

# PhonepayPlus 12<sup>th</sup> Code consultation

## 2ergo response

### Overview

We welcome the opportunity to respond to PhonepayPlus on the draft 12<sup>th</sup> code. However we are disappointed that PhonepayPlus has not taken the opportunity to truly do what it says it will and move to an 'outcomes' based code. Although some rules have been removed or replaced, generally this has remained a 'rules' based code with the rules set in the frame of outcomes. It is therefore unnecessarily large and many of the rules would be better placed as guidance.

A particular example of this is section 2.2 on Transparency and Pricing. The outcome for this section is "that consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made". Rule 2.2.6 then provides a paraphrasing of the cost element of that outcome with "In any promotion of a premium rate service, written or spoken or in any medium, the cost must be included and must be prominent, clearly legible, visible and proximate to the telephone number, shortcode or other means of access to the service." Whilst clearly this does say more than the outcome (and we would welcome its inclusion as guidance) this is clearly part of ensuring that the consumer is fully and clearly informed. For the avoidance of doubt, we are not disagreeing with the rule, just stating that this rule, as with many others, would be better to be included as guidance.

However, rule 2.2.8 we believe is too specific and actually works against the principle of an outcomes based code. This rule states "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 £2". This rule clearly is a repeat of rule 2.2.6, but does it suggest that a service costing £1.50 does not need to have pricing information clearly presented? Of course not- because that would be against the outcome. But by having more rules, room for doubt is created.

While some rules are required, even in an outcomes based code, the number of rules, and repetitious rules such as in this example, is excessive and means that PhonepayPlus's objective to only have rules to aid clarity where necessary (paraphrasing paragraphs 5.10 and 5.11) has not been achieved. We have responded to the rest of the consultation document below. Should you wish to discuss this further then in the first instance please contact James Esson on 0161 874 4222.

### **Q1 – Do you agree with the proposals around how Governance arrangements are taken forward? If not, why not?**

Yes.

### **Q2 – Do you agree with these proposed terms and definitions? If not, why not?**

Yes. We agree with the concept of making terms generic across the spectrum of scenarios that exist now and may exist in the future. However we feel there is still a need for further development of the definitions of Level 1 and Level 2 providers. For instance, a company that manufactures videos for a mobile download service might sub-contract to others, for instance for actually making the video, and therefore could be a Level 1 provider under the current definition, whereas they clearly are supposed to be treated as a Level 2 provider and therefore some further clarity would be appreciated.

**Q3 – Are you aware of any premium rate delivery chains where the proposed distinction between Level 1 and Level 2 providers will be problematic? Are there other factors that we need to consider in relation to the distinction between Level 1 and Level 2 providers in a premium rate delivery chain?**

Yes. See response to question 2 above.

**Q4 – Do you agree with the proposal to convert Section 7 of the 11<sup>th</sup> edition of the Code into Service-Specific Guidance and to allow the creation of new Service-Specific Guidance, subject to appropriate consultation? If not, why not?**

Yes. However, it is imperative that if the CCP/tribunal choose to allow/accept variations from the guidance that their thinking behind this decision is clearly set out in adjudication minutes. It would also be helpful if the guidance could be made 'search friendly', for instance to make it easier for a new entrant to discover there is a relevant guidance note and to locate it.

**Q5 – Do you have any comments on the draft Service-Specific Guidance attached at Annex C? Please set out any comments you have and the reasoning behind them.**

Given they are for guidance only, not binding, we hope that where logic and common sense in line with achieving the desired outcome from the Code was behind the decision, by a Level 2 provider, not to follow the guidance, that consideration is treated maturely by PhonepayPlus. Based on this the guidance is fine (as it can be modified on a case by case basis). However, some points need to be raised from the word go to highlight to PhonepayPlus where their "expectation" is perhaps off the mark.

