

**Q.1: Do you agree with our assessment of digital marketing in the PRS context and our overall approach for dealing with it? If not, why not?**

I consider that PhonepayPlus is downplaying the problems and exaggerating their activity against them.

In paragraph 2.10 it is stated “In the vast majority of cases, the digital marketing of PRS is legitimate and serves both the interests of businesses and consumers”. In my experience a large proportion of promotional material for PRS is non-compliant (including that for legitimate services operated on or on behalf of organisations that it would be reasonable to expect to follow regulatory requirements as a matter of routine). In digital media the level of non-compliance appears to be higher than elsewhere so I would be surprised if a majority, let alone a “vast majority” of digital marketing for PRS is legitimate (which I take to mean complying with the PhonePayPlus code, the CAP code and any relevant legislation). As this assertion differs so much from my experience, it is difficult not to conclude that either it is wishful thinking or any research from which it was obtained had a significant bias.

Paragraph 2.29 refers to PhonePayPlus’s “active approach to enforcement” and mentions that 10 cases were taken to the tribunal in 2012 which it is elsewhere indicated corresponds to 861 complaints. Compared with the level of obviously non-compliant digital marketing of PRS this seems a tiny number. Furthermore, it is implied that the level of complaints is about 4200 per year, suggesting that formal action was taken covering little over 20% of complaints. While it is reasonable to assume that some of the remaining complaints did not provide evidence of breaches or any breaches have been resolved by informal action, these figures (without any more detailed breakdown) would suggest that no effective action has been taken in many cases.

It should also be noted that I have observed the scam in case study 2 was still in operation in the last few weeks (i.e. after the consultation was published).

**Q.10: Do you agree with our illustrative representation of affiliate marketing? If not, why not?**

**Q.11: Do you agree with our consideration of affiliate marketing and our expectations? If not, why not?**

**Affiliate based scams**

I consider that it useful to distinguish between two different situations involving affiliates:

- The affiliate is genuinely promoting the PRS, even if that promotion is being done in a misleading or otherwise non-compliant way.
- The affiliate is operating a scam which uses the PRS as a charging mechanism (which I will refer to as an affiliate based scam).

The impression that I get is the PhonePayPlus has primarily considered the first of these without taking into account important differences between the two scenarios and that the second is potentially a more serious problem. I consider case study 2 a good example of an affiliate based scam.

An important way in which these differ is that in the case of an affiliate based scam many details of the underlying PRS (e.g. number/shortcode and nominal legitimate purpose) are irrelevant so can be easily changed. Hence if regulatory action is targeted at a particular underlying PRS, rather than the affiliate based scam itself, the best outcome that can be realistically expected is that the specific underlying PRS is detached from the scam - which can continue using different underlying PRS(es). I assume this is the explanation for the continued operation of the scam in case study 2.

In the case of affiliate based scams it may be appropriate to consider if the affiliate may fall within the definition of a Level 2 provider. For example, in case study 2, the affiliate would appear to be “the person who controls or is responsible for the operation, content and promotion of” a prize claim scam “service” and that this “service” makes use of a charging facility provided by the level 2 provider of the quiz service in a manner analogous to how the services of a level 1 provider are used by legitimate services.

A further point to consider is whether the underlying PRS exists primarily for use in affiliate based scams rather than for any purported legitimate purpose. In my opinion this should be treated as an aggravating factor.

### **Due diligence**

I agree that PRS providers should be expected to carry out due diligence on affiliates, however I consider that the proposed guidance on this is inadequate and may be counterproductive.

It would be reasonable to assume that if action is taken against a PRS provider due to non-compliant marketing by an affiliate that they may present as a mitigating factor that they had carried out due diligence according to the guidance. However it is difficult to see how due diligence as described in the existing guidelines would identify affiliates likely to engage in misleading advertising. An important difference from the case of due diligence being performed on a level 2 provider is that PhonePayPlus does not publish details of affiliates found to be involved with breaches of the code.

Based on this there are two scenarios which I think are likely:

- A level 2 provider, who is attempting to act responsibly, carries out due diligence following the guidelines on an affiliate who has previously been involved in breaches of the code for which another level 2 provider has been fined. This procedure does not link the affiliate to the breach and the affiliate’s prior (non-compliant) involvement with PRS is considered a positive point.
- A level 2 provider, who wishes to contract with an affiliate they (unofficially) expect to promote a PRS in a misleading way, can go through the motions and assemble the correct documentation without needing to carry out any checks which would result in the intentions of the affiliate being recorded.