

Dear Sirs,

Please find below in RED our responses to the summary version of the public consultation of the new PhonepayPlus Code of Practice.

The new PhonepayPlus Code of Practice
A Public Consultation
(SUMMARY VERSION)

This document is a summary of PhonepayPlus“ full consultation on its new Code of Practice.

Stakeholders may find it less time-consuming to respond to this summary version and can do so using the contact details on page 2 of this document or by completing an online survey.

Issued by PhonepayPlus on 24 May 2010
The deadline for comment is 8 July 2010

Introduction

This document explains the main changes to the PhonepayPlus Code of Practice proposed in the full consultation document. It does not include all proposals, but it highlights the main aspects we think those affected most need to understand and have a chance to comment on. It is particularly aimed at smaller providers and consumers who may not have the time or resources to read through the full document, but whose responses would be valuable.

The Code of Practice is used by PhonepayPlus to regulate premium rate services (PRS), which are sometimes referred to as „phone-paid services“. That means anything beyond standard-rate phone calls or text messages that are charged to consumers“ phone bills or deducted from pre-paid mobile credit. These services include everything from ringtones and other downloads, to chatlines and charity donations by text message. The Code of Practice sets out rules for companies providing phone-paid services, in order to pre-empt and prevent problems, such as those to do with pricing, advertising and promotions, and to protect consumers so they can use these services with confidence.

The current, 11th version of the Code was published in 2006. There have been important changes since then, both in technology and in how people use their phones. The new Code of Practice is meant to take those changes into account, and to be more flexible so that it can adapt to further changes in the future. The focus of the new Code is on the needs and expectations of consumers wherever possible. Rather than setting out prescriptive rules, the new Code explains what outcomes providers need to consider to deliver the best results for consumers. PhonepayPlus will also supply detailed guidance for companies providing phone-paid services, where this is necessary or would be helpful.

The point of this consultation is to make sure PRS providers, and their customers, understand the proposed changes and have a chance to comment, so any necessary revisions or useful suggestions can be incorporated before the new Code of Practice is finalised. The deadline for comments is **Thursday, 8 July 2010**. Where possible, these should be submitted in writing to Mark Collins at mcollins@phonepayplus.org.uk. Alternatively, comments can be sent by post to Mark Collins, Head of Industry Affairs, PhonepayPlus Ltd, Clove Building, 4 Maguire Street, London, SE1 2NQ, or by fax to 020 7940 7456. If you have any queries, you can contact Mark Collins by email, or by phone on 020 7940 7412.

Clarifying accountability: new definitions of phone-paid service providers

There are typically several different companies involved in providing any given phone-paid service. These include not only the provider actually operating, promoting and providing the content for that service. The chain to the consumer also includes the providers responsible for the phone lines and other technical apparatus the service requires, for connecting between different networks, as well as sub-contracted providers who may advertise the service or deal with any complaints. Some services may involve only two or three providers, but it is not unusual for several different providers to play a part in delivering a service. This relationship between these providers is known as the 'value chain' for phone-paid services. The terms used to describe providers involved in phone-paid services in the current Code of Practice have become increasingly problematic as the market has evolved. While „Network operator“ still properly describes the phone companies providing connection to the consumer for PRS providers, the terms „Service Provider“ and „Information Provider“ have become confusing as the market for phone-paid services has evolved, especially as the same company could play both roles at different times. For an in-depth discussion of this issue, see sections **4.7 to 4.27** of the full consultation document.

The new Code of Practice will refer to all providers of phone-paid services, other than Network operators, as either Level 1 providers or Level 2 providers. Level 2 providers are those who are ultimately responsible for the content, promotion and operation of a service. Level 1 providers form part of the delivery chain between Level 2 provider and the consumer, usually offering technical facilities or expertise for a share of revenue. 3

Parties involved in the phone-paid services 'value chain'

Network operators – phone companies who own and operate network infrastructure, and who are contracted by companies providing phone-paid services.

Level 1 providers – companies who assist connection between Network operators and other providers of phone-paid services (e.g. Level 1 providers aggregate content, obtain best rates, supply shortcodes, etc.).

