

Vulnerability Guidance

Statement following consultation

SUMMARY

1. PhonepayPlus issued a consultation on draft vulnerability guidance on 23rd March 2016. We received 7 responses to the consultation. 4 responses were received from providers of premium rate services, 1 from a trade association, 1 from a consumer body and 1 from an individual.
2. Responses were largely supportive of the draft guidance. The majority of respondents were particularly welcoming of the hypothetical examples contained within the draft and the general tone of the guidance. A number of respondents requested that we should add to the hypothetical examples and we intend to do so in due course. On balance, we felt that we should publish the guidance rather than waiting until we develop further examples as we are confident that the guidance as it stands now will assist providers in meeting their obligations set out in the Code of Practice.
3. Some respondents did express a few concerns with the draft guidance and the interpretation of the Code. We have made a number of minor amendments to the draft guidance in response to comments received from stakeholders. These are highlighted in the annex to this document. The finalised version of the guidance is published on the PhonepayPlus website today.

BACKGROUND

4. Rule 2.3.10 of the 13th Code of Practice offers specific protection for vulnerable consumers. Consistent with our regulatory approach and corporate values PhonepayPlus has developed and published guidance on a number of aspects of the Code of Practice. The purpose of this guidance is to:
 - Assist providers with interpreting the Code and remaining compliant with it
 - Assist providers with proactively ensuring they mitigate any risks of taking unfair advantage of vulnerable consumers
 - Contribute to building trust in the market
 - Define who is likely to be considered as vulnerable consumers by detailing some of the characteristics and circumstances that may lead to a situation of vulnerability
5. We developed the draft guidance in consultation with a working group which included both industry representatives and consumer advocates, prior to the

formal consultation and we are grateful to the members of that group for their input which shaped the approach and content of the document.

STAKEHOLDER FEEDBACK AND PHONEPAYPLUS RESPONSE

6. As noted above, most of the responses were supportive of the guidance including in one case offering positive comment on the approach taken to developing the guidance. One response from an individual suggested a completely different approach to consumer protection in relation to premium rate services without offering specific comment on the guidance itself.
7. We have made a number of minor amendments to the guidance in response to comments and suggestions received as well as to ensure that it is clear. A number of respondents suggested that the guidance would benefit from further hypothetical examples. We are happy to accept this suggestion and will work with stakeholders to develop further examples. Once we have done so we will add them to the current guidance and publish an updated version.
8. However, stakeholders also offered a number of more general comments which are not specifically addressed by the amendments we have made to the guidance. In this regard, we wanted to highlight the following:
 - **The role of guidance** – One stakeholder commented that a particular interpretation of the draft guidance would automatically lead to some consumers being classed as vulnerable when in fact their circumstances meant that they were not. We have made one clarificatory amendment to the list of characteristics that may lead a consumer to be considered vulnerable but we would also stress that guidance is intended to assist providers in complying with the Code of Practice. It is neither part of the Code nor is it intended to be a rigidly interpreted checklist to ensure compliance with the Code.
 - **Identifying vulnerable consumers at point of sale or engagement** – Stakeholders commented that it is not always easy to identify whether a consumer is vulnerable when they engage with a premium rate service. We appreciated this fact and we have changed the guidance to make this point clearer. Indeed, the guidance has been developed with this challenge in mind. In our view, rigorous risk assessment prior to launching a service and ongoing monitoring while a service is in operation are crucial to reduce the risk of consumer detriment, particularly to those considered vulnerable, precisely because it is difficult to know whether an individual consumer engaging with the service may be vulnerable.

