



**BT plc Response to
The New PhonepayPlus Code of Practice
A PhonepayPlus Consultation**

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Summary

We agree with the approach PhonepayPlus (PPP) are taking with the new principles-based regulation. It will be much more flexible than prescriptive rules and will be easier for consumers and industry to understand. This should increase compliance and lead to greater consumer trust.

We believe that there are some weaknesses in the drafting, which we cover in our answers to the consultation questions. The points we raise do not alter the meaning but we think they support a streamlined Code that is focussed, easy to understand and future-proof.

As the new Code is not likely to be implemented until 2011, PPP and Industry need to consider the impact Ofcom's NTS review will have on the interpretation of the new regulations. Key points there are likely to be around price transparency, usage warnings, call-spend cut-off limits and categorising PRS services by number range.

Ensuring that consumers are aware of the changes to the Code will maximise the benefit of this regulatory change. PPP and the industry should agree a communications plan to raise awareness before the new Code comes into force. Similarly PPP need to consider an implementation timescale for industry to make the necessary changes to their contracts and processes. We suggest an absolute minimum of three months from the date the Code is ratified.

Further detailed comment on the Conditions in the draft Code and other concerns are raised on the following pages.

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

Yes, but for ease of use there should only be one document that covers both governance and the terms of reference for PPP. There's no need to keep the Ofcom/PPP Memorandum of Understanding as a separate document.

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

Yes, but there is scope for clarity on definitions, see Q3 below.

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, the Broadcast TV Event chain. It isn't clear in all cases whether the Broadcaster or the Service Provider is the Level 2 Provider. It probably isn't feasible to give guidance that covers every variation of the supply chain but to an extent this could be resolved if PPP accepted that parties could agree the scope of their Code responsibilities within their supply contracts.

Q4 – Do you agree with the proposal to convert Section 7 of the 11th 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, the key point with any guidance is that players know which behaviours are needed to meet the "outcomes" within the Code rather than being given a prescriptive solution.

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.

We consider that the items covered give adequate protection for consumers though we have a few suggestions in advance of the consultation.

First, the wording on 118 services refunds (page 7) does not consider that the user of the DQ service may give inaccurate information. This could be re-worded as follows:

"...aside from numbers that are restricted, having given accurate and current information the consumer was not provided with number they asked for; and...."

Second, we believe that "betting tipster service guidance" should include wording on encouraging sensible betting and third, we expect that Adult services would be covered by service-specific guidance.

Q6 – Do you agree with the proposal to convert Statements of Expectation that support the 11th 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 we would ask if it is necessary to have so many different types of guidance. Presently the intent is to have "General Guidance notes", "Service Specific Guidance", "Compliance Updates" and "helpnotes". None are mandatory so the purpose and differentiation could simply be brought out in the title and opening paragraph of each document.

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.

There is too much emphasis on the Network Operator monitoring compliance of downstream contracted parties. Having undertaken an initial due diligence exercise, brought the Code to the attention of their contracting party and included contract conditions on compliance, the responsibility for ongoing compliance must rest with that downstream party. The NO or level 1 provider should not be subject to an obligation for ongoing monitoring. We believe that is the role of the Regulator.

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

No, as time passes and different interpretations of the Code come to light this could be addressed by any one, or a combination of notices on PPP website. For example, broadcast e-mail messages to those registered with PPP or an amendment to existing guidance; rather than having another type of information note.

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

Yes, there should be a general guidance note on Ofcom's PRS analysis framework (outlined at Section 4 of Ofcom's final statement on its PRS scope review). This framework was a fundamental element of that consultation to determine which services should be regulated but it has never been used. If it were promoted then it would foster appropriate regulatory remedies.

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

Yes, the outcomes clearly cover what the current rules intended. The Level 2 provider is the right role to have that responsibility.

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

Yes, though it must be the case that the law stands regardless of any mention in this Code.

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

Yes. However, as the intent is to have a shorter Code that is easier to follow sections 2.2, 2.3 and 2.5 should be consolidated into one and rationalised to avoid overlap and keep them focussed. For example 2.3.3, 2.3.7, 2.3.8, 2.3.10 look more akin to avoidance of harm whereas 2.3.12 looks nearer to price transparency. Section 2.3.5 should be removed as it is not enforceable.

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?

There should be no need to issue guidance, the rule should be clear enough or be re-written. The concept of the new Code is to offer flexible, outcomes based regulation, PPP cannot then caveat that by issuing guidance which an adjudications panel will then take as the default method of meeting an outcome. As for drafting, the word "visible" isn't needed when the requirements to be prominent and legible are already included.

