

BIS consultation

Enhancing consumer confidence by clarifying consumer law in relation to the supply of goods, services and digital content.

15 October 2012

For further information, please contact

Sarwar Khan

Senior Public Affairs Executive

PhonepayPlus

T: 020 7940 7408

E: skhan@phonepayplus.org.uk

Contents

General comments..... 3
About PhonepayPlus..... 4
Response to specific questions..... 5

General comments

1. PhonepayPlus, the UK regulator of premium rate services (PRS), welcomes the BIS consultation on the supply of goods, services and digital content. We support in principle a strengthening of consumer protections relating to digital content and services because we believe that some of the consumer risks we have seen in PRS are likely to emerge more broadly across other mobile and digital micropayments. We also believe that clear and effective consumer protection would build greater trust and therefore growth and innovation in the market by giving businesses the confidence to invest.
2. PhonepayPlus has been regulating the PRS market for over 25 years and our regime has proved effective in regulating not just traditional forms of PRS, but also new types of digital services where they are charged to a phone bill, such as content delivered through apps and in tackling emerging threats to consumers such as mobile malware. Furthermore, our model is focused on outcomes not prescriptive rules ensuring we deliver the best result for consumers whilst giving the industry the flexibility to innovate and develop their services.
3. In recent years we have seen market developments that have transformed the way consumers' access and pay for digital content and services – these are products or services which the consumer can access either online or through a mobile device. Whilst this innovation is welcome, the legislative framework has not fully reflected the emergence of a range of micropayments for digital content and services and has not kept pace with where the market is now and where it is going. This creates potential risks for businesses and consumers alike.
4. The proposals for strengthening consumer rights relating to digital content are helpful. However, they only cover a relatively narrow range of rights and remedies – namely those that apply where digital content is sub-standard or non-functioning (although we recognise that this is supplemented by a further consultation on implementing the Consumer Rights Directive). We believe that there is a case for looking more comprehensively at how best to protect consumers and promote trust, growth and innovation in digital services.
5. Given the cross-cutting nature of digital services, we believe the issue needs to be considered in a co-ordinated way across communications, consumer and payments regulations. Since the Government is currently reviewing all three, it is an excellent opportunity to approach these issues in a coherent way to ensure the growth potential in this area is not compromised. We have set out our proposed approach in a recent submission to the Government's Communications Review, which we attach.
6. In addition to possible changes to legislation, we believe greater thought needs to be given to how consumer regulations relating to digital content and services should be enforced. Although there is an existing framework for enforcing general consumer protection, which the Government has recently reformed, our experience is that oversight and enforcement relating to digital content and services can benefit from more specialised input, given the rapid developments in technology, the evolving nature of consumer harm and the relatively low price points. We believe that our experience regulating PRS is relevant and could help to contribute to a more effective oversight and enforcement regime.

About PhoneyPayPlus

7. PhoneyPayPlus is the independent regulator of PRS in the UK. These are in essence added-value services that consumers can purchase by charging the cost to their phone bill or mobile pre-pay account. Some current and popular examples of PRS include voting in TV shows, directory enquiries and charitable text donations.
8. Under the Communications Act 2003, Ofcom has strategic responsibility and accountability for the regulation of PRS. PhoneyPayPlus, which has been regulating the market since its introduction in 1986, has been appointed to carry out the day-to-day regulation using a Code of Practice, which is approved by Ofcom (the Code).¹ The Code gives us a range of powers to investigate and address consumer harm through robust sanctions including fines for breaches of the Code, such as those who run “scams”. The Code requires, amongst other things:
 - Clear and accurate pricing information;
 - Customers are treated fairly and equitably; and
 - Complaints are resolved quickly and any redress is provided quickly and easily.
9. Rather than just dealing with harm and scams after they occur, we place emphasis on pre-emption and prevention of harm by working with industry to drive up standards in the market and by taking swift action to tackle emerging risks before they set in. This approach has reduced consumer harm and increased consumer confidence in the market, which is essential for investment and growth.
10. There are a number of advantages to having a regulatory body that specialises in digital micropayments. First, it means we have the experience, expertise and relationships to know the market and how it is developing. This is particularly important when it comes to dealing with emerging issues such as mobile malware. Secondly, it means that we act to prevent and resolve harm even on purchases with low price points. Whilst low price points may appear to suggest low harm to consumers, this is in fact not the case.
11. Low price points can make it easier for consumers to run up large bills unnoticed, especially because many digital services (such as online games) can encourage impulsive or repeat purchases. In addition, low price points can make it easier for scammers to operate undetected, by taking relatively small amounts of money from a large number of consumers. We saw this, for example, with the internet dialler problem in 2004. The aggregate cost to consumer can therefore mount up to a considerable sum. Moreover, if a poor experience leads consumers to decide not to use digital services, or not to use their phone as a payment device, then this will have wider costs for the industry and the economy beyond the direct financial loss to consumers.

