

PhonepayPlus's review of mobile phone-paid services and their marketing – response from the Mobile Broadband Group

1. The Mobile Broadband Group (“MBG”, whose members are the UK businesses of O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to PhonepayPlus's review of mobile premium rate/phone paid (PRS) services and their marketing.
2. Mobile operators and PhonepayPlus share a common purpose in promoting the ability of customers to buy goods and services through their mobile with convenience and confidence. We therefore support PhonepayPlus carrying out the review.
3. We also note that the proposals represent an evolution of the rules rather than root and branch reform, which suggests that the regulatory principles are basically as they should be and that it should be possible to reduce complaints through thorough enforcement.
4. The MBG also supports the much of the review's findings. We have a few issues with the some of the descriptions and commentary in the consultation and have addressed these within our response. All paragraph references in our response refer to the paragraph numbers in PhonepayPlus' downloadable consultation document published on 17th July 2008.
5. The MBG has some specific suggestions, particularly in relation to prior permission. We support the use of guidance notes from PhonepayPlus relating to marketing of PRS and the conduct of PRS in particular subscription services, and believe a tougher regime of compliance once the guidance notes are issued would be an effective and proportionate response to the problems identified by PhonepayPlus. MBG members would wish to work with PhonepayPlus to ascertain how the networks can assist PhonepayPlus in responding to consumer harm.
6. The MBG recognises that PhonepayPlus has to work with a structural problem, in that it is not practical to introduce specific new rules to the Code mid-stream, as it is so time consuming. As an alternative, PhonepayPlus has been using the mechanism of a Prior Permission to obviate this difficulty. The problem with such an approach is that it is a blunt instrument and increases the regulatory burden on all, without being subject to the rigour of the full statutory process.
7. The MBG suggests that PhonepayPlus use a better and more proportionate approach would be to introduce a Prior Permission that is only triggered by those information providers that fall foul of the adjudication procedure. In this way extra rules are targeted at those that are intent on breaking the rules. This is discussed in more detail in our answer to Question 23.

Q1 – Do you agree with our analysis of the promotion and delivery of phone-paid services? If not, why not?

8. For the most part the MBG concurs with PhonepayPlus's description of premium rate services as executed on a mobile. We also agree that "*the mobile phone paid market has a faster level of innovation than the phone-paid services market as a whole.*" Regulation has to be designed in a way that both provides protection for consumers and allows investment in new services to flourish.
9. PhonepayPlus is aware that the mobile operators do not agree that Payforit falls within the definition of a premium rate service, as set down in S120 of the Communications Act 2003 and so all our comments are without prejudice to that position.
10. With respect to factual information in the first section, there are a couple of points: paragraph 1.14 it should be noted that calling into an IVR service is also a method of opting into a PRS; in paragraph 1.16, PRS services can also be images to be viewed immediately without being storable or be streamed video images.

Q2 – What other evidence do you have about complaints about mobile Phone-paid services that you can share with us?

11. PhonepayPlus states that it had experienced a rise in complaints in the months leading up to the announcement of the review of mobile services. Usually there is a correlation between the complaints received by PhonepayPlus and the mobile operators. On this occasion the link does not appear to have been present, as mobile operators had not seen a similar rise. We also note that the consultation document does not suggest that Ofcom has seen an increase in complaints, but instead that complaints have "remained consistently high". We are not sure why this is the case, though we note that the change in the recording of complaints by PhonepayPlus is a contributing factor.
12. We are very concerned that the complaints data is not well understood and that the recent change in the basis for calculation has not been properly thought through. We are not convinced that the trend observed by PhonepayPlus merited being described (in the press release that announced the review) as 'an extraordinary rise'. As so much policy (and this review in particular) is driven by trends in complaints data, it is essential that the data is transparent, based on genuine complaints and that the detail is properly understood by PhonepayPlus and communicated to its stakeholders. (It is possible, for example, that the increase has just been driven by greater awareness of premium rate regulation in general.)
13. We note too that, although PhonepayPlus appears to be receiving an increasing number of complaints, they are concentrated on a limited number of services rather than a growing across the board. This could support the view that consumers are increasingly directing their complaints about problematic services to PhonepayPlus, as well as suggesting that the Code is being flouted by a minority of information providers.

