



**Regulation of Mobile Phone-paid Services
and their Marketing:
A Policy Statement by PhonepayPlus
following
its consultation**

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Executive Summary & Background

Background

Mobile phones were first actively marketed during the 1980s, and since the late 1990s have become an essential part of most people's lives in the UK. Ownership is almost universal now, with young people especially keen users. Of all UK consumers, for example, 16-19 year olds are most likely to own and use a mobile phone.

During the same period mobile handsets have become ever more sophisticated. 3G networks allow higher-speed access to the mobile internet, and improvements in computing functionality continue to create opportunities for innovative, feature-rich applications and content. Much of this content is charged to the user's mobile phone bill, which brings such services under the regulatory remit of PhonepayPlus.

Most phone-paid services are spontaneous, low-cost and provide users with instant gratification. They have entered mainstream society, to the extent that almost every other person in the UK (48%) has used a phone-paid service. Consequently, UK consumers have derived a great deal of value, use and entertainment from them. As well as downloading ringtones, pictures and games, millions of people use their mobile phone to participate in television programmes, receive news alerts, find contact details and enter competitions.

The result of this is that consumers spent £464m on mobile phone-paid services in 2007/08. This represented 46% of the total phone-paid services market and, for the first time, meant that mobile was the biggest single segment of that market.

Unfortunately, a significant increase in complaints accompanied this growth. PhonepayPlus received more than 8,000 mobile related complaints in 2007/8, a 108% increase on the previous year. This upward trend continued into 2008. Each month we receive close to 2,000 complaints relating to mobile content services.

In 2007 PhonepayPlus adjudged 33 mobile services to be in breach and imposed fines of more than £360,000. In 2008 we adjudicated on 54 mobile phone-paid services with total fines in excess of £1.2 million.

Many industry stakeholders have told us they have not seen a similar rise in complaints made directly to them. However other UK regulators with an interest in this market, such as Ofcom and OFT, also reported a rise in complaints during the same time period. Other regulators around Europe, and worldwide, also indicated they had received a similar rise in complaints to PhonepayPlus, often for the same reasons we had identified.

Earlier this year, the European Union carried out a sweep of websites promoting mobile ringtone services, one of the more popular phone-paid services. 80% of these promotions were adjudged to be in some way misleading in such a way as to result in possible harm to consumers, and in the UK this number was even higher.

In addition, the number of individual complaints to PhonepayPlus relating to a single service has increased from an average of 5-10 per service in 2007 to as many as 270 complaints per service in 2008. This suggests to us that some mobile phone-paid services are being marketed more aggressively, and resulting in more consumer harm, than was previously the case.

Potential for harm

When we analysed complaints further, three main causes emerged:

- Misuse of promotional SMS messages and misuse of marketing lists
- Failure to provide sufficient information about the costs and conditions of the service
- Various issues linked to subscription services

Because these causes each encompass a number of different service types and issues, PhonepayPlus proposed a number of different, targeted solutions. These proposals formed part of a consultation exercise that was launched in July and is available at www.phonepayplus.org.uk/pdfs_news/Mobile_White_Paper.pdf.

Promotional SMS messages and misuse of marketing lists

This is an area regulated by the Information Commissioner's Office (ICO) which is responsible for enforcing the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). With the ICO's agreement, PhonepayPlus proposed a series of principles to be adhered to by service providers. These would be set out in a Helpline, drafted in collaboration with the ICO.

Presentation of information

The PhonepayPlus Code of Practice requires providers to present information relating to the service in such a way as to ensure consumers are able to make informed purchasing decisions. In the consultation, we proposed a new Statement of Expectation, a document that allows us to further clarify how we expect to apply our Code in the context of the operation and promotion of premium mobile content services.

Subscription services

The three largest causes of complaint relate to ringtone, wallpaper and music download services that operate on a subscription basis. We proposed that any provider wishing to offer such services would first need to seek permission from us, and to adhere to certain conditions, including the requirement to wait for active confirmation from the consumer before charging them.

Responses

In concluding our Review of mobile phone-paid services and the way in which they are marketed, we took account of all responses to the July consultation. We also continued to gather evidence from monitoring of and investigations into premium mobile services while the Review was underway, which also helped inform this Statement.

Responses to the consultation echoed the need to address certain areas within the market which had the potential to result in consumer harm.

A majority of industry respondents were sceptical of the need for subscription services to seek active consumer confirmation, on the grounds that this could cause consumer confusion and adversely affect sales. However none were able to provide sufficient evidence that this confusion would arise and thus would prove a disproportionate response to the identified harm.

Conclusions

As outlined above, PhonepayPlus has identified three main concerns around the operation and promotion of mobile phone-paid services.

Subscription services

Analysis of consultation responses and of complaints reveals that most consumer harm derives from subscription-based services carrying a charge of more than £4.50 a week. Problems are exacerbated when the service includes a joining fee of £3 or more in addition to the subscription charge.

Effective immediately, providers of all such services must first seek permission from PhonepayPlus. Conditions will state that:

- Promotional material, including advertisements, search engine metatags and text messages, must not state or imply that the consumer will receive a “free” download or other product. This is because the free gift is almost always dependent upon first entering into a subscription;
- Once consumers have selected a subscription service, they must be informed of the cost and all other required subscription information by means of a free text message. They must then reply with their own text message confirming that they agree to these terms before they are charged.
- This will not apply where services use the Payforit payment mechanism, as Payforit already carries a similar secure confirmation requirement.

Promotional Text Messages

PhonepayPlus wants to ensure that consumers receive fewer and more targeted promotional text messages, and can be sure that they will not be charged to receive text messages they had not asked for. With this Statement we have also issued a Statement of Expectation to the effect that consumers:

- should be informed that the promotional message they are reading is free, either within the subject or in the first words of the message;
- should be informed of the cost of receiving chargeable text messages or accessing a mobile internet site, and then consent to be charged, before they incur any cost; and
- should be able to opt-out of receiving future promotional messages quickly, easily and without fuss.

Additionally, PhonepayPlus will work closely with the ICO to provide guidance for businesses. This will explain that:

- Companies which buy or otherwise trade third party marketing lists should be prepared to provide evidence upon request to prove that all recipients have consented to receive promotional text messages; and
- A consumer’s consent will only be valid for 6 months, assuming the consumer has not since responded to further promotional text messages.

Providing adequate information

The Statement of Expectation sets out PhonepayPlus’ requirements as follows:

- Mobile internet sites should clearly display all pricing and other information as required by the PhonepayPlus Code of Practice. This avoids the confusion caused when consumers access a mobile website via a text message or search engine, and so have not seen the information needed to make an informed purchasing decision;
- Promotional text messages should make it clear to the consumer whether a reply to the message will result in them consenting to receive a service carrying a premium rate charge. This is specifically designed to deal with text-based chat services, some of which send marketing messages in such a way as to appear to be arriving from another mobile phone user;
- Text-based chat services should not imply that users are exchanging messages with other individuals, or that customers will be able to meet people by using the service, unless that is the case.

In addition, providers of services which charge consumers to view each page of a mobile website they visit will be required to first seek permission. They will then be subject to the following conditions:

- Consumers must be clearly informed of the price of viewing individual images or pages, and then consent to be charged, prior to being diverted to each; and
- Where consumers retrace their steps to exit a mobile internet site, they must not be charged again for the same pages they have already viewed

Section 1

Assessment of Market and Risks

Market Analysis

1.1 To begin our review and consultation “Mobile phone-paid Services and their Marketing”, PhonepayPlus provided an overview of the current market and the way in which mobile phone-paid services are promoted and delivered to consumers. This made the basis for our subsequent analysis and proposals clear, and also provided an overview for non-industry stakeholders who were perhaps not so well-acquainted. This overview covered the following broad areas:

- The usage of mobile phone-paid services;
- The structure of the mobile phone-paid services value and delivery chain;
- The methods by which mobile phone-paid services are marketed;
- The methods by which mobile phone-paid services are purchased and paid for;
- The different types of mobile phone-paid services and content, and;
- The market characteristics which, in PhonepayPlus’ opinion, create consumer risk.

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

1.2 Whilst responses highlighted a small number of relatively minor corrections to our overview, respondents were in general agreement with our analysis and, in some cases, commended it.

Consumer Complaints Analysis

1.3 The Review went on to provide a synopsis of the adverse trend in consumer complaints that had led PhonepayPlus to review our regulation of the mobile phone-paid services market. Tables within the Review demonstrated that from October 2007 until April 2008 the number of consumer complaints about mobile phone-paid services rose by 49%. Whilst there was a rise in overall complaints to PhonepayPlus during the same period, the proportion of complaints about mobile remained constantly high at between 86% and 91% of all complaints. These percentages are considerably higher than the overall share of the market that mobile phone-paid services account for (43%).