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

Yes, but See Q12 above, 2.2 to 2.5 would benefit from a re-draft.

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.

Yes, but rather than quoting figures in the Code the section could refer out to guidance that shows the rates. That way if there is a rate change the Code wouldn't need a formal amendment.

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

It's not clear that the rules in the draft Code add anything that isn't already in the Data Protection Act or covered in 3.6. Even so, only one section would be needed to cover privacy and data protection. Also see Q40 below.

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, provided the requirement clearly includes the need for the provider to notify their users of changes to the service and gain further opt-in agreement if the service becomes notably different. Also see the drafting point at Q16 above; if separate sections are kept we suggest that 2.4.3 and 2.4.4 sit better in 3.6.

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

Yes, the points are valid but as mentioned at Q12 the elements within sections 2.2, 2.3 and 2.5 need rationalising.

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

Yes, but when guidance is issued it should include a recommendation that Service Providers draft a complaints process document appropriate to the size of their business. That would give them a framework and useful material to provide to PPP in the event of investigation on complaint handling.

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?

No. Where due diligence has been met and adequate contract conditions on compliance put in place, parties downstream that have obligations under the Code must be held responsible and pursued directly by PPP.

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, but as with Q7 and Q 21 above, there is a limit to the role NOs can and should take with regard to monitoring compliance with the Code. From a drafting aspect we consider that section 2.1.1b from the existing Code is more concise than the proposed section 3.3.

When registering with PPP under the new registration scheme, parties are committing that they are providing accurate information. That along with current due diligence should be a sufficient check along with PPP random monitoring.

Under 3.6 we don't believe there is a need to mention data protection if it is just re-iterating the DPA. As per Q11 above, the law stands regardless of the conditions in this Code.

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, but refer to Q21 above.

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?

No. The guidance places a greater responsibility on NOs than is suggested by the draft code. It is too onerous a responsibility for any NO operating in the volume market and places a level of burden that is not proportionate to their role.

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.

Option a. NOs will undertake checks for commercial reasons and in many cases those checks will be sufficient along with due diligence. Also see Q37 below on suggestion of PPP managing some verification of information loaded onto the database.

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

Yes, provided it is clear that NOs and Level 1 providers are only obliged to pay refunds from withheld revenue.

As for drafting, Sections 3.2.2 and 3.2.3 could be covered in 3.2.1, with an additional sentence saying that the recipient of the direction will comply with the request and contact PPP if they have any problems. There's no need to lay out what that direction might cover, that could be included in the guidance.

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, but as there is to be a formal consultation on the database we will comment in detail at that time.

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?

No, the default position should be that all services must register. If there is a suggestion that some services are less risky to consumers then the question has to be whether those services should be categorised as controlled PRS, 0871 being a case in point. For consistency if any criteria is used it should be the Framework Analysis outlined in Ofcom's PRS Scope review final statement.

We also consider that all "live" PRS numbers should be registered whether or not they are being actively promoted by the SP. As these numbers attract calls and revenue there is no reason why a caller should not have access to the SPs contact details.

If PPP does eventually allow exemptions to registration this needs to be made clear to consumers and industry alike; e.g. that whole number ranges or types of services are exempt not just certain aspects such as lower pricing.

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

No, as stated at Q30, we consider that all services should be subject to registration. If a service is designated as PRS then consumers should be provided with the relevant details of the supply chain. The wider point here is that services should not be designated as "controlled PRS" if they do not present a notable risk to consumers.

If an exemption process is adopted by PPP then all services should be subject to it and treated accordingly, it is not appropriate to single out 0871 in this consultation.

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, though we cannot see any benefit repeating what is available on the Companies House website free of charge on a database that is being funded by industry.

The information requirements will need to be flexible to account for the different size of business at the moment many are not applicable to small businesses. We also have a comment on limited entry for large organisations, see Q36 below.

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, provided it applies to known individuals as well as organisations as frequently having closed down one business, individuals will open another to operate a similar service. We also recommend that previous breaches listed at the time a new breach occurs continue to be listed until the end of the latest 3 year period. In addition there should be a lifetime publication for those companies and individuals who have been subject to banning orders.

Q34 – Do you have a view on whether breaches from the 11th 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.

Yes, it supports the idea of a time limit being set as per Q33. Information on compliance with the rules is of interest to all parties. The fact the rules had changed since doesn't mean that the breach didn't apply at the time. PPP are not going to alter the adjudication retrospectively to account for the new rules, so the sanction stands and should be listed.

