

PhonepayPlus
Code of Practice (12th Edition) Review
Update

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Responses welcomed by 26 March 2014

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Introduction

- 1.1 PhonepayPlus launched a review of the PhonepayPlus Code of Practice (12th Edition) ('the Code') in 2013. The rationale for the review was fourfold: the experience of implementing an outcomes-based approach to regulation for the first time has allowed us to reflect on the transition from a more prescriptive regulatory approach; a desire to ensure the Code remains future-proofed and ready for market innovation; to strengthen our implementation of the polluter pays principle; and to reflect Ofcom's review of Non-Geographic Call Services (NGCS). This paper is to update stakeholders on progress with the Code review and precedes a formal consultation which will follow later this year.
- 1.2 In September 2013, PhonepayPlus published a Call for Inputs that set out our initial considerations. The Call for Inputs asked stakeholders to comment on the breadth and scope of the review, note any issues that we had not considered and assess our then approach to the issues outlined.
- 1.3 PhonepayPlus received 17 responses from a variety of stakeholders, including providers throughout the value chain, trade associations, consumer groups and a member of the public. We are grateful to all those who provided us with feedback. While we do not propose to directly respond to nor summarise the responses here (16 are available on our website¹), these views were fully considered and have influenced our approach to a number of issues. PhonepayPlus also hosted a number of workshops with industry and consumer groups to discuss the initial proposals and garner views from a variety of stakeholders.
- 1.4 The feedback received as well as recent developments have led us to reflect on the proposals and ideas set out in the Call for Inputs. PhonepayPlus continues to believe the approach discussed in the Call for Inputs is the right one – the fundamentals of the Code and an outcomes-based approach to regulation remain appropriate and are now embedded. We also believe that the four broad themes outlined in the Call for Inputs should remain the focus of the review of the Code.
- 1.5 This document details the more substantial changes to the Code planned under the four themes², many of which were considered in the Call for Inputs. Minor changes included in the Call for Inputs but not mentioned here will be included in the full consultation in summer. However, having considered stakeholder feedback and the practicalities of implementing the proposals, a number of the proposals published in September are no longer being taken forward to consultation.
- 1.6 In the interim, reason has arisen to consider a number of other proposals that were not set out in the Call for Inputs. Hence both the reasons why proposals have been rejected and the reasons why other issues are now being considered are set out in this update paper. The proposals set out in the paper reflect our latest thinking on the Code review, informed by analysis, research and previous feedback. We are seeking further views on

¹ A provider asked that their response be kept confidential.

² These are: NGCS, Future Proofing, Enforcement and Technical Review and Polluter Pays.

these proposals from interested parties ahead of finalising the revised draft Code for consultation later in the year.

1.7 The major differences between the proposals outlined in the Call for Inputs and this update paper are:

- The introduction of a new approach to prior permissions that will see long standing permission regime conditions brought into the Code to simplify the regulatory landscape and reduce unnecessary burden, whilst retaining the necessary consumer protections.
- More detail on a potential approach to spending caps in light of consumer research and industry input.
- Changes to proposals to revise the investigation and adjudication procedures, particularly in light of feedback received.

1.8 Since the September Call for Inputs, Ofcom have published their final NGCS policy statement and have set a 26 June 2015 deadline for the implementation of the new regime which has ramifications for PRS and the next Code. In order to publish a new Code by Ofcom's deadline for implementation of their NGCS decision, PhonepayPlus now plans to consult in early July this year on our changes to the Code.

1.9 While there are no formal questions in this paper, PhonepayPlus does very much welcome views from stakeholders on the proposals outlined. Given the need to consult on a new Code in early July, please forward any comments to Jonathan Levack (contact details are included at the end of the paper) in four weeks.

Section 2: Non-Geographic Call Services

2.1 Ofcom published its NGCS policy statement in December 2013. The statement sets out Ofcom's decisions on changes to the regulation of calls to the 080, 084, 087, 09, 116 and 118 number ranges. It also established a firm implementation timetable for these changes, with all, including the introduction of a new unbundled tariff and per minute caps on the 09 number range, to take effect on 26 June 2015. Given the scale of these changes, PhonepayPlus has been reflecting on the impact of the new regulations on the Code throughout the review process.

Spending Caps on Live Services

2.2 As set out in the Call for Inputs, PhonepayPlus has been reviewing the existing spending caps on live services that sit both in the Code and prior permission³. In forming our view of the future of these caps, we have consulted with a range of stakeholders and commissioned consumer research into user experience of such services⁴. This research is being published on the PhonepayPlus website alongside this document.