Level 2 providers – the companies responsible for promotion, operation and content of particular services.

Because some companies can be both Level 1 and Level 2 providers for different services, the new Code of Practice does not attempt to define providers as Level 1 or Level 2 in general, but *in relation to any given service*. While there may be more than one Level 1 provider involved in a particular service, the Level 2 provider is the one company ultimately responsible for its promotion, operation and content. If the Level 2 provider subcontracts any part of that responsibility (such as handling complaints or ensuring quality) to a Level 1 provider, that company could also be held accountable for any breaches of the Code in relation to that part of the service.

Do you agree with PhonepayPlus' proposed definitions for the different parties involved in phone-paid services? If not, why not?

Lebara recognises the need for flexibility and has no strong objections against the proposed definition as long as its outcome will not in any way enlarge the regulatory burden on either Level 1 or 2 providers in any given any given service.

Guidance: a new, flexible approach

The new Code of Practice will focus on Outcomes for consumers rather than rigid rules for companies providing phone-paid services, which should allow greater flexibility for those companies to innovate. Where further explanation is needed, PhonepayPlus will publish clear Guidance indicating what the Code means in practice, so companies can be confident about what is required of them.

The idea of the new Guidance is firstly to provide a consolidated source of information so providers of phone-paid services can easily find what they need. Secondly, it will allow for a quicker response to newly-identified risks or unacceptable practices (since Guidance can be updated without the need to amend the Code of Practice itself). And finally, the Guidance will assist in clarifying where the Code sets out Rules that must be followed, and where companies can reach the same Outcomes using different means. Companies will not be required to follow Guidance as long as they fulfil customers' needs and expectations as set out in the Code, though if their alternative procedures fall short, this will be regarded as a serious breach.

Proposed changes:

Section 7 of the current, 11th Code of Practice, which sets out service-specific rules, will be converted to „Service-Specific Guidance“, while „Statements of Expectation“ will be published as „General Guidance“.

„Help Notes“ and decisions made by the Code Compliance Panel will be published as „Compliance Advice“ (or „Compliance Updates“).

Notices to Industry will be published as before.

An in-depth discussion of the proposals regarding Guidance and the thinking behind them can be found in sections **4.28 to 4.50** of the full consultation document.

Do you agree with PhonepayPlus' proposals to reform our existing Guidance, and to convert Section 7 of the 11th Code into Guidance wherever possible? If not, why not?

Again Lebara recognises the need to have regulation flexible enough to cope with the fast changing environment. However, we do have concerns on the uncertainty this will impose for providers and we urge to have implemented a practical system whereby providers can seek guidance proactively, within short timelines and which guidance give sufficient reliability to build business cases and investment decisions on.

Consumer outcomes first: what the new approach will mean

The new Code of Practice is designed to protect consumers and ensure they can use phone-paid services with confidence, so the industry as a whole can flourish. Rather than setting out prescriptive rules about how services should be operated, PhonepayPlus will require providers to achieve certain Outcomes. These will be supported by a limited number of Rules (many unchanged from the previous Code of Practice), and detailed Guidance to clarify what is required. When responding, please let us know if there are areas where you feel additional Guidance might be necessary or helpful.

The Outcomes and Rules apply to the Level 2 provider of any given service (i.e. the company responsible for promotion, operation and content of that service). But, if a Level 1 provider or Network operator is involved in the service in any way that

directly affects consumers, that company will also be accountable for that part of the service.

The required Outcomes are:

Legality – “That premium rate services comply with the law”.

Transparency – “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”.

Fairness – “That consumers of premium rate services are treated fairly and equitably”.

Privacy – “That premium rate services do not cause the unreasonable invasion of consumers’ privacy”.

Avoidance of harm – “That premium rate services do not cause harm or unreasonable offence to consumers or the general public”.

Complaint handling – “That consumers are able to have complaints resolved quickly and easily by the Level 2 provider responsible for the service and that any redress is provided quickly and easily”.

Full details of the associated Rules can be found in **Section 5** of the full consultation document. However, there are particularly important changes to the Rules on Fairness:

Rule 2.3.10 highlights that “premium rate services must not seek to take advantage of any vulnerable group or any vulnerability caused to consumers by their personal circumstances” (e.g. targeting people on benefits, or those suffering financial hardship as the result of a widely-publicised event, such as the failure of a bank).

