



**Consumer Law Review: PhonepayPlus'
response to a Call for Evidence issued by
BERR**

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Section One

Introduction

Background

The Executive of PhonepayPlus welcomes the opportunity to respond to this Consumer Law Review: Call for Evidence issued by the Department for Business, Enterprise and Regulatory Reform (BERR) in May 2008. We agree that it is timely to undertake a review of consumer law in the UK. We broadly agree with BERR's observations that consumer law in the UK could be more streamlined, simplified and consolidated.

At the same time, any legislation however clear needs to be enforced when companies or individuals fail to comply with it. We are of the view that regulators, whose codes cover the relevant law as well as extending beyond that, can play a critical part in ensuring that businesses provide consumers with a better outcome than might otherwise be the case especially in complex markets where the balance of power between the consumer and trader can be sub-optimal.

The wider non-statutory solutions available to protect consumers, take enforcement action against traders who break the rules or law and in certain cases deliver consumer redress should not be lost in any such legislative review and if anything should be built on where appropriate.

About us

PhonepayPlus (previously ICSTIS), an agency of Ofcom, is the independent regulatory body for premium rate – phone-paid – telecommunications services that are accessible in the UK. Our primary task is to set standards for the content and advertising of phone-paid services. These standards include a Code of Practice that set rules for the promotion and content of such services. The Code covers many areas including those about how the cost of such services should be communicated to consumers. Further information on PhonepayPlus' work, and the Code of Practice, can be found at: www.phonepayplus.org.uk.

About Phone-paid services

Phone-paid services offer information and entertainment via platforms such as phone, fax, PC (e-mail, Internet, bulletin board), mobile (SMS/WAP) or interactive digital TV. Services range from sports, voting and adult entertainment lines to competition, directory enquiry, chat and business information services, and currently vary in cost from 10 pence per call to £1.50 per minute. The money paid for the call is shared between the telephone company carrying the service and the organisation providing the content.

Uniquely therefore, PhonepayPlus regulates a range of platforms as described above, including products (or services) and a micro-payment mechanism which will increasingly compete with other payment mechanisms that may emerge in the mobile/online markets.

UK-based phone-paid services must normally be advertised on and paid via five digit mobile short codes, '090' dialling codes and Directory Enquiry (DQ) services on 118xxx codes. With technological developments it is becoming possible to charge the cost of services and goods to a communications account online and on the mobile web without a phone number being needed.

Dynamic and fast-changing markets

The market for phone-paid services is dynamic and fast-changing and in the last two years has faced an element of disruption caused by the well publicised media stories about failings in the provision of phone-paid services when used in TV programmes. The market is global – providers of these services can be based anywhere in or outside the UK.

The market dynamics have also changed over the last few years as a consequence of the growth of mobile phone ownership by large number of consumers, and increasingly children. In 2007/8 some 40% of all phone-paid revenues were derived from Mobile SMS services such as ringtones, downloads, games and information services. This was a 10% growth in revenues over the previous year. At the same time, of the 10,463 complaints we received in 2007/8, some 8,000 were about the same Mobile services which is a cause for concern. This has consequences for how we set regulation and for the enforcement activities that arise from the standards we set.

Section Two

The case for reform

In the Call for Evidence, BERR observes that although consumer law has been strengthened by a number of developments there are still a number of challenges. BERR identifies three main issues which could be addressed to improve the existing consumer law regime:

- the complexity and cost of existing prescriptive legislation;
- the fragmentation of current legislation; and
- the lack of “flexibility and future-proofing”.

We would generally agree with BERR’s observations that the current consumer law in the UK is fragmented and overly complex. We agree with BERR’s proposition that there is scope to streamline and consolidate the existing regime.

Our experience with fast-changing global markets is also a reminder of the need to have legislation that can be flexible and future-proofed. To that end, having legislation which is based on principles rather than prescription is our preference and has been the way that we have approached the development of our Code of Practice and one that we want to extend further in our next Code review which will take place during 2008-10.

Vulnerable consumers

In respect of vulnerable consumers we would also observe that a consumer, who may not be generally regarded as vulnerable in other parts of their life, may become so when dealing with novel and complex purchase decisions. In our own sector we deal with many consumers who it can be argued have been made vulnerable as a consequence of their engagement with technology which is seemingly personal to them and which creates new opportunities for commercial transaction – for example we receive many complaints from aggrieved consumers who are distressed about having received text promotions on their mobile device for a phone-paid service as they worry as to how their personal details, such as a mobile number, were obtained by a trader.