#### **Advice services**

*All promotional material should detail and explain the source of information by which the advice is being given. This is likely to include;*

- *Any relevant professional qualification of a person supplying advice;*
- *Why that qualification is relevant (if not immediately obvious) and the status of that qualification;*
- *The relevant experience of the person(s) or organisation supplying the information or advice.*

In many scenarios it is just impossible to include this level of information in promotional material; it might be that a Level 2 provider embeds this information at a relevant part of the service. E.g. Psychic chat, it becomes somewhat impossible to give all information the individual chat operator at the point of reading about the service, surely a catch for "get psychic advice from a trained provider" ..... and then the consumer is given a choice of what operators and there qualification, experience, etc, would be more appropriate for achieving the desired outcome?

#### **Children's services**

*Children's services should not:*

*Involve competitions that offer cash prizes or prizes readily converted to cash.*

What prize cannot be converted to cash? Does this mean a provider cannot offer a paid for competition to a person under 16 which has a prize?

*Encourage children to use other premium rate services or the same service again.*

So, if a consumer purchases a ringtone of Kylie Minogue, it is not possible to offer a second ringtone from Kylie Minogue? We note the comment about offering children products and services they can afford and surely this takes care of this piece of guidance? If a ringtone is 25p then we would suggest offering a second ringtone, for 25p is not excessive (a packet of polo sweets was 60p today in the shop) – thus – a provider should be able to offer another Kylie Minogue ringtone.

## **Competitions and other games with prizes**

*Promotional material should provide clear details as to how the competition operates.*

Even the national lottery only includes salient points, allowing the consumer to visit the terms of service if they want to explore further. Whilst this is a lottery, surely the same applies. When taking into consideration, if you are targeting an adult then he/she will know that he/she needs to explore the terms of service.

*Promotional material should clearly and prominently state any information that is likely to affect an individual's decision to participate. This may include;*

- *For the key terms and conditions to be clearly stated;*
- *Any restrictions on the number of entries, or prizes that can be won;*
- *The cost per minute and/or the full costs of participation;*
- *An adequate description of all prizes and other items being offered and to quantify each prize on offer;*
- *Any restrictions placed on the availability of those prizes being offered;*
- *Where the prize consists of vouchers, either the value of a single voucher or the total value should be stated;*
- *When the competition closes, except in instances where there are only instant prize winners, or where it is a rolling competition with all entries honoured.*

Quite simply, this will in real terms require substantial space (e.g. advert space, which is purchased off the page, web, etc.) at a real cost. This will make it impossible to capture a positive ROI. As above, surely there is scope to only include really salient points, such as cost, and allow the adult to gather further information.

**Q6 – Do you agree with the proposal to convert Statements of Expectation that support the 11<sup>th</sup> edition of the Code into General Guidance to industry, and to allow the creation of new General Guidance subject to appropriate consultation? If not, why not?**

Yes (but see response to 4 above).

**Q7 – Do you have any comments on the draft General Guidance to industry regarding due diligence, risk assessment and control attached at Annex C? Please set out any comments you have and the reasoning behind them.**

No

**Q8 – Do you agree with the proposal to convert the Help Notes and Tribunal notifications that support the 11<sup>th</sup> edition of the Code, into Compliance Advice (or “compliance updates”)? If not, why not?**

Yes. However ‘Compliance Advice’ must not be used as a back door for PhonepayPlus to force its views on the Industry without having the proper consultation that will be held for new

Guidance. PhonepayPlus must be willing to (and should state its willingness) to revisit all compliance advice with Industry on request.

**Q9 – Are there any other areas where Service-Specific Guidance or General Guidance to industry is necessary? Please state any areas you have identified.**

None noted.

**Q10 – Do you agree with the proposals around how responsibility for Part Two of the Code would be applied? If not, why not?**

Yes. However, where PhonepayPlus uses paragraph 5.3.8c to determine the Level 2 provider it should set out its reasoning in adjudication minutes. It is important that interpretation of Guidance is published to ensure a level playing field across the industry.

**Q11 – Do you agree with the proposed Outcome and supporting Rules around Legality? If not, why not?**

Yes. However, subject to also ensuring compliance with Guidance published, it cannot be right that a Level 2 provider go to an authoritative source of advice and regulation (e.g. the ICO regarding opt ins) and be told what they are doing is Ok, only for PhonepayPlus to then say it is not. In this regard it is pleasing to see that PhonepayPlus have spoken to some of these other sources and it is hoped that the outcomes of these discussions are fully reflected in Guidance published. However, where PhonepayPlus Guidance is silent on a particular issue it is imperative that Guidance provides that confirmation from an alternative regulator, rather than PhonepayPlus Executive opinion, will be 'as good as' following actual published Guidance.