Rule 2.3.3 clarifies that consumers cannot be charged without their prior consent. Where consumers allege that they have been charged without consent, it will be up to the company to prove beyond reasonable doubt that the consumer did consent.

The clarity of promotional material will also be taken into account.

Rule 2.3.6 is designed to reduce cases of „bill shock“, when consumers receive unexpectedly high bills from using premium rate services, either because someone else has used their phone or because they simply failed to recognise the cost. The new Rule requires Level 2 providers to monitor usage of their service and identify individual usage patterns that are well above the average for that service. In such cases, they should quickly make reasonable efforts to contact the bill-payers and make sure they understand the costs.

Rule 2.3.11 says “there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further 5

charge to the consumer after exit”. Supporting Guidance will indicate that, wherever technically possible, customers should be able to exit a phone-paid service by texting „STOP“, free of charge, to the relevant number.

Do you agree with the proposed Outcomes and Rules? If not, please highlight any with which you disagree, and explain your reasons, providing evidence where possible.

Lebara strongly opposes the Rule 2.3.3 whereby the providers are given the obligation to prove beyond reasonable doubt the consumer did consent. We are concerned that, as there is no real barrier to challenging the payment which in each case puts much strain to the providers, this will provoke a large amount of

unwarranted challenges that have no real ground. We would suggest to build in a reasonable threshold which can be returned once it is established the challenge was correct.

Spending caps and thresholds for phone-paid services

The current Code of Practice sets spending caps, or thresholds, at which companies providing phone-paid services must remind customers how much they have spent, so they can make an informed decision about whether to continue using the service. The current proposal is to retain these thresholds at the same levels in the new Code's Rules (2.3.12):

All **sexual entertainment services** must be ended by the company providing the service when a maximum of **£30** per call has been spent.

Services aimed at, or which should have been expected to be particularly attractive to **children**, must be ended by the company providing the service when a maximum of **£3**, or in the case of a subscription service a maximum of **£3 per month**, has been spent.

Other **subscription service** customers must be reminded what they are paying every month, or every time they have spent **£20**.

A new Rule, 2.3.12c, says providers of **virtual chat services** must remind customers every time they have spent **£10**, stating that they have spent £10, rather than just repeating the cost of the service, and obtaining reaffirmation of the customer's original decision to use the service before continuing. This must be separate from the customer's interaction with the service itself (i.e. not within the text of a chat message).

These Rules are discussed in sections **5.60 to 5.63** of the full consultation document. PhonepayPlus is testing whether these limits are appropriate and invites suggestions about changing the thresholds if respondents have robust evidence that this is desirable.

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

Lebara considers the caps to be reasonable but would urge for a review every 6 months to ascertain if they will remain in line with the developments.

General responsibilities, due diligence and risk assessment

While the Outcomes and Rules for protecting consumers set out in the new Code of Practice apply to the Level 2 providers responsible for phone-paid services, Network operators and Level 1 providers do retain some general responsibilities. These are discussed in-depth in sections **6.8 to 6.35** of the full consultation document, and summarised below.

All parties have a degree of responsibility to ensure **customer complaints** are dealt with properly. In many cases, customers will complain in the first instance to their phone company. In others, a Level 1 provider responsible for 'shared' shortcodes used by more than one Level 2 provider may prefer to have its own contact details listed on PhonepayPlus' Number Checker for that shortcode. In all cases, the respective companies must quickly provide customers with contact details for the company responsible for resolving consumer complaints about the service.

The current Code of Practice requires 'Service Providers' to ensure services are of adequate **technical quality**. Given the changes in the industry, reflected in the new terminology for the various parties, this requirement will now be extended to all those parties – i.e. Network operators, Level 1 providers and Level 2 providers – in the context of their particular roles. An example of a technical concern is that it should be simple and easy for customers to exit a service (Rule 2.3.11, explained above in 'Consumer outcomes first: what the new approach will mean').