¹ Formal Framework Agreement between Ofcom and PhoneyPayPlus:
http://www.phoneypayplus.org.uk/~media/Files/PhoneyPayPlus/Corporate/Ofcom_PhoneyPayPlus_Framework_Agreement_December_2007.pdf

Response to specific questions

12. We have structured our response to focus on digital content where we have relevant expertise from which to comment.

Q65 – Do you agree that we should clarify consumer law for digital content transactions?

13. We agree in principle with the need to clarify consumer law for digital content and consider that having a clear and proportionate legislative and regulatory framework in place can help support the UK's ambition to be a world leader in mobile and digital micropayments by:
- Helping to protect consumers and giving them the basis to use mobile and digital micropayments with confidence;
 - Providing a level playing field for businesses so that the products and services that best meet consumers' needs can win out; and
 - Avoiding imposing unnecessary barriers to entry, costs or constraints on the development of new products and services.
14. Building consumer confidence will be a particularly important element in growing the market, as without consumer confidence there will not be the sustained consumer take up that will justify the investment needed to develop new products and services.
15. However, as set out above, whilst the proposals in the consultation are helpful, we are not convinced that they are sufficiently comprehensive to fully protect consumers and promote trust, growth and innovation in a market that is rapidly evolving and that carries potential risks to consumers. We believe there is a case for looking more comprehensively across consumer, communications and payments legislation to develop an appropriate regulatory regime for digital content and services.
16. We also consider, as outlined above, that there is scope to strengthen the enforcement regime for consumer rights relating to digital content, drawing on more specialised input and we believe that our experience could be relevant here.

Q66 – Can you provide us with any further evidence of the impact / costs of the current unclear legal framework on business or consumers?

17. We have seen and acted to resolve a number of significant threats to consumers in the PRS market. For example, in recent years we have dealt with threats posed by internet diallers, the mis-selling of ringtones and the problems with broadcast PRS. The threats we are dealing with now are different, but are arguably even greater given the increasing ownership and functionality of smartphones, which allow PRS to be offered and delivered over the internet to an increasing degree and increases the potential for misleading digital marketing and malware.
18. The picture of consumer harm in the digital micropayments market is currently unclear. This is partly reflected by the fact that the market is still relatively new and evolving; that the low

price points mean that many consumers may be unaware of or may absorb their losses rather than complain and seek redress, although the aggregate loss to consumers can be substantial; and that because there is no single point where consumers can complain or that can assemble a full evidential picture in relation to consumer harm.

19. From what we see, our assessment is that consumer harm arising from digital micropayments is currently fairly limited, but we are nonetheless seeing some cases of harm emerging that are similar to the sorts of harms we have seen previously on premium rate. Particular risks include:

- *In-app billing* – this often arises in online games, where consumers may not be charged for playing a game, but will then be charged for additional in-game content, for example to progress to a higher level or improve the user experience, without being made clearly aware that these charges will occur.
- *Virtual currencies* – where consumers purchase (and indeed may be required to purchase) content or services using virtual currency (such as Nintendo Points for Wii games) rather than real currencies. This can create confusion and potential detriment where consumers are not clearly informed of, for example, the ‘exchange rate’ or expiry date.
- *Misleading promotions* – this can cover a wide range of harm, but the essence is that consumers are misled into using a service on the basis of it being presented as something that it isn’t.
- *Inappropriate content* – where children in particular may be exposed to inappropriate adult content either through accessing services that they should be barred from or through inappropriate advertising and marketing.
- *Unsolicited marketing* – where consumers are sent marketing messages that they did not give appropriate consent for previously.

20. Q71 – Do you agree that digital content should be treated as separate and bespoke category within the Consumer Bill of Rights?

21. We agree that digital goods and services need a category which acknowledges their difference from physical goods and services. There are key differences which need separate and targeted protection for consumers.

22. Clearly, digital content cannot be returned in the same manner as physical goods. If a full right to withdraw is available for digital content, providers would be forced to rely on technical means to prevent unauthorized use and copying after withdrawal. Also, we know that consumers purchasing digital goods and services through PRS may not always seek redress given the relatively smaller value purchases. However losses may accumulate to significant consumer harm.