1.4 During the pre-consultation phase to the Review, a number of stakeholders suggested that the rise in complaints could be explained by an increased consumer awareness arising from our rebrand (from our former name of ICSTIS). The Review confirmed that neither PhonepayPlus nor anyone else had data which suggested an increase in consumer awareness significant enough to support such a rise in complaints. In addition the most significant rise in complaints came during January-March 2008, some time after our rebrand.

1.5 The Review also reported that the number of individual complaints to PhonepayPlus about each individual service had increased from an average of between 5 and 10 in 2007 to as many as 270 complaints in 2008. This suggested to us that some mobile phone-paid services are being marketed more aggressively, and with more consumer risk, than previously.

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

1.6 Many industry respondents said that the rise in complaints seen by PhonepayPlus was not matched by a rise in consumer complaints directly to them. In addition the Review had set out that the way in which PhonepayPlus classified a complaint had been changed in February 2008, and as a result the tables referred to at paragraph 1.3 (of the Review) had been adjusted in order to provide a like-for-like comparison. For this reason some respondents requested clarification as to the exact nature of the change.

1.7 In order to provide greater clarity, PhonepayPlus can confirm that the changes made in February 2008 were in order to more accurately record the true number of complaints. Prior to February we had classed some complaints as “inquiries”, on the grounds that we had referred these complaints onto the service provider in the first instance. Given that these were still genuine complaints – i.e. expressions of dissatisfaction about a phone-paid service – the decision was taken to change the classification and recording pattern.

1.8 The data presented in the Review was presented on an adjusted basis, with the data from October 2007 to January 2008 being re-counted as if under the new classification. It is on this basis that complaints increased by 49% from Q3 in 2007 (October to December) to Q1 in 2008 (April to June).

1.9 Whilst the majority of industry respondents reported their complaint figures had not spiked in the same way as PhonepayPlus’, most agreed that our figures did provide cause for concern and further investigation.

1.10 Responses from other regulators and consumer protection bodies confirmed that they too had seen a rise in consumer concern about mobile phone-paid services. A number of these organisations identified the root causes as being marketing which was often unsolicited or confusing, and a lack of transparent consumer information – especially about subscription-based services.

1.11 Since the consultation was launched in July 2008, complaint figures have begun to slowly drop, as set out in the table overleaf, although we noted a 10% rise again in the month of November. Whilst the current level of complaints is still significantly high, we welcome this downward trend.

Month	Landline	Mobile	Totals
Nov 07	201	423	624
December	189	237	426
Jan 08	256	807	1,063
February	144	1,683	1,827
March	328	2,059	2,387
April	161	2,182	2,343
May	153	2,135	2,288
June	104	2,126	2,230
July	160	1,980	2,140
August	168	1,765	1,933
September	190	1,724	1,914
October	177	1,672	1,849
November	148	1,834	1,982
December	146	1,374	1,520
Sum:	2,252	18,796	21,048

1.12 Since the publication of the Mobile Review we have adjudicated on a further 25 cases specific to mobile phone-paid services from 1 July to the year's end, with fines totalling £660,500. When added to the 29 mobile specific cases on which we adjudicated from 1 January to 30 June, this brings the total fines for 2008 to £1,263,500.

Mobile phone-paid services in other countries

1.13 In order to ascertain whether the increase in complaints PhonepayPlus had experienced was unique to the UK, PhonepayPlus asked a number of regulators in Europe and beyond whether they had experienced a rise in consumer complaints in the same four areas we had identified, and what action, if any, they had taken. Those areas were:

- Misuse of Promotional SMS messages
- Misuse of Marketing Lists
- Failure to provide transparent consumer information
- Issues linked to Subscription Services

1.14 The majority of overseas regulators who responded suggested that they had also seen rising complaints and consumer harm in the same areas. Regulatory action included:

- A ban on most types of SMS messages that promote phone-paid services
- A ban on the implication that a service is free where it is conditional upon a related purchase
- The requirement for subscription services to obtain a second confirmation text message from the consumer before charging

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?

1.15 Only a small number of stakeholders responded to this question, perhaps reflecting that some of them are not active overseas. Those who did respond made the point that the regulatory approach in other territories can differ to that of PhonepayPlus. Some of these regulators' practices were commended to us as follows:

- Where a service has been temporarily stopped, the regulator gives specific instructions on how the service should be changed before it can be re-started.
- Regulators will pick a particular topic or type of service and forewarn industry that they will be investigating it. This allows service providers to internally audit their compliance in the selected area..

1.16 One respondent stated that the introduction of a second, confirmation text message for subscription services had reduced the German subscription market by 30%, and so felt that the German model would be too draconian for the UK market. The same respondent expressed the opinion that an approach which involved all services seeking Prior Permission (as in Ireland) would not work in the UK because of the UK market's greater size.

1.17 Whilst PhonepayPlus is a leading member of the International Audiotex Regulators' Network (an organisation for national regulators of phone-paid services), and so is able to keep up to date with regulatory developments, we continue to welcome any insight or opinion regarding overseas markets or regulatory strategy that stakeholders can provide.

Risk to Children and Other Vulnerable Groups

1.18 Whenever PhonepayPlus examines an issue within the phone-paid services market, we are especially mindful of its effect on vulnerable groups, such as children, elderly people, people with learning difficulties, and those for who English is a second or third language.

1.19 Our analysis in this case acknowledged that some vulnerable groups may be less credulous, and so more open to exploitation, and that the same groups may not be willing to complain or capable of doing so. However we had no evidence to suggest that any mobile phone-paid service provider had specifically targeted these groups, and our conclusion was that the majority of mobile phone-paid services which are misleading to vulnerable groups are just as likely to mislead other consumers.

Q4 – Do you agree with PhonepayPlus' assessment of the risk of mobile phone-paid services to children and other vulnerable groups? If not please provide any data or other evidence you have.

1.20 Respondents were generally in agreement with our assessment (as set out above in paragraph 1.17). Consumer protection bodies generally welcomed our recognition of vulnerable groups, but did not present any evidence that they were being systemically targeted.

Section 2

Promotional SMS Messages

Unsolicited Charged SMS Messages

2.1 The first issue the Review addressed around Promotional SMS Messages was the practice of sending unsolicited SMS messages to mobile handset owners. Whilst the owners of the handsets have not accepted any message or consented to any charge, they are sometimes charged to receive these messages, which often contain a promotion of some kind.

2.2 A variant of this issue is the misuse of SMS messages which “push” a mobile handset’s internet browser to a specific mobile website. Ordinarily PhonepayPlus considers this practice benign, as the consumer can easily exit the mobile website and will have incurred little or no cost in terms of data charges. However some SMS “push” messages direct the mobile handset to a mobile website which immediately charges the handset’s owner, or registers them for a subscription service, without their consent.

2.3 The Review highlighted anecdotal evidence suggesting consumers had become wary of opening any form of promotional SMS, for fear that they would be charged or “pushed” upon doing so. The Review considered this a detrimental situation to both consumers and legitimate promoters of mobile phone-paid services.

2.4 The Review made PhonepayPlus’ position clear, which is that this practice is already a breach of the PhonepayPlus Code. This is on the grounds that the consumer has neither consented to the message nor the subsequent charge. In light of this, PhonepayPlus proposed the following clarification of our requirements, to be included in a Statement of Expectation:

- Where users are sent promotional SMS messages which carry a charge the user must be informed, clearly and straightforwardly, of the cost of receiving that SMS message prior to receiving it
- Where promotional SMS messages contain a link to a mobile website, if the user is charged for access to the landing page beyond normal network data rates, the user must be informed of the cost of access prior to incurring any charge.

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?

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?

2.5 Readers of this Policy Statement will notice that question 6 is missing from the above questions. This is because it duplicates question 8, which we will deal with under a later heading in this section. We would like to apologise for any confusion this may have caused respondents to the Review.

2.6 Respondents were generally in agreement that unsolicited charged SMS messages were unacceptable. However the following points were made regarding the proposed conditions:

- That the first of the two conditions risked suggesting that an SMS can be chargeable even where the recipient does not consent to the charge, as long as they are first informed of the cost. As such it should be deleted or altered.
- That PhonepayPlus needed to consider services which push a consumer to a mobile website, and then charge the consumer after a certain period of time unless the consumer texts a STOP command.
- That consumer angst that they will be charged upon opening SMS messages could be alleviated by requiring all such messages to contain the wording “FreeMsg” in the title of the SMS.
- That to prevent any confusion between promotional SMS which are charged without a consumer’s consent, and promotional SMS which are not charged, an industry agreed glossary of terms should be produced.