- **The use of spending caps** – It was suggested that spending caps might in some circumstances provide additional protection for vulnerable consumers. Spending caps, or more accurately the obligation to comply with any spending caps set by PhonepayPlus on certain service types, is set out in the Code. Indeed, providers are required to implement these caps regardless of the likelihood that a vulnerable consumer may engage with a service or be at risk of suffering detriment¹. Given that these are considered elsewhere, we do not believe the guidance needs to consider these. However, we will keep this issue under review.
- **Unfair advantage** – Some stakeholders commented on the issue of intent in relation to taking unfair advantage of a consumer. The Code of Practice is outcomes-based. Therefore, if harm to vulnerable consumers has taken place, PhonepayPlus' primary focus will not be on the intent of a provider, and in particular whether or not they intended to take advantage of vulnerable consumers. However, PhonepayPlus will have to demonstrate that the provider's action or inaction resulted in unfair advantage being taken and that the risk of such a result was reasonably foreseeable.
- **Reasonable foresight** – A few responses expressed concern at the retrospective and subjective nature of reasonable foresight. Reasonable foresight aims to introduce a measure of proportionality into the assessment of compliance with Rule 2.3.10. This means that providers are not required to do more than is reasonable in considering and taking steps to limit the likelihood of vulnerable consumers being taken unfair advantage of. While we cannot provide absolute clarity whether certain actions will meet this criteria in the event of consumer detriment – this is a matter for the independent Tribunal to determine, we hope this provides a degree of comfort for providers.

We are committed to ensuring this guidance is fit for purpose and, given its sensitive nature, we will keep it under active review. Alongside adding further hypothetical examples to the guidance in the coming months, we will review the guidance in a year's time, amending if necessary subject to the usual consultation process.

¹ Services currently subject to spending caps can be found here: <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/Annex-B--Notice-of-actions-and-thresholds-under-paragraph-312.pdf>

Annex: Amended version of Vulnerability Guidance, highlighting changes following consultation

1. The Code of Practice offers specific protection for vulnerable consumers. The vulnerable consumers guidance is designed to assist providers across the value chain and service types ~~to~~in ~~ensur~~inge that they meet the ~~Code's~~ requirements of the Code. The key points for providers to take note of are:
 - The new Code Rule, which came into effect with the launch of the 13th Code of Practice;
 - PhonepayPlus' definition of vulnerable consumers;
 - The risk factors providers should consider;
 - What is meant by “unfair advantage” and “reasonable foresight”;
 - Questions to consider when designing an effective strategy to meet the ~~Code's~~ requirements of the Code.
2. Consumers can be vulnerable for a variety of reasons, either based on their characteristicss or circumstance. This can result in vulnerable consumers being less likely to make fully informed, rational decisions. Vulnerable consumers may lack confidence with technology or be less able to understand the deal presented to them or its value, or less able to assess the true nature of the service or be overly reliant on services. Vulnerable consumers, therefore, may be more likely to suffer detriment.

Rule 2.3.10

3. The 13th Code ~~brought in~~introduced a ~~new~~revised vulnerability provision that is intended to offer vulnerable consumers effective protection from harm. Rule 2.3.10 reads:

PRS must not be used or provided in such a way that it results in an unfair advantage being taken of any vulnerable group or any vulnerability caused to consumers by their personal circumstances where the risk of such a result could have been identified with reasonable foresight.

4. The ~~new~~revised Code provision is consistent with PhonepayPlus' regulatory approach, placing emphasis on outcome as opposed to the manner in which something was done (e.g. intentionally or recklessly). As well as emphasising outcome, the provision introduces two new concepts that providers should be aware of: “unfair advantage” and “reasonable foresight”.

Who is a vulnerable consumer?

5. PhonepayPlus defines a vulnerable consumer as:

~~Someone who~~A consumer who is ~~can be~~ less likely to make fully informed, rational decisions due to a specific characteristic or personal circumstance, ~~that and can lead to~~suffer detriment as a result.

6. Vulnerability due to characteristics - Traditionally consumers were considered vulnerable because of a defined characteristic. Characteristics that may lead to a consumer being considered vulnerable include (but are not limited to):

- ~~English as a second language~~
- ~~Low literacy skills~~ Lack of English language or literacy skills
- Disability
- Age – children (defined as under 16 years of age) and the elderly (usually defined as over 65 years of age)
- Learning difficulties
- ~~Long term financial hardship~~
- Those with a mental illness

7. Vulnerability due to circumstance - A temporary or unexpected change in circumstance that might cause distress and result in a situation of vulnerability. These are generally considered significant life events that can effect anyone and are often unexpected. Unlike characteristic-based causes of vulnerability, circumstantial vulnerability tends to be more short or medium term and are temporary in nature. These include for example (again not limited to):

- Bereavement
- Job loss or other loss of income or livelihood
- Victim of a natural disaster (e.g. flood)
- Sudden and unexpected situation causing strife (e.g. collapse of a financial institution, ~~or~~ illness or relationship breakdown)

Unfair Advantage

8. In contrast to previous iterations of the Code, unfair advantage focuses on outcome rather than any perceived intention to take advantage. To illustrate, what might be considered unfair advantage, we have developed some hypothetical examples to illustrate a) whether a consumer may be considered vulnerable, b) whether the provider may have taken unfair advantage of that consumer, intentionally or not and c) what providers might do to avoid such a situation occurring².

