

Mobile phone-paid services and their Marketing

A PhonepayPlus Review and Consultation document

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Background

The state of affairs whereby PRS companies are able to appropriate money from mobile phone users by sending unsolicited reverse charge text messages is, and always has been, a scandal. Since this system was clearly open to abuse from the outset and has been abused from the outset in every country where it has operated, it is an even greater scandal that it has taken PhonepayPlus until now to begin to address this problem.

While the PhonepayPlus consultation document published on 17 July this year contains some welcome (albeit belated) responses to the problems of unsolicited reverse charge SMS and the related problems of dishonest marketing of subscription services, the proposals are still inadequate.

The analysis presented in the consultation document

The analysis presented in the consultation document contains a largely accurate description of the current situation – the situation that ICSTIS/PhonepayPlus has failed to police adequately for many years. On one point, however, the document is misleading. It talks repeatedly about “Unsolicited text message *promotions*” [my emphasis].

In fact, there are three categories of unsolicited messages that cause problems for mobile phone users:

1. Unsolicited *promotional* messages. These, while being a nuisance, are normally free. They are illegal under the 2003 Communications Act, although no action is ever taken by the ICO against firms that send them and no action *could* be taken against overseas firms. Of course many of these (such as “missed call” and “missed parcel delivery” messages) are also fraudulent in character and PP+ has taken action against the firms that send them – though PP+’s actions have fallen short of working with the authorities to prosecute the fraudsters.
2. Unsolicited “*services*” (often “jokes” or football results). These are the real menace since they are charged to the phone account of the unsuspecting recipient and are nearly always part of an ongoing series of reverse charged messages. These are (at least under PP+’s interpretation of the law) not illegal under the 2003 Act but are probably illegal under the 1968 Theft Act.
3. Unsolicited *combined* messages which contain a “service” and the promotion of other “services” and which would normally incur a charge for the recipient. Such combined messages *are* covered by the 2003 act (and, probably, the 1968 act) and seem to be the main focus of this consultation. Such combined messages are, however, comparatively rare.

While the consumer can protect himself (and his children) against most of the premium rate problems identified in the consultation document by simply never ringing a premium rate number or accessing a WAP site and by insisting that his network block *access* to all such “services” from all his family phones, the situation is very different with respect to unsolicited reverse charge SMS (“2” above). Generally speaking, such messages cannot be (pre-emptively) blocked by mobile users (although the “T-mobile” and “Vodafone” networks do allow this and it can be anticipated that consumer pressure will eventually force the other networks to follow suit.).

In addition to unsolicited messages, there is (as the consultation document correctly notes) the even bigger problem of “solicited” services where the victim (often a child) is tricked into soliciting a

service or subscription – often by an unsolicited promotional message (or by a web site). There is also a problem (as the consultation document also correctly notes) with companies ignoring “STOP” requests. This problem applies both to unsolicited subscriptions and subscriptions that the victim is tricked into “requesting”.

But these are different species of problem and different measures are required to deal with them. My contribution to this consultation focuses on the “opt-in” mechanism.

What additional measures are required?

The proposals for a robust opt in mechanism (such as double opt in) only address part of the problem. The opt in mechanism also needs to be *verifiable* – otherwise dishonest firms who were previously able to produce bogus evidence at tribunals to show that their “customers” had opted in once, will now simply produce bogus evidence to show that their “customers” have opted in twice.

The central problem is that PhonePayPlus places the burden on the victim to prove that he/she did not subscribe – a reversal of the normal legal relationship between consumer and supplier. As PhonePayPlus wrote to me when Dialogue Communications sent us series of unsolicited reverse charge text messages (and we were able to disprove the original claim that we had texted from the mobile in question requesting the service):

“Although you are able to forward a copy of your itemised bill for your case against *Bergholt* [one of many names used by the content provider], the subscription was completed by a user calling a 0871 number and initiating the service. The bill you can provide will show that you have not dialled the 0871 from that particular phone; it will not however prove that you have not dialled the number from any other phone you have access to.

I appreciate it would be very difficult for any user to provide this evidence, but in order for ICSTIS to prove that the messages were unsolicited and take action against the service provider we must have evidence to this effect.”

Fortunately, from the point of view of regulation, PhonePayPlus does not have to rely on the word of dishonest PRS providers. When people make phone calls, send text messages, and make contact with websites, electronic evidence of such transactions is automatically created and stored. Any claim of opt in made by a PRS firm (that is disputed by the victim) should be checked against those records.

Finally, PhonePayPlus should mandate an opt-*out* mechanism for phone users who would like to choose never have dealings with any premium rate services. Phone users (and, more importantly, the parents of phone users) on all networks can opt to block *outgoing* calls and texts to 09 numbers and short codes. As has been noted, phone users (and, more importantly, the parents of phone users) can only block *incoming* calls and texts to 09 numbers and short code if they are customers of T-mobile and Vodafone. The protection offered by these two networks should be offered by all networks, and since the other networks are currently refusing to provide this kind of protection, PhonePayPlus and/or Ofcom should force them to do so as a matter of urgency.

Summary of additional measures required:

- A robust opt-in mechanism for services and subscriptions (e.g. “double opt-in”)
- A verifiable opt-in mechanism for services and subscriptions (i.e. Checked against ISP and network provider records in cases of dispute)
- A reversal of the current burden of proof from the PRS victim to the PRS provider
- Opt out from *all* PRS – including incoming reverse charge SMS