Q5 and Q7 Conclusions

2.7 PhonepayPlus accepts that the wording of the first proposed condition could provide a loophole for companies who informed consumers they were charging them, but still charged them without their consent. We have altered the wording of both conditions to reflect this (see paragraph 2.12).

2.8 In the Review, PhonepayPlus expressed the opinion that we could not require all promotional SMSs to contain the wording that they were free without introducing a prior permission regime. We have continued to examine this issue, and have determined that because a proportion of consumers are confused as to whether they will be charged for opening a promotional SMS, a failure to inform consumers that a message is free could be misleading, and so potentially breaches paragraph 5.4.1 of our 11th Code. As such we have added a third point of clarification to that effect to the Statement of Expectation at Annex A..

2.9 With regard to services which push a consumer to a mobile website, and then charge them after a certain period of time unless they text STOP, we consider this to be an issue of how clearly the consumer has been informed. If the consumer has previously consented to such an arrangement (and consented within a reasonable timeframe), and is aware before they enter the service that they will be charged unless they text STOP, then in principle we see no problem with this practice.

2.10 If, on the other hand, the consumer receives an unsolicited text which pushes them through to a mobile website and they are informed only at that point that they will be charged unless they text STOP, then we would consider this practice to be potentially misleading, and in breach of our Code. This scenario would be akin to a consumer being posted goods without their previous consent, and informed that they will be charged for the goods unless they return them within a certain time limit.

2.11 As regards the proposition that a glossary of terms is produced to avoid further confusion, PhonepayPlus looks forward to being informed of any industry initiative or other progress in this area.

2.12 In light of feedback from respondents, and our own continued consideration, we will alter the proposed points of clarification (as referenced at paragraph 2.4) to read as follows:

- Where users are sent SMS messages which carry a charge the user should be informed, clearly and straightforwardly, of the cost of receiving that SMS message, and consent to the relevant charge, prior to incurring it
- Where SMS messages contain a link to a mobile website, if the user is charged for access to the landing page beyond normal network data rates, the user should be

informed of the cost of such access, and consent to the relevant charge, prior to incurring it.

- Where users are sent SMS messages which promote a phone-paid service and do not carry any charge, then the user should be informed, clearly and straightforwardly, that they are free: either within the title of the SMS message itself, or in the first words of the message

Opt-out information within Promotional SMS messages

2.13 The Review recognized that many SMS messages which promote a phone-paid service are entirely legitimate, and are in response to a previous purchase by the consumer to whom the message is sent. However the Privacy and Electronic Communication (EC Directive) Regulations 2003 (PECR) requires that where any form of promotional SMS is sent directly to consumers they must be able to opt out of receiving future promotions. For consumers who have opted in by virtue of having made a previous purchase, this opt-out must be provided with each subsequent promotional message.

2.14 The Review identified a lack of a clear opt-out method in an increasing number of SMSs which promote phone-paid services. The Review addressed two types of promotional messages:

- “Ordinary” SMS messages, which promote a shortcode contained within the text of the message
- Binary SMS messages, which provide a link to a mobile website (but do not necessarily “push” the consumer, as set out in paragraph 2.2)

2.15 In the case of ordinary SMS messages, the Review’s analysis was that the only way to provide a clear opt-out facility was to provide a shortcode, either within the title or text of the message, to which the consumer can send a message in order to stop any future promotion.

2.16 In the case of binary messages the issue was more complex, as binary messages use a different coding technology which means the messages themselves have far less characters available than the 160 characters available in an ordinary SMS. So in some cases it will not be possible to display both a link to a mobile website and other information within the text of a binary SMS message.

2.17 For this reason, the Review set out the following two options for the provision of a simple opt-out where binary messages are used to promote phone-paid services:

- a) That they provide a shortcode, either in the title of the message or in the remaining characters available in the message itself, which consumers can send a text message to so as to opt out of future promotions
- b) That they provide a clear and unambiguous opt-out facility on the landing page of the mobile website to which the binary SMS provides a link. Consumers would have to visit the website to opt out, but this would actually be cheaper in most cases than the cost of sending a text message.

2.18 Having analysed the relative costs to industry and consumers, and the consumer ease, of both options the Review concluded that option a) would represent best practice. This was on the grounds that texting STOP to a shortcode is an easier and more familiar process for consumers to follow, and was supported by the positive feedback we had from a number of industry stakeholders during pre-consultation.

2.19 Our analysis had the support of the Information Commissioner's Office, which directly enforces PECR, although the Review concluded that PECR only requires there to be a valid and simple means of opting out of future promotions. So PhonepayPlus' proposal, to be included in a Statement of Expectation, in respect of opt-out information within SMS messages which promote phone-paid services was as follows:

- All promotional SMS messages must 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.

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

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?

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?

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

2.20 Respondents generally agreed with our assessment, but opinions differed as to whether the best practice at option a) in respect of binary SMS should be mandated as part of a Statement of Expectation. Some respondents expressed the view that it should, citing that whilst the title of a binary message only contains 11 characters, the body of the message contains 30. They felt this was adequate to provide "FreeMsg", followed by a shortcode, and then the website link and service details within the body of the text.

2.21 Other respondents supported the principle of a clear opt-out, but expressed the view that PhonepayPlus should not require this to be achieved by a proscribed method. Some of these respondents cited advice they had obtained from the Information Commissioner's Office which accepted the use of option b). However, this advice was not provided to PhonepayPlus as part of their response.

2.22 Responses also raised two other key points. The first of these was the increasing use of MMS (Multimedia Message Service), as opposed to SMS (Short Message Service) messages to promote phone-paid services. Unlike SMS, which are limited to 160 characters, MMS messages have no size limit and can contain sound, images, or video.

2.23 MMS can only be delivered to mobile handsets which use 3G technology, but as this area grows the use of MMS is likely to increase. In respect of consumer opt-out it may prove significantly more expensive for a consumer to reply STOP to an MMS message than to an SMS.

2.24 The second point (as referenced in paragraph 2.22) was made specifically regarding "ordinary" SMSs by respondents who provide Betting Services charged to a consumer's mobile phone. Their point was that their account holders will receive promotional SMSs offering betting options on an almost daily basis. Given this regular interaction, and their concern that to include opt-out information in each SMS would leave little room to communicate a clear and unambiguous set of betting odds to a consumer, they recommend

that in respect of Betting Services opt-out information should be provided after a certain number of promotional SMSs rather than in the body of each promotional SMS.

Q8 to Q11 Conclusions

2.25 In assessing whether our proposed condition in respect of opt-out information was appropriate, we took into account not only stakeholder responses, but also evidence from PhonepayPlus' Code Compliance Panel (CCP) Tribunals. The CCP Tribunals are responsible for adjudicating on whether or not our Code has been breached, and their recent experience is that the amount of consumer confusion regarding opt-in information provided on the landing page of a mobile website has increased – even during the Review's consultation period.

2.26 In light of this increase, and the assertion from aggregators that it is possible to include the words "FreeMsg", followed by a shortcode, a website link and service details within the limited number of characters provided by a binary SMS, we will alter the proposed condition to read as follows:

- All SMS messages which promote a phone-paid service must ensure that recipients are provided with a shortcode, either in the title of the message or in the remaining characters available in the message itself, as a mechanism by which the recipient may opt out of future promotions by texting STOP to the shortcode, in line with the Privacy and Electronic Communications (EC Directive) Regulations 2003.

2.27 We are grateful for the insight which respondents provided in respect of MMS messages, and the potential difficulties of applying the above condition to them. Whilst the use of MMS to promote phone-paid services will clearly grow alongside the general take-up of 3G technology among mobile handset owners, it is clear that their use is not currently widespread, or even yet significant.

2.28 As such, and using our Statement of Expectations at Annex A as a starting point, we would appreciate further discussion with stakeholders as to the most appropriate way of providing a valid and simple opt-out to consumers who receive an MMS message promoting a phone-paid service.

2.29 Lastly, in respect of text-based Betting Services we do not intend to apply the above condition. Although the definition of SMS messages used to promote a phone-paid service clearly applies to SMS which promote text-based Betting Services, we are exempting them for the following reasons:

- That text-based Betting Services promote betting odds only to consumers who are already registered account holders. They do not promote to consumers solely on the basis of previous purchase.
- That text-based Betting Services promote to many account holders on a daily basis.

2.30 In respect of text-based Betting Services, the condition set out below will apply:

- Where SMS messages are used to promote a text-based Betting Service, recipients should be provided with a shortcode as a mechanism by which they may opt out of future promotions by texting STOP to the shortcode, in line with the Privacy and Electronic Communications (EC Directive) Regulations 2003. This shortcode should be provided, either in the title of the message or in the remaining characters available in the message itself or in a separate message containing clear and

unambiguous opt-out instructions which immediately follows a promotional SMS, every third promotional message or 72 hours, whichever occurs sooner.