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All Network operators, Level 1 providers and Level 2 providers must have **internal risk control** arrangements in place to ensure they can comply with the Code of Practice, and must demonstrate these arrangements to PhonepayPlus on request. Companies that systematically fail to comply with the Code will be required to contract an independent third party to carry out an audit of their procedures and advise them on how to ensure they comply with the Code in future (see 'Sanctions and refunds' below).

An important change in the new Code of Practice is that all parties must now carry out a reasonable **risk assessment and control of any party with whom they contract**. All parties who share revenue from a service have a degree of responsibility for it, so where a connection is subcontracted, the party that has subcontracted it must show due diligence, and maintain control of its clients on an ongoing basis. The degree of control expected will vary depending on whether the Level 2 provider is directly contracted or further down the chain. A draft version of the supporting Guidance for this rule is published with the full consultation document, and we welcome feedback.

Do you agree with the proposals around due diligence, risk assessment and control (paras 3.1.1a, 3.1.7, and 3.3.1)? If not, why not?

Registration of all phone-paid services

Lebara feels these new requirements unduly affect providers's discretionary powers and is opposed to the proposals. Lebara is of the opinion that providers themselves must decide and execute how they will ensure compliance, not the regulatory authority.

An important change in the new Code of Practice is that all parties involved in providing phone-paid services will be required to register with PhonepayPlus. This is to ensure PhonepayPlus is able to enforce the Code of Practice effectively and identify repeat offenders. It is also to give all providers a better understanding of the regulatory risk of working with others, as well as to give both consumers and providers a facility for checking premium rate numbers.

A full discussion of the implications of the new Registration Scheme can be found in sections **6.40 to 6.84** of the full consultation document, but the key points and areas where feedback is sought are as follows.

New requirements

Registration of a business or sole trader will be required not only in order to offer services to the public, but also to contract with Network operators or other providers of phone-paid services. All services provided by each company must also be registered. Details must be kept up-to-date and registration must be renewed annually for a fee to cover costs, the amount to be determined but perhaps in the

region of £100 for each provider; suggestions on the level of this fee are welcome. Along with basic company information, including previous names and parent companies, which must be supplied, certain other information can be shared voluntarily. PhonepayPlus would welcome comments on what kind of information would be helpful for inclusion in the database (see sections **6.55 and 6.56** of the full consultation document). Only companies exclusively providing low-risk service types, such as 087 services, may be exempt from the requirement to register (see sections **6.53 and 6.54**).

Breaches and investigations

PhonepayPlus will add information on any breaches of its Code of Practice, and sanctions imposed, to the registration details of the companies concerned, along with relevant information about directors, partners or other associated individuals. This information will be available to any other registered party, to PhonepayPlus, Ofcom and any law enforcement agency with a legitimate interest. PhonepayPlus may suspend registration as a sanction for non-compliance or failure to renew.

Breach records will only be kept with company details for three years in the case of Track 2 (or Standard) breaches, or five years for those dealt with under the Emergency Procedure (see 'Investigation procedures' below). Breaches under the current Code of Practice will be 7

included under the new Registration Scheme. However, it may be possible to indicate that these relate to the former regulatory regime with different definitions of Service Provider, etc. and that the party found in breach at the time may not have been solely responsible. It would also be possible to flag providers currently under investigation by PhonepayPlus, while making it clear that no conclusion has been drawn. This information would be available only to other companies registered with PhonepayPlus, and not the general public, but feedback is sought on whether the benefits would outweigh any possible damage to a company's reputation. See sections **6.57 to 6.63** of the full consultation document for more on these questions.

The PhonepayPlus Number Checker

The Registration Scheme will also be used to populate the PhonepayPlus Number Checker, which helps consumers identify numbers that appear on their bills.

Currently, some services are associated on the Number Checker with Level 1 providers who are not directly responsible for them, meaning customers have to contact that company for details of the Level 2 provider. To make things simpler for consumers, all Level 2 providers should now register up-to-date information about the customer care provider, non-premium rate contact details, and all associated numbers known by the provider (including shortcodes, premium rate numbers and billing numbers), as well as trigger words for each service, so consumers can identify a service and contact the relevant providers directly. PhonepayPlus aims to pass information about any complaints automatically to any Level 1 providers concerned, so they are aware of problems with their clients. See sections **6.66 to 6.83** of the full consultation document for more in-depth discussion.

