

GENERAL GUIDANCE NOTE

Definitions

Who should read this?

All Network operators and providers involved in the provision of premium rate services ('PRS') to consumers.

What is the purpose of the Guidance?

To assist Network operators and providers by clarifying whether they are required to register with PhonepayPlus before operating PRS. This General Guidance Note also sets out PhonepayPlus' expectations around the [PhonepayPlus Code of Practice](#), and how any investigation procedures resulting from suspected breaches of [PhonepayPlus' Code of Practice](#) are likely to operate, depending on how a registered party is defined under the [PhonepayPlus Code of Practice](#).

What are the key points?

This General Guidance Note is designed to:

- Briefly signpost the Code definitions of Network operators, Level 1 providers and Level 2 providers
- Explain how PhonepayPlus would determine responsibility in the event of an investigation
- Explain how PhonepayPlus would determine whether a registered party is a Level 1 or a Level 2 provider where there is material doubt

1. Definitions of providers in the PRS value chain

Network operators

- 1.1 The definition of a Network operator has not changed from the previous edition of the [PhonepayPlus Code of Practice](#), and stems from a category of persons specified in the Communications Act 2003. If you are unsure whether or not your company would be considered a Network operator, you should contact PhonepayPlus for further advice.

Level 1 and Level 2 providers

- 1.2 Level 1' and 'Level 2' providers are defined in the [PhonepayPlus Code of Practice](#) at paragraph 5.3.8, as follows:

5.3.8

- (a) *A Level 1 provider is a person who provides a platform which, through arrangements made with a Network operator or another Level 1 provider, enables the relevant PRS to be accessed by a consumer or provides any other technical service which facilitates the provision of the relevant PRS.*
- (b) *A Level 2 provider is the person who controls or is responsible for the operation, content and promotion of the relevant PRS and/or the use of a facility within the PRS.*
- (c) *In respect of any relevant PRS where PhonepayPlus considers there to be a material doubt whether a person involved in any way in the provision of the service and/ or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant PRS is a PRS provider falling within (a) or (b) above, PhonepayPlus shall determine whether that person is a Premium rate service provider and whether the person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time.*

How is responsibility for promotion, operation and content defined? What about sub-contractors beyond a Level 2 provider?

- 1.3 Paragraph 5.3.8(b) of the PhonepayPlus Code of Practice refers to a Level 2 provider as a person “*who controls or is responsible for the operation, content and promotion*”
- 1.4 PhonepayPlus is aware that not all entities who we would deem to be Level 2 providers will generate all the promotion or content, or perform all the operation of their services, in-house. A significant number of Level 2 providers will sub-contract with other entities to undertake promotional functions (e.g. in print, broadcast, or SMS-based promotions), to support or supply certain technical platforms involved in the provision of a service, or purchase content which the Level 2 provider will then package and sell under their brand.
- 1.5 In such circumstances, PhonepayPlus **does not** regard a party which is sub-contracted to provide only some of the functions of promotion, operation and

content as a Level 2 provider. Rather, these entities are regarded as contracted parties. Contracted parties are not required to register with PhonepayPlus and are not considered to be directly regulated by [PhonepayPlus' Code of Practice](#). Rather, the Level 2 provider who has sub-contracted those functions will be considered to retain responsibility for the contracted party's actions.

What about sub-contracted digital marketing?

- 1.6 In addition to the use of contracted parties as outlined above, an increasing number of Level 2 providers will sub-contract with another entity to handle web and other digital-based marketing functions, such as pop-up and banner ads which redirect consumers to browse a PRS provider's products. This practice is generally known as "affiliate marketing", and the sub-contracted partners as affiliates.
- 1.7 In these circumstances, PhonepayPlus also **does not** regard a party which is sub-contracted to provide digital marketing as a Level 2 provider. This is because they do not have overall control or responsibility as a whole for the operation, content and promotion of the service but rather just provide a digital advertising source that links a consumer to the service.
- 1.8 As such affiliates are not required to register with PhonepayPlus and are not considered to be directly regulated by PhonepayPlus' Code of Practice. Again, the Level 2 provider will be considered to retain responsibility for the affiliate's actions.
- 1.9 For more information on the expectations we would have of Level 2 providers in terms of effectively controlling the actions of affiliates, please read the General Guidance note on Digital Marketing.

What about where some operational aspects of a service are handled by a Level 1 provider?