Cross-Promotion within phone-paid SMS messages

2.31 The Review outlined that where phone-paid services carry a repeat charge (e.g. subscription charged services or text-based chat services), the SMSs used to deliver either charged content or spend reminders also increasingly contain promotions for other phone-paid services.

2.32 Whilst the Review signalled that PhonepayPlus does not object to this practice in principle, it would breach our Code where either of the following occurred:

- Where promotional material appeared before the charging or spend reminder information
- Where there was no text or spacing that served to separate the promotional part of the message from the part containing charging or reminder information

2.33 In light of this analysis we proposed the following condition, to be included in a Statement of Expectation:

- Where chargeable or reminder messages, either for subscription or Virtual Chat Services, contain promotions for other services, such promotions should be placed after any information given relating to the original service. In addition, the message should clearly distinguish the original service information from any promotion related information. To do this effectively PhonepayPlus strongly suggests that the words ADVERT or PROMO are inserted immediately before the promotion related information.

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?

2.34 Respondents almost universally signalled their agreement that promotion should be distinct from, and placed behind, charging or reminder information in an SMS message. However a number of respondents expressed the view that there was no need to mandate the prefacing of any promotional material with the word ADVERT or PROMO.

Q12 Conclusions

2.35 This view is understandable, given the limited space even in an “ordinary” SMS with 160 characters available. Although the proposed condition did not require the use of ADVERT or PROMO, only making the suggestion that they be used where possible. Where it is clear that to use either of these words would be difficult in terms of the number of characters available, the condition as worded could be met by a simple spaced separation of the promotional element from the rest of the message. For this reason we have not altered the condition as worded in the Review.

Section 3

Marketing Lists

3.1 The Review set out how text messages which promote phone-paid services are included within the definition of “electronic direct marketing mail messages”, as set out in the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The principles which govern the sending of such messages can be summarised as follows:

- That the marketer must have obtained the individual’s details through a sale or negotiations for a sale, and the individual must have been given the opportunity to refuse such marketing when their details were collected (a practice known as “soft” opt-in)
- That where the individual’s details are to be passed to third parties they must be clearly informed of this, and positively confirm their acceptance (a practice known as “hard” opt-in)
- That soft opt-in marketing materials only concern similar products to the individual’s initial purchase or area of interest (e.g. it would not be appropriate to promote adult services to someone who had only previously purchased ringtones)
- That soft opt-in individuals must be given a simple means of opting out in each subsequent promotion (a requirement addressed in section 2 of this document)

3.2 Whilst PhonepayPlus does not directly enforce PECR, we do take a view as to whether PECR has been breached by a phone-paid service. The Information Commissioner’s Office (ICO), the body which enforces PECR, had signalled their willingness to work with us to establish which practices were acceptable and unacceptable interpretations of PECR in respect of the way in which phone-paid services are marketed, and to jointly prepare a Help Note to the phone-paid industry.

3.3 So the Review’s proposals in respect of the way in which the phone-paid industry uses Marketing Lists would not be added to a Statement of Expectation but rather to this Help Note, which will set out the circumstances where PhonepayPlus would take a view on whether PECR had been breached, or refer cases to the ICO, and the accompanying guidance we would offer.

Recycled MSISDNs

3.4 When a consumer gives up their mobile account and the number attached to it, the number – known as a MSISDN within the industry – is quarantined for 6 months before being allocated to a new mobile handset. Where the owner of that new mobile handset, and the recycled number, receives an unsolicited promotional SMS, it is possible that it is because the number’s previous owner will have consented to it.

3.5 This is largely because content providers retain records of the MSISDN numbers which have purchased from them, not records of the individuals who own the numbers. So the provider may not be aware that the number has a new owner, and so will continue to send promotional SMSs once it is re-activated.

3.6 In order to address the consumer confusion, worry, and sometimes offence caused where promotional SMSs are mistakenly sent to the new owner of a recently recycled number, PhonepayPlus proposed the following practice, to be included in the Help Note:

“that service providers, or subcontracted parties, have firm evidence – i.e. some substantive record – that the MSISDN numbers on their opt-in lists have not been recently recycled before the opt-in lists are used”

Q13 – Do you agree with PhonepayPlus’ assessment of recycled MSISDNs, and our proposal that service providers, or subcontracted parties, prove the MSISDN numbers on their opt-in lists have not recently been recycled? If not, why not?

3.7 A number of respondents stressed the need for information providers, rather than service providers or aggregators, to have the responsibility for checking numbers on an opt-in list because it is the information providers who use opt-in lists.

3.8 Whilst a significant number of respondents agreed that problems exist in this area, many highlighted the impracticability of requiring information providers to check the status of numbers on their opt-in lists without an automated “look-up” database that was maintained consistently by all Mobile Network Operators (MNOs). A number of MNOs who responded said that this would require a near constant database cleansing service, at a level of resource they could not currently support.

3.9 Other responses confirmed that consumers who receive a recycled number do sometimes mistakenly receive promotional SMS meant for the number’s previous owner, but took the following broad positions:

- If a consumer in such a situation is only receiving a free promotional message with a clear opt-out facility, then the chances of harm are very low
- Could MNOs not ensure recycled MSISDN numbers are “clean” of all previous marketing before they re-allocate them?

Q13 Conclusions

3.10 In light of the responses received, and PhonepayPlus’ own research in this area, it appears that the only way of checking whether a MSISDN number has been recently recycled is through a Mobile Network Operator. The MNOs have signalled through their responses to this question that they would not support the resource required for an automated database.

3.11 Whilst the lack of an automated database of recently recycled numbers would make checking an opt-in list very difficult and time consuming, it would not make it impossible. However in recent months MNOs have taken a number of additional steps to ensure MSISDN numbers are clean, which has led to a further decrease in an already low level of complaints to PhonepayPlus about issues arising from recycled MSISDNs. In view of both these factors we have decided not to include the proposal set out at paragraph 3.6 in the final Help Note.

3.12 We will continue to keep this issue under review, and discuss database arrangements in this area with MNOs, with a view to introducing the requirement to check for recycled numbers if the problem becomes more significant.

Opt-in Lists sold or traded to Third Party companies

3.13 The second area of concern around Marketing Lists which the Review addressed was the practice among some information providers of selling or trading opt-in lists of consumers’ MSISDN numbers to other companies for them to use in marketing. As set out at paragraph 3.1, this practice does not contravene PECR as long as the consumer

positively consented to their details being passed onto third parties when they made a purchase (or were in negotiations to do so).

3.14 When deciding if PECR has been breached in respect of this condition, the ICO might consult the Direct Marketing Association (DMA), a trade association which sets standards of best practice for direct marketing. The DMA's standards in this area are as follows:

- That the selling company must be able to prove that all MSISDN numbers on the list result from a legitimate opt-in where the consumer was positively, not passively, opted in.
- That the buying company must only send messages appropriate to the original opt-in.

3.15 The Review highlighted that the DMA's standards only cover the selling of marketing lists from one company to another, not like-for-like trading of lists between companies. Trading is a practice which has occurred frequently within the phone-paid market, and is often at the root of unsolicited SMS marketing.

3.16 Despite a large body of support during pre-consultation for an outright ban on the exchange of third-party opt-in lists, the Review concluded that it was not within PhonepayPlus' remit to do so. However PhonepayPlus proposed the following guidance, to be included in a Help Note:

- That service providers, and/or contracted organisations, should ensure that the MSISDN numbers on their list result from legitimate consumer opt-in, and produce evidence confirming this (such as network data records linking a consumer's MSISDN to a positive consent to receive promotion from 3rd parties) when asked to do so by PhonepayPlus. In practice this will require businesses who sell or trade opt-in lists to also sell or trade appropriate evidence.
- That service providers, and/or contracted organisations, should ensure that promotional messages fall within the parameters of the consumer's original opt-in, and produce evidence confirming this (such as network data records showing the nature of the consumer's original purchase) when asked to do so by PhonepayPlus. Again, this will require businesses who sell/trade opt-in lists to also sell/trade appropriate evidence.

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?

3.17 Respondents were almost universally in agreement with the intent of the proposed guidance, with a number of them highlighting the need to narrowly define what would be acceptable evidence of explicit consent. A number of respondents offered the analysis that if this definition is not sufficiently robust, then many of the issues which gave rise to PhonepayPlus' proposals would continue unchecked.