**Q12 – Do you agree with the proposed Outcome and supporting Rules around Transparency and Pricing? If not, why not?**

Yes. However it is important that the Guidance clearly highlights that there is not any expectation from PhonepayPlus that in character limited environments, such as text messages, rule 2.2.2 would apply.

**Q13 – Do you have a view as to whether there is a need to issue Guidance that interprets how Rule 2.2.6 (around pricing proximity to the means of access) is applied where secure mechanisms for phone-payment are used to purchase a PRS?**

If the CCP are to take the view that simply ensuring the consumer clearly knows what they are being charged 'at some point' before confirming their purchase, then guidance would be appreciated. However, close proximity should differ from service to service, e.g. a service for children would require pricing information to be more prominent than a service for adults, as children will generally be less aware that they could be charged for a service.

**Q14 – Do you agree with the proposed Outcome and supporting Rules around Fairness? If not, why not?**

Yes. However some guidance is required around rule 2.3.4. This rule states that services should be delivered promptly, but on the other hand tribunals are currently forcing delays to be inserted in services (by saying that a chargeable message delivering a service sent a couple of seconds after a free subscription initiation charge is in breach of the 11<sup>th</sup> code).

**Q15 – Do you agree that the spending caps and thresholds for reminder messages, set out at Rule 2.3.12a-d, are appropriate? If not, then please suggest alternative levels, and please provide the evidence you have to support them.**

In general these caps appear appropriate. However, the outcome should be the driver which is that consumers should be treated fairly and equitably. £30 for some services may not be an excessive amount and therefore, if PhonepayPlus feel there is a requirement for a cap to be in place, surely this is better placed in guidance, so that if a provider can prove that the actions they have taken have achieved the desired affect they will not be held in breach of the code?

**Q16 – Do you agree with the proposed Outcome and supporting Rules around Privacy? If not, why not?**

Yes. However, subject to also ensuring compliance with Guidance published, it cannot be right that a Level 2 provider go to an authoritative source of advice and regulation (e.g. the ICO regarding opt ins) and be told what they are doing is Ok, only for PhonepayPlus to then say it is not. In this regard it is pleasing to see that PhonepayPlus have spoken to some of these other sources and it is hoped that the outcomes of the these discussions are fully reflected in Guidance published. However, where PhonepayPlus Guidance is silent on a particular issue it is imperative that Guidance provides that confirmation from an alternative regulator, rather than PhonepayPlus Executive opinion, will be 'as good as' following actual published Guidance. In addition, rule 2.4.3 needs to allow for the fact that data may need to be transferred as a requirement of part of the service e.g. names may need to be transferred to an outsourced (UK numbered) customer care centre.

**Q17 – Do you agree with our assessment that consumers benefit from being clearly informed that their data may be used for marketing and being given an opportunity to opt in to this? If not, why not?**

Yes

**Q18 – Will Rules 2.4.4 and 3.6.2 of the proposed new Code deliver clarity to consumers when they opt in to a service? If not, why not?**

Yes

**Q19 – Do you agree with the proposed Outcome and supporting Rules around Avoidance of harm? If not, why not?**

Yes

**Q20 – Do you agree with the proposed Outcome and supporting Rules around Complaint handling? If not, why not?**

Yes

**Q21 – Do you agree with the proposals around the level of responsibility Network operators and Level 1 providers should take in regard to their direct clients' handling of consumer complaints (paragraph 3.1.1d of the draft Code)? If not, why not?**

Yes

**Q22 – Do you agree with the proposals around technical quality? If not, why not?**

Yes

**Q23 – Do you agree with the proposals around internal risk control (paragraph 3.1.5 of the draft Code)? If not, why not?**

Yes

**Q24 – Do you agree with the proposals in regard to due diligence, risk assessment and control (paragraphs 3.1.1a, 3.1.7 and 3.3.1 of the draft Code)? If not, why not?**