14. Nevertheless, whatever the underlying situation, we welcome the opportunity to work with PhonepayPlus with a view to reducing complaints and ensuring consumer trust is built into premium rate services. We believe the Code already offers the necessary tools to do this and that the focus needs to be on firm and consistent enforcement of the rules.
15. We also believe that PhonepayPlus could add some proactive service testing to its armoury of monitoring and enforcement. This technique has been used to great effect by at least one mobile operator (as presented at a recent meeting of the Industry Liaison Panel). If designed well and targeted on a risk basis, service testing will provide a good return on the time and resources invested in the activity.

Q3 – Do you have further evidence about the issues arising from mobile Phone-paid services in other countries, or the effect of any action taken to regulate those issues?

Q4 – Do you agree with PhonepayPlus’ assessment of the risk of mobile phone-paid services to children and other vulnerable groups? If not, then please provide any data or other evidence you have.

16. The MBG agrees that marketing messages that could be received by either adults or children should be expressed in terms that can be understood by the whole audience. Providers may have more latitude when the audience is established to be only adult.
17. We are particularly concerned that advertising copy should contain all the most pertinent information and should not include text that is designed to distract and obfuscate. There are examples of advertising copy that is padded out with irrelevant material. The apparent purpose of this is to divert the reader, who is often inclined only to read the first sentence, from inspecting more critical information later in the copy.
18. One point of caution, though, is that there may be limited scope for designing regulation with ‘other vulnerable groups’ in mind, as the ‘vulnerabilities’ singled out by PhonepayPlus are very unlikely to be apparent to the information providers. There was a recent complaint levelled at a mobile phone dealer for selling a mobile to an epilepsy sufferer. It was not explained how the dealer was meant to know about the epilepsy.
19. Where adults are concerned a more reasonable approach is to draw on the Unfair Trading Regulations, where the information that must be supplied is that which “the average consumer needs to take an informed transactional decision.”¹

¹ Consumer Protection from Unfair Trading Regulations 2008. Section 6(3)

Q5– Do you agree with PhonepayPlus’ assessment of the risk caused by promotional SMSs that carry charges or “chargeable pushes” of which a consumer is unaware? If not, why not?

20. The MBG feels that the text in 4.6 may be misunderstood and create a loophole that can be exploited by unscrupulous marketers. We cannot see any reason why a promotional message should contain a charge unless the purpose of the message was delivery of a charge (MT) and contained promotional information as well. The only reason for a chargeable landing page is where the service delivers content directly from that page, in which case this would be due to a users MO based request and therefore the MT message is not “promotional”. This statement of expectation needs review and we suggest (bullet 1) “Where users are sent promotional SMS there should be no charge for the receipt of that SMS unless the SMS is part of a chargeable subscription service to which the user has already knowingly signed up”.

21. It should already be clear but, just in case it is not, no charges should be levied on customers unless they have expressly agreed to buy products and services and have been clearly informed of their price.

Q6 – Do you agree with PhonepayPlus’ assessment of the risk caused by promotional SMS messages with no clear opt-out facility? If not, why not?

22. See response to Q8

Q7– Do you agree with the proposed conditions, to be included in a Statement of Expectation for mobile phone-paid services? If not, why not?

23. No. See MBG’s response to Q5 above.

Q8 – Do you agree with PhonepayPlus’ assessment of the risk caused by promotional SMSs with no clear opt-out facility? If not, why not?

24. The MBG believes that it is extremely important the customers have a clear and simple access to an opt-out and we believe that this should principally be the STOP command, which is extremely widely recognised and straightforward.

25. Whatever measures are put in place to minimise customers’ confusion over marketing material, with the best will in the world, there is every chance that he or she will forget or not realise that they have been legitimately opted in. Unless the customer is wrongly charged (as discussed below), marketing messages may cause annoyance but not actual harm. Such annoyance will be considerably reduced or eliminated if the customer can send a STOP command that takes effect promptly.

26. The MBG also recognises that, while just the word ‘STOP’ is the best method for ceasing marketing or subscriptions when there is only one service being sent

from that short code, it may cause problems when the customer is receiving more than one service from the same short code and he or she only wants to cease one of them. In such circumstances the marketer should be allowed to specify a key word in the opt-out instructions (e.g. STOP joke) so that a customer can stop a specific service. If the marketer fails to specify the key word in the opt-out message, then an instruction of STOP from the customer must lead to the cessation of all services from that short code.

