



## **Response to PhonepayPlus's Review and Consultation Document: Mobile Phone-paid Services and their Marketing**

on behalf of Orange Personal Communications Services Ltd

11 September 2008



## Introduction

Orange welcomes PhonepayPlus's review of mobile Premium Rate Services (PRS). This review demonstrates PhonepayPlus's commitment to understanding the market better and to working with stakeholders to foster innovation and build consumer trust in mobile PRS services.

Whilst we are generally in agreement with PhonepayPlus's description of the issues, we are concerned that the problem may have been overstated in the White Paper causing unwarranted levels of alarm amongst regulators and consumers. This risks engendering a response which is disproportionate and fails to remedy the root cause of the issue. We believe that PhonepayPlus is right to take action, but this must accurately reflect the nature of the problem. We believe there is scope for further analysis of the complaints received and the driver for these complaints. For example, PhonepayPlus's evidence base does not demonstrate widespread abuse of the regulation, rather a minority of services are generating the majority of complaints and it is these services that need to be reined in through targeted enforcement action.

Orange agrees with an agenda that prevents harm and we believe that there is already a robust, anticipatory co-regulatory framework in place for PRS. The majority of PRS services are compliant with the regulation. More regulation will not necessarily eliminate non compliant practices – the key is to ensure that enforcement focuses on those who fail to comply. We believe a series of stakeholder workshops should be held to implement a plan of enforcement action. We hope that PhonepayPlus will continue to work closely with all segments of the value chain in order to build in to build in compliance, foster a competitive market and protect consumers.

We broadly support PhonepayPlus's Statement of Expectation on the application of the Code of Practice. It has always been Orange's preferred approach to have a principles based Code accompanied by a set of helpnotes/Statements of Expectation to refine its application. We look forward to continuing to work closely with PPP to scope and draft these guidance notes in order to address issues causing consumer harm.

However, we do have reservations about the introduction of a Prior Permissions regime for ringtones, music or wallpaper download services. We believe this will increase bureaucracy for all service providers, without furthering compliance or boosting consumer confidence in those services, as the regime is not targeted at those services intent on misleading customers. There is no evidence that Prior Permission reduces nefarious activity. PhonepayPlus run a Prior Permissions regime for chat and adult services; however, these services are still the biggest driver of complaints seen by Orange. As mentioned above, the emphasis should be on improving compliance.

We agree with the concept of publishing a helpnote in order to combat problems relating to the trading and selling of third party marketing lists for premium rate services; however, this must be done formally in conjunction with the ICO i.e. through a joint Helpnote.

Finally, we agree with PhonepayPlus's immediate Notice regarding services which fail to respond to a STOP command. In terms of applying this Notice, we believe it is important that before the Emergency Procedure is invoked and the service suspended, PhonepayPlus should



first contact the SP to understand whether there is a legitimate reason for the failure of the STOP command (e.g. known technical problem).

## **Specific Questions**

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

Orange broadly agrees with PhonepayPlus's analysis of the promotion and delivery of PRS. We would reiterate our support for PhonepayPlus's review and commitment to better understanding the mobile sector.

We note PhonepayPlus's suggestion in 1.3 that payasyougo (PAYG) customers may be more vulnerable to unscrupulous service providers and less likely to complain because they cannot check their premium rate transactions against their monthly bill. We do not agree with this conclusion. Customers choose to use PAYG precisely because it does give them more control, over their spend. Indeed, PhonepayPlus also notes in 8.16 that PAYG customers may become aware of their charges more quickly than pay monthly (PAYM customers).

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

Orange is generally supportive of PhonepayPlus's review of mobile services. However, we are concerned that PhonepayPlus's presentation of its complaints figures may be inflating the scale of the problem. PhonepayPlus's press release accompanying the review stated that there has been "an extraordinary increase in complaints". However, the evidence does not bear out this statement. Whilst we agree that a concerted effort is needed to rein in those information providers that are systematically breaching the fundamentals of the PhonepayPlus Code, we do not agree with the suggestion that there is a pandemic problem.