23. In relation to digital content, a trader should not put the consumer in a position where they may be unwittingly breaching copyright, and/or downloading a counterfeit version. We have seen cases where consumers have purchased and downloaded mobile phone apps in good faith, which transpired to be imitation software of popular branded apps that eventually infected their phones with malware.

24. Our experience suggests that consumer confidence in use of PRS as a method of purchasing digital goods and services is greatly enhanced when there is robust regulation in place with swift redress. For example, over the last two years, consumer confidence in the pricing transparency of PRS has increased by 58%². Having effective protection in place specifically for purchases of digital goods and services will safeguard consumers and build their confidence in digital payments more generally. The fact that in 2010 the average spend per head in PRS in the UK was more than £11, higher than comparable jurisdictions and around four times higher than the US, demonstrates the benefit of an open and well regulated market.³

Q75 – Should we remove the ‘freedom from minor defects’ aspects of quality (s.12(2B)(c) of SOGA) specifically and only for digital content? Should we do so for certain types of digital content, if so which?

25. PhonepayPlus believes that providers should ensure that services are of adequate technical quality. Where PRS is concerned, our Code of Practice requires the service to meet the expectation of the consumer. If not, then we would expect the provider to address concerns with the service or provide a refund should the consumer request it.

Q76 – Should we clarify that the ‘safety’ aspect of quality (s.14(2B)(d) of SOGA) means the safety of a computer or other device used to access digital content as well as personal / physical safety?

26. PhonepayPlus considers it is important that the safety aspect of quality is defined in such a way as to include the safety of a computer or other device through which digital content is accessed. We have seen and taken swift action to protect consumers from mobile malware – whereby a mobile application, programme or file that is downloaded by unsuspecting consumers to a handset and can without the owner’s consent, initiate calls or texts to premium rate numbers or access confidential information.

Q78 – Do you think that these rights to quality are broadly appropriate for digital content?

27. With reference to box 32 on page 170 of the consultation document, we agree that these rights to quality are broadly appropriate for digital content and are in line with what PhonepayPlus would expect from the regulation of PRS.
28. Our regulatory regime for PRS provides end to end protection for consumers throughout the consumer journey which includes the promotion, operation and content of premium rate services. The harms we can protect against include misleading promotions, invasion of privacy, misuse of personal information, lack of price transparency, harmful or inappropriate content, non-functioning content and lack of redress and customer care.

² PhonepayPlus Current and Future Market for 2011: <http://www.phonepayplus.org.uk/For-Business/Research/~media/PhonepayPlus%20research%20%20Curent%20and%20Future%20Market%20for%20PRS%202011.pdf>

³ Premium rate services: *International markets and regulation*, 20 May 2011: http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/Research/Analysys_Mason_Premium_Rate_Services_International_Markets_and_Regulation.pdf

29. However, the convergence in the market and the increasing competition between PRS and other digital micropayment mechanisms creates a challenge for the regulatory regime in ensuring consistent protection for consumers and a level playing field for businesses.

Q79 – Do you think these are suitable remedies for cases where sub-standard digital content has been supplied?

30. We consider that the definition of replacements where sub-standard digital content has been supplied needs to be broad enough such that it encompasses any alternative solution that is acceptable to both consumers and businesses. For example, where an online game's login has failed for one consumer on launch day, they may not want a replacement or refund, but just the same 'in-game' status as their friends attained while the log-in issue was being rectified.

Q80 – What impact would clarification of these remedies have on consumer or businesses? Can you provide any evidence that would help us assess the likely impacts of our proposals?

31. PhonepayPlus believes that consumers should be able to have their complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily. We have specific provisions in our Code of Practice which requires this of providers.

Q87 – To a) avoid confusion around the fact that the digital content will not actually be returned but deleted and b) more clearly differentiate between the right to reject and the right to withdraw, would the right be better expressed as a right to an immediate refund for faulty digital content with an obligation to delete digital content?

32. Our experience of regulating PRS reminds us that it would be difficult and complex to determine whether or not the consumer has deleted the digital content after they have received a refund.

Q92 – Do you think the concepts of repairing, replacing, reducing the price or terminating the related service will work in practice?

33. Please note answer to question 79. We consider the framework for remedies should be flexible enough to work in practice.

Q94 – Which of these remedies do you think consumers would be most likely to find satisfactory?

34. We consider it is important that consumers have a suitable mechanism through which they can obtain a refund, but we also recognise that there may not be a single, defined solution for this. Therefore, the framework needs to be flexible enough to deal with the complex value chains which may require different redress in different circumstances. PhonepayPlus' Code of Practice is focused on outcomes and not on prescriptive rules which means industry have the flexibility to deliver the required outcome but through different means.