27. The MBG welcomes the involvement of the Information Commissioner's office (ICO) in the discussions about appropriate operation of electronic marketing techniques. They are, as PhonepayPlus emphasises the statutory authority and it is important that their view is properly reflected to ensure that premium rate regulation is consistent with other marketing techniques in the wider economy.
28. We would recommend that any Help note clarifying PECR – whether in the context of promotional SMS or third party databases – to clearly identify the ICO as co-author. In other words, it should be published as a joint help note available on both PhonepayPlus's and the ICO's website. Furthermore, to avoid consumer confusion, it needs to be made clear that PhonepayPlus's remit only encompasses the promotion of PRS and not SMS marketing more generally.
29. It is a legal requirement that consumers be offered a simple route to opt-out both at the time the consent is collected (whether positive or soft) and for subsequent marketing messages.
30. PhonepayPlus's document does not cover how users should be advised prior to "sale or negotiation for sale" about the soft opt in and how they can prevent future marketing through an opt out facility available at that point of time. As many marketing issues stem from the "soft opt-in" being utilised, we expect the help note to provide clear guidance on their expectations in this area in addition to guidance on marketing beyond the opt-in. We would be happy to contribute to any guidance.
31. One further point, the MBG is not certain whether PhonepayPlus has used the 'service provider' and 'information provider' terminology interchangeably in this section of the document. On page 12, the service provider is identified as the aggregator in the context of this consultation. It would seem that the PECR requirements should fall on the information provider/marketer.

Q9 – Do you agree with PhonepayPlus' assessment that providing the originating shortcode as part of the title, and clear instructions regarding the texting of STOP to opt-out within the body of the message, is the best practice for all promotional SMSs that do not use the binary format? If not, why not?

32. The MBG agrees that providing the originating shortcode and clear instructions for opt-out is the best method and should be recommended as best practice.

Q10 – Do you agree with PhonepayPlus' assessment that option a) is the best practice opt-out facility for promotional SMSs using the binary format? If not, why not?

33. As PhonepayPlus states, there is a clear requirement in the PECR that customers are offered a simple opt-out if they are in receipt of marketing messages. The problem with option b), whereby a customer has to click on the link in order to find the opt-out facility on the WAP site, is that he or she does not know that there will be an opt-out facility offered on that site, might be very unconfident about the price of clicking through and might be very worried that clicking on the link would draw them unwittingly into a premium rate charge. The MBG does not favour option b).
34. Option a), whereby a short code is provided in the binary marketing message as the “from” address, would be an acceptable way of providing a STOP facility, so that a reply to that shortcode would lead to cessation of the marketing activity. However, as PhonepayPlus points out, it may be impractical to maintain enough shortcodes. (Note: PhonepayPlus requested technical input regarding managing STOP to marketing from shortcodes. All marketing using a shared shortcode runs the risk that the user who texts stop for the marketing may actually wish to stop another subscription service, therefore which one takes the priority? When shared shortcodes are being utilised, then marketing opt-out facility must be clearly signposted in the message by either STOP to another shortcode or another keyword to the same shortcode. Where the marketing utilises WAP Push, then another plain SMS must follow giving the opt-out facility. This will not require a significant amount of new shortcodes to operate.)
35. If it is not practical to supply a short code within a binary message, marketers should send an SMS immediately after the binary message containing all the necessary opt-out information, until the customer has been educated about how to exercise the right to opt-out. In other words, if there is regular contact with the customer, it may not be necessary to accompany every binary message with a follow-up SMS. PhonepayPlus could have a reasonableness test to assess whether the marketer has made sufficient effort to inform their customer how to opt-out. The MBG understands that the ICO would be accept such an approach.

Q11 – Do you agree with the proposed Statement of Expectation condition? If not, why not?

36. The MBG suggests the addition of “and cost no more than the normal cost of carriage”.

Q12 – Do you agree with PhonepayPlus’ assessment of the consumer risk arising from cross-promotion, and the proposed Statement of Expectation condition? If not, why not?

