
Mobile phone-paid services and their Marketing**The MX Telecom response to PhonepayPlus' Review and Consultation Document****11th September 2008****Summary Response**

MX Telecom welcome the opportunity to consult with PhonepayPlus on the regulatory challenges faced in the phone-paid services market and on how they should be effectively addressed to continue to build consumer confidence in mobile paid-for services.

We fully anticipate the statistics we have provided within this consultation will generally reflect those provided by other key stakeholders within the mobile services market. In particular, they will demonstrate a general downward trend in terms of End User complaint levels that are not attributable to a general depression in revenues associated with this market. On this basis, we would urge that the headline figures provided by PhonepayPlus are revisited to ensure genuine complaint levels match those figures and statistics being widely espoused. There are other potential contributory factors to the increase in calls received by PhonepayPlus which have not been given sufficient consideration in the Consultation.

Notwithstanding the above, it is nevertheless evident that there are serious, significant problems that need to promptly and effectively addressed. The statistic that 18 of 25 adjudications against mobile services in the first 6 months of 2008, were specifically against mobile subscription services, illustrates where the focus of our collective efforts needs to be. In particular, Internet-advertised subscription services represent the chief concern and area of non-compliance. This problem is exacerbated and consumer confidence further damaged by the persistence of unsolicited third party marketing. It is absolutely vital that as an absolute minimum, effective and enforced measures, which go beyond reiterating existing Code provisions, are introduced to resolve these twin problems.

Please find to follow our responses to the questions raised within the Consultation. If any areas merit further clarification or conversation, please do not hesitate to contact us.

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

The explanation of service delivery and promotion is an accurate overview.

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

Appended as Schedule A to this Consultation response, are statistics for End User calls received by MX Telecom in the period December 2007 – Present. MX Telecom is a pure provider of mobile connectivity and does not provide any service to End Users whatsoever. However, in circumstances where a Mobile Network or Phonepayplus are unable to provide an End User with contact details of the Service Provider (such as if the service operates on a Shared Short Code), MX Telecom's End User Care number is provided.

The graph shows the amount of time during each month when calls were connected to our End User Care number. Whilst the total volume increased during the months of January and February as compared with December, this can reasonably be attributed to and correlated with higher overall traffic volumes during those months. From March onwards, the volume of calls has dropped both consistently and significantly. Comparing the total volume from August 2008 to December 2007 demonstrates that call volumes were 50% less in August 2008. This change can reasonably be construed as the culmination of a gradual change (demonstrated by month-on-month reductions) rather than as an anomaly. In the same period, overall premium SMS volumes have increased.

Whilst these figures are indicative only, as they do not demonstrate the entirety of End User care calls, they are indicative of the fact that End User calls (and as a subset of calls, dissatisfaction) to MX Telecom and it's Clients, are at an all time low. It is our experience that End User complaints have, overall and in percentage terms, consistently fallen during 2008.

Q3 – Do you have any 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?

No general information to provide which would assist with the current Consultation.

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.

Yes, we agree with the assessment made.

Q5. Do you agree with PhonepayPlus' assessment of the risk caused by promotional SMS's that carry charges or "chargeable pushes" of which the consumer is unaware? If not, why not?

We agree with the following contributory factors to PhonepayPlus' assessment of the risks associated with promotional SMS messages:

- that they do not always contain adequate opt-out information;
- that spend reminder messages can be presented in such a way that the amount spent is unclear, because the messages is predominantly promotional in nature; and
- they can be unsolicited.

The following two suggested contributory factors require further consideration. Namely:

- that these message carry a charge to which the End User has not consented; and
- that the consumer's handset immediately accesses a mobile website when a message is opened.

If a message carries a charge to which the user has, or has not consented, it cannot be defined as a promotional SMS message. A promotion assumes the message is intended to solicit a purchase of a product or service from the End User. Whereas conversely, if a message is charged, the promotion must already have taken place. Whilst the absence of consent to receive charged messages is an exceptionally serious matter, it is not relevant for the purposes of a discussion of Promotional SMS.

As an adjunct to the previous point, a user can technically be billed for the receipt of a WAP Push message or an SMS message. They are not technically billed at the point at which they open a WAP Push or an SMS message. The practice of sending billed WAP Push messages is banned by most mobile networks – a position we advocate. The potential for the End User to be misled as to the fact they have been billed for receiving a WAP Push means that this is the correct way to provide clarity.

