

GENERAL GUIDANCE NOTE

Privacy

Who should read this?

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

What is the purpose of the Guidance?

To assist networks and providers by clarifying the Phone-paid Services Authority's expectations by way of the fulfilling the following Rules of [the Phone-paid Services Authority's Code of Practice](#):

2.4.1

Level 2 providers must ensure that premium rate services do not cause the unreasonable invasion of consumers' privacy.

2.4.2

Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with the opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a PRS, the Level 2 provider of that service must be able to provide evidence which establishes that consent.

What are the key points?

This Guidance is set out in two parts:

- **Part One** – Consent to marketing;
 - When does Guidance on privacy apply?
 - The right to privacy
 - Verifying consent for soft and hard opt-in – PECR and rule 2.4.2 of the Code
 - Soft opt-in
 - Hard opt-in

- **Part Two** – General formatting for marketing;
 - Format for marketing SMS
 - Format for marketing via WAP link
 - When a consumer texts 'STOP'
 - Assumed withdrawal of consent
 - How does the Telephone Preference Service (TPS) apply?

PART ONE - CONSENT TO MARKETING

1. When does Guidance on privacy apply?

- 1.1** Providers should refer to this General Guidance Note on 'Privacy' when communicating with consumers ('marketing') – whether by electronic or non-electronic means. This Guidance Note does not apply to communications that take place during the delivery, or provision, of a service.
- 1.2** Marketing covers a wide range of activities – not just the offer for sale of goods and services, but also the promotion of an organisation's aims and ideals. Accordingly, communications that promote charitable donations, or promote a political ideal, and are related to a premium rate service, are also included within the scope of this General Guidance Note.

2. The right to privacy

- 2.1** Mobile phones can provide a personal connection to an individual (rather than to a household) – a connection that many individuals strongly feel should be protected from unwanted communications. Yet, it has never been easier to reach a high number of individuals with a simple database and a connection to a communications network. The Phone-paid Services Authority receives regular complaints from consumers about PRS marketing which they have not opted in to receive and, as such, feel intrudes upon their right to privacy.
- 2.2** Consumers have a fundamental right to privacy – enshrined in law, through both the Privacy and Electronic Communications Regulations 2003 ('PECR') and the Data Protection Act 1998 ('DPA'). In the UK, the Information Commissioner's Office ('ICO') is the body charged directly with enforcing PECR and the DPA. We work closely with the ICO in order to define what constitutes acceptable and auditable consent to marketing. We may refer cases to the ICO, when appropriate, but will also deal with invasions of consumers' privacy through rule 2.4 of the Phone-paid Services Authority's Code of Practice.
- 2.3** For the purposes of rule 2.1 of the Code PECR's provisions on consent apply only to marketing of premium rate services via electronic communications. PECR's provisions therefore do not apply to such marketing where non-electronic communication methods are used. However, where personal data is processed for the purposes marketing through non-electronic methods, such processing will be subject to the requirements of the DPA (which includes consent).
- 2.4** In terms of PECR it provides for two forms of consent; 'hard opt-in' and 'soft opt-in'. The former involves explicit consent to marketing, which may extend to consumers giving consent for third parties to promote to them directly. The latter involves the implicit provision of consent to market when a consumer negotiates a purchase from a company. That company can promote other similar products and services it supplies

(subject to conditions being met, as set out below), but such implicit consent cannot extend to third parties.

2.5 In practice the Phone-paid Services Authority will enforce the right to privacy through rule 2.4.2 of the Code. However, we may also use rule 2.1 of the Code in respect of PECR and/or the DPA where we consider it appropriate to do so. In respect of the application of rule 2.4.2, whilst the Code does not itself define consent, we consider that for both electronic and non-electronic marketing, both hard opt-ins and soft opt-ins (where it meets the requirements of paragraph 22(3) of PECR), will be acceptable forms of consent. Providers should note that rule 2.4.2 contains additional requirements relating to marketing that must be satisfied where relevant.

