

# Mobile Phone-paid Services and their Marketing



## Response to the consultation by the Premium Rate Association for and on behalf of its members.

August 2008

### *Introduction*

The Premium Rate Association thanks PhonepayPlus for an opportunity to add comment to this consultation piece.

As a non profit, membership driven, trade organisation operating in the Premium Rate telephony sector we welcome action to remove disreputable operators and questionable practices. Our members understand the need for balanced regulation to instill public trust in the premium rate billing mechanism and we supported all relevant and appropriate industry agreed regulatory change in this arena.

The Association is keen to place on record its belief that Mobile premium rate services are not intrinsically bad, there would appear to be many satisfied customers regularly purchasing products and services who do not experience problems. The instances of consumer harm highlighted by the review would appear tacitly linked to an underutilization of the provisions already contained within the Code of Practice, or primary legislation. The custodians of these various provisions must therefore take at least partial responsibility for the current industry situation, which would appear to stem from ineffective enforcement.

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

Whilst the analysis appears to be a fair reflection of the current climate, we would question the sharp spike in the level of complaints, which, perhaps, suggests a change in collection methods of these complaints. This may indicate that there was in fact a greater level of consumer harm prior to December 2007, which may have been ignored by PhonepayPlus over the past few years.

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

Good communication links built upon the foundations of a strong and trusted relationship between the industry, the regulator and its agent are key to addressing harm and building consumer trust in the Premium Rate Industry. Unfortunately, Service Providers are unlikely to volunteer information regarding trends in complaints to an agency that does not have the best industry track record in dealing with them, or the information they supply.

When information is supplied, or advice sought, in good faith, we believe that it is imperative that PhonepayPlus work with companies, not against them, to ensure that problems are addressed. To build a system where honest and trustworthy Service Providers are confident to work with PhonepayPlus to build fully compliant services, investigations and breaches need to focus on establishing and punish the *mens rea*, not just the *actus reus*.

**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 understand that the issues highlighted are pan-European problems and therefore a consistent approach to regulation across the member states is appropriate.

We would add a note of caution that any new regulation must provide industry with the time necessary to implement the proposals once finalised. We are aware that in the past the lack of clarity over regulation and the inadequate time the regulator has allowed for implementation has had a major impact upon the industry in Denmark and in Germany has led to a 2 euro limit on Mobile.

**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 question the relevance of risk analysis on social economic grounds. We also question whether the guidance issued by PhonepayPlus on marketing to children is in line with the new consumer protection from unfair trading practices regulations 2008.

**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?**

We share PhonepayPlus’ view that consumers should be made fully aware of charges before they are incurred and provided the opportunity to opt-out without charge. “Chargeable pushes” would appear contrary to this aim.

**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?**

Whilst we would not necessarily classify non-chargeable promotional messages as a risk, we do support the principle that unwanted marketing messages can present an annoyance. More importantly, we believe that it is a statutory requirement under the Electronic Communications Regulations 2003 that an opt-out is provided at the time of each communication. Any breach should therefore already be being enforced by the Information Commissioner.

**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?**

We agree with the proposed conditions, which will require a greater degree of transparency in the promotion of mobile services. We believe that many of these conditions are already tacit requirements of the existing code of practice and that PhonepayPlus has been slow to address the consumer harm that misleading promotions have generated to date. We are pleased to see that PhonepayPlus has now provided clarity in this area and welcome PhonepayPlus’ intent to crack down on practices that have damaged consumer confidence in the industry.

**Q8 – Do you agree with PhonepayPlus’ assessment of the risk caused by promotional SMSs with no clear opt-out facility? If not, why not?**

Whilst we would not necessarily classify non-chargeable promotional messages as a risk, we do support the principle that unwanted marketing messages can present an annoyance. More importantly, we believe that it is a statutory requirement under the Electronic Communications Regulations 2003 that an opt-out is provided at the time of

each communication. Any breach should therefore already be being enforced by the Information Commissioner.