2.3 The rationale for spending caps in this area has been that the live and compulsive nature of these services are likely to make it harder for consumers to monitor the cost of calls and to disengage from the service when they have paid what they wanted to. This, however, has to be balanced against the need to ensure that spending caps, or other interventions, do not harm the consumer call experience or unfairly hold back live PRS from competing with other payment mechanisms such as credit card.

2.4 Our consumer research clearly suggests that there is a strong consumer case for retaining spending caps on live services. 91% of respondents to the survey thought there should be some sort of spend limit, with 66% believing that caps prevent bill shock. Very few consumers had a negative opinion of spending caps; only 6% of respondents believing spending caps stop them from enjoying a service. This, we believe, is robust evidence that consumers value caps and, far from holding back PRS in competing with other payment mechanisms, caps set at the right level can help promote consumer confidence and take up of PRS.

2.5 We are now minded to conclude therefore that spending caps should remain. If that is the case, where they should be set and whether they need to be changed has to be considered.

2.6 The current regime has a cap with forced release at £30 with no prior intervention before that point. This approach has proved largely successful. It has the benefit of being familiar both to users and providers of live PRS services and our consumer research

³ A cap on Sexual Entertainment Services (SES) exists at Rule 2.3.12(a), whereas spending caps on other live services sit outside the Code in prior permission.

⁴ The research, conducted by Analysys Mason, surveyed 1,038 users of live premium rate services in October 2013. Users were asked to comment on their experience of live services and opinion of spending caps. The research, including full details of the results and methodology, is available on the PhonepayPlus website.

suggests that £30 is within what most consumers would expect to pay as a maximum for these services. We therefore do not at this stage rule out retaining the current £30 cap.

2.7 However, our research and analysis suggested that there are two ways in which the current cap could potentially be improved upon. Firstly, there is an argument that the £30 cap is too low. Even at current tariffs, more than 20% of live PRS users would prefer a cap set above the current limit. With new higher rate tariffs coming in for 090 numbers from June 2015, retaining the cap at £30 might curb providers' ability to make use of the new price points to offer more innovative or greater value added services. It might also make it more difficult for PRS providers to compete with other payment mechanisms, such as credit card, especially in relation to those consumers who are willing and able to pay more for these services.

2.8 Secondly, the existing approach doesn't help to protect consumers who expect to pay *less than* £30. This is relevant because our research suggests that only 14% of users' most recent calls leading to bill shock reached the £30 spend limit. The research also found that the average call is 30% more expensive than users originally thought, suggesting that consumers are not fully aware of the cost and length of a call. Indeed, calls lasted longer than respondents thought necessary in 45% of cases.

2.9 In light of this, we consider that there is a strong case for moving to a regulatory regime that offers both greater flexibility for services to cost more than £30, where consumers have genuinely consented to this, whilst at the same time providing greater protection for those consumers who expect to pay less than £30. Our proposal at this stage is to move to a more graduated consumer protection regime with a spend reminder at £15, an opt-in at £30 and then a cap/forced release at £45.

2.10 Needless to say, this is one of a number of options that have been considered. While we are currently minded toward the option outlined, we have not yet finally decided on it and welcome alternative views prior to a formal Code consultation. We will formally consult on a preferred option in the summer. Therefore, we welcome feedback on these proposals in terms of the protection they offer consumers, the rationale behind them and their feasibility. As noted in the Call for Inputs, PhonepayPlus will continue to work with Ofcom to place caps on live services outside of the Code to offer greater flexibility for both providers and the regulator.

Section 3: Future Proofing

3.1 PhonepayPlus' outcomes-based approach to regulation is naturally more flexible and technology-neutral than a prescriptive approach. This inbuilt flexibility is particularly important in a fast changing marketplace. Despite this, we are conscious that any Code can be improved to take account of market developments and ensure it continues to protect consumers as well as offer the appropriate clarity for stakeholders. The Code review team have therefore assessed where the Code can be amended to achieve this aim. There are three substantial changes being considered under this theme. These are:

Complaint Handling

3.2 The Call for Inputs discussed whether the requirement for PRS providers to operate a telephone based non-PRS complaints line was still relevant and consistent with an outcomes-based approach to regulation.

3.3 PhonepayPlus remains of the opinion that this Rule 2.6.2 is a legacy of our previous approach to regulation and could be made more flexible, especially in a world where more services are moving online. PhonepayPlus therefore intends to remove the requirement in the Code for all premium rate services to operate a non-PRS telephone customer care line.

