



11 September 2008

Mark Collins
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Dear Mark

Mobile phone-paid services and their Marketing

Thank you for the opportunity to respond to PhonepayPlus's consultation on Mobile premium rate services¹.

Telefónica O2 UK Ltd ("O2") supports the MBG's response to the consultation document. O2 also has additional comments on some specific issues raised in the document.

Complaints

O2 notes the evidence presented by PhonepayPlus on complaints. However, O2 has not itself experienced an increase in complaints about mobile premium rate services.

It would have been helpful to know more information about the complaints statistics presented by PhonepayPlus, in order to assess where problems are arising. For example, an analysis of complaints generated by customers of the different mobile networks, by service category, by service provider etc would have been useful.

In addition, it would be helpful to understand what PhonepayPlus regards as a "complaint", for the purpose of compiling its statistics. For example, in the context of considering consumer complaints, Ofcom is proposing that a complaint should be defined as:

*"an expression of dissatisfaction made to a Communications Provider related to its products or services, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected."*²

It would be interesting to know whether all of the "complaints" that PhonepayPlus reports it has received corresponds to this definition.

¹ Mobile phone-paid services and their Marketing, PhonepayPlus, 17 July 2008

² See paragraph 3.14 of Review of Alternative Dispute Resolution and Complaints Handling Procedures, Ofcom, 10 July 2008 - http://www.ofcom.org.uk/consult/condocs/alt_dis_res/condoc.pdf

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O2 has tried to elicit this type of information from PhonepayPlus on a number of occasions during the consultation period, and before. However, regrettably, PhonepayPlus has not provided any further details at all. This does not inspire confidence in the evidence that PhonepayPlus has presented, particularly when it conflicts, as it does, with O2's own experience, that complaints in this area have *not* increased.

Subscription services

Regardless of the veracity of the complaints evidence that PhonepayPlus has presented, O2 is concerned at the approach that PhonepayPlus appears to be adopting in setting policy on mobile subscription services.

In simple terms, PhonepayPlus purports to provide evidence of breaches of its code and an increase in customer complaints. We have discussed the evidence about complaints, above. However the point to note, here, is that PhonepayPlus does not appear to provide any evidence that its code itself, or the interpretation that it has taken of its code, is deficient. Accordingly, to the extent that there is a problem, it would seem to be one of *enforcement* of the rules, and not in the deficiency of the rules themselves.

This is an important point, because the solution to this type of problem, in O2's view, lies in better and more efficient enforcement procedures, and not in the production of yet more regulation (that would increase compliance costs and potentially distort competitive markets).

O2 draws a comparison with its work in ensuring that the Payforit scheme rules are adhered to. As PhonepayPlus is aware, O2 has dedicated significant resource into testing providers' compliance with the Payforit scheme. In circumstances where O2 finds a breach of the scheme rules (and unless breaches are serious), O2 contacts the relevant merchant and service provider and directs them to correct the breach. We have found this to be a quick, effective and efficient means of ensuring the scheme rules are complied with. Further, industry participants know that O2 undertakes this testing, so O2 has built a reputation within the industry that it will uncover and take action against breaches of the Payforit scheme rules. We have found that the testing that O2 carries out, and the reputation it has earned, acts as an extremely effective and efficient deterrent against breaches in the first place.

We note what PhonepayPlus has said, in paragraph 7.16, about its attempts to enforce its provisions on subscription services in the past. However, it is important to distinguish between the approach O2 is advocating, and the action that PhonepayPlus appears to have taken to date. A series of sporadic "crackdowns" might be expected to address problems only in the short term, but only a programme of continual testing, will result in a *reputation* that breaches will be dealt with quickly.

In O2's view, such an approach has been extremely effective in securing compliance with the Payforit scheme rules and we are firmly of the view that PhonepayPlus should seriously consider its deployment in the enforcement of its Code in relation to subscription services.

Regulatory impact assessment

O2 welcomes PhonepayPlus's acknowledgement that, as a matter of principle, it should carry out a regulatory impact assessment on its proposals. However, we are of the view that the RIA that PhonepayPlus has carried out is deficient in a number of respects.

Firstly, and fundamentally, the benefit of conducting a RIA is that it enables policy makers to make an informed choice between a number of different policy proposals that have been formulated to deal with a specific public policy issue, in order that the best one may be selected. However, PhonepayPlus has *not* carried out an assessment of different policy proposals for dealing with each specific problem it reports. Instead, the exercise that PhonepayPlus has undertaken merely seeks to demonstrate that for each such problem it has identified, its *solitary* policy proposal would result in a net benefit. This is a serious deficiency because PhonepayPlus's preferred option cannot be compared, objectively, to



other policy options for dealing with any particular problem. Accordingly, PhonepayPlus is simply not in a position to conclude that its proposals should be implemented.

In the context of subscription services for ringtones, wallpapers and music, as we set out above, O2 believes that a quick, informal but comprehensive enforcement procedure is likely to be the best way of eliminating any consumer harm that may arise. However, because PhonepayPlus has not conducted a RIA on this approach, it is not in a position to determine that its policy proposal (requiring a double opt in) is better or worse than O2's alternative.

Furthermore, the RIA that PhonepayPlus has carried out in respect of double opt in omits a key cost. PhonepayPlus acknowledges that, under its proposal, providers would have to fund the provision of an additional text message and has assumed the cost of this to be 5 pence per message. PhonepayPlus estimates that the total cost of this would be between £460,000 and £1.38m per annum. However, PhonepayPlus has *not* estimated the additional cost of the text message that *subscribers* would need to send in response. If this is assumed to be 5 pence per message, as well, then the cost of PhonepayPlus's proposal would be double, ie between £0.92m and £2.76m. PhonepayPlus estimates that the benefit of its proposal would be between £2.4m and £7.2m³. Accordingly, if PhonepayPlus's RIA is adjusted to take account of the additional cost, the results are ambiguous – it is not clear that PhonepayPlus's proposal would result in a net benefit.

In our view, PhonepayPlus should carry out another regulatory impact assessment for all sensible policy options in relation to subscription services for ringtones, wallpapers and music, including the type of enforcement procedures of its current code that we have described, (ie without the additional prior permission regime it is proposing). We are convinced such an approach would be better than the double opt-in regime which PhonepayPlus is proposing, that promises to add additional compliance costs for industry and consumers alike, and which would be cumbersome and offer a poor customer experience.

I hope that you find this helpful. We would like to discuss our comments with you and I will call to arrange a meeting in due course.

Yours sincerely

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³ On the basis that it receives 2,000 complaints each month about the relevant services. See O2's comments on complaints levels