Children

BERR make no specific comments in the Call for Evidence about children and their rights as a sub-category of “consumer”. This may require further consideration – and research. In the area we regulate, children have ready access to the credit available on mobile handsets and by this and other means are increasingly able to make purchases without parental input.

We therefore find ourselves dealing with services that are increasingly used by children by reason of their growing ownership of mobile devices. Our Code of Practice sets down specific rules in relation to services that are aimed at, or are likely to be particularly attractive to, children (who we consider to be under 16 years old). Conversely we have found it necessary to ensure age-restricted services cannot be bought by children – not least because we cannot prevent them accessing marketing material in a multi-media age.

Section Three

Options for legislative reform

BERR make clear in this section of the Call for Evidence that the Government's role is to set a legal framework for markets that allows free and fair competition to thrive, but is tough on those who seek to impair the competitive process or cause detriment to consumers. It is further noted that there is no one agreed legislative approach to achieving this but that stakeholders, in their quest to strike a balance between certainty and flexibility, would want an approach that incorporates:

- a greater use of general principles, underpinned by
- supporting provisions to make the principles effective, drafted in as plain English as possible, with
- additional provisions in non-legislative instruments such as guidance, codes of practice or standards to promote regulatory compliance, leading to
- the part or total repeal of some or all sector and product-specific legislation.

Broadly we do believe in goal-based regulation and legislation. Our Code of Practice is focused on fundamental issues of fairness, privacy, pricing clarity, avoiding offensive content and legality. But we know industry also wants helpful and meaningful advice on how these principles apply in relation to particular services or situations. So, while it is important that primary legislation and national regulatory frameworks are goal-based it is equally important that the supporting sub-structures (of secondary legislation, codes, etc) contains the right balance of detail and specificity to help businesses comply and to create a climate in which they can innovate and invest with as much certainty as possible

For these reasons our current Code of Practice is a mix of general principles and service-specific rules for categories of service where we have evidence of consumer harm that requires specific and targeted rules. This is supplemented by guidance that we issue designed to assist providers of services in understanding the principles behind the Code so that they can comply with the minimum of disruption to their businesses. In our experience, most businesses find it straight forward to comply with our Code given that the core principles are essential parts of any reasonable traders' business practice and sales ethic.

Our Code of Practice also makes it clear that all phone-paid services and their promotions must comply with the law. In respect of the Consumer Protection from Unfair Trading Regulations (CPRs) we have agreed with OFT that we are the Established Means for their enforcement.

We also note at paragraph 2.15 of the Call for Evidence the example provided of a blurring between the purchase of products (in this case a mobile phone) and a service (a ringtone) which typically could be charged as a phone-paid service. Again, the flexibility of the non-statutory approach is usefully displayed here as we are well placed to deal with any infringements arising from the mis-advertising of this service through to issues of service quality such as a failure of the download to the handset.

The role for regulators in any legislative review

Finally, we would make the general point that whilst this Call for Evidence is about considering the need for "legislative" reform, much of the consumer protection regime in

place in the UK today is supported, and enforced, by non-legislative mechanisms such as the PhonepayPlus Code. This has some of the flexibility of a self-regulatory scheme but is supported by the regulatory architecture of a statutory regulator (Ofcom) with all the relevant back-stop powers that go with such support. Any review should be conducted in the widest context with a view to considering how any such legislation will be enforced and what role non-statutory regulatory solutions can also play in making markets work well for consumers.

Section Four

Consumer empowerment and redress

BERR state in their Call for Evidence that “good reliable information is the beating heart of consumer empowerment”. We would agree and also note that markets, and the incentives that some businesses put in place for their staff, are not always aligned with ensuring that consumers are fully informed and empowered to make a purchase decision which is in their economic best interest. For this reason regulators like PhonepayPlus are called upon to investigate complaints in situations precisely where consumers were misled into making purchase decisions that they may not have otherwise made had they, for instance, been fully informed as to the cost of the service before they committed to the purchase. Any review should consider the wider issue of creating a legislative framework which generates business incentives to delivering good reliable consumer information on which consumers can act in their best interests.

Education

We agree that consumers need a basic level of knowledge and understanding of their consumer rights to make good decisions and take action if something goes wrong. It is for this reason that we have put in place, and taken steps, to better educate consumers as to the operation of phone-paid services such as through our children’s interactive website www.phonebrain.org.uk. We also provide other information and material on our website designed for consumers to assist them in understanding their rights in respect of the provision of phone-paid services. This includes our “number checker” which allows a consumer to check the service that lies behind a premium rate phone number or short code that appears on their phone bill. Last year more than 1.2 million such numbers were checked in this way by consumers on our website.