We do not recognise the concept of "pushing". Rather, End Users may select the title of a WAP Push they have received and then be directed to a WAP Site. What is therefore more material is whether the user solicited the WAP Push and if so, whether the pricing of any content they can purchase on the WAP Site is clearly presented.

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?

The absence of STOP command information with a promotional SMS message is a material breach of the Privacy and Electronic Communications Directive, the PhonepayPlus Code of Practice and Mobile Network Codes of Practice. We believe that no further assessment is necessary – it is absolutely imperative that STOP command information is provided and the receipt by Service Providers of STOP command information is acted upon. The issue here is one of enforcement of clear, necessary and existing rules. We therefore welcome increased proactive steps being taken by PhonepayPlus to enforce these existing requirements.

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?

Expectation 1:

On the basis that a billed message cannot constitute a promotional SMS, we do not believe the first condition is correct and therefore should not be included.

Expectation 2:

An End User can never provide informed consent to receive charges by opening a WAP Push or selecting a link contained within an SMS. As such, this requirement is superfluous and should be removed.

Expectation 3:

We agree with this requirement, with the addition that the means of opt-out should be the STOP command to a Short Code. The Short Code must be contained:

For Promotional SMS Messages: within the sender field or the body of the message

For Promotional WAP Push Messages: within the title of the WAP Push.

Expectation 4:

Any message which may potentially combine regulatory information (such as a spend reminder) with a promotion, should have the regulatory information at the very beginning of the message, so that the information being provided is clearly presented to the User and not overlooked. Any promotional material a Service Provider wishes to include after the provision of such information should be at the discretion of the Service Provider. We suggest that the imposition of mandatory wording such as "ADVERT" or "PROMO" is excessive where the regulatory information is at the beginning and it would not be of additional benefit.

Additionally, it should be made an Expectation that if a message is Free, it is clearly identified as such. This can be achieved in the sender field or at the beginning of the message, in addition to the STOP information being provided.

Q8 – Do you agree with Phonepayplus’ assessment of the risk caused by promotional SMS’s with no clear opt-out facility?

Answer as with Q6.

Q9 – Do you agree with PhonepayPlus’ assessment that providing the originating Short Code 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?

Yes, we agree. Additionally, clarification should be provided that the Short Code to which the recipient can send STOP, can be contained within the sender field (so the End User can simply reply STOP) or be contained within the text message (e.g. “send STOP to 8xxxx”).

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?

We reiterate our long-held position that the title of the WAP Push should commence “Free Msg” and the Short Code to which the End User can reply with the STOP command should be included in the title, immediately after the words “Free Msg”. This should be a mandated requirement. It is unacceptable that End Users should have to visit a WAP Site to try and find a Short Code to which they can send a STOP command, or other instructions as to how to unsubscribe. For the vast majority of recipients of WAP Push messages, the present situation does not constitute a valid and simple means of opt out – as required by the PECD.

The inclusion of this information does not unduly restrict the provision of a WAP Push title, as on most handsets, there are still approximately 30 characters remaining in which to convey this.

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

The Condition needs to be more specific. It should detail what constitutes a clear and visible opt-out (i.e. the Short Code and opt-out instructions within the sender field or the body of the SMS, or the Short Code in the title of a WAP Push).

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?

Yes, with the caveat that as detailed in the Answer provided to Q7, the “ADVERT” and “PROMO” wording is unnecessary.

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

The Mobile Networks require that where there has been a period of six months of inactivity between an End User and a Service Provider, the MSISDN in question must be expunged from all Service Provider databases. Six months is longer than the time for which any MSISDN is quarantined by a Mobile Network. Therefore it stands to reason that if the Mobile Network requirements are adhered to, no End User will ever receive a promotional message that was intended for the previous owner of the MSISDN.

We therefore suggest that PhonepayPlus adopt a consistent policy, such that the existing requirements do not become overly-complex or unnecessarily and disproportionately burdensome. The current Network policy satisfactorily addresses this problem. As such we recommend PhonepayPlus simply reinforce that six months is the maximum allowed time of inactivity between interactions.

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?