Yes

**Q25 – Do you agree with the draft General Guidance around due diligence, risk assessment and control set out at Annex C? If not, why not?**

Yes

**Q26 – If you have a preferred option (a, b, or c) in regard to the application of risk assessment and control to Network operators, then please state that preference, along any reasoning you may have.**

No preference

**Q27 – Do you agree with the proposals about Directions? If not, why not?**

Yes

**Q28 – Do you agree with the proposals about Contracts? If not, why not?**

Yes

**Q29 – Do you agree with the proposed Code rules around the Registration Scheme? If not, why not?**

Yes. However, we would appreciate clarity on who 'associated individuals' under rule 3.4.11 are- e.g. I would not expect to see my own name on the list just because I correspond with PhonepayPlus on RFIs etc. We would also be interested to have confirmation on how PhonepayPlus will ensure details provided under rule 3.4.12b are kept current. This is of particular concern given the high historic levels of inaccuracy in number checker as highlighted by AIME's research.

**Q30 – Do you agree that these are the appropriate risk factors and measures to use when drawing up a framework for assessing which services should be required to register? Do you have any further suggestions on criteria we should consider?**

We believe that all services should be registered, as any service can create a consumer enquiry and a non-satisfactory answer from the register will quickly erode public confidence in it.

**Q31 – Do you agree that 087 services should be exempt from the requirement to register? If not, why not?**

No- see our answer to question 30 above.

**Q32 – Have we captured the correct mandatory information to include on the Registration Scheme to meet our regulatory objectives and assist businesses in carrying out due diligence on their contracted partners? Is there other mandatory information we should require registrants to provide?**

Yes

**Q33 – Do you agree that the publication of breaches should be limited by a period of time? Do you agree that three years for a Track 2 breach and five years for an Emergency procedure are appropriate timeframes?**

Yes to both parts.

**Q34 – Do you have a view on whether breaches from the 11<sup>th</sup> edition of the Code should be matched across to the proposed registration database, and/or how this could be best achieved? If so, please provide it, along with any supporting evidence.**

Generally, even where breaches have been upheld against the service provider, the information provider is still known and their identity disclosed in the adjudication minutes, so the breach should still be linked to the information provider. However there should be a clear note that the breach was not actually upheld against the information provider. People using the database for the purpose of performing their own due diligence should have the market knowledge to be able to determine whether to discount the breach or not when deciding to contract with the relevant party.

**Q35 – Do you have a view on whether open investigations against Level 2 providers should be flagged to other parties registered with PhonepayPlus, and/or how this can be best achieved? If so, please provide it, along with any supporting evidence you have.**

Yes, open investigations should be flagged (but only to Level 1 providers). This would allow the new provider to question the Level 2 provider and reach their own conclusion on whether it is reasonable to contract and on the relevant level of due diligence for the Level 2 provider's services. However, does this question revolve around investigations (i.e. where a breach letter has been issued) or RFIs? In our experience most RFIs turn into investigations, but not all and it would be wrong to highlight RFIs which can occur e.g. simply because the operation of a service needs to be clarified to PhonepayPlus.

**Q36 – Do you support mandatory registration of all Network operators, Level 1 providers and Level 2 providers of eligible services? If not, why not?**

Yes.

**Q37 – What do you consider to be an appropriate fee for registration? Do you agree that the Registration Scheme should be funded by fees or should its cost be incorporated into the general industry levy that funds PRS regulation?**

The registration scheme should be funded by fees as this is likely to heighten a Level 2 provider's awareness of the requirements upon them, as someone with authority for payments will need to be aware. A fee of around £100 seems reasonable and is unlikely to cause any unfair barriers to entry.

**Q38 – Do you agree with the proposals around registration of service details? If not, why not?**

Yes.

**Q39 – Do you agree with the proposals around withhold and retention of payments? If not, why not?**

Yes. However an allowance will need to be made for the fact that in some cases contractual arrangements will need to be renegotiated and therefore there may be delays in full implementation of this proposal.

**Q40 – Do you agree with the proposals around Data Protection? If not, why not?**

Yes.