In terms of the customer contacts Orange has received, we have not seen an extraordinary rise in complaints over the past 12 months. Furthermore, we have not seen an increase in complaints about subscriptions services in particular; text chat services receive more complaints (although this is commensurate with a rise in usage of these services on Orange, which could be one explanation for the growth). We hope that PhonepayPlus will share further details on the data set used in this review with us so that we can work together to enforce good practice and in order to better understand complaint trends. We note that some work to this end is beginning to be carried out in the ILP, for example through the Risk Register.

Whilst PhonepayPlus is right to take quick and decisive action, this must also be done in the context of evidence. We believe PhonepayPlus should analyse the complaints in further detail in order to better understand the problem. For example, we believe the following factors that may have contributed to the increase in complaints and need to be better understood:

- Changes to the way PPP logged complaints in February
- PhonepayPlus's re-brand and supporting publicity campaign

- MNOs have been encouraged by PhonepayPlus to help raise PPP's profile by briefing contact centre staff on the role and remit of PhonepayPlus and to direct PRS complaints to PhonepayPlus. One of the reasons for this was to give PhonepayPlus more visibility of the market and also to help the gathering of evidence for investigations purposes.
- We note in 2.5 that Ofcom's complaints figures relate to PRS and not just mobile PRS, although the statistic is being used to support the evidence of the rise in *mobile* PRS services.
- There is an increasing number of individual complaints about individual services, which not only suggests a growing awareness of PPP, but also that a minority of services is generating the majority of complaints.

In summary, we agree that PhonepayPlus is right to take action to address any problems identified. However, more investigation needs to be conducted to understand the complaints numbers whilst at the same time enforcement action needs to be targeted on transgressors.

***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?***

We are pleased that PhonepayPlus has taken an active role in the European Commission's sweep of premium rate websites and is sharing their expertise and best practice with other member states. We believe much can be learned from the UK's experience and comparatively successful PRS market. We would encourage PhonepayPlus to remain involved in the OFT's investigation.

***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.***

We agree with PhonepayPlus's assessment.

***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?***

A promotional SMS should never be chargeable – this is a fundamental pillar of the PhonepayPlus code and we wholly agree with PhonepayPlus's assessment. Any service which did charge consumers without their consent would be in breach of the PhonepayPlus Code and PhonepayPlus should take firm action.

As a network, we mandate that promotional SMS for PRS services include “free msg” in the header or in the first line of the text message.

We would suggest that PhonepayPlus should increase their testing of services as part of their monitoring regime in order to identify and deal with non compliant services and to keep information providers on their toes in terms of ensuring compliance.

***Q6 & Q8 – Do you agree with PhonepayPlus' assessment of the risk caused by promotional SMS messages with no clear opt-out facility? If not, why not?***

It is imperative that consumers are given a clear and valid means of opt out as part of every promotional message (free of charge except for the cost of transmission). This is the law.

We concur that PhonepayPlus should not prescribe what constitutes valid and simple opt out, as this is a PECR/DPA issue, which falls in the ICO's direct remit. That said, from an operational perspective, we would point out that we do have our own requirements in our network Code of Practice.

We note PPP's consideration of a requirement for all mobile websites to have an opt out facility accessible from the landing page and for the cost of accessing this page to cost no more than standard data rates. PPP remarks that this practice is permissible as standard data rates are low. Whilst we understand PhonepayPlus is simply explaining their thinking on this point, as binary SMS is a comparatively new marketing tool, we must point out that standard network data charges are not regulated by PhonepayPlus and that texting STOP also often incurs a standard network charge. So, for the avoidance of doubt, we do not believe there is any reason for PhonepayPlus to consider the use of standard rate data charging as being unacceptable.

