

PhonepayPlus Consultation

© Crown copyright 2008

This publication (excluding the OFT logo) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

Introduction

The OFT welcomes the opportunity to respond to PhonepayPlus's review and consultation on 'Mobile Phone-paid Services and their Marketing'.

The OFT is the UK's national competition and consumer authority. Our mission is to make markets work well for consumers and this directs the approach we take to all our work. Supporting economic progress is integral to our role and by striving to make markets work well, we aim to deliver significant benefits to consumers, businesses and the economy. We want consumers to be able to make informed choices between suppliers competing for their custom. Businesses which are good at delivering what consumers want then prosper and enhance the productivity and competitiveness of the economy as a whole.

The OFT recognises PhonepayPlus as a key partner in protecting consumers. This is reflected in the Memorandum of Understanding between our two organisations and our close working relationship on enforcement matters.

GENERAL OFT COMMENTS ON THE PHONEPAYPLUS CONSULTATION

OFT/PhonepayPlus sweep of websites offering mobile download services charged at a premium rate

1. In June 2008 the OFT and PhonepayPlus participated in a European wide initiative aimed at investigating consumer law compliance by websites offering mobile phone services. The sweep found that 39 out of 43 UK websites reviewed that offered mobile download services such as ringtones required further investigation or action for potential breaches of consumer law and/or the PhonepayPlus Code.

In particular the sweep found that:

- services advertised as 'free' had costs which the consumer would only discover after the transaction. Some tied the consumer to a subscription contract without clearly indicating how the consent to such a contract was given or how it could be terminated;
- prices and related charges were not indicated in a clear way until invoiced;
- there was unclear disclosure of important information: for example hiding key contractual or product information, or presenting it in an unintelligible, ambiguous, or untimely way.

These findings are consistent with many of the consumer problems highlighted in the PhonepayPlus consultation.

2. There has also been an increase in complaints reported to Consumer Direct (a telephone and online service operated by the OFT offering information and advice on consumer issues) about phone downloads. There were 139 complaints recorded by Consumer Direct between 1 January 2007 – 31 August 2007. However, for the corresponding period this year, 1 January 2008 – 31 August 2008, there have been 241 complaints. This is consistent with PhonepayPlus's experience, albeit we would expect most consumers to complain directly to PhonepayPlus.

3. Consumer trust and confidence are critical to the continued growth of mobile phone-paid services. We therefore support PhonepayPlus's proposal to address the central issue of a lack of transparency. Consumers must be provided with material information in a clear, prominent and straightforward manner in order that they can make an informed choice about any phone-paid service prior to incurring a cost. Further, consumers must not be misled about the nature or characteristics of the service on offer.
4. PhonepayPlus has identified that services which offer ringtones, music or wallpaper downloads using a subscription and/or joining fee are the single biggest cause of complaint about mobile phone-paid services and have the potential to cause significant consumer harm because of the recurring nature of the charge. We believe that a risk based and proportionate 'prior permission' requirement is an important tool for pre-empting consumer detriment where problematic services with a high risk of potential harm have been identified.
5. The proposals set out in the consultation, once implemented, should be kept under regular review to ensure that they have been effective in reducing consumer harm.

Consumer Protection from Unfair Trading Regulations 2008

6. Many of the transparency issues identified in the PhonepayPlus consultation are also likely to constitute breaches of the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs'), for which the OFT, local authority Trading Standards Services and the Department of Enterprise, Trade and Investment in Northern Ireland have a duty to enforce.
7. The CPRs implement the EC Unfair Commercial Practices Directive into UK law. The CPRs prohibit unfair commercial practices which distort consumers' decisions. They introduce a general duty not to trade unfairly on businesses dealing with consumers. They set out broad rules for determining when commercial practices are unfair, including misleading practices such as false or deceptive advertising or omitting important information. They also contain prohibitions against misleading and aggressive practices, as well as 31 specific practices that are always considered unfair. They are enforceable by the OFT and other designated enforcers through both the criminal and civil courts.

8. A 'commercial practice' is defined in the CPRs as "any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product." Product means any goods or service.
9. A commercial practice is unfair if (a) it contravenes the requirements of professional diligence (which is the standard of care and skill to be expected from an honest trader acting in good faith in a field of activity) and (b) it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer with regard to the product.
10. A commercial practice is a misleading action if (a) it contains false information and is therefore untruthful in relation to any of a range of matters (such as the nature and characteristics of a product) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of a range of matters (such as the nature, characteristics and benefits of a product) and (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
11. A commercial practice is a misleading omission if, in its factual context (taking account of (a) all the features and circumstances of the commercial practice; the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means (a) the commercial practice omits material information, (b) the commercial practice hides material information, (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely; and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
12. 'Inertia selling' - such as where consumers are signed up to a subscription service without their knowledge or consent - is also considered unfair in all circumstances under the CPRs (banned annex practice 29).

13. PhonepayPlus is responsible for regulating Premium Rate telephony services in the UK and will deal with appropriate complaints relating to this sector under the CPRs. If an enforcer is satisfied that complaints and cases are clearly within the remit of PhonepayPlus and can be adequately dealt with by it, they can refer such complaints and cases to ensure that businesses comply with the CPRs. However, the OFT may also take appropriate enforcement action under the CPRs against a business where, for example, there is evidence of significant consumer harm or where vulnerable consumers such as children are being targeted.