3.18 However, one MNO raised a concern about how evidence of opt-ins would be supplied to businesses which purchased or received an opt-in list in trade. Their opinion was that the only way to prove legitimate opt-in is to link Mobile Network data records to a positive opt-in held by the service or information provider. The MNO signalled that whilst they would be happy to provide network data records during a PhonepayPlus investigation, they could not provide this information in order that lists be sold or traded between companies. This was because the MNO themselves would have no business relationship with many of the companies to whom the lists were sold or traded.

Q14 Conclusions

3.19 In light of the responses we received, and having regard to the Information Commissioner's [July 2008 Report](#) on the data sharing review, which deals with issues of transparency in section 6, we must consider whether our proposed conditions are still appropriate. To do this, we have taken two factors into account. The first of these is the assertion that MNOs will not be able to provide network data records to those who wish to trade or sell opt-in lists. If PhonepayPlus defines appropriate evidence of 3rd party opt-in as that which contains network data records – either an Mobile Origination (MO) message or an acceptance of 3rd party marketing on a Payforit payment screen – for each individual, then this will make it all but impossible for someone buying or trading an opt-in list to be sure all the opt-ins are valid.

3.20 The only method we would deem acceptable where network data records are not necessary is where a third party takes responsibility for the generation and sending of unique passwords, and images of those passwords as entered by consumers on a website landing page (with any changes date stamped) are also stored with a third party. This method is discussed in greater detail later in this section at paras 3.40 to 3.52. Industry stakeholders with whom we have discussed it have signalled it is likely to be expensive to achieve.

3.21 We must set this consideration against the large majority of industry stakeholders who expressed their belief that the exchange of 3rd party opt-in lists should be banned. No-one, either during extensive pre-consultation or formal consultation, confirmed they used 3rd party opt-in lists, or felt it was something a reputable provider of phone-paid product would do. We must also take into account the still growing number of cases in this area which go to PhonepayPlus' Code Compliance Panel for adjudication.

3.22 In conclusion, we have decided that 3rd party opt-in lists should be used only by providers of phone-paid services (either service or information providers) where each opt-in on the list can be clearly linked to a network data record, or to images of unique passwords entered by consumers on a website which have been timed stamped and stored with a third party. Where a network data record is used, this should either be an MO text or an acceptance of 3rd party marketing from the MSISDN number concerned.

3.23 We are aware that MNOs will not provide such network data records to those who wish to sell or trade opt-in lists, but will provide them only in response to a request during a PhonepayPlus investigation. This would leave only the second, and potentially costly, option open to those who wished to trade 3rd party opt-in.

3.24 This decision does not constitute a ban on the sale or trade of 3rd party opt-in lists. Should a company still wish to purchase or receive in trade such a list, they are at liberty to use it. However, unless they had available the facility to time stamp and securely store unique consumer passwords, such a company would not know whether all the opt-ins on the list are legitimate until PhonepayPlus requested network data records as part of an investigation. Without this primary information companies put themselves at considerable risk of being found in breach of the PhonepayPlus Code if any of the opt-ins were not supported by a network data record.

3.25 Lastly a number of respondents made the point that they have more than one subsidiary brand which sells phone-paid services within their company structure. We can confirm that where a consumer has purchased from a company previously, we would regard the provision of their details to any other brand within that company as being "1st party", rather than as the exchange of 3rd party opt-in details.

3.26 In light of these conclusions, the proposed Help Note guidance at paragraph 3.16 will be altered to read as follows:

- That service providers, and/or contracted organisations, should ensure that the MSISDN numbers on their list result from legitimate consumer opt-in, and produce either network data records (either a Mobile Origination message or an acceptance of 3rd party marketing on a Payforit payment screen), or images of unique passwords entered by consumers on a website which have been timed stamped and stored with a third party, linking a consumer's MSISDN to a positive consent when asked to do so by PhonepayPlus.
- That service providers, and/or contracted organisations, should ensure that promotional messages fall within the parameters of the consumer's original opt-in, and produce evidence (either a Mobile Origination message, an acceptance of 3rd party marketing on a Payforit payment screen, or images of unique passwords entered by consumers on a website which have been timed stamped and stored with a third party) confirming this when asked to do so by PhonepayPlus.

Time between Consumer opt-in and the start of promotional SMSs

3.27 The Review set out instances where consumers complain to PhonepayPlus about an unsolicited SMS which promotes a phone-paid service, only for our investigations to discover that the consumer has in fact opted in. The reason for consumer confusion is often that the consumer opted in, either through "soft" or "hard" opt-in, some time ago and has now forgotten that they did so.

3.28 Assuming that consumers have been given clear information about their opt-in at the time, the Review explored whether there should be a time limit between the consumer's opt-in and the commencement of promotional SMSs, with the opt-in ceasing to be valid after that point. Because the nature of phone-paid services is that they provide instant gratification and consumption, and at present have little or no retained value, PhonepayPlus proposed the following condition, to be included in a Help Note:

- That 2 weeks should be the maximum time frame between consumer opt-in and the commencement of regular promotion

3.29 The Review accepted that a possible exemption to this condition could be phone-paid services which are designed to coincide with significant dates such as a consumer's birthday, Christmas/Easter/Valentine's Day, or the beginning of a football season or other sports tournament. Such an exemption would be dependent upon the consumer being clearly informed of the intention to use date-specific promotions when they opted in. Respondents' views were invited on whether such an exemption should apply.

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 two weeks of the consumer opting to receive it? If not, why not?

Q16 – Would you exempt promotions tied to a specific date (e.g. consumer's birthday, Easter, start of the football season) from the two week requirement in Q15, as long as the consumer is clearly informed of the intention to use date-specific promotions when they opt-in? Please give your reasons.

3.30 Some respondents questioned whether the 2 week limit would apply to a consumer who was using a subscription service, and so presumably would not have forgotten about the original purchase which opted them in.

3.31 Other respondents questioned whether the 2 week limit should apply to “1st party” marketing – i.e. “soft” opt-in based on a purchase or negotiations for a purchase.

3.32 However an overwhelming number of respondents highlighted that setting a 2 week limit, or indeed any limit, for marketing to begin would result in the need for a service or information provider to generate promotional SMS messages earlier than they had previously. The net result of this would be consumers receiving more, rather than less, SMS messages, and the promotions would be likely to be less well thought out due to the time limit.

Q15 and Q16 Conclusions

3.33 In light of the number of respondents highlighting the unforeseen consequences of a 2 week limit between consumer opt-in and the commencement of promotional SMS, we have decided not to include this limit in a final Help Note.

3.34 However the Review also stated that PhonepayPlus was not minded to set a limit for how long marketing should continue after a consumer opt-in, without response from the consumer. This was because of our understanding that a 6 month limit was already enforced by Mobile Network Operators as part of their contracts with service providers.

3.35 It has subsequently come to our attention that this 6 month limit does not refer to a consumer’s failure to respond to marketing, but rather to a 6 month period where a promotional SMS cannot be delivered to the number concerned.

3.36 Whilst we accept the view, expressed by some industry stakeholders, that the majority of companies would not continue to market for long to a consumer who did not respond, we have adjudicated on some high profile cases where SMSs – either promotional or charged – have been sent to consumers long after their initial opt-in, at a point where the consumer could be reasonably considered to have forgotten about it.

3.37 With this in mind, we intend to set a time limit of 6 months for an opt-in to remain valid where a consumer does not respond to marketing or where no charged SMS to which the consumer has consented is delivered. Whilst the criteria are not the same as those set out by MNOs, the 6 month time limit is. We would like to discuss this further with stakeholders as we jointly draft the Help Note with the Information Commissioner’s Office.

3.38 Again, the possible exception to this rule is marketing, or indeed charging, to which the consumer has already consented where they are informed that this will tie into a specific date which falls after 6 months from the original opt-in. PhonepayPlus had decided that this is reasonable where the opt-in is not 3rd party, and intends to include such an exemption in the final Help Note.

3.39 Whilst PhonepayPlus has concluded that a limit between consumer opt-in and commencement of promotional SMS is not appropriate at this stage, the sending of promotional SMS some time after consumers have opted to receive them has certainly been an instrumental driver in some recent complaints. With this in mind we will continue to revisit this matter as a Helpline is jointly drafted between ourselves and the ICO. Similarly we will continue to discuss whether 6 months is the most appropriate timeframe for consumer opt-in to remain valid where a consumer does not respond.

Opt-in through websites

3.40 In respect of 3rd party opt-in, PhonepayPlus has already decided there is too much risk involved to allow any form of proof other than mobile network data records, Payforit acceptance that can be linked to a consumer's acceptance of 3rd party marketing, or images of unique passwords entered by consumers on a website which have been time-stamped and stored with a third party.