**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?**

We support clear and precise information of all PRS communications. However, the reconvening of the INOC regarding such precise network issues would help this dialogue, as it would be able to confirm if this is possible across all MOs. If this is possible, the proposal would prove useful for both the consumer and industry in providing clarity.

**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 agree with the proposal at option a) would be best solution for allowing consumers to opt out. This would appear to be a simple and quick procedure costing no more than a standard text message.

Consumers wishing to opt-out should not be discouraged by an overly complex procedure or uncertainty over the cost of requesting an opt-out. Option b would appear both time consuming and risks the consumer incurring data charges, which depending upon the individual contract may present considerable uncertainty over the costs involved.

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

We share the belief that there should be a distinction between the service paid for by the consumer and any marketing message promoting additional service. Where a consumer is paying for the communication, these communications should be used first and foremost to deliver the service as should not be such that it detracts from the level service provided. These messages should of course be subject to the requirements of the Privacy and Electronic Communications Regulations (2003).

In the case of reminder messages it is imperative that important communications relating to future charges are not overlooked by the consumer due to this information being obscured by advertising. We agree that housing marketing messages as distinct and secondary sections will help minimise the risk of consumer harm as long as the products are in principle what the consumer would be happy to receive.

**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?**

Firstly, we would draw a distinction between matters of consumer harm and those that are merely an annoyance. We believe consumer harm is only likely to occur in relation solely to financial liability, or exposure to content that could generally be considered as offensive due to its violent or sexual nature, explicit language or illegality. We believe that it is inaccurate to classify marketing messages that do not meet these criteria under the category of consumer harm.

It is our understanding that it is already a statutory requirement under Section 22, Sub-Section 3(b), of the Privacy and Electronic Communications Regulations (2003), that “the direct marketing is in respect of that person’s similar products and services only” in order for an opt-in to apply.

In our view it should fall to the Information Commissioner to police these matters, as PhonepayPlus should not seek to regulate or enforce where a more appropriate regulatory agency is already in place.

**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?**

Whilst acknowledging that the network reallocation of mobile numbers does present a situation whereby marketing messages might be delivered to a non-intended recipient, we question whether Service Providers have adequate facility for the suggested data cleansing, as this would appear to be a network issue.

In much the same way that postal mail would be marked ‘return to sender’ when if the intended individual has since moved on, we believe that where SMS messages are wrongly directed that the option to unsubscribe from further such messages is a

sufficient solution. No marketing list will ever be perfect, due to deaths, moving, or the reallocation of handsets within a family or company.

We believe the Information Commissioner guidance in respect to group email addresses would equally apply to SMS, where marketing is to a terminating number rather than a named individual. This guidance states:

*“The Directive which these Regulations implement says that unsolicited marketing should not be sent by electronic mail to an individual subscriber unless the subscriber has given consent. However, this Regulation refers to the consent of the recipient. We consider that the practical interpretation of the meaning of ‘the recipient’ is the intended recipient. Where a household member has an individual email address then the consent of that individual is required unless the soft opt in criteria are satisfied. Where a household has a household email address (for example, familyname@domainname.com) then the consent of someone whom it is reasonable to believe does speak on behalf of the family is sufficient unless the soft opt in criteria are satisfied.”*

We therefore submit that recycled MSISDNs would be covered by this interpretation as long as the recipient’s request to opt-out of future promotions is respected.

**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?**

We do not believe that Mobile Marketers should be subject to any higher condition than those already governing general marketing practices. We do not believe that it is appropriate for PhonepayPlus to double regulate and that these matters should be referred to the Information Commission to establish whether the Privacy and Electronic Communications Regulations 2003 have been breached.

Whilst a Service Provider can make, and should make, all reasonable enquires, it is not possible to absolutely guarantee the quality of external data. We believe that it may be more reasonable for the ultimate responsibility for data quality to rest with the data owner.

