

Response to the PhonePayPlus Discussion Paper: “Developing the next PhonePayPlus Code of Practice”

Submitted by **AQA 63336**, content providers of the text messaging question and answer service

General comments and observations

We support the development of a Code based on principles, supported by detailed guidelines, rules and case precedent. This will give PhonePayPlus flexibility to address new cases as they arise, rather than having to apply a prescriptive and rigid set of rules when they may not be wholly appropriate. However, all successful regulatory regimes that rely on principles require a very good understanding of how those principles will be interpreted, backed up by a wealth of case precedent. The PhonePayPlus market is still relatively young and, as such, there are fewer examples of what constitutes best practice and what may be considered reasonable. It is therefore appropriate in this market to retain and build on the detailed rules and guidance already in place. We particularly feel that the Themes in the areas of “Transparency” and “Privacy” have to be tightened, as we consider these areas key in developing trust in the Premium Rate Service Market.

Section Three of the document indicates a move towards apportioning responsibility to those members of the value chain who are directly responsible for breaches. We support this aim and believe that appropriate sanctions should be imposed on the Information Providers who breach the Code. However, we believe that quick and effective enforcement of the Code may in some cases be better delivered through greater emphasis on controls and supervision by the Service Providers and the Mobile Network Operators. These have the direct relationships with the Information Providers and the means of stopping rogue services immediately. We therefore, support proposals to increase the focus on due diligence, risk assessment and controls.

Q1. Do you agree with our broad assessment of the range of harms that may impact upon consumers? If not, why not?

We agree with the broad assessment of the range of harms.

Q2. Do you agree with our assessment and definition of Outcomes and supporting themes? If not, why not?

Outcomes

We agree with the outcomes although we think that some of them could be made clearer for consumers. PhonePayPlus’ own statistics suggest that a majority of breaches occur in a number of limited areas. In these areas we feel that the outcomes should be more explicit. Therefore, we believe you need the following two specific outcomes:

- Prevent unsolicited communications
- Clear transparent pricing

Supporting Themes

We believe that tight drafting of the supporting themes will be the key to effective regulation. All users must understand how the principles of the Code will be interpreted.

Whilst the Code must be written to allow flexibility to address future developments, new technologies and new services, it must also make clear what is acceptable for current services.

We believe that some of the supporting themes as currently drafted are still too general and open to interpretation and do not address the current abuses of the Premium Rate Services market. The existing rules and guidance notes provide a good basis of what is, and what is not, acceptable behaviour. As further cases are considered by the PhonePayPlus Tribunal, this will result in further adjudications and further precedents.

With that in mind we have the following specific issues on the current themes as drafted in the discussion paper

Transparency:

We believe it is unacceptable for customers to be misled in any way over pricing. Transparent pricing is not just the display of pricing at a specific place and at a specific point in time. It is also about not trying to mislead customers on pricing over the life of the service. Given that Premium Rate Purchases can be made at any time, often well after any promotion was seen or the last purchase was made, customers should have a reasonable expectation that prices will remain stable. Regular changes of pricing and short-lived promotions or free offers have the effect of making the real price less transparent. Therefore, the transparency theme needs to also address this.

Privacy:

Currently the theme states *“Providers of Phone-paid services must not directly promote to consumers, or otherwise contact them, unless the consumer has previously purchased from them or otherwise given their express consent”*.

As worded above, the mere purchase of a ringtone or other Premium Rate product would give the Service Provider the right to spam a consumer in the future. Under no circumstances should this be acceptable. Purchasing from a company does not imply consent.

There is existing legislation in this area (the Privacy and Electronic Communication Regulations 2003). This states:

“Electronic mail

Electronic mail is emails, SMS (text), picture, video and answer-phone messages. Electronic mail marketing messages should not be sent to individuals without their permission unless all these following criteria are met:

- 1. The marketer has obtained your details through a sale or negotiations for a sale.*
- 2. The messages are about similar products or services offered by the sender.*
- 3. You were given an opportunity to refuse the marketing when your details were collected and, if you did not refuse, you were given a simple way to opt out in every future communication.”*

Consumers simply purchasing a Premium Rate Service are neither given an opportunity to refuse marketing nor are they given a simple way to opt out. We urge PhonePayPlus to enforce and tighten the existing Code in this area rather than weaken it and make it consistent with the Act. Your current wording of the supporting theme would make the thrust of proposal in this new Code weaker rather than stronger than the existing regulation.