3.41 As such this section deals with the definition which should be applied to proof of "soft" opt-in – i.e. opt-in obtained from a direct sale or from negotiations for a direct sale – through a PC or mobile based website.

3.42 The Review highlighted that PC based websites can be problematic, as the PC does not have a direct billing connection to the consumer's mobile handset, and so cannot automatically verify a consumer's MSISDN as a mobile website can. However where a mobile website needs to prove negotiation for a sale rather than a direct purchase, then the same problem may apply.

3.43 During the Review's drafting, consultation, and subsequently, PhonepayPlus has adjudicated on an increasing number of complaints which could be traced back to the alleged entry of a mobile phone number into a data capture field on a website (which in PECR terms means the consumer has entered into negotiations for a sale). Often the only proof that the operators of these websites had as to who had entered these numbers was an Internet Provider (IP) address, which makes a full audit trail to determine validity of opt-in almost impossible.

3.44 Given that PhonepayPlus' Code Compliance Panel had already ruled that an IP address linked to the entry of a mobile phone number was not in itself suitable evidence of a "soft" opt-in, the Review set out three methods, other than a purchase, by which verification of a soft consumer opt-in might be obtained. They were:

- i) The consumer enters their phone number in a data capture field on the website. The number they have entered is then sent a free SMS message from the website operator which contains a password. The consumer enters this password back into a mobile website to confirm that the number belongs to them
- ii) Similar to i), except that when the website operator sends the consumer a free SMS message, the consumer replies to that message with an SMS message of their own. This confirms that the number belongs to them, and provides a network data record.
- iii) The consumer sends a standard rate SMS to a shortcode displayed on the website. They receive an SMS in reply which contains a password. They enter this password into the website to confirm the mobile number is theirs.

3.45 The Review's analysis was that method iii) carried no risk of contravening PECR, Method ii) carried only a small risk, which was that if somebody entered a number into a website which was not theirs, then the owner of that number would receive an SMS which was, technically, unsolicited. This problem could be resolved by a requirement that the SMS contain suitable information to the effect that if the consumer has received this message in error then they should not reply to it.

3.46 Method i) posed a greater level of risk in the opinion of the Review, especially in light of the Code Compliance Panel's ruling. As such we invited respondents to include evidence

that a robust audit trail could be conducted using method i) in advance of any decision on a final Help Note condition.

Q17 – Do you agree with PhonepayPlus’ assessment of MSISDN number verification on websites offering phone-paid services, and the risks to consumers in terms of fraudulent opt-in? If not, why not?

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 may have.

3.47 A number of respondents expressed the view that method i) could work where the password contained in the SMS which a website sends to a consumer was unique, and did not reference the website itself (and so could not exhort a consumer who received a message in error to reply). The use of unique passwords would serve as a safeguard, as long as it could be proven that each password was only sent to one number.

3.48 Fewer respondents suggested ways in which a robust audit trail could be conducted using method i), and some of those that did provided confidential commercial information which we cannot reproduce. But the basic methodology of these replies was that aggregators, rather than information providers, be responsible for the generation and sending of a unique password, and also host the landing page where the password would be entered. Additionally aggregators would be required to store an image of this page (and any subsequent changes, with date stamps confirming them) with a third party.

Q17 and Q18 Conclusions

3.49 On the basis of the responses above, we propose to include the following advice within the final Help Note:

- That method iii) carries no risk of contravening PECR in the context of phone-paid services, and so is entirely acceptable
- That method ii) carries a slight risk, which can be mitigated if any SMS message sent to a mobile number contains a warning that if the consumer has received this message in error then they should not reply to it. We will suggest a form of wording in the final Help Note.
- That method i) carries a significant risk, which can be mitigated where a third party takes responsibility for the generation and sending of unique passwords, and images of those passwords as entered by consumers on this landing page (with any changes date stamped) are also stored with a third party. Although PhonepayPlus strongly recommends that any company using method i) demonstrate to us first that the audit trail is robust.

3.50 The one exception to this advice above would be where a consumer viewing a PC based website opted-in to receive only one marketing SMS. This SMS usually takes the form of a binary message with a link to a mobile website. In these circumstances, PhonepayPlus would consider it acceptable for method i) to be used without the secure process described above, but only where the consumer is clearly informed that they will only receive one marketing message as a result.

3.51 Where the consumer does not quickly access the mobile website link in the SMS sent to them we would consider it acceptable for one reminder message to be sent within 24 hours of the first SMS. Any more than one reminder, or any reminder sent beyond 24 hours from the first SMS, are not acceptable in this regard.

3.52 PhonepayPlus does not wish to stifle innovation in the phone-paid market, and the final Help Note will also reflect our willingness to consider the robustness of any alternative method of opt-in validation which is demonstrated to us.

Section 4

Transparency and Fairness

4.1 There is a strong argument to suggest that the failure to provide transparent information to consumers lies at the heart of every issue in the Review, whether that information is about price, opt-in, opt-out, or the nature of a service. However, this section of the Review addressed three of the main areas where a lack of transparency can directly mislead consumers.

General failure to provide adequate consumer information

4.2 The Review set out that, in the main, complaints in this area arise from mobile phone-paid services which are purchased through a website (either accessed through a PC or mobile handset). This is because it is not possible to set out pricing information in a binary SMS message which provides a link to the website, nor when a website is accessed by clicking on a list of results from a search engine. So the only place that pricing information can be displayed, that will ensure all consumers see it before they purchase, is on the website itself.

4.3 The Review set out PhonepayPlus' proposed conditions to clarify this requirement, to be included in a Statement of Expectation, as follows:

- Where promotional material acts as a direct link to a website, it must not contain any information that will, or will be likely to, mislead users
- Websites which allow users to browse and purchase different phone-paid services must contain all of the information required by Section 5 of the 11th PhonepayPlus Code of Practice, regardless of whether general information has been supplied 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, nor simply referenced in the website's terms and conditions.

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?

4.4 Responses made the following two key points:

- That the second proposed condition risked putting phone-paid services at a disadvantage to other web services in its current form, and so the reference to "Section 5 of the 11th PhonepayPlus Code" should be altered to read "paragraphs 5.7 to 5.14 of the 11th PhonepayPlus Code".
- That the most effective way to ensure these conditions made an impact would be to provide practical examples of inadequate transparency in the most common promotional environments (e.g. print and web).

Q19 Conclusions

4.5 In light of the responses above, the first condition will read as originally proposed. We propose to alter the second of the two conditions to read as follows:

- Websites which allow users to browse and purchase different phone-paid services should contain all of the information required by paragraphs 5.7 to 5.14 inclusive of the 11th PhonepayPlus Code of Practice, regardless of whether general information has been supplied in promotional material. This information should 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, nor simply referenced in the website's terms and conditions.

4.6 A number of respondents suggested that practical examples of good and unacceptable practice would help companies to stay compliant. Whilst PhonepayPlus cannot provide examples that in effect endorse a website or advertising – i.e. create a template that will always indemnify those who copy it from being found in breach – we accept the need to provide more practical guidance.

4.7 Practical guidance will be provided as soon as is practicable to support the Statement of Expectation conditions with respect to website transparency. Whilst this will not completely indemnify service or information providers from further action by PhonepayPlus, it should provide reassurance that a website is compliant in almost all cases.

Phone-paid services which charge per page viewed

4.8 The Review explained the relatively new practice of charging consumers for each page of a mobile website they view, as opposed to charging for the download of video or images. PhonepayPlus has received an increasing number of complaints about these services, and our concerns can be summarised as follows:

- That some pay-per-view websites list the price of each image or video clip, but charge per page viewed where the page contains more than one clip or image. So it will be impossible to ever incur the charge listed for viewing just one.
- That some pay-per-view websites charge consumers for each page they view whilst retracing their steps to exit the website, so charging consumers again for pages they have already viewed.

4.9 Based on these concerns, the Review proposed the following Statement of Expectation conditions:

- Where consumers are charged for each image or segment of video footage they view, then this must be clearly and prominently stated, along with the amount that consumers will be charged for viewing each image or video segment, prior to the consumer incurring any charge
- Where consumers are charged for each page containing more than one image or segment of video footage, then the price of viewing that page must be clearly and prominently stated, prior to the consumer incurring any charge.

4.10 The Review also considered pay-per-page services to carry an additional risk, on the grounds that consumers can access new pages, and be charged, almost instantaneously. In effect this allows consumers to run up large cumulative bills, and is akin to the repeat charging involved in a subscription service condensed into a very short period of time.