2.6 PECR requirements for soft and hard opt-ins can be summarised as follows:

- Where there is no explicit consent, the marketer may evidence consent to marketing by obtaining the individual's details through a sale, or negotiations for a sale, and the individual must have been given the opportunity to refuse such marketing, when their details were collected (soft opt-in);
- Marketing materials provided following a soft opt-in must relate only to that marketer's products or services and only concern similar products to the individual's initial purchase, or area of interest (e.g. it would not be appropriate to promote adult services to someone who had only previously purchased ringtones);
- Soft opt-in consumers must be given a simple means of opting out at the time of initial purchase, and in each subsequent promotion; and
- Where the soft opt-in conditions are not met a positive action signifying consent must be obtained from consumers after clear information about the intended activity has been provided. For example, where the individual's details are to be passed to third parties, they must be clearly informed of this, and positively confirm their acceptance ('hard' opt-in).

2.7 While it is not mandatory to use hard opt-in for consent to marketing which is not from third parties (i.e. where soft opt-in applies), providers are encouraged to wherever possible seek hard opt-in consent.

3. Verifying consent for soft and hard opt-in for the purposes of rules 2.4.2 and 2.1 (in relation to PECR) of the Code

Soft opt-in

3.1 Where a provider markets to a consumer using a soft opt-in obtained during a sale or negotiations for a sale, we consider there is less potential detriment, although not an absence of detriment, than where a provider charges the same consumer. As such, we do not consider that the need to provide auditable verification of opt-in is as great as with charging. However, this is subject to the following criteria:

- The consumer was given a clear opportunity to opt out of marketing on each occasion, and was opted out of all future marketing, if they exercised this option.

An example would be a promotional SMS that contains the words “to stop future marketing reply STOP”.

- 3.2 If this criterion is met, we will look at any complaints on a case-by-case basis. Low levels of complaints, which might suggest any unsolicited marketing is a result of mistaken entry of mobile numbers into websites, or a similar error, may be dealt with informally.
- 3.3 However, where consumers complain about unsolicited marketing in significant volume, or in any volume about marketing which contains no opt-out facility, the Phone-paid Services Authority will examine such complaints on a balance of probability, unless the provider can provide auditable proof of opt-in, in the same way as that set out for charging in Part One of this General Guidance Note. For the avoidance of doubt, the retention of a record of an IP address, or MSISDN (mobile) number, used to browse a website will not be sufficient in these circumstances.

Hard opt-in

- 3.4 In order to reach a greater number of consumers, a provider may trade or purchase consumers’ personal data. In these circumstances, further protection is necessary because the connection between the consumer and the business they first interacted with, and subsequently with the provider who is now marketing to them, is remote and indirect.
- 3.5 Sharing of data in these circumstances include any transfer – including renting, or trading or even disposing free of charge. A third party is any other, distinct legal person – even in the same group of companies or partners in a joint venture.
- 3.6 For this reason, promotions designed to gain a hard opt-in must draw each consumer’s attention specifically to the issue of consent, and that consent must involve a positive step beyond mere purchase of the service by the consumer, to be valid.
- 3.7 For example, if one provider wishes to purchase a marketing list from an unrelated provider, then evidence of a hard opt-in for each number on that list should be obtained.
- 3.8 When obtaining consent via a website, using a pre-checked tickbox is not sufficient for this purpose.
- 3.9 In this context, a compliant example is an empty box that a consumer must tick in order to consent. Next to this, a clear explanation should be made of how the data will be used in future. If this explanation is not clear enough, then the hard opt-in is likely to be invalid.
- 3.10 A good example of compliant consent is: “I want to hear from companies X, Y and Z so that they can send me offers to my phone. Please pass my details onto them so that they can contact me.”

Where this text is placed next to an unchecked box which the consumer checks, and where there is a robust and independent audit trail of the data which supports the consumer having provided their consent, then it is likely this would be regarded as

compliant.