Our position is that third party marketing is seldom carried out by Service Providers with robust evidence of opt-in from the recipient. Any demand from End Users to receive third party marketing is at most on an exceptional basis, as the Payforit figures clearly demonstrate. Unsolicited third party marketing, on the other hand, represents one of largest sources of justified End User complaints about phone-paid services.

In the absence of PhonepayPlus being empowered to introduce an outright ban on third party marketing in order to address this matter, the conditions associated with acceptable instances of third party communications must be much tighter. What constitutes “evidence” of explicit consent must be narrowly defined. If this condition is not sufficiently robust, many of the issues giving rise to this Consultation will continue unchecked and frequent instances of unsolicited third party marketing will continue.

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?

It is important that this section is considered in two distinct areas:

- 1st Party Marketing
- 3rd Party Marketing

1st Party Marketing

If an End User has made a purchase from a Service Provider, has not opted out of receiving promotional material from that Service Provider and then receives promotional material within six months from the last date of interaction with the Service Provider, no extra requirements are necessary. A reasonable person will have the power to recall their previous relationship with that Service Provider. The fact that the promotional message will comply with the PECD and provide a route to unsubscribe will further ensure that the End User is fully empowered to discontinue promotions at any time.

In this scenario, requiring the Service Provider to commence marketing within a period of 2 weeks is unnecessary. Furthermore, it will have the effect of generating unwanted promotional messages as Service Providers will be forced to commence marketing before they otherwise might. The net result will be End User receiving more, rather than less, promotional messages.

3rd Party Marketing

As previously stated, the prevention of third party marketing should be achieved by any means available in order to prevent the problem of unsolicited third party marketing. Consequently, the requirement that third party marketing must be commenced within two weeks of the date of purchase by the End User of a service AND that the End User has provided an opt-in to receive third party communications (such opt-in to be proved by specific means of consent, such as evidence of a checked third-party marketing box in a Payforit transaction) would be a welcome one.

Q16 – Would you exempt promotions tied to a specific date (e.g. a 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.

Where a 1st party marketing promotion is within six months from the last successful interaction with that End User and promotional messages comply with the PECD, no further obligations should be imposed.

On the assumption that PECD precludes an outright ban on 3rd party mobile lists, where 3rd party marketing is accompanied by acceptable evidence of opt-in to receive third

party marketing and is undertaken within 2 weeks of a sale by a 1st party, it should be deemed acceptable.

Any promotion falling within these criteria and otherwise compliant with the Code of Practice is thus likely to be acceptable.

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?

We agree that it is generally not possible to provide robust evidence linking a website to an individual. As a consequence, we believe that an End User should not be able to subscribe to the receipt of continued promotional messages to their mobile handset solely by means of inputting their number in a website. It stands to reason that the threshold of proof for charging Users must be higher again and as such, in no circumstances can website opt-in be acceptable as a precursor to chargeable messages.

Where there is no evidence of consumer harm, is in the provision of a one-off promotion or WAP Push as a result of inputting a number onto a website. Therefore, for one-off, non-charged products, such as a WAP Push from which repeat access to a WAP Site can be gained, no such ban should be imposed.

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

Both sections of this answer assume opt-in refers to opt-in to subscribe to a promotional database and not opt-in to receive any chargeable services.

Method i) relies on all Service Providers operating a PIN system which only accepts the PIN returned to the MSISDN. This would be very difficult to audit so theoretically and where an unscrupulous Service Provider wished to do so, could lead to the provision of fictional Web-based opt-in’s from End Users to receive promotional material on a repeat, or subscription, basis.

Method ii) benefits from being more auditable. The existence of a free MT to the End User and an MO reply from the End User can easily be provided to demonstrate opt-in.

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?

We agree that in certain environments, particularly Internet and Mobile Internet advertising, there are more instances than are acceptable of adequate consumer information being provided.

The proposed conditions to combat this however, are inadequate. The conditions do not impose any requirements additional to those already in place and therefore they will not have any additional impact.

MX Telecom reiterates that the most effective way to make an impact on unclear service advertising is for PhonepayPlus to provide some practical examples of marketing that will be considered unacceptable in the most common advertising environments (Print, WAP and Web). Whilst these examples would not be exhaustive, they would enable Mobile Networks and Aggregators to take decisive action against clear breaches of the PhonepayPlus Code, rather than the current and unacceptable situation of trying to reach agreement as to at what point advertising becomes misleading. The removal of subjectivity is needed in this area if the problem is to be properly addressed.

