

Adequacy of information provided to consumers prior to entering a contract or obligation to pay

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Who should read this?

This compliance update is relevant to all providers of premium rate services (PRS), but particular attention is required from providers of services sold across the internet and using direct operator billing, premium SMS and the Payforit (PFI) scheme to charge.

This compliance update is intended to provide broad guidance to assist providers in ensuring that premium rate services comply with the relevant parts of both the PhonepayPlus Code of Practice (“the Code”) and the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 (“the Regulations”).

Background

PhonepayPlus has recently seen a significant increase in the number of complaints from consumers who claim to have been unaware that they have entered into a service for which they incur charges to their telephone account whilst browsing on the web and clicking on active buttons using their handsets or other devices. This is particularly an issue with, but not limited to, mobile internet-based services which charge per page or item viewed, and subscription-based competitions.

The increased convergence between PRS and other payment methods, where PRS is now often just one payment option of several for a web-based service, is in turn increasing the consumer expectation that the standard of information provided about price and other key terms plus the manner of opt in to those charges will be consistent with the standard which the larger websites and app stores have set.

It is PhonepayPlus’ view that more consistent standards will benefit both consumers and the PRS market as PRS continues to converge with other payment options in respect of them being offered for the same products and services.

PhonepayPlus is also mindful of the Regulations which came into force on 13th June 2014. Amongst other things, the Regulations place responsibilities on providers to ensure clarity and consumer understanding before the consumer enters into a financially binding contract with the provider, and subsequent to the contract being concluded. In these respects the Regulations are generally consistent with existing requirements in the Code.

The Code and the Regulations

In light of the increased number of complaints received and our ongoing drive to ensure that high standards in the provision of consumer information are achieved and maintained, we would draw providers’ attention to relevant provisions of the Code and the Regulations. In terms of the Code, providers should be aware that:

- Rule 2.2.1 of the Code requires consumers of premium rate services to be fully and clearly informed of all information likely to influence the decision to purchase before any purchase is made.

- Rule 2.2.2 of the Code requires that all written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Existing PhonepayPlus Guidance states that promotions that do not make it clear and prominent that the service they are promoting will be charged using a subscription mechanic are likely to be found in breach of the Code.
- Rule 2.2.5 of the Code requires that information about cost be presented in a manner which is prominent and proximate to any call to action (such as an active button). Existing PhonepayPlus Guidance states that where pricing information is presented in the middle of the terms and conditions of a service, promotion or product, rather than as clear and correct 'standalone' information, this is unlikely to be viewed as compliant with the Code of Practice by a PhonepayPlus Tribunal.
- Rule 2.3.1 of the Code requires that consumers of premium rate services must be treated fairly and equitably.
- Rule 2.3.2 of the Code requires that providers must not mislead or be likely to mislead in any way. This can include misleading by inclusion of false or confusing information, or by omission of information which is important to the consumer's decision to purchase.
- Rule 2.3.11 of the Code requires that, where the means of termination of a service is not controlled by the consumer, 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.

Providers should note that where a PhonepayPlus Tribunal finds a breach of any of the above Rules, it is likely to be viewed as "serious" or "very serious" (depending on the circumstances of the case).

Providers should also take note of the Regulations, which place particular focus on "distance selling" contracts, a subset of which is the distance selling of electronic and digital goods and services. We anticipate this will cover the majority of PRS. However, the Regulations do contain a few specific exemptions. For instance, Regulation 6 exempts certain types of service (such as contracts for licensed gambling within the meaning of the Gambling Act 2005). We would urge providers of services listed in Regulation 6 of the Regulations to seek independent, expert legal advice.

Providers should be aware that a breach of the requirements of the Regulations may also constitute a breach of the legality rules within the Code. Providers should note the requirements of Code Rule 2.1.1 that premium rate services must comply with the law. In the UK, the Regulations are enforced by Trading Standards and a number of other bodies, including Ofcom, under the auspices of the Competition and Markets Authority (CMA). We will work closely with Ofcom, Trading Standards, the CMA and other enforcement authorities associated with the Consumer Protection Partnership where we have information which suggests that breaches of the Regulation may be taking place and may refer cases to them for investigation.

This compliance update is not intended to advise providers fully on compliance with the obligations imposed by the Regulations, nor does it constitute legal advice. Providers are urged to seek legal advice to ensure that their services comply with the Regulations.

Next Steps

The following steps should be considered by providers to assist them in ensuring they meet the relevant obligations under both the Code and the Regulations. These steps are not intended to be exhaustive and therefore providers are encouraged to seek compliance advice from PhonepayPlus in relation to compliance with the Code of Practice and to seek legal advice in relation to compliance with the Regulations.

Information to be provided to the consumer before they enter into a distance contract - Rules 2.2.1, 2.2.2, 2.2.5 and 2.3.2 of the Code and Regulation 13

Providers (who will normally fall within the definition of “traders” in the Regulations) must provide all relevant information about the product/service for sale, ensuring that the consumer can make an informed decision to enter the contract. This should cover the following:

- all of the main characteristics of the service
- the total costs and any subscription information, including price and billing period, as appropriate
- where a service is subscription-based, the provider of the service must detail the method of exit from the service or termination of the contract, to the satisfaction of paragraph (s) of Schedule 2 of the Regulations and Rule 2.3.11 of the Code
- the provider must also provide information as to their identity and relevant contact details for complaints and enquiries

For more information about the method of complaint handling, especially where a provider intends to offer a consumer contact telephone number, please see PhonepayPlus Guidance on Complaint Handling.