² For the avoidance of doubt the examples may raise other Code breaches which we do not seek to identify here.

Hypothetical example	Is the consumer vulnerable and could this hinder effective decision making, potentially leading to detriment?	Has the <u>promotion or service resulted in the consumer being</u> taken unfair advantage of?	How could a provider avoid taking unfair advantage of consumers?
<p>A psychic services user who has recently experienced a significant life event (e.g bereavement). The provider of the service proactively encourages the user to call back on multiple occasions to reach a satisfactory conclusion, whereas one or two calls may have sufficed.</p>	<p>Yes, the consumer may be suffering as a result of their sudden change in circumstances. This could play a role in the consumer assessing the value of the service or becoming over-reliant on it through a feeling of dependency.</p>	<p>Yes unless further safeguards have been implemented to prevent the consumer being taken advantage of. The operator of the service may have acted insensitively to the consumer's vulnerability to create a dependency on their service.</p>	<p>Operators of the service will need to be alert to a consumer's potential vulnerability and, if identified, act in a sensitive manner that does not seek to profit from their situation.</p>
<p>An elderly consumer enters a competition service paid for on a weekly subscription basis. The consumer discovered the content online and entered the service in a clear and transparent manner but was unaware that it was a subscription.</p>	<p>Yes, in a traditional sense that may manifest in a lack of confidence in using technology. The instant, frictionless payment experience combined with the consumer's potential lack of confidence may result in a sub-optimal decision being made.</p>	<p>In this example, it is unlikely that the consumer has been taken unfair advantage of.</p>	<p>Providers should consider whether their service journeys are clear and unambiguous, mitigating the risk of such a situation arising on numerous occasions and ensure they are monitoring their complaints to identify any patterns.</p>
<p>A payday loan brokerage service over states the chances of a consumer making a successful application for a loan and subsequently lengthens the call to their service beyond what the consumer deems necessary.</p>	<p>The likelihood is that consumers contacting such a brokerage are in a situation of some financial difficulty and so are likely to be considered vulnerable.</p>	<p>Yes, the provider's <u>promotion</u> would likely be considered to have unfairly targeted and <u>thereby</u> taken advantage of the consumer's circumstance by overstating the chances of securing a loan and unduly lengthening the call. A broker is likely to be investigated in circumstances where</p>	<p>The service and likelihood of securing a loan would need to be transparent and fair as per the Code of Practice.</p>

		marketing was directed to people known to have been refused a loan elsewhere.	
A nine year old child enters into a competition service by clicking on a banner ad in a popular children's app. This led directly to a PayforIt flow, which the child enters	Yes, in that a nine year old child is less likely than an adult to understand the deal presented to them (and the paid nature of it) and the value of the purchase they are making.	Yes, in that a service was advertised in a known popular children's app.	Because the service was advertised in an app designed for a younger audience, the provider will need to demonstrate that they have taken additional steps to mitigate the risk of this situation arising. This may include specifying that marketing must not be directed at children, monitoring complaints for any involving minors and acting appropriately if any have been identified. (We appreciate that it is impossible to completely eliminate the risk of this happening all the time). Without such evidence, the provider will likely breach the Code.
A male in his twenties engages in an adult service late on a Friday night after drinking alcohol. The consumer later regrets their purchase.	Certainly, the consumption of alcohol could affect the consumer's ability to make an effective decision. However, this circumstance is very short term, self-induced and the service is designed to fulfil a want rather than a perceived need.	Unlikely, while the consumer may have made a sub-optimal decision that they later regret, they are unlikely to be considered vulnerable. However if the provider had deliberately targeted drunk consumers or had altered their service in response to the consumer's circumstances, then	Providers should consider where it is appropriate to advertise and the risks associated with this.

		they would likely be considered to have taken unfair advantage of the consumer.	
--	--	---	--

Reasonable Foresight

10. The requirement to exercise “reasonable foresight” is designed to mitigate the risk of a provider ~~unintentionally~~ taking unfair advantage of vulnerable consumers. ~~(PhonepayPlus believes that taking intentional advantage of vulnerable consumers is totally unacceptable regardless of the actions a provider might take to mitigate risk.)~~ In short, providers are expected to take steps to actively identify and monitor risk and take appropriate action if there is a risk that the service may take advantage of vulnerable consumers.