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?

Owing to the potential for pay-per-page WAP sites to generate repeated transactions and thus high charges in a short space of time, it is very important that End Users are appropriately protected. We agree that transparency has been an issue with some services of this type but would propose more specific requirements than those currently being suggested.

In particular, where a charge will be triggered by selecting a link, the price should be mandated to appear directly above that link or selection of links. Reference to “clear and prominent” is open to unhelpful interpretation.

Where a user is billed by an MT message further to using a pay-per-page service, the MT message should act as a receipt for use of the service and contain the following information:

- Service Provider name;
- Clear reference to the cost of the message and what it relates to; and
- A customer care number for the Service Provider.

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.

We have no preference on this matter, subject to enforcement action being taken to ensure the adopted requirements are adhered to.

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

Consideration of chat services needs to identify the two different types of chat services operated: one-in one-out services and one-in, multiple out services. In the latter case, it is imperative that the STOP command requirements are enforced as with subscription services. That is to say, if an End User sends the STOP command to a chat service they are using, they must not receive any further billed messages, until such time as they again provide consent to receive billed messages.

The main problem we have identified with some Chat Services is the lack of clarity associated with promotional messages. The Statement of Expectation will hopefully address this matter by clarifying that any promotional message must contain minimum details such as Service Provider, price, opt-out etc. Lack of clarity is accentuated by the use of Mobile Long Numbers in the sender field of promotional messages. In certain cases, this would appear to be designed as an attempt to mislead the End User into replying and then receiving billed responses. We would advocate a bar on the use of such numbers for the promotion of chat service, given the propensity for End Users to be misled by personalised promotions coming from such numbers.

The Statement of Expectation conditions currently proposed do not go beyond what are existing requirements of the Code of Practice. It is therefore unlikely that in isolation that they will have any impact on any existing problems identified.

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?

Subscription services and the way in which they are advertised constitute the single biggest area of non-compliance with the PhonepayPlus Code of Practice. Section 2.6 of the Consultation demonstrates that 18 of 25 adjudications against mobile services in the first six months of 2008 relate to subscription services. That is to say, almost 80% of materially non-compliant mobile services adjudicated against in those six months were subscription based.

On the basis this constitutes such a high percentage of all non-compliance, it is of paramount importance that decisive action is taken to address this growing trend. Firstly, the existing mandated requirements for the advertising of subscription services (as contained within the Code of Practice), need to be better enforced. Highly visible monthly publications frequently demonstrate a lack of enforcement in this area.

Secondly, PpP need to align themselves with Mobile Network policy and mandate the requirement for End Users to provide an MO SMS message in order to initiate a subscription service.

Thirdly, we agree that Prior Permission, to be obtained by the companies providing identified high-risk subscription services, should be implemented as a priority. This will help address one of the main problems with subscription service regulation today – that of a lack of visibility as to how such services are advertised and operated. Any significant deviation from the terms of a license should be met with revocation of license, which will be more effective than the imposition of relatively minor fines against companies undertaking fraudulent or wilfully reckless behaviour.

Whilst recognising the importance of a tough approach against non compliant Service Providers in this area, it is also important that Service Providers adhering to the Code of Practice and providing legitimate services are not unnecessarily and detrimentally affected. It is for this reason that we counsel against the imposition of a double opt-in requirement for such subscription services. The imposition of further obstacles to an End User making a purchase, despite already being fully aware of the price of a service, will inevitably cause drop off in legitimate subscriptions. It is important we are mindful of this distinction in reaching any conclusions, rather than generalising that any drop off would be explained solely by Users becoming aware of the price of a product or service.

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?

It is our experience that misleading Internet advertising of the service types already identified represent the main types of subscription that are currently causing consumer harm.

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?

We trust that specific reference within this question to ringtones is an error. We agree that any subscriptions initiated through Payforit should definitely not be subject to any prior permission requirement. Payforit is founded on the principle of guaranteeing the End User is aware of the price before committing to a purchase. Consequently, the risk of an End User not being clear as to the price of a service before committing to purchase is entirely removed.

Q26 – Do you have any further evidence of other compliance costs which we have not identified in this Regulatory Impact Assessment? Please provide data where appropriate.

No evidence to provide.