37. The MBG suggests the insertion of “similar” in the first sentence to remind marketers of the legal position – as in “*contain promotions for other similar services, such...*”

Q13 – Do you agree with PhonepayPlus’ assessment of recycled MSISDNs, and our proposal that service providers prove the MSISDNs on their opt-in lists have not recently been recycled? If not, why not?

38. We would welcome further clarity regarding what “proof” would be required. Individual operators have their own processes and methods for mitigating the risk of their customers receiving unwanted text messages because they have a recycled number. Therefore, we would not support a requirement for Service Providers to have their databases cleansed by network operators on a near constant basis (see response to Q14) as this would be a significant burden for network operators both in terms of time and resources.
39. Moreover, as PhonepayPlus notes in 5.13, opt in lists are most often traded by content providers rather than the service providers, therefore it is questionable as to whether database cleansing would make a significant difference.
40. We believe that better enforcement of clear opt out processes, as set out in section 4 of the consultation, should help reduce the problem through improved consumer awareness.
41. In every database situation, whether postal, email or text, there are likely to be short term timing differences that give rise to misdirected direct marketing and so one cannot expect to eliminate all instances. However, providing recipients are not charged and are able to opt-out simply, through the use of STOP, the risk of consumer irritation will be minimised.

Q14 – Do you agree with PhonepayPlus’ assessment of opt-in lists sold or traded to third party companies, and our proposed conditions? If not, why not?

42. PhonepayPlus presents some convincing evidence (in paragraph 5.16) that it is very rare for customers to opt in to receiving marketing messages from third parties – perhaps around 0.5% of customers. The MBG is a bit sceptical that significant numbers of names are being traded based on positive opt-in (as is required).
43. In any event, churn rates among the prepaid base are in the region of 25-35% and so marketers will have to be quite active in keeping both their own and bought in lists up to date and valid. And so, even if opted in lists come with valid evidence, it will not be long before the marketer has to check that the customer is still ‘live’. Moreover, the MBG finds it hard to imagine how marketers will establish that a number has not been recycled without either continually asking the mobile operator or the customer (or, if the MSISDN has been recycled, the innocent recipient of the recycled number) whether the number has been recycled. The MNOs would not support the administrative burden of providing the evidence to the marketer.
44. We agree with PhonepayPlus’s conclusion in 5.30 that, in view of the ICO’s position with regards the validity period of opt ins, it is beyond PhonepayPlus’s remit to require that all promotional SMS cease after six months if no response is

received. Such issues can be dealt with in individual contract negotiations and the MBG notes Phonepayplus's suggestions and support in this regard.

45. With respect to the requirements set out in 5.15, the MBG supports the interpretation of the PECR by the ICO only. Consumer opt-in via web sites are very unlikely to be irrefutably proven through network data records linked to MSISDNs. Moreover the Phonepay Plus adjudication panel has rejected the user IP address as being acceptable evidence.

Q15 – Do you agree with PhonepayPlus' assessment of the issues that could lead to consumer confusion about a previous opt-in, and our proposal that marketing must begin within 2 weeks of the consumer opting to receive it? If not, why not?

46. No. Paragraph 5.18 is incorrect. It should read "they expressly consent via informed opt-in to receive further marketing messages from other parties".

47. and the second bullet should also contain "...marketing information for the same or similar products".

48. It does seem sensible to recommend a reasonable time period between opting in and commencing direct marketing. However, we are not clear how this would work with traded lists. Would it mean that the purchaser of a list would only be able to market to customers whose consent was less than two weeks old? After all, the customer is perhaps less likely to remember having consented to receive marketing material from third parties than from the supplier of the original product and so such a stipulation might be more relevant for 3rd party lists. We would also be concerned that this requirement might give rise to more promotional activity just to keep a consent live.

49. The MBG seeks clarification on these points. Again, though, the MBG believes the most important aspect is for the customer to be able to execute a simple opt-out, preferably the STOP command.

Q16 – Would you exempt promotions tied to a specific date (e.g. consumer's birthday, Easter, start of the football season) from the 2 week requirement in Q13, as long as the consumer is clearly informed of the intention to use date-specific promotions when they opt-in? Please give your reasons.

50. See our answer to Q15. Even if the marketing activity is anniversary based, the MBG believes that the list needs to be refreshed with an opt-in after six months.

Q17 – Do you agree with PhonepayPlus' assessment of MSISDN verification on PC based websites offering phone-paid services, and the risks to consumers in terms of fraudulent opt-in? If not, why not?