11. PhonepayPlus appreciates that is not always easy or possible to identify at the point of use whether a consumer is vulnerable or not. Therefore to help providers act with reasonable foresight, PhonepayPlus has developed a series of questions designed to contribute to the approach providers take to identifying risk.³ Clearly, not all eventualities can be predicted but we believe such steps will help reduce the likelihood of consumer detriment. This list, which was developed in consultation with industry, is not exhaustive. Rather, this is both a guide and starting point for providers that can be adapted to a specific business model or augmented where appropriate. We strongly recommend that actions taken to ensure you are acting with reasonable foresight are evidenced and auditable.

12. The key aspects of this approach are to ensure that:
 - a. The risks of potential harm to vulnerable consumers have been thoroughly assessed
 - b. Ongoing risks are monitored when ~~your~~a service is in operation
 - c. Once an issue has been identified, adequate steps are taken to address it.

³ This approach is similar to the approach expected of providers that contract with affiliate marketers to promote their service. In this case, providers are expected to have thoroughly assessed the risks to consumers of contracting with an affiliate marketer or network, taken steps to mitigate and monitor that risk and respond to any issues accordingly. For more information about this approach please see: <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/Consultation-PDFs/Affiliate-Marketing-discussion-paper-published.pdf>

<h2 style="text-align: center;">Risk assessment</h2>	<h2 style="text-align: center;">Monitoring risk</h2>	<h2 style="text-align: center;">Response to issues</h2> <p style="text-align: center;">(this will depend on the nature of the risks and issues identified)</p>
<ul style="list-style-type: none"> • What is my target audience? Is it likely to include vulnerable consumers or a particular type of vulnerable consumer? • Have I considered how a vulnerable consumer may come into contact with my service? • Who do I intend to market to and how? Is this likely to attract vulnerable consumers? • Am I advertising in ways which will attract vulnerable consumers? • Is my proposed service and consumer journey clear and unambiguous? • Will I have oversight of my marketing campaigns? 	<ul style="list-style-type: none"> • Who is using my services? • What visibility do I have of consumer complaints relating to my service • Am I able to identify complaints from vulnerable consumers? • Is my complaint handling sufficiently sensitive to the needs of vulnerable consumers? • Are there patterns in my complaints? Do a number involve, for example, children (or some other vulnerable group)? • Are consumers knowingly and willingly engaging in my services? • Do I have appropriate oversight of my advertising? • Am I advertising in places that will attract vulnerable consumers? 	<ul style="list-style-type: none"> • If a higher than normal level of complaints are from those who may be vulnerable, have we thoroughly assessed the causes of this? • If an advertising channel is suspected of driving vulnerable consumers to my service, how can I address this with my marketing partners? • If I am likely to be attracting children to my services and, if so, should I have parental controls? • Do I need to change my service flows to ensure they are clear and unambiguous? • Are there additional steps that I can take to prevent the service provision taking unfair advantage of consumers? • Is redress appropriate and, if so, what sort?

Other Considerations: Complaint Handling

12. There are various ways a PRS provider can respond to its assessment of consumer vulnerability. ~~#~~ [Such assessment](#) can help businesses plan consumer engagement and marketing campaigns, improve customer care facilities and establish an effective complaint handling protocol.
13. The Code requires providers to handle consumer complaints quickly, easily and fairly. Complaints from vulnerable consumers are no different. Complaint handling that is sensitive and aware of the potential for consumer vulnerability should form part of a provider's approach to meeting this requirement. [Providers](#)

are encouraged to listen to complainants and be aware of both the explicit and implicit signs of potential consumer vulnerability⁴.

⁴ The Direct Marketing Association produced a guide for call centres on how to deal with vulnerable consumers. While this is a little out of date and not entirely focused on the issues that PRS providers will face, it may be of use when developing a sensitive call handling process. See: http://dma.org.uk/uploads/call-centres-vulnerable-consumers_final_53d7c237289c1.pdf