**Q41 – Do you agree with the proposals around Network operator responsibilities? If not, why not?**

Yes

**Q42 – Do you agree with the proposals around Level 1 and Level 2 provider responsibilities? If not, why not?**

Yes

**Q43 – Do you agree with the proposals around Prior Permission? If not, why not?**

Yes

**Q44 – Do you agree with the proposals around PhonepayPlus' investigations? If not, why not?**

Yes

**Q45 – Do you agree with the proposals around the Track 1 procedure? If not, why not?**

Yes. However, we note an inconsistency between the third bullet of paragraph 7.16 of the consultation document (which states that a formal breach does not have to be accepted) and rule 4.3.4 which states that disputing a breach can result in the case moving to the Track 2 procedure. We would like to see this clarified that it is not necessary to agree a breach has occurred but it is necessary to agree to the Track 1 action plan. We believe that Track 1 resolutions should allow a short opportunity for the Level 2 provider to propose an alternative solution as they may have a better understanding of how the service operates. However, PhonepayPlus would not necessarily have to agree to any of the changes to the action plan which were proposed.

**Q46 – Do you agree with the proposals around the Track 2 procedure? If not, why not?**

Yes. However, if a time limit is being set in the Code within which a provider must respond, there should also be a requirement for PhonepayPlus to respond promptly to help ensure prompt resolution of investigations. At the very least, a service level should be set and reported upon.

**Q47 – Do you agree with the proposals around the Emergency procedure? If not, why not?**

Yes

**Q48 – Do you agree with the proposals around adjudications? If not, why not?**

Yes

**Q49 – Do you agree with the proposals around reviews? If not, why not?**

Yes

**Q50 – Do you have an opinion on what time limit should be imposed (except in exceptional circumstances) for seeking a review after publication of a Tribunal's decision? If so, please state it.**

A 30 day time-limit is reasonable for requesting a review. Depending on the nature of the case, there should be an opportunity for a period beyond 30 days for information gathering, although the request (or at least notification of an intention to request) should be made within 30 days.

**Q51 – Do you agree with the proposals around sanctions and refunds? If not, why not?**

In general yes. However, rule 4.8.2 should ensure that sanctions can only be put in place for defined periods of time, or at least a maximum time period should be included for a sanction to be in place. With regards to rule 4.8.2k, the time period for implementing the recommendations should be determined by the auditor, unless otherwise agreed between the parties (i.e. not determined by PhonepayPlus). Otherwise some of the benefit of using a third party to review the services will be lost.

**Q52 – Do you agree with the proposals around the administrative charge? If not, why not?**

Yes.

**Q53 – Do you agree with the proposals around oral hearings and appeals? If not, why not?**

Yes

**Q54 – Do you agree with the proposals around publication of decisions? If not, why not?**

Yes. However, there should be a requirement for publication of decisions to be prompt to ensure that the industry is aware of any decisions made which set new precedents.

**Q55 – Do you agree with the proposals around delegation of powers? If not, why not?**

Yes

**Q56 – Do you agree with the proposals around definitions? If not, why not?**

Yes

**Q57 – Do you agree with the proposals around Annexes? If not, why not?**

Yes

**Q58 – Do you agree with this assessment of parts of the 11<sup>th</sup> edition of the Code that should be withdrawn completely going forward? Please list any specific provisions that you feel should be preserved in some form, and provide your reasons.**

Yes

**Q59 – Do you agree with PhonepayPlus' assessment and proposals around how the new Code will be interpreted in respect of 087 services? If not, why not?**

Yes

**Q60 – Do you agree with our assessment that now is not the right time to review our funding model? If not, why not?**

Yes. However, we would like greater clarity on how administration unit costs are derived. We would also like to see time spent on investigations minimised to ensure prompt resolution of issues for the benefit of all parties.

**Q61 – Are there any other areas of change within the proposed new Code that carry an impact that you feel we should consider? If so, please provide them, along with any evidence you have of the likely impact.**

None other than already considered in the consultation.

**Q62 – Do you agree with our assessment of the potential impact caused by the proposed new Code? If not, then please provide any areas of consideration you feel we have missed, and any supporting evidence for them.**

Yes.