51. The MBG would agree with the concerns raised around MSISDN verification on PC based websites, particularly where there is no MO sent from the MSISDN during the verification process. Our experience with issues created by PC web site opt-in is the lack of clarity of the reasons for requesting MSISDN and the pricing of any services supplied thereafter. This is applicable regardless of

method 1, 2 or 3 being used. PhonepayPlus must concentrate efforts to ensure clarity is ensured regardless of the methodology of user verification. We do not agree with the statement that method 1 breaches PECR when a false number is entered as this has been executed by a user and not by the marketer. However continued marketing to an unverified user would breach PECR.

Q18 – Do you have any view or evidence as to whether methods i) or ii) are likely to cause consumer harm? Please provide any viewpoint or material evidence you have.

52. Method 1 could be supported if the Service Provider provides the web sites for their customers (i.e. the Information Providers). This method is supported in the Payforit scheme rules and is performed under trust. We agree that the only data (IP address) supplied as an audit trail has difficulties in both proving and disproving. The advantage to a proposal for SP's to perform the web site MSISDN verification function is that a web site owner cannot instruct Service Providers to bill users that have not been verified by the SP. SP's are more skilled at ensuring correct messages are sent to users and that unverified users are not marketed to.

53. We agree that there is concern that PC web based opt in methods have led to consumer harm through a lack of pricing transparency and that web site providers have used the users' MO response (originally for verification purposes) as carte blanche to commence subscription billing. We would like to see PhonepayPlus place an emphasis on requirements for pricing clarity and other essential terms including marketing intent to be available to users prior to the verification of the MSISDN verification process and that regular snapshots of the web page are independently stored to ensure that there is always an audit trail in the event of a user complaint..

Q19 – Do you agree with PhonepayPlus' assessment of the general failure to provide adequate consumer information in respect of mobile phone-paid services, and our proposed conditions? If not, why not?

54. We fully support PhonepayPlus's intention to reinforce industry adherence to the fundamental concepts of transparency and fairness. This is the foundation for building consumer trust and confidence.

55. The current Code is already explicit in describing what is expected of premium rate services in this regard. We therefore believe the focus needs to be on ensuring consistent compliance and clear guidance. PhonepayPlus's Compliance Advice team is already taking huge steps in this regard and efforts are being stepped up by PhonepayPlus and operators alike to ensure proper enforcement.

56. We therefore agree with PhonepayPlus providing a Statement of Expectation, which seeks to give further clarity in this area, but believe that the emphasis must now be placed on enforcing existing rules in a more pro-active manner.

Q20 – Do you agree with PhonepayPlus’ assessment of the transparency issues around Services that charge per page viewed, and our proposed condition? If not, why not?

57. We believe there are three main issues with pay-per-view services:

1) lack of pricing clarity in what each click will cost

2) lack of technical robustness and

3) the ability to extend credit (this practice deludes pre-pay customers into thinking they are getting a free service and then drains their credit when they top up). This last point is not covered by the consultation document but presents a material risk to consumers. We believe that these issues are easily resolved by the services carrying pricing in close proximity to each clickable link (clicking this link will cost you...), by seeking confirmation from the user for the charge, by tracking the users purchases so they are not charged twice for the same item and by not extending credit. These are simple measures and once announced with a period for implementing technical changes, can be covered by enforcement and not new regulation or prior permission.

Q21 – Do you have any view or evidence as to whether a Prior Permission regime should be introduced for Services that charge per page viewed? Please provide any viewpoint or material evidence you have.

58. We believe that issues exist due to lack of regulatory enforcement of existing codes and a prior permission regime should not be imposed to cover up this issue. We would like to see best practice guidelines or a statement of expectation and then use enforcement powers to regulate where the expectations are not being met. See our answer to Q23.

Q22 – Do you agree with PhonepayPlus’ assessment of the transparency issues around Text-based Chat Services and our proposed conditions? If not, why not?

We agree with PhonepayPlus’ assessment and the Statement of Expectation. We also agree that the promotion of services on mobile long dial numbers can mis-lead customers into thinking they are communicating with real individuals (as opposed to a service). We also note that your concern that such use could potentially be in breach of the Numbering Plan has been highlighted to Ofcom and we would be interested to hear their views on this particular issue.