4.11 For this reason, the Review also invited respondents to comment on whether services which charge per page viewed should be subject to Prior Permission. Such a regime would contain the two Statement of Expectation conditions set out at paragraph 4.9, plus two additional conditions as follows:

- That the consumer must be informed of their total spend so far each time they select to view an additional page or screen of charged content, and must confirm they accept the additional charge before each new page is opened.
- That the consumer is not charged for pages/screens that they view whilst retracing their steps to exit a website.

Q20 – Do you agree with PhonepayPlus’ assessment of the transparency issues around services that charge per page viewed, and our proposed conditions? If not, why not?

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 may have.

4.12 Responses generally agreed with the Review’s assessment of the risk caused by pay-per-page services. Whilst some respondents expressed their preference that Prior Permission was not introduced, they petitioned that any Prior Permission requirement should fall on the information provider – who promotes and manages the services - rather than the service provider.

4.13 Respondents were in general agreement that consumers should not be charged to view pages when retracing their steps through a website, but did not support the proposal for a dynamic bill counter that informed the consumer of their total spend each time they selected to view a new page. Some respondents signalled this would be technically difficult, if not impossible, to achieve.

Q20 and Q21 Conclusions

4.14 Whilst we acknowledge some stakeholders’ view that a Prior Permission regime is not necessary at this stage, and that these services could be reviewed within 6 months of the Statement of Expectation conditions taking effect, we remain very concerned about the ease with which consumers can accumulate substantial charges in a single viewing session. These concerns are borne out by the continued complaints to PhonepayPlus about pay-per-page services, with consumers who were not fully informed often having incurred large bills.

4.15 Because of these concerns we have decided to introduce a Prior Permission requirement for services which charge per page or screen viewed. This requirement will cover such services regardless of the platform through which they are delivered.

4.16 The conditions of this Prior Permission regime will be as follows:

- Where consumers are charged for each image or segment of video footage they view, then this must be clearly and prominently stated, along with the amount that consumers will be charged for viewing each image or video segment, prior to the consumer incurring any charge
- Where consumers are charged for each page containing more than one image or segment of video footage, then the price of viewing that page must be clearly and prominently stated, prior to the consumer incurring any charge
- Where consumers retrace their steps to exit a website, they must not be charged again for pages which they have already viewed

4.17 Service providers should seek a separate Prior Permission Licence (Licence) in respect of each information provider with whom they contract. Alternatively service providers can require information providers to complete and pay for an application request

which they countersign. In this latter scenario information providers would be expected to complete an application for each service provider with whom they connect in respect of pay-per-page services, and the service providers to countersign the relevant application to indicate they have read and endorsed it. Where service providers or information providers submit multiple applications at once, we will permit them on such an occasion to pay one Licence fee rather than a separate fee for each application.

4.18 Prior Permission applications will be required to list all the company directors of an information provider, and all managers of an information provider having any responsibility whatsoever for pay-per-page services. Where a Licence is withdrawn, no service provider will be permitted to provide the information provider named in such a licence with an interconnect to supply pay-per-page services.

4.19 Once any previously granted Licence is withdrawn, all future applications for Prior Permission will be checked to discover if the company directors or managers involved were linked to a previous, withdrawn application. Should a Prior Permission application be linked in such a way to a previously withdrawn Licence, the risks associated with granting the application will be assessed and if appropriate the application may be refused.

Text-based Chat Services

4.20 Lastly in respect of Transparency, the Review summarised the consumer risk carried by text-based Chat Services. Based on the complaints PhonepayPlus had received in the months leading up to the Review's publication the risk could be divided into two distinct areas:

- a) Promotion of a text-based Chat Service using an SMS sent from a mobile long number rather than a shortcode. This potentially misleading practice is then compounded where the promotional message itself does not contain any pricing information, or inform the consumer that by replying they will sign up to a text-based Chat Service.
- b) Promotion that misleads consumers into believing they can meet the people who they are exchanging texts and/or pictures with.

4.21 The issue of whether or not text-based Chat Services should be able to promote using mobile long numbers is currently being discussed by PhonepayPlus with Ofcom, and no absolute decision has yet been reached. But whether a long number is used within promotion or not, the Review confirmed that the content of the promotional SMS should clearly inform consumers that if they reply they will be signing up to a text-based Chat Service, and the cost of that service.

4.22 Many text-based Chat Services advertise in a way that suggests consumers will be able to "meet local girls in your area". Most of this advertising either implies or explicitly states that the women concerned have joined the advertised dating service in order to meet men for sex, and so may have raised expectations that any meeting would result in sexual liaison. After monitoring several services, the Review concluded that the promise of any such contact was misleading.

4.23 PhonepayPlus proposed the following conditions in respect of text-based Chat Services, to be included in a Statement of Expectation:

- Promotional messages must make it clear to the consumer if a reply to the message will result in them opting into a service carrying a premium rate charge

- Services must not imply that consumers are exchanging unique messages with other, distinct, individuals, or will be able to meet others by using the service, unless that is the case

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

4.24 Respondents generally agreed with the first condition, that promotions should be clear, and that mobile long numbers should not be used to promote text-based Chat Services. Some responses did urge that a more lenient position was taken around the use of mobile long numbers to deliver messages once a consumer had opted into a Text-based Chat Service.

4.25 Opinion was divided on whether the second condition was necessary. Some respondents felt it was a sensible suggestion, but others expressed the view that consumers of text-based Chat Services understood the fantasy element to them, and so also understood that personal meetings may not happen.

4.26 Finally, one respondent highlighted that, since Prior Permission for Virtual Chat Services (including text-based Chat) was discontinued, many text-based services have moved from sending one charged SMS in response to a consumer SMS to sending multiple charged SMSs in response to one consumer SMS. The respondent suggested this was a symptom of a less compliant market, and asked whether Prior Permission for text-based Chat Services could not be re-introduced.

Q22 Conclusions

4.27 Since the Review’s initial assessment of text-based Chat Services which suggest that consumers will be able to meet women for sex, PhonepayPlus has conducted further detailed research..

4.28 This research exercise has heightened PhonepayPlus’ original concerns. We accept that not everyone who uses a relevant type of text-based Chat Service will be able to arrange a date, but we expect that consumers who join a service which is advertised to heavily imply sexual contact will have access to contacts that have a genuine interest in meeting for sex. As with all services which are of a sexual nature, consumers are often disinclined to complain, which makes precaution on the part of the regulator more important.

4.29 We are aware of an argument from some stakeholders which points out that some consumers will be unable to get a date after a prolonged period of usage, and so may wish instead to exchange sexual SMS chat with an operator. We would consider this re-routing of the consumer to be acceptable, as long as they are clearly informed of it at no more than standard charge. This gives the consumer the option to opt out of future text chat if they so wish.

4.30 In conclusion we will not alter the first Statement of Expectation condition proposed in the Review. The second condition will be slightly altered to read as follows:

- Services should not imply that users are exchanging messages with other users, or that users will be able to meet others by using the service, unless that is in fact the case

4.31 In order to prove that consumers are exchanging messages with other users that are genuinely motivated to meet for a date, PhonepayPlus will require evidence of registration by

these other users linked to network data as part of investigations. We may also ask for evidence that some meetings have taken place as a direct result of the service.

4.32 In addition to the Review's original proposal, we will keep text-based Chat Services under review for the first 6 months following the publication of Statement of Expectation conditions. If compliance does not improve within those 6 months, we will consider re-instating a Prior Permission requirement for such services.

Section 5

Subscriptions and Joining Fees

5.1 The last main issue covered by the Review concerned all types of phone-paid service, regardless of the content on offer, which use the subscription billing method. The Review set out PhonepayPlus' view that the recurring nature of subscription charges carries a heightened risk of consumer detriment, when compared to phone-paid services which are purchased with a single charge. This is why the 11th PhonepayPlus Code already carries a number of provisions which apply specifically to the operation of subscription services.

5.2 The Review highlighted that, in recent months, approximately 51% of total complaints about mobile phone-paid services had been about services using subscription billing. The root causes were largely as follows:

- Failure to provide pricing or other required information that informs the consumer they are purchasing a subscription
- False or misleading implication that a product or service is free, when in fact it is dependent on the consumer signing up to a subscription
- The charging of a joining fee to the consumer without clearly informing them

5.3 The Review analysed three potential regulatory solutions in respect of subscription services:

- a) To change the current focus of existing regulation
- b) To require a "cooling off" period of an hour between the consumer being sent an initiation text message (which supplies information about their subscription) and receiving charged content. This would give the consumer a chance to reflect on the information, and decide whether to opt-out of the subscription or to continue and receive charged content.
- c) To introduce a Prior Permission requirement for the service content types using subscription billing which are known to cause the most consumer harm. One condition of this requirement would be that no subscription charge and/or joining fee may be incurred until the consumer has been sent their initiation text message and confirmed their subscription by sending an SMS message.