- 1.10 PhonepayPlus is aware that, in some circumstances, certain technical aspects of a service will be handled by a Level 1 provider further up the delivery chain from the Level 2 provider. Examples could include, but are not limited to, occasions where a Level 1 provider's technical platform handles the sending of SMS-based marketing, or where the Level 1 provider's platform processes a consumer's instruction to stop a service and ensures no further billing takes place.
- 1.11 In these cases, where the failure of such an operational component has led to a breach of [PhonepayPlus' Code of Practice](#), paragraphs 3.8.1 and 3.8.2 of the Code set out that the Level 1 provider should be regarded as the party responsible for the technical failure, and so the breach itself, as if it were the Level 2 provider. The Level 2 provider who would ordinarily be responsible for the service in its entirety would not be held in breach for this particular aspect of any consumer harm. However, they may still be considered responsible for other aspects of consumer harm which arose in connection with the service.
- 1.12 PhonepayPlus is also aware that in some cases a Level 1 provider may provide a

“white label” service, the operation and promotion of which it very tightly controls (for example by not only providing the technical platform or operation of the service to the consumer but also either providing the promotional material for the service or prescribing the manner in which the service may be promoted and exercising a right of veto over each promotion before its release into the public domain). In other cases a Level 1 provider may, under their contractual powers, conduct frequent monitoring of service activity and promotions to ensure that the services are operating and being promoted in a compliant manner. In the former scenario PhonepayPlus is very likely to regard the Level 1 provider as the Level 2 provider as they are in *de facto* control of the service and its operation. In the second scenario PhonepayPlus is likely to regard the Level 1 provider’s actions as consistent with pursuing its due diligence and risk assessment obligations under the Code and thereby not regard it as the Level 2 provider.

2. How PhonepayPlus will determine responsibility during an investigation

2.1 In the event that PhonepayPlus investigates an alleged breach of the [PhonepayPlus Code of Practice](#), it will first request information from various parties within the relevant value-chain to determine each party’s role in the service. In most cases, it will be clear fairly quickly whether a party is either a Level 1 or Level 2 provider or a contracted party; however, the information we request should include the provider’s opinion and reasoning as to where they fall within the value-chain. This is in order that PhonepayPlus can fully consider this issue before any decision is made.

2.2 The key factor to remember during this process is that PhonepayPlus will look to identify the responsibilities of each party in the delivery chain, in order that any breaches can be correctly raised against the party responsible for them.

3. How PhonepayPlus will determine whether a party is a Level 1 or Level 2 provider where there is material doubt

3.1 From time to time PhonepayPlus will be required, or otherwise asked, to make a decision about where a party sits in the value chain where it is less straightforward to do so. This may be in the context of an investigation or a request for compliance advice, and because there is material doubt about whether a provider is either a Level 1 or Level 2 provider, or because a party doubts they should be defined as a PRS provider at all in the given circumstances.

3.2 In these circumstances paragraph 5.3.8(c) of the PhonepayPlus Code permits PhonepayPlus to determine whether a registered party is a Level 1 or Level 2 provider. We will consider each example on a case-by-case basis in these situations, and the paragraphs below set out a number of examples where consideration has been made in the past. However, generally we will consider the following, non-exhaustive, list of factors when making our determination:

- The level of control that the party, and other parties in the value chain, have over promotion, operation and content of the service
- The contractual agreements between parties in the value chain
- Whether the promotion, operation and/or content have been sub-contracted to a

- single party further along the value chain
- Whether a party within the value chain controls (and potentially promotes) a platform to which other parties connect to provide a service
- Whether any party in the value chain controls any technical platforms which operate specific aspects of a service

3.3 It is not often that circumstances arise when there is material doubt which would require PhonepayPlus to make a decision as to whether a party is a Level 1 or Level 2 provider. However the following examples, the first two being actual previous determinations and the third a theoretical example, provide an insight into how PhonepayPlus makes its decisions.

Example One: Status of app store merchants

An app store contacted PhonepayPlus to enquire about the likely status of its merchants, and whether such merchants would be regarded as Level 2 providers and therefore part of the PRS value chain. The app store had a direct connection with mobile network operators, and provided their own payment and browsing platforms to which merchants submitted content.

The app store would first test the content concerned to make sure it worked, did not contain malware, and was not offensive, inappropriate, or against the law. If the content passed these tests then it would be uploaded by the app store and they, not the merchant, would control product description and pricing and other key information on the browsing platform. Whilst some content was aimed specifically at children, it was kept in a “children’s area” of the app store browser where the app store ensured the price was capped as required by the PhonepayPlus Code of Practice.

Consumer complaints were handled directly by the app store, with no need for the consumer to contact or enter into dialogue with the merchant at any point.

PhonepayPlus advised that in this case the app store was firstly undertaking functions of a Level 1 provider, due to its direct connection to a network and its provision of a payment platform. In addition, it was still found to act as the Level 2 provider for the following reasons:

- Whilst merchants did upload content, the app store tested and approved it before uploading it themselves, so giving them gateway-based control over the content which was offered to consumers
- The app store clearly controlled not only the operation of the service – i.e. payment mechanisms and provision of the content directly to consumers – but also the promotion given that the merchant was unable to directly add or change pricing or any other information about their content on the browsing platform.
- Therefore as part of their contractual agreement with the app store, the merchants had given over control of promotion and content and, the app store now controlled these as well as operation.
- In addition, the app store had also taken control contractually of the complaints process from start to finish.