***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?***

Orange does not believe that chargeable promotional premium SMS should be permitted. We are therefore concerned that the wording in the first condition risks suggesting that promotional SMS can be chargeable so long as the user is informed of the cost. We would recommend that the first Condition be deleted for the avoidance of doubt.

***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?***

So long as opt out instructions are clearly provided in the body of the message, we do not think that the shortcode needs to be included as part of the title. It is a requirement of the Orange Code that opt out instructions must be clear in the body of the message. So, if "free message" is indicated in the title/originator, the content of the message should either indicate the shortcode to which STOP should be sent, or the user should be advised to reply to the message to opt out. These are all user friendly opt out mechanisms, in our view.

We would suggest, though, that the introduction of keywords for each service provided by a SP (which may be operated by a different IP) could lead to confusion and be complicated to implement. It may also pose additional difficulties to marketers who must work to 160 character limits.



We recommend that PhonepayPlus should hold to the principle that opt out should be clear and easy to use without prescribing detailed rules. PhonepayPlus should provide examples of good practice rather than defining exactly what best practice should look like. This would be in line with PhonepayPlus's conclusion that it should not define specific conditions in this area, being within the remit of PECR and the ICO. We fully support and indeed encourage the involvement of the Information Commissioner's office (ICO) in the discussions about the appropriate operation of electronic marketing. 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.

***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?***

PhonepayPlus should only be giving examples of good practice and not specifying what best practice is at this stage. So, whilst we agree that option "a" should be considered good practice, we do not believe that it is the only means of meeting the requirement. Orange requires that SPs using binary/push SMS marketing on our network should state in the message title that it is a free message and include the short code to which users can reply STOP in order to opt-out of future marketing. We believe this works well.

That said, we agree that PhonepayPlus's suggestion for good practice is practical as any SP promoting service via WAP push will almost certainly have short codes (as this would be how they charge for the service unless they are promoting a Payforit site). Shortcodes provide the easiest way to opt out and would allow identification of the service owner.

However, whilst not our preferred approach, Orange considers that a clear link provided on the landing page should not be excluded as an option.

We note that PhonepayPlus had initially thought that incurring a standard data charge may be unreasonable (4.14). Whilst PPP has stepped back from this because standard data charges are considered "extremely small", we would highlight again that: the issue of standard data charging is outside of PPP's remit; and it is not technologically neutral to suggest that incurring a standard data charge is unreasonable when customers may incur a standard text charge for texting STOP. This is permitted under PECR.

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

In order 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. Otherwise, there is a real risk of further frustrating consumers who are misdirected to PhonepayPlus to complain about unsolicited messages. PhonepayPlus contact centre staff should be prepared to clarify the difference to consumers and direct them to the ICO, as appropriate. PhonepayPlus should not be giving advice on non PRS promotional SMS.



The ICO's "when to complain to us" page sets out when a consumer should complain to them and when they should seek advice from other regulators e.g. PhonepayPlus. We would suggest that PPP's consumer facing website should also do the same. [http://www.ico.gov.uk/complaints/privacy\\_and\\_electronic\\_communications.aspx](http://www.ico.gov.uk/complaints/privacy_and_electronic_communications.aspx)

We would suggest the following amendment to the Statement of Expectation to ensure clarity:

All ~~Promotional~~ SMS messages **promoting PRS services** must **provide** ~~ensure~~ that recipients ~~are provided~~ with a valid and simple means to opt-out of receiving future promotions from the same service, in line with the requirements of the Privacy and Electronic Communications Regulations (EC Directive) 2003. This means of opting out should be clearly visible to the consumer".

We would also recommend that the entire "Promotional SMS Messages" section of the Statement of Expectations should make clear that it is dealing with PRS promotions only.

PhonepayPlus's intention to work with the ICO to produce agreed principles on how PECR should be interpreted in respect of premium rate services (as set out in 5.6) is helpful and welcome. It is our strong view that any helpnote clarifying the application of PECR – whether in the context of promotional SMS or third party databases – must clearly identify the ICO as co-author. In other words, it should be co-branded as a joint help note available on both PhonepayPlus's and the ICO's website.