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, if the following is applied: That information is only made available to contracting parties not consumers. Only PPP would have access to make changes and the messages are updated promptly or removed by PPP, as soon as the status of the investigation changed. Another important factor is the wording of the message to ensure there is no risk of unfairness toward the organisation under investigation.

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. We suggest that all Network Operators register but a financial limit is introduced where less information is made publicly available for large NOs where PRS is a small element of their overall business. Name and contact details would suffice for large organisations.

The Ofcom billing approval scheme applies to communications providers with an annual turnover of £40m, this criteria is already used by PPP for its own definition of an NO so is already familiar to Industry. It could be used for

setting the level of detail required for registration. NOs with a turnover of that size are well known to consumers and are not going to disappear if simply faced with a PRS problem.

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?

At the moment no financial model or specification for the database exists so the running cost is a complete unknown. That said, we do agree that the scheme should be self-funding, and an annual registration fee is an acceptable way of covering the running costs.

A further point to mention here is maximising the benefit of the database itself. If PPP do not undertake any verification of the information entered by the supply chain then it is of little additional use to that an NO might obtain from its own due diligence exercise. There should be some value-add on the part of PPP with respect to the accuracy of information held.

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

The basic purpose of the database and number checker is that anyone calling a PRS service can find the name of the service and contact details of suppliers. The new Code places responsibilities on level 2 providers including registration and direct responsibility for complaint handling under section 3.1. The consequence of that is that they must be given the authority to manage direct customer contact, the NO or level 1 provider cannot subsequently become responsible for their failure. If the customer remains unhappy they can approach their own communications provider or PPP.

Where Level 1 providers or NOs have concerns about their brand image (as a result of poor complaint handling) they can address that through their supply contracts.

If there is a need to monitor complaint levels PPP could introduce a requirement that level 2 providers give complaints information on a regular basis, quarterly for example.

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

Yes.

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

No, there is a risk of PPP confusing matters over data protection by including any provisions in this Code that do not directly reflect the DPA and Privacy and Electronic Communications Directive Regulations (PECR). If PPP intent is only to reflect DPA and PECR then there is no need to include it in the Code. It can be covered in guidance within the “new to payphoneplus” webpage.

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

Yes, provided due diligence is sufficient to ensure responsibility for compliance for Level 1 Providers. Where Level 2 Providers have liabilities under the Code they must be held responsible for their own activities.

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, but the detail at 4.2.3 a – i is not necessary. The condition 4.2.3 states that NOs will be directed to supply information so there isn’t a need to list what that might be, especially as the list given isn’t exhaustive.

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

Yes.

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

Yes.

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?

There does not seem to be that much difference between “Reviews” and “Appeals” (4.12) that they warrant separate conditions. Again within 4.8.2 there is no need to list items a-k, if a list is needed it sits better within the separate governance document or Annex 2 of the Code which covers Tribunals.

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.

We have no particular viewpoint but 30 days seems suitable.

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

More thought is required around refunds, we do not consider the suggestion is workable for the following reasons. First, it could be the case that the money retained by a Terminating Network Operator (TNO) isn’t enough to refund all customers. If that is the case how is that managed and by whom? Second, any refund situation is likely to prompt queries and the TNO is not in a position to handle those when they played no part in the breach that led to the refund nor were they the Operator that billed the customer. Third, before TNO’s were obliged to be involved a method for them to assess and recover their reasonable handling costs would have to be devised.

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, but see Q 49 above.

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

Yes, but not for Track 1 if that process is retained.

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, but at 5.2.3 we don't see any need include the definition of controlled PRS in the Code itself as it is not derived from the Code. A better fit might be within guidance on the PPP website.

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

Yes, but annex 2 and 3 should form part of the proposed Governance document rather than be part of the Code.

Q58 – Do you agree with this assessment of parts of the 11th 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, also see Q30 and 31 above. 087 should not be subject to PRS regulation.

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

Yes.

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.

We consider that there is one important omission in the scope of the Code. To date artificial inflation of traffic (AIT) has largely been ignored by PPP and Ofcom alike. Whilst AIT does not have a direct impact on consumers there is an indirect impact as it increases operational cost for Networks which inevitably has a downstream effect. In any event AIT is an abuse of the PRS process and needs to be addressed by PPP or Ofcom as presently it costs Networks millions of pounds each year.

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, in the main but there is no recognition of the Ofcom analysis framework anywhere in the consultation or the impact Ofcom’s NTS review might have.

END.