Q3. Can you identify any Outcomes for consumer that you consider we may have overlooked?

No, although as pointed out above we believe that “Transparent Clear Pricing” and “Prevention of Unsolicited Communications” are the two fundamental outcomes that are required to restore trust in the Premium Rate Services market and hence these should be given greater prominence.

Q4. Do you agree with our Outcome and supporting themes about complaints handling? Do you have any other suggestions

Yes, this is acceptable.

Q5. Do you agree that PhonepayPlus is right to suggest that it should be able to revoke permission or consent where it is proven that Conditions have been breached and where such an action would be justified and proportionate? If not, why not?

Yes, we believe it is acceptable.

Q6. Do you agree that PhonepayPlus is right to consider allowing parties along the value-chain to apply for prior permission when in a contractual relationship to provide a service?

Yes.

Q7. Do you agree that PhonepayPlus is right to suggest that an applicants previous breach record is a factor that it is entitled to consider as part of a consideration of an application for permission or consent? If not, why not?

Yes, we believe it is appropriate.

Q8. Do you agree with our assessment that ALL participants in the value chain for delivery of phone-paid services have responsibilities for compliance? If not, why not?

All participants in the value chain have responsibilities for various aspects of compliance. It is therefore appropriate that sanctions are levied directly on those responsible for breaches of the Code.

We believe the proposed new approach will inevitably involve longer investigation times and more disputes over who is responsible for what. PhonePayPlus will have to engage with significantly more third parties and deal with a greater number of appeals. Therefore, whilst we accept that all participants have responsibility we still believe that the current process, which focuses responsibility on the Service Providers, has some merit. Accordingly, we believe that the Service Providers and MNOs should be responsible for their controls and the supervision of Information Providers. We therefore support a greater emphasis on these factors.

Q9. Such a change in approach may have differential impacts on different providers in the value-chain. What are these impacts likely to consist of and what business or consumer benefits do you think will arise?

Ultimately, the consumer will only benefit if a rogue service is prevented from setting up and if it does set up, it is closed down as quickly as possible. Hence, effective enforcement is key in this area. The Service Providers and MNOs may be more effective tools to ensure enforcement happens quickly.

We therefore support proposals which emphasise the responsibilities of Service Provider and MNOs to put in place systems which ensure proper due diligence of Information Providers and also for proportionate monitoring of these businesses going forward. There should be proportionate penalties for failure of controls and supervision in this area.

Q10. Do you agree with our analysis of the outcomes of Assessment and Control? If not, why not?

We agree.

Q11. What thoughts do you have on our suggested approach to a registration scheme?

We support the registration scheme.

Whilst it might be appropriate for PhonePayPlus to host such a database, in our opinion it is the Service Provider and MNOs and TCPs who are best equipped to populate such a database. As part of their due diligence and other controls they will be getting this information and checking it.

Q12. What other suggestions do you have for how we could create greater incentives for providers to co-operate with PhonepayPlus in the event of investigations?

We have no comment on this.

Q13. Do you agree with our proposed approach to reforming the Informal procedure? If not, why not?

We support the idea of bringing in the concept of an informal breach. However, there need to be clear guidelines on what are informal or inadvertent breaches versus what are systemic or intentional breaches. For example, an accumulation of say 3 informal breaches should constitute a major systemic failing. In these cases we feel that a formal adjudication should then be issued covering systemic failure.

Q14. Do you agree with our proposal that our arrangements for Standard and Emergency procedures should be retained? If not, why not?

We are comfortable with the existing arrangements.

Q15. Do you agree with our approach and what regulatory impacts, costs and benefits do you foresee?

Our concerns surround the lack of vigorous enforcement of the existing Code and the very long time it takes to investigate and adjudicate on breaches. It is unclear how the new approach based on principles will actually improve any of the matters above. Indeed loosely worded principles, without detailed guidelines will inevitably slow the process down as defendants argue for their interpretation of a principle.

Q16. What would be the costs and business impacts associated with such proposals? What consumer benefits do you think would accrue?

See answer to Q15.

Q17. What thoughts do you have about improving PhonepayPlus' effectiveness of fine collection and do you have any specific proposals for how we could better secure fine collection through changes to the Code?

We have no comment in this area.

Q18. Do you agree with PhonepayPlus' proposals for new terms in respect of the current terms "Service Provider" and "Information Provider"? If not, can you suggest alternative terms?

We have no problems with the proposed new terms.