Conditions that specifically applies to online competition services. In my view it is unclear why the market-based solution approach was not followed in full by means of a monitoring plan to which Level 2 Providers are invited to actively participate in order for PhonepayPlus and/or its monitoring team to identify mitigations, put forward compliant content and reduce the apparent issues and risks.

The market-based solution could be initiated with information that has been gathered by means of Requests for Further Information and the Requests for Information (RFI), in cooperation with the specific Level 2 Provider, and/or on a market level, by assessing the AIME/Trading Standards scheme to establish if the services are high-risk.

Until now the individual assessments lead to investigation and enforcement procedures where the name of the Level 2 Provider was submitted to the local authorities when the Level 2 Provider is established within the European Union. This is made known to the Level 2 Provider in accordance with an enforcement-based solution, **but works contra-productive to the idea of a market-based solution and a (monitoring) plan of action to review the current market limits and achieve an adequate level of compliance on the market level.**

On the research-based or pilot level a market-based approach has been performed by means of desk research in the Craft report on Consumer Journey Research commissioned by PhonepayPlus. There was however no prior or simultaneous dialogue with a Level 2 Provider to give direct feedback about the consumer journeys that were examined during the research. For instance, we applied several compliance updates and a checkbox has been in place to have an 'informed consent' of the consumer prior to the start of the subscription process. The checkbox could not be ignored and the intention of the checkbox was specified next to the checkbox as a pre-contractual notice to the consumer.

Q5 – Do you agree with the conclusions of our application of the new Risk Assessment Process to existing Special Conditions regimes, and the proposals to remove the current regimes around Consumer Credit and Remote Gambling regimes? Please give reasons, including for any changes or additions you would like to propose.

The reason for reducing a Special Conditions regime is put forward as an opportunity for PhonepayPlus 'to reduce regulatory burden' and 'without lessening the protection afforded to consumers' (see page 16, point 2.28). This applied to the current Special Conditions regimes for Consumer Credit and Remote Gambling. **In both cases there were developments shown in regulation that would mean that the conditions within these regimes show duplicate similar requirements set out by other regulators.**

As known, in the case of online competition services there is currently also the Trading Standards regime as a 'Primary Authority' regime for implementation and enforcement. **As there is also a draft version of the Special Conditions, it is unclear which authority will have the 'primary authority' to create and maintain a level playing field in the market.** The new Risk Assessment Process does not indicate the position of Trading Standards as yet.

Q6 – Do you agree with our proposed Exemptions process? Please give reasons, including for any changes or additions you would like to propose.

In practice it is not clear why Special Conditions has been set up that apply to online competition services without, to my understanding, consulting a generic/market based request for Exemption. **It would be proportionate to examine if AIME and/or the current Trading Standards regime can be qualified as an Exemption as there are and because of duplicate similar obligations that govern online competition services.**

Q7 – Do you have any comments on, or suggested additions to, our list of areas where we might consider exemptions in the near future?

It would be of great interest when the network operators in the UK unite and are having a single portal in which online competition services are monitored and then audited on the basis of a 'one-stop-shop' portal for a selected group of preferred Level 2 Providers who need to self-certify themselves with the Level 1 Provider or the network operator. Currently the mobile operators are divided with own monitoring means with own codes of practice to regulate and monitor the market.

Another option for exemption would be a complaint-based portal site where a joint complaint handling process is in place in order to prevent that complaints are first handled by the network operator and then often is forwarded to PhonepayPlus instead of being handled directly by the Level 2 Provider.

Q8 – Would a map of the digital payments regulatory landscape, setting out the intersecting remits and scope of different regulators, be of value? Please provide the rationale behind your answer.

The map of the digital payments regulatory landscape setting out the different (self-) regulators and their legal backstops is of value because of the overlap on duplicate and similar obligations.

Also this would be of value because there is a need to combine promotional marketing that contains premium rate payment mechanisms with promotional marketing for physical products that contain offline billing mechanisms, such as SEPA transactions on the basis of subscription business models.

Q9 – Would a joint working group of regulators, to consider and provide a joint response to questions of regulatory overlap, be of value?

Yes. This would especially be the case with Trading Standards as there is the Special Conditions regime and the Trading Standards scheme. **If the working group could be joined by the compliance contact(s) of the Level 2 Provider or a selection of preferred Level 2 providers, then there is the opportunity to build common ground for addressing issues that need to be resolved.**

Q10 – Which regulators should we invite to take part in such a group, and why?

Trading Standards because of the existence as Primary Authority on CONSUMER CONTRACTS (INFORMATION, CANCELLATION AND ADDITIONAL CHARGES) REGULATIONS 2013.

Advertising Standards Authority (ASA) because of the handling of similar complaints that require immediate action. **ASA could play a role in adjudicating the promotional flow on the basis of a number of similar complaints for similar ads. For instance, a procedural relationship could be agreed between PhonepayPlus and ASA in which the complaints are forwarded to ASA in order to adjudicate if the promotional flow has been misleading and to what extent.** Level 2 Providers need to adjust the promotional flow on the basis of the ASA adjudication or are otherwise referred to PhonepayPlus or Trading Standards as legal backstop.

Q11 – We would welcome any comments on the scope and approach of a joint monitoring capability.

We are willing to cooperate with PhonepayPlus by giving information in advance on what promotions are running and how the promotional flow looks like for certain online competition services.

By offering PhonepayPlus the opportunity to register the main features of the promotion in advance, the concept of a *pre-clearance model* can be set-up. This pre-clearance model is also known in the television/broadcasting of advertisements, in order to make clear

which promotions are live in the market prior to going live. Such input would be and increase the responsibility of the Level 2 Provider and would provide a viable solution to handle and diminish the volume of complaints. The reason for suggesting this is also to avoid that the volume of complaints govern the situation of what is allowed and not allowed.

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