We recognise the limitations of our role here and generally take the view that any such campaigns are co-ordinated with the supplier who has the primary relationship with the consumer and who owns the customer relationship.

Company complaints procedures

For the most part when things go wrong it is our experience that providers of phone-paid services recognise that it makes good business sense to find a solution that leaves the customer happy. However, we encounter a number of cases where providers of these services do not seem to take complaints seriously or have in place effective complaints handling procedures designed to find a solution quickly, easily and in a way that does not undermine a long-term valued relationship with the customer. For this reason, as part of our next review of our Code of Practice one area we plan to explore further is the role that providers of phone-paid services should play in having in place effective complaints handling procedures designed to be focused on the customer experience and resolving problems quickly and easily. We see that as an important way that the industry could address some of the trust issues that it sometimes faces.

Alternative dispute resolution

In considering a review in this area we would remind BERR that PhonepayPlus, whilst not the providers of dispute resolution per se, is empowered through our Code to award refunds to consumers as a sanction when breaches of our Code are upheld against a service provider. We find this a useful way to ensure that consumers who have complained

to us about a failing can have the issues addressed in one step without having to also file a claim for compensation with another party. This model may have relevance in other sectors.

Section Five

Securing compliance with the law

The Call for Evidence makes clear that rules and regulations are of no value if they are widely disregarded and that statutory regulation must be effectively enforced. We agree and take seriously the powers we have under our Code to act against providers of phone-paid services who are found to be in breach of our Code. We exercise these powers in a targeted and proportionate fashion consistent with recognised good practice (“Regulatory Justice: making Sanctions Effective” Macrory, November 2006) acknowledging that we are ultimately challengeable in the courts as a public body in law. To this end, and to provide certainty for business providers of phone-paid services, we publish and keep under review a sanctions guide which sets out the criteria that PhonepayPlus will use when adjudicating on breaches of our Code of Practice.

Targeted interventions based on risk

Over the last 12 months we have developed a structured approach to regulatory risk assessment in order to better pre-empt market developments that may require regulatory intervention before the need for sanctions arises. As part of this strategy we have also developed our approach to regulatory advice and guidance so that we can better support businesses in securing compliance before consumer detriment arises thus precluding the need for an investigation and the possibility of sanctions being imposed.

Established Means

As we state in Section Three, we are acknowledged by the OFT as the Established Means in respect of the Consumer Protection from Unfair Trading Regulations (CPRs). This recognises that regulatory enforcement bodies such as PhonepayPlus have an acknowledged specialist competence which can complement the skills and resources of other enforcement arrangements such as local Trading Standards Offices. Such arrangements do not preclude other enforcement bodies from taking action under these regulations but it provides some certainty to businesses as to how they are likely to be applied in a niche business area where a regulator has a specialised competence. We hope that initiatives like this can be developed further as part of any wider thinking about a legislative review and the enforcement consequences that need to closely follow on.

Consistency, cross-boundary working and the Internet

We have been pleased to have worked closely with the OFT’s scambuster teams where they have identified phone-paid services which are generating scams that require urgent remedy. We have powers under our Code which allow us, in hours where necessary to suspend a phone-paid service pending a full investigation. We have been pleased to pool these powers with OFT as part of this initiative.

We also work closely with other regulators, not least Ofcom with whom we have developed a close and constructive relationship which has been documented in a Framework Agreement published in December 2007. We also more recently concluded a formal Memorandum of Understanding with the Gambling Commission outlining how each of us will work together where we have areas of mutual interest such as with a gambling service that is charged for using a phone-paid service. Co-operative agreements such as these are a useful way to provide clarity and certainty to both consumers and businesses about how

complaints and disputes will be handled by regulators and other agencies, especially in areas which are fast-changing.

In respect of the Internet, we have encountered challenges over the last few years with dealing with phone-paid services which are Information Society Services under the E-Commerce Directive and dealing with the practical enforcement issues that arise cross-border when UK consumers encounter problems with a service based in another EU Member State. We think enforcement issues in this area are challenging for the very reasons that are outlined in paragraph 4.21 (a) to (c) of the Call for Evidence and we would welcome a closer dialogue with BERR about our practical difficulties in this area in order to illustrate the reality of the situation. This is especially the case given the likely growth of cross-border trading as a consequence of wider access to the Internet by consumers in Member States. But regardless of this, consumers will almost certainly still expect to enforcement to be “local” in their home countries despite the fact that the drive behind the E-Commerce Directive is for law and regulation to be driven by the country where the trader is based. This issue is one we have encountered and tried to deal with and our practical experiences are ones that should be relevant to this Review.