3.4 It is important to note that in doing so, we will not be reducing consumers' ability to easily contact providers to register a complaint or seek redress. Our intention is for a revised Rule 2.6.2 to set out clear principles for providing redress, which will include the provision of an accessible and low-cost route for complaint. In most cases, and especially where the initial service is provided through a phone call, we will still expect the providers to continue to provide a low-cost phone helpline for consumers and this will be spelt out clearly in Guidance.

3.5 However, where providers are able to demonstrate to our satisfaction that they can provide an accessible and low-cost redress service without using the phone then the new approach to Rule 2.6.2 would enable them to do this.

3.6 Any Code change to Rule 2.6.2 will also take account of new requirements to post-contract customer care lines being introduced by the Department for Business, Innovation and Skills under the Consumer Rights Directive.

Spending Caps on Children's Services

3.7 As well as spending caps on live services, the Call for Inputs outlined PhonepayPlus' intention to review the level of one-off caps on services deemed particularly attractive to children (Rule 2.3.12 (b))⁵ and to introduce a cumulative cap. While the cap at 2.3.12 (b) is unlikely to be heavily affected by Ofcom's NGCS review, we feel that it warrants attention given market developments.

⁵ Rule 2.3.12 (b) reads: Services aimed at, or which should be expected to be particularly attractive to children, must terminate immediately when a maximum of £2.56 plus VAT per call, or in the case of subscription service a maximum of £2.56 plus VAT per month, has been spent.

3.8 PhonepayPlus has underpinned its understanding of this issue with consumer research⁶. In short, parents overwhelmingly welcome caps on services designed for children. 95% of parents think that one-off spending caps should be maintained. Parents also welcome caps at a similar level to the current cap; on average parents suggested that they would welcome a one-off spending cap at £3.50, with nearly 60% suggesting that caps should be at £2 or less. Given these findings and the general priority that we attach to protecting children, we believe there are strong reasons to maintain one-off spending caps on children's services at the current level of £3.

3.9 In response to the Call for Inputs, a mobile network argued that the one-off cap should rise in line with the increase in average pocket money since spending caps were set, resulting in an increase from approximately £3 to £10. We are concerned that such a hike presents significant risks and does not tally well with parents' expectations. Thus PhonepayPlus is minded to maintain the one-off cap on children's services at the current level of £3.

3.10 We also consider that there is a good case for broadening out the range of the cap. Currently the cap relates specifically to calls or subscription services. We consider that this is outdated given that children's services can be accessed and paid for through other mechanisms as well, such as through premium SMS or through direct to bill purchases (such as in-app purchases). We are therefore minded to broaden out 2.3.12(b) to reflect this range of payment and access routes.

3.11 The Call for Inputs also discussed introducing a cumulative cap on children's services to protect against bill shock caused by repeat spending. This is particularly relevant to those children's services where one-off purchases may be well within the £3 limit, but where children can nonetheless run up substantial bills through repeat purchases, such as in-app purchases and voting competitions that are specifically targeted at, or expected to be particularly attractive to, children. Both stakeholders and the consumer research suggest a cumulative cap would be a welcome addition to the Code. We also envisage the cumulative cap replacing the existing cap on subscription services.

3.12 It is important that a cumulative cap both supports innovation and protects children and their parents from bill shock. PhonepayPlus is minded to take a view that this cap should be a minimum of four times the one-off cap, i.e. £12. However, we are keen to engage further with providers, platforms and consumer groups to understand in more detail the implications of a cumulative spending cap on children's services, and the level at which it is set, both for consumer protection and for the operation of the market.

⁶ PhonepayPlus commissioned Analysys Mason to conduct research of 1,001 parents of children aged 8 to 16 in October 2013. The research asked parents to comment on their child's use of PRS and for their thoughts on spending caps on children's services. The research and methodology are available on the PhonepayPlus website.

Vulnerability

- 3.13 The twelfth edition of the Code introduced a revised provision to protect vulnerable consumers. Rule 2.3.10 states that *“premium rate services must not directly seek to take advantage of any vulnerable group or any vulnerability caused to consumers by their personal circumstances.”*
- 3.14 Whilst this is a significant improvement on the PhonepayPlus Code of Practice (11th Edition), we believe it could be further amended to add greater clarity and market certainty. Greater clarity will not only aid industry but it will also ensure that the provision adequately protects vulnerable consumers, whether such vulnerability arises on an individual, circumstantial or transactional basis.
- 3.15 PhonepayPlus is therefore considering whether alternative wording could add clarity as well as better protect vulnerable consumers, particularly when they are often disproportionately affected by a PRS. While seeking to do both, we appreciate that it is important to help ensure that the market functions effectively and that any change to this provision should not come at the expense of market certainty or compliant members of industry. We would welcome any further thoughts on this area prior to formal Code consultation.