***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?***

We agree that information about the original service and promotional information about a further service should be clearly delineated. Where instructional and/or operational messages relating to spend contain any other promotional material, Orange's Code of Practice requires that this must come after the main content of the message and the message should not mislead the user in any way. However, so long as the two messages are clearly differentiated, we do not agree there is a need to prescribe the inclusion of the words "Advert" or "Promo".

***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?***

We agree there is an issue with the trading of third party marketing lists. However, we disagree with the proposal that service providers provide evidence that the MSISDNs on their opt-in lists have not recently been recycled. We are concerned the only means of proving this is via the network operator and that the implication is for the networks to offer a near constant database cleansing service. This would require a level of resource that we cannot support.

Orange recognises that it can be confusing to customers who have recycled numbers and who receive messages aimed at the previous owner of the MSISDN. Therefore, we have already implemented a database cleansing process for SPs to protect Orange customers. If an SMS is



sent to a quarantined number we will send an error message back to the SP so they know the number is no longer in use (i.e. they will know that Orange no longer has a billing relationship with the owner of the MSISDN). They should therefore not send any further SMS to that number. Every month, we will automatically send the aggregators a list of all MSISDNs to which they have submitted messages, either premium or promotional/marketing, which have failed to deliver due to either the MSISDN being ported or in quarantine. We place a requirement on SPs to ensure the removal of these numbers. It is then the responsibility of SPs to ensure that their content providers do not market further to those MSISDNs. If SPs/marketers can demonstrate they have fulfilled this requirement, this should be sufficient to evidence that the MSISDNs on their lists have not been recycled. For the avoidance of doubt, we will only send this list of numbers to the SPs with whom we have a direct relationship (and whose services these MSISDNs have interacted with), not to information providers.

As explained above, we believe that the Statement of Expectation will help boost general consumer awareness and understanding of opt out processes. This is critical, as practically speaking, it not possible to eliminate all instances of misdirected communications (via any media). Coupled with better enforcement of clear opt out processes, an increase in consumer awareness of opt out mechanisms should help reduce consumer confusion.

***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?***

As above, Orange agrees that the selling and trading of opt-in list poses problems for the PRS industry and that it is beyond PhonepayPlus's remit to ban the selling and trading of hard-opt-in lists. Any proposed conditions should not place a disproportionate burden on the networks. It is the content providers' responsibility to ensure they abide by PECR requirements.

The only way to irrefutably prove an opt-in is legitimate is to link network data records to a positive consent record held by the SP. Orange is happy to do this as part of a PhonepayPlus investigation, but we cannot provide this information to SPs on a routine basis (and we would not be able to provide this information directly to marketers with whom we have no direct commercial relationship).

***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?***

Orange broadly agrees with the assessment of the issues. A joint ICO/PPP helpline and the Statement of Expectation on promotional SMS should help improve general consumer awareness of valid opt-ins/how to opt out. As stated previously, we share the view that PPP should not specify precisely how consumers should be informed of the hard/soft opt-in beyond what is specified in PECR.

We have concerns that the proposed two week rule would simply encourage the sending of marketing just before the two week deadline, whether it was required or not, just to keep the opt-in live. So long as the customer has a clear and simple means of opting out and this is



properly advised to the consumer, we feel there should be no need for a formal deadline for promotions to be sent. However, if PhonepayPlus remains of the view that a deadline is necessary, it would be more appropriate to ensure this is set at a frequency that is relevant to the nature of the specific service.

We concur with PhonepayPlus's conclusion at 5.30 that, in view of the ICO's position with regards the validity period of opt-ins (i.e. that they remain valid indefinitely as long as they are regular), it is beyond PhonepayPlus's remit to require that all promotional SMS cease after six months if no response is received. However, Orange does implement this requirement as part of its commercial agreement with SPs. Our definition of mobile interaction is either an MO message to the marketing party's services within the last 6 months, or where an MT message (either premium, information or marketing), has been successfully delivered within the previous six months.