A second app store also contacted PhonepayPlus with the same enquiry. As before they had a direct connection with mobile operators, and provided their own payment

and browsing platforms to which merchants submitted content. However this second app store relied upon a series of monitoring programs and consumer feedback, both to post the submission of content, and to identify malware or inappropriate or unlawful content, and did not test content prior to its addition to the browsing platform. Merchants were also able to add or change pricing, or other information relating to their content, themselves.

In addition whilst the app store monitored how the merchant handled complaints, the merchant had first-line responsibility for receiving and handling them.

In this case PhonepayPlus advised that the app store was acting as a Level 1 provider, due to its direct network connection and its provision of payment mechanisms. However despite the enhanced risk control mechanisms the app store displayed, their merchants would still be regarded as Level 2 providers for the following reasons:

- Whilst the app store did monitor uploaded apps and quickly remove malicious or offending content, they did not have gateway-based control over the content offered to consumers and as such this control was still held in the first instance by the merchant.
- The merchant was able to add or change pricing and other key information about their content as it was presented on the browsing platform, and so retained responsibility for promotion.
- The app store did not have full control of the complaints process from start to finish, and so responsibility remained with the merchant.

Example Two: Status of small charities using a donation platform

A mobile Network operator contacted PhonepayPlus to enquire about the status of small charities who operated a donation platform for which it controls the PRS text function. Donors would text the platform's shortcode with the keyword of their chosen charity – e.g. CATS4 - followed by the amount (up to £5) they wished to donate.

The donation platform, as controlled by the mobile network, would then send the donor a receipt, thanking them for their donation, confirming the amount donated, and providing a customer services number to call in the event of any complaint or enquiry. The customer service number, and any subsequent complaints process and refund, was entirely handled by the mobile network.

Whilst the great majority of promotion was on the donation platform's website, also controlled by the mobile network in respect of text-based donation, the charities concerned could promote the shortcode and their keyword to potential donors and they would have control over such promotions.

PhonepayPlus advised that it was likely that the mobile network could be regarded as acting as the Level 2 provider, with the charities using the platform falling outside the value chain when they did so. This was due to the following:

- The mobile network clearly controlled the operation of the service, and also the

- content – i.e. the mechanism by which the donation was made and the issuing of the receipt which thanked the donor.
- In addition the mobile network controlled the information given in the receipt, which gave them final responsibility for the information provided about the donation, and ensuring that donors were provided with an accurate number to call in order to complain or make enquiries.
 - The mobile network also handled any complaints in their entirety, and directly issued any refunds.
 - Whilst the charities who used the donation platform could promote the shortcode and their own keyword, the charities concerned were very small in size, and as such their own promotional efforts were highly unlikely to reach a large number of consumers. In addition the issuing of a receipt by the mobile network to donors acted as a safeguard on their part against a donor being misled by a promotion for which the charity was directly responsible.

Historically complaint levels about charitable donation have been extremely low. However PhonepayPlus advised that if complaint levels grew then we would have to revisit this advice.

It is also important to note that this advice does not apply to medium or larger charities which connect with a Level 1 provider in respect of their own individual shortcodes which they (and not the provider of the payment platform) then promote. In such circumstances it is highly likely that the charity would be regarded as a Level 2 provider.

Example Three: “White label” voice services - theoretical

A Level 1 provider with a direct network connection controls an Interactive Voice Response (IVR) platform and mechanism for international call routing, which they allow a variety of clients to connect to. The clients connect to the same platform, and the same basic service, through different numbers which they promote themselves. The numbers that the clients use may even have different prices per minute. The Level 1 approached PhonepayPlus to ask whether or not their clients would be regarded as a Level 2 provider.

PhonepayPlus has not previously given formal advice on this question, however circumstances exist which might cause such a question to be asked. In such circumstances PhonepayPlus’ likely consideration would be as follows:

- That the clients would still be responsible for all promotion of the services in relation to the numbers they use in their contracts with the Level 1 provider, and further they place their own brand, and sometimes their own price point, on them.
- Whilst the Level 1 provider controls the operation of the IVR facility– i.e. the routing of the call – it does so only as a result of it providing the technical platform, which is done on behalf of the client.
- This is different from circumstances where the Level 1 provider dictates the operation of the service (rather than meeting requirements of the client) and also controls the promotional aspects of the service.

- As a result of the factors above, it is likely the client would be regarded as the Level 2 provider in the circumstances as described.

The role of general guidance

General Guidance does **not** form part of the Code of Practice; neither is it absolutely binding on PhonepayPlus' Code Compliance Panel Tribunal ('the Tribunal'). However, we intend for it to assist **all** Network operators and providers as to how compliance with the Code can be achieved.

Network operators or providers are free to disregard Guidance where they feel that the same standard and expectation of consumer protection can be met by some other means. Should consumer harm occur, the Tribunal may examine the provider's alternative actions (including no action), and whether those actions have achieved compliance with the Code. If they have not taken any action to comply with the Code, then the behaviour is likely to be regarded as a serious breach.