- 3.11 A hard opt-in can also be obtained via a conversation. However, a recording of the conversation, or of key-presses during the call, should be retained to provide robust verification.
- 3.12 Providers using marketing lists should ensure that each number marketed to has a valid opt-in, gathered no more than six calendar months ago. Providers should ensure that they can robustly verify (see the whole of section 5 of this General Guidance Note) each and every consumer's opt-in, and ensure that none are currently suppressed. Please note that, where a hard opt-in is used to market to consumers who have not previously purchased from a provider, or been in 'negotiations for a sale', then we will expect opt-in to be robustly verifiable in the event of any complaints, no matter how small or large the scale; this is in contrast to the approach to soft opt-in set out at paragraphs 5.1-5.3 of this General Guidance Note.

PART TWO – GENERAL FORMATTING FOR MARKETING

4. Format for marketing SMS

- 4.1 When marketing via SMS, providers should follow this format to minimise any risk of invading privacy. The message should begin 'FreeMsg'.
- 4.2 The message should state contact information of the initiator of the message (not any affiliate or publisher). This can be in the metadata of the SMS (so, if consumers can text back to the shortcode on which the communication was sent, then this is likely to be sufficient). The message should also include a means of refusing future marketing. A best practice example of a message compliant with these guidelines would be:
"FreeMsg: to receive more guidance on privacy contact us on 0845 026 1060, to end marketing reply STOP" [116 characters].

5. Format for marketing via clickable link

- 5.1 'Binary' messages which contain clickable links may be restricted by technology to a set number of characters. Alternatively, a clickable link can be inserted into a standard SMS message. Given the need to inform consumers clearly and accurately about the service, we would advise, as best practice, that a standard SMS message should be used where PRS is being marketed.

6. When a consumer texts 'STOP'

- 6.1 When a consumer sends 'STOP'¹, or other word as notified to the consumer as a valid marketing opt-out contained in the marketing message, then all marketing must cease. For more information, see the General Guidance Note on '[Method of exit from a service](#)'.

¹ Providers can consider other suitable opt-out methods, where appropriate. These must be equally robust and clearly communicated to the user.

- 6.2 When a consumer texts 'STOP' in connection with an ongoing paying commitment – be it for a subscription, or as an element in a virtual chat service – the consumer must not receive any further charge. For more information, see the Service-Specific Guidance Note on ['Subscription services'](#).
- 6.3 However, in this circumstance, the provider may still send marketing messages. If, at this point, the consumer then sends 'STOP' (again), then all marketing must cease. If a consumer sends 'STOP ALL' at any point, then consent for all contact has been removed. At this point, the mobile number should be suppressed. Suppressing a number does not mean deleting it – it means recording the fact that no further messages should be sent. If a number is deleted, it could be received from a third party, then marketed to again, which would be in breach of the rules. For this reason, providers should store the date of suppression, as well as the number.

7. Assumed withdrawal of consent

- 7.1 Consumers' recollection of giving their consent to be marketed to deteriorates over time, and what could have been an interesting promotion immediately after their initial contact, could much later constitute an intrusion. On this basis, we advise that marketing should happen soon after consent is given, and that no consumer should be marketed to more than six months after the date of their last consent². There may be some types of service which can legitimately market longer, such as services centred around a specific date in the annual calendar, such as a consumer's birthday or Valentine's Day, or the start of a new football season. However, the consumer will need to be clearly informed upon consenting to marketing that they may be marketed to the next year/season.

8. How does the Telephone Preference Service (TPS) apply?

- 8.1 The TPS applies to domestic fixed line numbers and allows consumers to register their telephone numbers for a prior indication that they do not wish to be contacted by telephone for marketing purposes. This means that, if a company is marketing a premium rate service by telephone, they should cross-refer their database to the TPS. If the date of the TPS preference declaration post-dates their consent (only relating to a soft opt-in, not to a hard opt-in), then their number should be suppressed. If the consent was provided after the TPS preference declaration, then they can be marketed to. The TPS does not apply to the sending of MMS or SMS messages, but does apply equally to telephone calls made to mobile and landline telephone numbers.

² This is shorter than the duration suggested by the ICO, which recommends 12 months. However, six months is a more appropriate length of time for the mobile market because this matches the length of time a telephone number must be quarantined before it is recycled by a Mobile Network operator.