**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?**

The collection and use of data for marketing purposes is already regulated under the Privacy and Electronic Communications Regulations 2003. We believe these

regulations to be sufficient and that PhonepayPlus would be acting inappropriately if it were to place more stringent restrictions on marketing practices within the premium rate industry, to those governing other industries. As these regulations do not appear to contain any time limits governing the use of data once collected, we do not support the proposal that marketing should commence within two weeks of data collection. This short window of opportunity will create problems for industry in collecting, processing and utilising data.

**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.**

We would not support limitations on the time frame in which promotions must start. A consumer should be considered as opted-in until such time as they opt-out.

If a consumer chooses to purchase and gives their authority, no time limit should apply. In any respect, as birthdays are annual events allowing annual marketing would seem reasonable.

**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?**

The PRA believe that any rules relating to the use of marketing data should be based upon the requirement set down in statute. The Electronic Communications Regulations (2003), section 22, subsection 3 states that the opt-in requirements will be satisfied if:

*The recipient has been given a simple means of refusing (free of charge except for the cost of transmission) the use of their contact details for marketing purposes at the time those details were initially collected and, where they did not refuse the use of those details, at the time of **each subsequent** communication.*

The PRA believe that if data is to be used for marketing purposes a consumer should be provided with a tick box, or similar method, to opt-out at the time the data is requested. Where this facility is provided and a consumer has not opted-out, then PhonepayPlus should not impose additional regulation. If the requirements of the Electronic Communications Regulations are not met, then any inappropriate marketing

using this data should be a matter for the information commissioner to investigate, not PhonepayPlus.

**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.**

All evidence is held by Network Operators making it difficult to comment on the most affective solution.

**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 believe that PhonepayPlus has failed to work with Networks and Aggregators. There would appear to be no evidence of pre-consultation work with these stakeholders, despite a statement from PhonepayPlus stating that meeting had taken place.

**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 believe that the proposal in principle is well founded providing that the necessary technological already exists to enable it to be easily implemented.

Any new technology presented to consumers will produce a new consumer education learning curve, which will take time to overcome. The real issue for the industry and its regulator is finding suitable technology to deliver the proposed solution, within a transparent and enabling regulatory framework.

We would suggest that adequate consultations of a technical nature is carried out by PhonepayPlus, possible through the reconvening of the INOC, before any final decision is made.

**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.**

The Prior Permission solution is only of use if it provides real protections for consumers and can be supported by the Network Operators. Prior Permission is no substitute for affective monitoring.

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

We believe that consumers have a right to receive accurate information on the services they are purchasing and to receive these services as described. We would raise a cautionary note, that ignorance should not be a defence and where information has been readily supplied consumers should not have recourse to the regulator where the product has been delivered as advertised.

**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?**

Whilst broadly agreeing with the conditions of service, we question the benefit of requiring a service provider to obtain prior permission before a service can be operated. Obtaining prior permission is a bureaucratic exercise, which is expensive both in the Service Provider’s direct resource cost to carry out the application and the indirect costs to industry to finance the additional PhonepayPlus resource to administer the scheme. The requirement to obtain prior permission also delays the time to market, potentially limited a Service Provider’s ability to take full advantage of time critical market opportunities and creating potential cash flow issues.

We believe that the conditions set out in the prior permission certificate should be included as code provision and that PhonepayPlus should only become involved where the service is being operated in breach of these conditions.

With regard to the conditions themselves, we are concerned by the paragraph that “unless a consumer confirms their purchase in one of the two ways they should not be considered to have opted into receive the service, and they must be neither charged nor sent further marketing information”. We support the principle that a double opt-in be required before a chargeable subscription service commences, we do not support the assertion that a consumer’s failure to respond should exempt them from further marketing.

This assertion is a higher stand than requirements of the Privacy and Electronic communications Regulations (2003), which holds that a sale does not need to be completed for a marketing opt-in to be obtained, an opt in will be obtained in statute merely from the negotiation process.