Section 4: Enforcement and Technical Review

4.1 The enforcement and technical theme contains the largest number of proposed changes under the Code review, most of which are relatively minor, although some are more significant. As set out in the Call for Inputs, the proposed changes under this theme are designed to streamline a number of procedures, add clarity where needed and reduce regulatory burden. Changes to 3.4.12 and 5.3.8 (c) are being taken forward to consultation and are not reviewed again here. The more major changes being considered under this theme, including to investigations procedures, prior permissions and reviews, are:

Investigations Procedures

4.2 The Call for Inputs aired a number of different proposals to improve our investigations processes. Having reviewed responses to the Call for Inputs and considered the implications of the proposals, we now plan to take forward two of the four proposals set out in the Call for Inputs.

4.3 PhonepayPlus believes that the definition at Paragraph 4.3 as worded could limit the effective and proportionate use of a Track 1 procedure. We therefore propose to alter the definition to clarify its scope and allow for a broader range of considerations to be taken into account when deciding to use the Track 1 procedure. This should give us more flexibility in being able to use the procedure where appropriate.

4.4 However, we no longer intend to consult on the introduction of the power to impose low level sanctions on Track 1 cases. This was not well received in responses from the Call for Inputs and, on reflection, PhonepayPlus already has the power to levy administrative charges on Track 1 cases and will consider introducing them where appropriate in due course.

4.5 The other proposal set out in the Call for Inputs that will be included in the formal Code consultation is the formalisation of the earlier commencement of a Track 2 investigation. According to Paragraph 4.4 of the Code, a Track 2 investigation commences when a breach letter is sent to a provider. In reality, the investigation for a Track 2 case starts some time prior to the issuing of a breach letter. In certain circumstances, this timing difference can lead to an inability for PhonepayPlus to ensure revenues from a service causing harm are withheld before being paid out when it is appropriate to do so, particularly in circumstances where there is a significant risk that where any Tribunal sanctions are imposed they will not be complied with and/or administrative charges paid. Where for example refund sanctions are not complied with this can lead to significant consumer detriment.

4.6 We therefore propose to consult on introducing a requirement for PhonepayPlus to notify providers that a Track 2 investigation has started before a full breach letter is issued. Where there is justification for doing so, this would allow PhonepayPlus to seek a withhold at that point to ensure that any potential sanctions and/or administrative charges can be met.

4.7 The Call for Inputs also introduced the concept of a single member Tribunal for relatively simple, uncontested breaches of the Code, including, for example, breach of sanctions cases. It was felt that a single member Tribunal could reduce the costs of an adjudicated case for both PhonepayPlus and provider, if found in breach of the Code.

4.8 Having reflected on the merits of the proposal as well as stakeholder feedback, PhonepayPlus is of the opinion that such an outcome can be better achieved without a Code change. Any revision of process, therefore, will not involve a reduction in the number of sitting members of a Tribunal. We are looking at options in this area and will update stakeholders of any relevant progress in due course.

Prior Permissions and conditions for higher risk services

4.9 The transition from a prescriptive approach to regulation to an outcomes-based approach has proved successful and has resulted in a Code that is both flexible and technology-neutral. PhonepayPlus believes the current Code is now well understood by all stakeholders, represents a significant change in consumer protection and offers the appropriate regulatory framework for the PRS industry now and moving forward.

4.10 Since this successful transition, we have been considering the place of prior permissions within the regulatory framework. Prior permissions remain an important regulatory tool in helping PhonepayPlus to deal with higher-risk services that could otherwise lead to considerable consumer harm. However, we recognise that with an outcomes-based Code, we should use a more prescriptive approach sparingly and only where necessary and that conditions should be amended or dropped when changes in the market mean that they are no longer needed to protect consumers.

4.11 Given this, PhonepayPlus has decided to reassess the 17 existing regimes and take forward a new proposal to bring all appropriate prior permissions regime conditions into the next Code. We believe that this will simplify the regulatory landscape and reduce unnecessary regulatory burden whilst retaining protection for consumers.

4.12 Having decided to consider incorporating existing prior permission regime conditions into the Code, we are now considering best to achieve this. PhonepayPlus currently believes there are three options:

A. Annex all existing regimes conditions to the Code as they currently are. This would be a relatively simple change that would offer continuity and familiarity. However this option would be contrary to an outcome-based approach to regulation and therefore inconsistent with the original rationale for bringing the regimes conditions into the Code. This may not be an attractive option for these reasons.

B. Annex a streamlined version of the current regime conditions to the Code. An initial assessment suggests that a significant proportion of existing conditions within the 17 prior permission regimes, many of which were introduced prior to the transition to outcomes-based regulation, are now covered by the current Code. Any remaining conditions that are not covered by the Code would then be

placed as an annex, much like option A. We believe this option has some merits over option A above.