PhonepayPlus notes that "*a promotion that... sent messages many weeks or months apart might be found in breach on the grounds that such practices would not constitute an ongoing marketing relationship with the consumer*". However, we would point out Whether or not a promotion is considered sufficiently "regular" must be for the ICO to determine.

***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.***

Orange would accept exemptions for promotions tied to a specific date. However, we would point out that Orange requires all promotions/services to stop if there has been no interaction with the MSISDN for a six month period.

***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 not possible to have a robust audit trail proving a valid opt-in if there is no MO sent by the customer.

Orange requires an MO message to be sent as part of any subscription service. Services that breach this requirement will be red-carded. So, we do not allow option 1 on our network.

***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.***

We agree that option 1 may cause consumer harm because there is no means of conclusively proving whether or not the customer initiated the subscription service.

We believe that both options 2 and 3 should be permitted. So long as there is an MO message to a shortcode, there will be an audit trail to protect the customer in case of dispute. In the case of both options, it must be made absolutely clear to the customer (as is already required by the PhonepayPlus code) that they are joining a subscription service.

**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?**

Orange fully supports the provision of clear and transparent information so that customers can make an informed choice, prior to incurring any charge. The PhonepayPlus Code (and indeed the Orange network Code of Practice) already makes this a prerequisite for all PRS. We therefore believe the focus should be placed squarely on better enforcement of these rules. PhonepayPlus's Compliance Advice team is already taking important steps to ensure adherence to good practice.

However, we disagree that there has been a "general failure" by service providers to ensure the provision of adequate consumer information. Orange believes that services breaching the rules are in the minority, although this is still wholly unacceptable and we support PhonepayPlus's efforts to eradicate bad practice.

We do not share the view that the transparency requirement is less straightforward where the customer purchases a service from a website (6.7). Regulation says that customers must be "fully informed, clearly and straightforwardly of the cost of using a service *prior to incurring any charge*" (5.7.1) – this also applies to PRS websites. So, even if a consumer accesses a website via a sponsored web link in a search engine, the SP would still be expected under a literal reading of the current code to provide clear information before any charge is incurred.

UK consumers are increasingly shopping online (not just for PRS) and therefore PhonepayPlus should not assume that this is a new way to market PRS services per se as consumers are already accustomed to the norms of the Internet and eCommerce. Web based PRS services should not be subject to additional rules.

We agree with the wording of the first proposed condition in this section.

The second condition risks putting PRS services at a disadvantage to other web services and should be modified as follows: "*Websites which allow users to browse and purchase different Phone-paid services must contain all of the information required by Section 5.7-5.14 of the 11th Code of Practice, regardless of whether general information has been provided in promotional material. This information must be provided alongside the description of any phone-paid service/download, and positioned prominently so the consumer is likely to see it in advance of any purchase. It is not acceptable for this information to be included elsewhere on the website, or simply referenced in the website's terms and conditions*"

This clarifies that the information must be provided in full on websites (bearing in mind websites may not be promoted in the same way as traditional PRS). The core principle of transparency should be at the heart of any investigation rather than judging compliance based on a technical



requirement regarding the positioning of information. As long as information is not wilfully obfuscated and consumers are informed of the cost and commitment before going ahead with the purchase, no further prescription is necessary.

We note that 5.7.3. of the code already requires that: *"In cases where it is unlikely that a consumer will have seen or heard any promotional material containing pricing information, the service provider must place a short, distinct pricing message at the beginning of the service"*. This has clearly been written with voice based services in mind, but the principle should apply to web based services as well (and the paragraph should be made technologically neutral in the review of the Code).