Section 22, subsection 3(a):

*“you obtained the contact details of the recipient in the course of a sale or **negotiations** for the sale of a product or service to that recipient”.*

This assertion, as well as removing rights conferred in statute, is perverse in that it would prevent a Service Provider from following up on a sale if for whatever reason the original SMS has been lost, or not received, and may conversely create customer service issues.

**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 have no tangible evidence to demonstrate that consumer harm has arisen directly from any other types of content. We would caution that any alleged consumer harm should be demonstrated and not be based upon perception.

We believe it is fair to say that any service which operates a repeat billing system will on occasions lead to complaints or misunderstandings over contractual conditions and it is not unique to Mobile phone-paid services generally or type of product specifically.

We believe that emphasis should be placed on directing complaints to the company responsible in the first instance to enable it to deal with its customer. Only where a company shows a consistent failure to deliver appropriate customer service should a more interventionist approach, such as prior permission, be implemented.

**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?**

The Payforit mechanism would appear to have a number of inbuilt safeguards which make it an open and transparent payment process. Where a system can be shown to

limit consumer harm we believe that a laissez faire regulatory approach is favourable. We commend PhonepayPlus more its proposal in this regard.

**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.**

Whilst immediate changes SMS and website copy may be within the direct control of Service Providers, any print or TV advertising already booked may be more difficult to alter. Media advertising slots and copy are often booked many months in advance and therefore Service Providers will be placed in a position whereby they are potentially running non-compliant adverts, or will be forced to cancel advertising at considerable cost.

We hope that PhonepayPlus will be mindful of this situation when deciding the date that its proposals will come into affect and possibly provide a moratorium on enforcement related to any advertising already booked.

**CONCLUSION:**

We welcome PhonepayPlus' renewed interest in the regulation of this area of the market and its desire to address the problems that have been allowed to ferment.

We are concerned by the suggestion that these proposed measure are to affected by way of a prior permission regime, rather than written directly into the Code of Practice. We note PhonepayPlus' growing preference for introducing new regulation through Notes to the Industry, Help Notes, Prior Permission and licence conditions rather than making changes to the Code and would like to place on record our view that this practice is an inappropriate method of regulation. We believe that these multiple sources of regulation are likely to create ambiguity both in identifying what rules are applicable and present problems in an accurate interpretation of these various rules.

We understand that there will be exceptional circumstances where, for the sake of expediency, these alternative methods of regulation will be necessary, as a temporary measure. However, we believe that this should be the exception, not the rule. Through the early identification of potential problems, allowing sufficient time to put in place appropriate regulatory measure, PhonepayPlus can minimise it reliance on crisis regulation.

We believe that many of the issues presented can already be addressed under the existing Code of Practice and that the costly and bureaucratic Prior Permission regime should only be implemented where an organisation has a history of compliance issues.

We reiterate our belief that there is already sufficient regulation regarding marketing opt-in and the use of this data and that the PhonepayPlus should not seek to implement proposals which go beyond these existing requirements. Instead, we believe that PhonepayPlus should focus its attentions on the transparency of promotions, where we support in principle the proposals put forward.

The lack of appropriate pre-emptive regulation and enforcement has been raised consistently by the industry following issues such as problems with Multi Party Chat, Diallers and TV Voting fraud, yet we continue to see a reactive system in operation. Unfortunately, unless the regulator truly engages with industry and then acts upon the information provided, we will continue to see the same damaging cycle of non-enforcement and consumer harm, followed by regulatory overreaction, often with undeliverable solutions.

We believe that PhonepayPlus needs to engage with the industry sooner and more earnestly, particularly on technological issues, to ensure that regulation is both appropriate and deliverable. We also believe that PhonepayPlus needs to work with the industry to address the issues it faces, such as the lack of pricing transparency created by the varying mobile network transiting charges. We believe that serious consideration should be given to the reintroduction of the INOC, which would provide an appropriate forum for PhonepayPlus to engage with the industry on important technology issues. We would also encourage PhonepayPlus and Ofcom to use its influence to help provide solutions to the issues faced by the industry, such as pushing for the introduction of an RRP for telephony.