

PhonePay Plus consultation on mobile phone-paid services and their marketing

Information Commissioner's response

This response has been sent by the Information Commissioner's Office on behalf of the Information Commissioner. Among other things, the Information Commissioner has responsibility for enforcing the Data Protection Act 1998 (DPA98) and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). We are therefore grateful for the opportunity to comment on your proposals for mobile phone-paid services.

Many of the questions in the consultation document relate to matters outside of the ICO's remit, in this response we focus on the data protection and privacy implications of the proposals.

General comments

We note that the number of complaints to PPP has risen over the past year. Our case-handling statistics do not allow us to measure whether the number of complaints about phone-paid services to the ICO has also risen. However, we are aware that unsolicited marketing sent to mobile phones is a concern for the individuals who contact the office and that they are often motivated to complain to us when they feel their number has been used without their permission or where they feel they have been misled.

The PECR are quite clear on unsolicited email marketing but do allow a reasonable degree of flexibility for marketers relying on the 'soft opt-in'. We recognise and support PPP's attempt to assist companies via a helpline and principles-based advice and the ICO is happy to continue to work with you to assist responsible marketers and protect individuals.

We agree that transparency of purpose and clarity of information is important in the attempt to ensure that consumers are fully aware of the services they are invited to sign up to. We would point out that the ICO is currently drafting a Code of Practice on fair collection of information and would urge PPP and the industry to contribute to our own consultation which we plan to launch in January 2009.

Finally in this section, and though a very minor point, we assume that in Q16 the reference to Q13 should actually be a reference to be Q15. Also, we assume that in section 3.11 you are referring to the credulity of certain groups rather than their 'lack of credulity'.

Q8 – Q11

There is a risk that the use of binary messages facilitating links to opt-outs on mobile websites can lead to consumers being given conflicting messages. Much of the material on how to stay safe on the internet advises consumers not to click on links to websites that appear unfamiliar. Yet opt-outs given by links to websites are an invitation to do just that. However, if a link is clearly marked as the method by which a consumer can opt out and consumers are not expected to click through more pages relating to the services being advertised then it is reasonable for this method to be used. It is not unreasonable to expect that as consumers become more familiar with this method of opting out, then the potential for confusion will reduce. Again, this will all depend on the clarity of the message containing the link and the content of the opt-out page they land on.

Notwithstanding the above, we are satisfied that both options a and b as outlined in 4.12 can provide a way for service providers to comply with the requirements of PECR. It is not for us to comment on the technical aspects of 4.13 but if it is feasible then this option is unlikely to cause concern with regard to PECR compliance.

In summary, we are happy with the proposed condition.

Q12

There is a strong argument in favour of a condition which ensures that consumers are made aware of the nature and purpose of the information they are invited to read. The Regulation relating to email marketing does not specify that marketing should be announced as such but it is clear that if service providers are expected to be transparent then consumers should be left in no doubt that, for example, one part of a message is billing information while another part of the same message is a promotion.

Q13

We would point out that the ICO does receive complaints about unsolicited marketing received by a consumer who has been allocated a recycled number. In cases where the service provider has taken every reasonable step to guard against sending unsolicited messages and where they are able to act on the customer's complaint, we would be unlikely to pursue the complaint. However, where the service provider is unable to demonstrate that they took steps such as maintaining up to date lists, we might uphold a complaint.

Q14

We agree with the assessment here. Where a marketer is relying on an opt-in, we expect them to be able to evidence this in the event that the consumer disputes this.

Q15

We agree with the assessment as presented in 5.24. Indeed, we have stressed the importance of context when assessing whether a consumer has consented to receive marketing or a service. We would also stress that consumer expectations are important and that these are often set by the quality of information given to them before they make their decision.

We do note the 'instant' nature of the industry and the products and services offered in this market. We agree that this might lead to the conclusion that a relatively short period between opt-in and the commencement of regular promotion is appropriate when assessing how long an opt-in should remain valid. We can see obvious consumer benefit in having a clear time frames.

However, we also recognise that this is a difficult area in which to provide definitive guidance. What is acceptable in one promotion will not be acceptable in many others. The ICO will always take into account the context in which the opt-in was agreed and assess each case on its own merits. We would like it to be made clear that whatever the benefits of the proposal, the legislation is not prescriptive in this regard.

Our focus is on whether the service provider has gone beyond the reasonable expectations of the consumer, taking into account all the circumstances of the case. In terms of enforcement action, we would also look at whether the service provider has taken appropriate action to avoid a repeat complaint.

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