We do not believe that ALL the information contained in section 5 must be provided (although services must, of course, comply with all the requirements). The information to be displayed prominently is that which is under the Promotions section of the Code i.e. 5.7-5.14.

**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?**

We agree that there may be cause for concern around the transparency of Pay per View services. However, as we have underscored throughout this response, clear and transparent pricing is already a fundamental requirement of the Code of Practice which applies equally to all PRS. So, while we appreciate PhonepayPlus's intention to ensure that a newer business model, such as Pay per View, adheres to these rules, and whilst we agree with the issues identified in the draft condition, we do not agree that a Prior Permissions regime is required at this stage (see below). If any service is confounding the rules by providing a range of different prices and charging mechanisms (i.e. a hybrid of per page and per image and variable pricing), then clearly the existing regulations are being breached. The existing regulation already makes it very clear that ambiguous pricing is unacceptable. Therefore, better enforcement is a more effective option.

Whilst we do not agree with the proposal to introduce a Prior Permissions regime for these services, we do agree with the suggestion that customers should not be charged for pages/screens which they view when retracing their steps to exit a website (and for which they have already paid).

We note PhonepayPlus's comments in 6.11 that pre-pay customers are at particular risk as they do not receive itemised bills (this would also contradict the comment in 8.16 where PhonepayPlus states its concern that Post paid customers *"become aware of the charges later than consumers who have Pre-pay contacts"*). Many customers who choose to use pre-pay services do so precisely because they want to have more control over their spend. Customers will soon become aware if their credit is being used up quicker than normal and query any unexpected spend with their network

**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 do not agree that a Prior Permission regime is necessary, rather there is a need for more robust application of the existing rules on pricing transparency and fairness. Prior Permissions regimes prescribe service design but do not necessarily counter undesirable practice as it emerges. PhonepayPlus should rather seek to pre-empt issues by working closely with industry to understand up-and-coming services.

A further shortcoming of a Prior Permissions regime is that it requires service providers (not the content providers) to gain Prior Permission before the service is launched. However, there is no obligation for any changes to the service to be notified to PhonepayPlus – indeed this would entail an unsustainable level of administration. Those information providers intent on causing consumer harm can change the mechanics of their service post permission.

Orange therefore advocates an increase in the level of service monitoring. By making such a scheme public, PhonepayPlus would also encourage more diligent compliance as service/information providers will be aware of the ongoing testing of their services.

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

The majority of complaints we receive about PRS services relate to text-based chat services. We are particularly concerned by services advertised on mobile numbers. These services appear to be taking advantage of the fact consumers recognise 07 to be a mobile number range (with an individual rather than a service attached to it).

We therefore welcome the proposed conditions and note that the second statement would mean that services promoted via long dial mobile numbers would likely be considered mis-leading. Orange would be interested to hear Ofcom's views on the use of mobile numbers for the promotion of text-based chat services.

***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?***

As we have reiterated throughout this response, Orange has reservations about the efficacy and benefits of implementing Prior Permissions regimes for any service type. In the case of subscriptions services, we note that the problems identified by PhonepayPlus are not due to any loopholes in the Code being exploited. For instance, the biggest single problem is a failure to provide pricing information or the provision of misleading information – this is already strictly forbidden. This would suggest there is a need for better enforcement of existing rules (and perhaps more high profile enforcement to spread the message). Further rules will not have any significant impact, but clear enforcement will.



We agree that there has been a problem with joining fees being unclear, but again, unclear pricing is already prohibited. PPP is right not to ban joining fees – so long as the cost is clear, there is no reason to restrict business models and pricing structures.

Therefore, of the three options proposed by PhonepayPlus, we believe that option a) is the preferred option. We will consider each option in turn.