59. Q23 – Do you agree with PhonepayPlus’ assessment of phone-paid services using subscription billing or joining fees, and our preferred option c) – that ringtones, wallpaper and music downloads provided using subscription charging or joining fees should seek prior permission under the conditions set out above? If not, why not?

60. It seems to the MBG that there has been some muddled thinking around the issue of Prior Permission for subscription services.
61. In paragraph 7.24 PhonepayPlus states that i) and ii) are root causes of consumer risk (respectively identified in paragraph 7.5 as providing information that is misleading and failure to specify the joining fee. Both of these would appear to be in contravention of the 11th Code. 7.12.4 d clearly states that providers must state “*the charges for the service and how they can or will arise*”.
62. If providers are flouting existing rules, the appropriate response is to enforce those rules not introduce further rules, which will just add further cost and inconvenience to the law abiding and are likely to continue to be broken by the law breaking.
63. If, on the other hand, PhonepayPlus believe that existing rules are inadequate to prevent consumer harm, then the appropriate response is to clarify or amend the existing rules. Based on the information presented to stakeholders by PhonepayPlus, the ongoing cause for complaints seems to that some providers are simply failing to abide by the current rules rather than circumventing them through crafty workarounds.
64. The MBG is also concerned about the regular use of a Prior Permission regime as a vehicle for introducing new rules to the Code in mid-stream, without formally changing the Code. It means that the law abiding and the administrative resources of PhonepayPlus are burdened with this process even though the intended target is those bent on obviating existing Code requirements.
65. The most significant aspect of the Prior Permission regime is to introduce the ‘double opt-in requirement. This is not a panacea. Double opt-in causes added cost and inconvenience to the users and providers of legitimate services. Moreover, if a provider is obfuscating pricing for the initial pricing, they can also do so for the ‘confirm’ stage. Indeed customers could just find it a nuisance (and an extra cost).
66. One way of avoiding these disadvantages is for PhonepayPlus not to introduce a blanket Prior Permission regime but instead introduce a targeted Prior Permission, through the adjudication and directions process, directed at delinquent information providers. Not only should transgressors be fined but they should also be required to receive copy and operational clearance for future services (including, potentially, a double opt-in). This would be an approach focused on a small minority. In this way regulatory action is targeted and legitimate providers are not saddled with regulatory burdens for the sins of others.
67. A targeted approach would be cost neutral from the point of PhonepayPlus’ administrative resources with more time being spent on those that break the rules and less time handing out Prior Permission to those that run services properly, which is the way it should be. If a Prior Permission regime is to be introduced perhaps it could be done on a ‘suspended’ basis and only invoked for those that transgress. This would be a heavy incentive to promote good behaviour.

68. The MBG also feels that PhonepayPlus' absolute prohibition of the word FREE goes too far. We recognise that the word is currently being used by some in a misleading way (and thus flouting the existing Code) but FREE can often be used as a legitimate marketing tool for conditional purchases (open a student bank account and get free books, sign up to an airtime contract and get a free handset) and it seems unreasonable to preclude those that are using the word properly from doing so. The expectation from PhonepayPlus should be that the use of the word FREE can only occur where the conditions behind the FREE are clearly signposted and with equal prominence.
69. In relation to Annex B, we have a couple of technical observations. First, the suggested text for the SMS would very likely exceed the 160 characters available, particularly when the variable text within square brackets is of any length. With the second method, clicking 'confirm' would not provide the auditable proof that a consent had been collected, as the PhonepayPlus adjudication panel has determined that a list of IP addresses is inadequate (para 5.44).
70. The MBG does not support providers being able to use such terminology as 're-subscribe', 'rejoin' or similar where a customer's subscription service has lapsed or been opted out of. Customers rejoining subscription services should be taken through the whole process as if they were joining for the first time.

Q24 – What evidence do you have that other types of content which is provided using subscription charging or joining fees causes consumer harm, and should also seek prior permission under the conditions set out above, that you can share with us?

Q25 – Do you agree with PhonepayPlus' assessment that subscription services which offer ringtones and are facilitated through Payforit should be exempt from any prior permission requirement? If not, why not?

71. We fully support this view as Payforit is designed to ensure pricing transparency and user control over charging to their account.