The information must be given in a way appropriate to the means of communication used. For example, where the service is promoted by text message the expectation is that the required information will be provided in the same way. However, the Regulations do allow for certain types of information (as set out in the Regulations) to be provided by a different means if there is limited space or time to display information in the original means of promotion. For instance, where a service is promoted to consumers by text message certain information may be provided on a webpage if a link to that webpage is also included within the original text message.

A full list of the relevant information which must be provided to a consumer before they enter into a distance contract can be found at Schedule 2 of the Regulations.

Contracts concluded by electronic means - Rules 2.2.1, 2.2.5 and 2.3.2 of the Code and Regulation 14

The Regulations prescribe information requirements for contracts concluded by electronic means (for example contracts concluded via the internet, including those which use the Payforit mechanism).

Directly before a consumer places an order, providers must ensure that the consumer is made aware of the main characteristics of the service, the price of the services (including any additional delivery charges and total costs per billing period for subscription services), the duration of the contract and how to terminate a subscription in a suitably clear and prominent manner.

The consumer must be able to explicitly acknowledge their obligation to pay before placing an order (Regulation 14(3)). The Regulations place specific obligations on providers where placing an order is done using a button (or similar function such as another type of active field¹). Where the contract is concluded using such a button, the provider must ensure that the button or similar function is labelled in an easily legible manner **only** with words which make it clear to a consumer that placing the order

¹ An active field includes a graphic on a mobile website which is coded to respond when the consumer touches the corresponding part of the screen on their smart device. Examples of responses would be to move the consumer to another website when they have clicked a banner ad or to initiate and record consumer consent to a payment. For avoidance of doubt, an active field includes functions which are sat within or behind icons or images.

will entail an obligation to pay. The Regulations require use of either the words 'order with obligation to pay', or corresponding unambiguous wording (Regulation 14(4)).

Providers should note that failure to meet the requirements of Regulation 14(3) or (4) of the Regulations mean that the consumer will not be bound by the contract. In such circumstances we will provide support to consumers who wish to obtain a full refund.

In order to provide some further assistance to providers seeking to comply with the above requirements of the Regulations and rules of the Code, PhonepayPlus recommends the following specific steps are considered:

- Where the contract is concluded by a consumer activating a button (or similar function):
 - Labelling the button / active field **only** with the words 'BUY NOW', 'PAY £[X] NOW', "click to buy and £[X] will be added to this phone bill", or a similar unambiguous phrase.
 - For the avoidance of doubt, PhonepayPlus does not consider terms such as 'OK', 'Enter', 'Join', 'Subscribe', 'Continue', or similar statements to be sufficient by themselves to highlight to a consumer that they will have an obligation to pay. Providers who wish to incorporate words such as "join" or "subscribe" in their labels are encouraged to contact PhonepayPlus for further compliance advice.
 - The button/option should be accompanied by pricing information which is prominent, and proximate to (if not directly on) the button/item selection point.
 - Pricing information should be presented as prominently and clearly as the option or button which continues the purchase flow.
- Consider implementation of a 'confirm payment' screen – this can be used to re-iterate/confirm the consumer's obligation to pay and also can include information on the consumer's cancellation rights required by Regulation 37 (a) and (b).
- PhonepayPlus recommends that the screens that the consumer views and the positive opt-in by the consumer should be recorded by an independent third party to ensure there is a robust, credible and fully auditable record of the information provided to the consumer and steps the consumer took to positively confirm the obligation to pay.

PhonepayPlus considers that the correct use of Payforit (see Figure 1, below) assists a provider with its responsibilities under parts of the PhonepayPlus Code of Practice, including obligations regarding information provision, positive opt in and third party verification. Providers should in any event seek legal advice to ensure they are complying with their legal obligations.



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Need Help?

You can contact us by calling [non-premium rate phone number] or emailing [email address]. Your purchase is subject to [Merchant](#) and [Payforit terms](#) and the cost will appear on your next mobile bill or will be deducted from your prepay balance. The UK mobile network operators created and support [Payforit](#) to enable secure payments.

Figure 1: Example of Payforit order button label: "Buy Now"

Information which must be provided to consumer to confirm a distance contract (as at Regulation 16 of the Regulations and proposed requirements for some types of services under Code 13 special conditions)

The Regulations require providers to supply to consumers confirmation of the contract in a durable medium. PhonepayPlus considers a 'durable medium' to include:

- Confirmation via email to an email address previously provided by the consumer;
- Confirmation via SMS;
- Confirmation via a link delivered by SMS or email which leads the user to a copy of the contract Note that information contained via a link to a website which may be changed by the

provider is not acceptable. If the information is placed into a user's personal account in a format which cannot be changed (such as PDF) or is stored with an independent third party, and will remain accessible to the consumer for a reasonable amount of time, this may be compliant.

Where consumers are likely to make a series of purchases over a short period of time – such as the purchase of add-ons within an app or answering of consecutive questions within a competition – they are unlikely to check the number or sum-total of their purchases until after their interaction with the app or website has ended.

In such cases PhonepayPlus would recommend that the provider also ensures the consumer is clearly informed each time they have made a purchase and how much they have been charged. This might be done within the app or website, or by another means. This does not replace the requirement within the Regulations to supply consumers with confirmation of a contract, but it does allow consumers to be aware of ongoing cumulative spend.

Compliance advice

The PhonepayPlus Executive provides a compliance advice service which is available to providers **free of charge**. Providers can seek compliance advice by contacting us at compliance@phonepayplus.org.uk. Please note that advice from the PhonepayPlus Executive is not binding on the PhonepayPlus Code Compliance Panel Tribunals although a record of advice is maintained and taken into account should a service later be found to be in breach of the Code.