- C. Introduce a suite of conditions as an annex that can be applied to higher risk services. An initial assessment suggests that a number of conditions are consistent across the existing 17 prior permissions regimes. We believe this option achieves a degree of flexibility and lessens the need to introduce new conditions.

4.13 PhonepayPlus does not propose to remove the power to introduce a prior permission regime in an emergency situation (currently detailed at Section 3.10), if consumer detriment and market developments warrant additional measures. However, we intend to use the power sparingly and believe that an outcomes-based regulatory framework allows issues often previously dealt with using the prior permissions power to be enforced through the Code.

Reviews, Oral Hearings and Appeals

4.14 The Call for Inputs also summarised PhonepayPlus' intention to examine and potentially refine the review, oral hearing and appeals processes in the Code. Here, we update stakeholders on the more significant changes still under consideration – as well as those that are not. Minor changes proposed in the Call for Inputs and not mentioned here will be included in the full consultation in the summer.

4.15 Rule 4.7.3 sets out the right to review a Tribunal determination. As it currently stands, the provision states that an application for a review must “...*demonstrate that the Tribunal came to a decision which was so unreasonable that no reasonable Tribunal could have reached it.*” As discussed in the Call for Inputs, the Code review is considering whether this is too high a barrier for reviews and we hope to propose alternative language at the consultation phase.

4.16 The Call for Inputs discussed the option of introducing some form of test for an oral hearing. On reflection, this seems unnecessary. However, the rationale for introducing the test was to ensure that the oral hearing process is not abused, for example being used as a lever to achieve an early settlement. Therefore, PhonepayPlus intends to make clear in the Code that, unless there are exceptional circumstances, all cases should pass through the paper-based Tribunal before proceeding to oral hearing thus minimising costs for the parties and in respect of the provision of the oral hearing Tribunal.

4.17 Annex 3, Paragraph 11 details the maximum award for costs of an appeal Tribunal brought before the Independent Appeals Body (IAB). Currently the maximum the IAB can award to one or other of the parties is £30,000 towards costs (e.g. legal fees etc.) and £25,000 for the cost of the provision of the Tribunal. In consultation with the IAB, PhonepayPlus is minded to raise the maximum level of costs to £100,000 and maintain the cost of a Tribunal to £25,000. Both PhonepayPlus and the IAB believe that this more accurately reflects the costs that could potentially be incurred by the parties in progressing complex and lengthy cases to the IAB. Therefore recovery of costs should

not act as a deterrent to PhonepayPlus or providers who seek to appeal to the IAB should they have reason to do so. These proposed changes will form part of the formal Code consultation

Definitions

4.18 Since the Call for Inputs was issued, it has emerged that section 5.2 concerning the reach of the Code could be made clearer. PhonepayPlus intends to clarify this Code provision in the full Code consultation in the summer.

Section 5: Polluter Pays

5.1 PhonepayPlus' polluter pays strategy aims to ensure the few that operate in breach of the Code do not drive up the cost of regulation for compliant members of the industry. We have been considering how the sanctioning powers contained in the Code could be amended to support this strategy.

Sanctions

5.2 The Call for Inputs outlined the areas of Section 4.8 of the Code that PhonepayPlus is reviewing to ensure that the sanctions regime is clear and effective. These were Paragraphs 4.8.2 (i), (j) and (k), 4.8.6 and 4.9.3. All of these will be taken forward to full consultation.

5.3 The Call for Inputs also discussed amending Paragraph 3.5.1 concerning withholds, either to increase the length of the current withhold period on networks, or to extend the current requirement on networks to Level 1 providers also. After further consideration, we are no longer proposing to amend this provision.

5.4 The proposal for an earlier commencement of the Track 2 procedure (see 4.5 above) is also integral to strengthening the implementation of polluter pays, as it will enable PhonepayPlus to ensure that, where appropriate, withholds are in place at an earlier stage so that fines and refunds are paid in cases where they otherwise might not be.

Section 6: Next Steps

The purpose of this paper is to update stakeholders on progress with the Code review. We therefore ask no formal questions in this paper. However, we welcome responses and comments to the proposals set out in this update. Comments should be submitted by email to Jonathan Levack via jlevack@phonepayplus.org.uk by no later than 26 March 2014. We plan to publish a full consultation on the Code in summer of this year.

Confidentiality

We reserve the right to publish any responses received to this update. If you want all or part of your submission to remain confidential, you must make a specific request for this, along with the reasons for this request.