Do you agree with the proposed requirement for all parties, who are defined as Network operators, Level 1 providers or Level 2 providers, to register with PhonepayPlus and with the rules of the Registration Scheme in terms of sharing that information? If not, why not?

Lebara feels these obligations serve no real purpose and are unduly onerous on providers.

Do you agree with the proposed requirement that Level 2 providers register all their services with PhonepayPlus? If not, why not?

Lebara feels these obligations serve no real purpose and are unduly onerous on providers.

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

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?

Lebara feels these obligations serve no real purpose and are unduly onerous on providers.

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.

This should only apply to very serious breaches and such data base should then be deemed as a sufficient source to fulfill any required risk assessment requirement as per Para 3.1.1a, 3.1.7 and 3.3.1.

Do you have a view on whether open investigations against Level 2 providers should be flagged to other parties registered with PhonepayPlus? If so, please provide it, along with any evidence or reasoning.

Lebara would be opposed to such flagging until the investigations are completed and have established actual serious breaches. Also, this should not just be limited to Level 2 providers.

Investigation procedures

PhonepayPlus' investigation procedures are not significantly altered in the new Code of Practice, with the exception of the points below. These are elaborated in sections **7.4 to 7.31** of the full consultation document.

The new Code adds examples of the kinds of information PhonepayPlus may request as part of an investigation. These include evidence of **due diligence** on the part of a

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Network operator or Level 1 provider, evidence of **risk assessment and control** by the same parties, and details of **arrangements between any provider and another party not registered with PhonepayPlus**. Companies under investigation must also provide **any information not specifically requested but likely to be illuminating**.

Under the new Code, PhonepayPlus may use any of three procedures when investigating (see below), and can investigate **as many parties as are responsible** for the same consumer harm.

The new Code replaces the Informal procedure with the **Track 1 procedure**, whereby PhonepayPlus will present companies under investigation with an action plan and a **deadline** to resolve the problem. Details of these resolutions could be recorded as part of the Registration Scheme, with a clear indication that these have been mutually agreed, rather than being the result of adjudications following a formal breach. PhonepayPlus may charge for reasonable administrative costs.

The new Code renames the Standard procedures as the **Track 2 procedure**, but they are not substantially changed apart from the points above.

The new Code retains the **Emergency procedure** process, with the only significant change being a reduction of the minimum time limit for the relevant party to respond from five working days to two working days in cases of serious and widespread consumer harm. This is to enable PhonepayPlus to deal quickly with cases that threaten the reputation of phone-paid services in general.

Do you agree with the proposed investigation procedures? If not, why not?

Lebara feels risk assessment and control as proposed should not be part of regulation but be up to individual providers to decide upon in light of their own due diligence processes as they feel should be applied in different circumstances complying with reasonable levels of precaution to be expected from professional providers.

Sanctions and refunds

It is proposed that the new Code of Practice should retain all sanctions from the current Code, along with two new ones. These are elaborated in sections **7.43 to 7.56** of the full consultation document.

PhonepayPlus may require providers who repeatedly breach the Code of Practice to carry out at their own expense a **compliance audit** by an independent third party. This means they must bring in professional auditors to investigate their internal procedures and advise them on how to ensure they comply with the Code in future. PhonepayPlus may require providers to pay **an automatic refund to all consumers** (either in part, or in full), not just those who have complained to PhonepayPlus. This very serious sanction will only be used against services adjudged to have been deliberately misleading and providing nothing of value to consumers.

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

Lebara is of the opinion that the compliance audit after repeated breaches may be a efficient and appropriate measure. However, the proposal on automatic refunds to all consumers should be applied very cautiously and only after a serious warning and order to rectify or halt the breaching behaviour has met not effect.

Lebara thanks you for the opportunity to share our views on the proposed new regulation.
Should you require any further explanation we will be quite happy to accommodate.

Yours,

Paul van Straaten

Chief Legal Officer

Lebara Group BV