- **A) Use Existing regulation:** we disagree that the enforcement programme has been stepped up to a level necessary to discredit this option. We believe a concerted enforcement and monitoring programme is the means of providing a strategic and sustainable long term solution. PhonepayPlus, MNOs and aggregators should have a series of workshops in order to seek to tackle the issue. Orange has been suggesting this since PhonepayPlus first made us aware of their concerns.
- **B) Cooling off period:** We agree this option would be inappropriate.
- **C) Prior permissions regime:** We believe this will increase administrative costs without actually tackling the issue. Prior Permissions requires a resource intensive, one-off vetting of service providers by PhonepayPlus, although the application of the requirements falls to information providers. While a Prior Permissions regime may offer some assurance at the outset, it is not a long term solution and may lead to a sense of complacency. However, if the requirement was modified to include an obligation to maintain this information, we would be very concerned that this would not be the most effective use of PhonepayPlus's resources and would detract from focusing on services actually causing consumer harm.

We are firmly of the belief that prescriptive regulation should only apply to those services which have been found in persistent breach of the rules. PhonepayPlus should adopt a sanctions regime which includes a requirement to seek Prior Permission for all services for a defined period. This would include a rigorous vetting of all services connected by that SP. Regulation then acts as a deterrent rather than as an indiscriminate hurdle for all market players, and ensures that valuable PhonepayPlus resource is being dedicated to those areas of the market that are causing consumer harm.

We also have specific reservations about the proposed double opt-in requirement. Anecdotal evidence from SPs with experience in the US is that the market shrunk as a result of the double opt-in. This is not necessarily because customers now have the opportunity to change their minds before they commit (they will and should have been presented with the information in a single opt-in scenario anyway), but because it becomes too much of a hassle to use a service. As PhonepayPlus also notes, mobile services offer instant gratification – the desire to engage with a service on the move may dissipate with time. PhonepayPlus needs to do more research in this area before introducing such a measure, particularly in view of the noted impact on subscription sales in the EU (8.10). We are concerned this impact has not been fully understood.

We would suggest that when the PhonepayPlus Code is reviewed, it should be made clear that no charges should be incurred before the initiation message is received. This would help mitigate the concern that joining fees are being charged before the



subscription service begins (the Code currently requires that the free initial subscription message is sent before receiving the premium rate service, not before charges commence 7.12.4).

We also believe that the banning of the word FREE is an extreme and disproportionate measure. PhonepayPlus has not considered the level of consumer satisfaction (or otherwise) of services promoted as being free before banning them outright. There are legitimate uses of the term – if it is being used in accordance with 5.11 of the code, for example, there is no need to ban it. PhonepayPlus should instead consider including a requirement that use of the word FREE can only occur where the conditions underpinning the FREE claim are clearly signposted and with equal prominence.

We also note that the proposed text in the confirmation SMS may be too long to allow customisation with relevant SP details. Even before the SP/IP completes the relevant blanks (which would need to include an 11 digit helpline, the name of the service, cost, billing frequency), the text runs to over 100 characters. This leaves little room for service description.

Finally, Orange requires that subscriptions only be initiated with an MO message. PhonepayPlus's proposed text for services subscribed to via a website would suggest that a "click to confirm" would be sufficient as part of the double opt-in. However, this latter step would not be auditable and it would be disproportionate to require two MO messages to be sent.

***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?***

We do not believe there is evidence to support an extension of the use of the Prior Permissions regime.

***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?***

PhonepayPlus will be aware of Orange's position that Payforit is not a premium rate service and that it does not fall within PhonepayPlus's remit. Without prejudice to this fundamental view, we wholly agree that Payforit has been designed to ensure pricing transparency throughout the buying process and especially at point of sale, as well as to ensure user control over charging to their mobile account.

***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.***

We welcome PhonepayPlus's decision to conduct a Regulatory Impact Assessment. We do not have any specific comments to make.



*All queries in relation to this response should be to Clare Seabourne, Regulatory Analyst, Orange, The Point, 37 North Wharf Road, London W2 1AG – [clare.seabourne@orange-ftgroup.com](mailto:clare.seabourne@orange-ftgroup.com)*