5.4 The Review discounted the adoption of option a) in isolation, on the grounds that previous focused enforcement by both PhonepayPlus and Mobile Network Operators had only abated the problems, not ended them.

5.5 Option b) was discounted on the grounds that whilst it would give consumers time to consider an initiation message, it would not guarantee they had read and understood it before charged content was sent to their mobile handset. In addition we did not feel most consumers would wish to wait for an hour or more to receive content, due to the instant gratification nature of most phone-paid services.

5.6 The Review proposed that option c), a Prior Permissions requirement, be introduced for subscription services which offered ringtones, music, or wallpaper, on the grounds that these content types are the most common causes of complaint. The proposed Prior Permission requirement would carry the following conditions:

- Promotional material must not use the words FREE or NO CHARGE, or contain wording that implies the same, except to state that the promotional message itself is free. This extends to promotional SMS messages, search engine metatags, and websites which use these words, or other wording which carries the same implication, in their title.
- No free service may directly link to another product or service which carries a premium rate charge unless the consumer is made aware of that charge, and has consented to it.
- Once consumers have selected a service by texting a keyword to a shortcode or by selecting a product on a website, they must be immediately provided with either a free text message which states the following:

U have joined/subscribed to [name of service and optional description] for [cost of service in £] per [billing frequency] until you send STOP to [originating service shortcode]. Helpline [UK standard rate or free helpline number]. To confirm text AGREE to this message/shortcode xxxxx.

Or, in the case of a website, consumers must be immediately provided with a page which states the following:

You have joined/subscribed to [name of service and optional description] for [cost of service in £] per [billing frequency] until you send STOP to [originating service shortcode]. Helpline [UK standard rate or free helpline number]. To confirm click the CONFIRM button below.

Unless the consumer confirms their purchase in one of the two ways outlined above they should not be considered to have opted into receive the service, and they must be neither charged nor sent further marketing information.

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?

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?

Q25 – Do you agree with PhonepayPlus’ assessment that subscription services which offer ringtones, music, and wallpaper and are facilitated through Payforit should be exempt from any prior permission requirement? If not, why not?

5.7 A majority of industry respondents expressed their view that a Prior Permission regime was not necessary. Their assessment was that the rise in complaints had been caused by a few “rogue” services which could be dealt with through greater use of existing regulation and sanctions. This was in contrast to public or consumer protection bodies, who largely welcomed a Prior Permission regime.

5.8 A number of these respondents added the caveat that if a Prior Permission requirement was introduced it should fall on the information provider rather than the service provider.

5.9 Within this body of opinion were a number of comments on the Prior Permission conditions themselves. Comments focused in particular upon the proposed requirement for subscription services to seek consumer confirmation prior to any charge being incurred. A large number of stakeholders, both in pre-consultation and formal consultation, expressed fears that such a requirement would affect the market adversely due to the need for the consumer to send a second SMS. It was felt that this would confuse consumers, who would then abort the transaction before it was complete.

5.10 PhonepayPlus had invited these stakeholders to produce evidence, either from the UK market or overseas, that supported the hypothesis that transactions would drop significantly due to consumer confusion. This is distinct from transactions which fail because the consumer elects to abort them, after receiving an initiation text with information about the service, its cost, and the frequency of charging. Whilst we did receive evidence that indicated a drop in transactions, none of this evidence demonstrated what proportion of that drop was due to consumer confusion rather than consumer awareness.

5.11 A number of specific suggestions were also made regarding how the Prior Permission criteria should be applied. The Review had proposed that Prior Permission be sought to run subscription services which sold ringtones, music, or wallpapers. One respondent suggested that competition services which used subscription billing may also be a problem area, a point of view which subsequent PhonepayPlus monitoring would lead us to agree with.

5.12 A separate comment on the Prior Permission conditions concerned the requirement for confirmation on a website.. The respondent concerned pointed out that in this scenario the only proof of website confirmation would be an IP address, something that other parts of the Review had signalled would not be acceptable.

5.13 Three main alternatives were suggested to PhonepayPlus' proposal to apply Prior Permission only to certain types of content (in this case ringtones, music, and wallpaper). They were:

- a) That Prior Permission be applied to all subscription services, but with the requirement for consumer confirmation replaced by a requirement to inform PhonepayPlus in advance of all the journals and websites in which subscription services would be advertised. The argument being that this would allow PhonepayPlus to monitor promotions and check their transparency.
- b) That Prior Permission be applied by cost of the service, with all subscription services where the consumer can accrue a weekly bill higher than a certain threshold required to seek Prior Permission
- c) That Prior Permission be applied only to those who have previously breached existing Code provisions regarding subscription services.

5.14 Lastly there was universal agreement among those who provided an answer that a Prior Permission requirement should not apply to subscription services which use the Payforit secure payment mechanism.

Q23 to Q25 Conclusions

5.15 Whilst we accept that a significant number of industry stakeholders felt that Prior Permission was unnecessary, and that the requirement for a confirmation SMS would adversely affect the market by confusing consumers, we did not receive any substantive evidence that precisely supported these views.

5.16 Whilst the suggested alternatives a) and c) as set out at paragraph 5.13 were carefully considered, they were discounted for the following reasons. Alternative a) would require almost constant submission of new advertising locations by all those holding Prior Permission, something which we felt would be unnecessarily bureaucratic for both information providers and PhonepayPlus. In addition alternative a) would not capture “pop-up” web advertising, which could operate over a very short period of time without detection.

5.17 Alternative c) was an attractive one, in that it would focus the requirement to seek a licence on those who had a poor track record. However we would be unable to retrospectively apply this requirement to those who had already offended, on the grounds that sanctions must be issued at the time a case is heard and adjudicated. As such we would only be able to apply the requirement going forward, which in our view would lead to more consumer harm before the introduction of a Prior Permission requirement became effective.

5.18 This left us to consider alternative b). This had become more attractive during the Review’s consultation period because many stakeholders expressed their view that non-compliant services would merely switch to providing content which did not fall under the Prior Permission requirement. This view was re-enforced by a number of breaches on which PhonepayPlus adjudicated whilst the Mobile Review was being consulted. The services concerned did not carry ringtones, music, or wallpaper content. By focusing on price rather than content when applying Prior Permission, a switch to other forms of content in order to avoid compliance could be prevented.

5.19 When considering the pricing threshold above which a Prior Permission requirement should be applied, we were particularly mindful of two considerations:

i) That a large majority of the subscription complaints which PhonepayPlus had investigated and adjudicated upon were about services which use joining fees. This is the practice of charging a consumer an immediate, one-off payment to join a club or scheme, in addition to the subscription costs the consumer will be charged. Setting a threshold that would require all services using joining fees to seek Prior Permission should achieve greater compliance in the type of services most responsible for consumer harm.

ii) That, if it is possible to do so whilst ensuring consumer protection and confidence in phone-paid services, the threshold should be set at a level which will not add bureaucracy to the operation of most compliant services.

5.20 With these considerations in mind, we have arrived at a price threshold of £4.50 per week. Any services where the cost can exceed £4.50 in any given week (including joining fees in the first week, and where a week is defined as a period of seven consecutive days) will be required to seek Prior Permission to operate. £4.50 is the average cost of a subscription service, and by setting the threshold at this level we expect the Prior Permission requirement to encompass services which carry an additional joining fee, and are responsible for the large majority of consumer complaints in this area.

5.21 Whilst the £4.50 threshold means that the requirement will not extend to services which cost no more than £4.50 in any given week, providers whose services subsequently breach the 11th PhonepayPlus Code may be required to seek Prior Permission as part of their sanction, regardless of the weekly cost of their services. It is hoped that in the first instance this will act as a deterrent to providers whose services cost no more than £4.50 per week.

5.22 The requirement will not extend to services which use Payforit, whatever the cost, on the grounds that Payforit already provides a method of consumer confirmation.

5.23 Prior Permission conditions will read as follows:

- Promotional material must not use the words FREE or NO CHARGE, or contain wording that implies the same, except to state that the promotional message itself is free. This extends to promotional SMS messages, search engine metatags, and websites which use these words, or other wording which carries the same implication, in their title.
- No free service may directly link to another product or service which carries a premium rate charge unless the consumer is made aware of that charge, and has consented to it.
- Once consumers have selected a service by texting a keyword to a shortcode or by selecting a product on a website, they must be immediately provided with a free text message which states the following:

U have joined/subscribed to [name of service and optional description] for [cost of service in £] per [billing frequency] until you send STOP to [originating service shortcode]. Helpline [UK standard rate or free helpline number]. To confirm text AGREE to this message/shortcode xxxxx.

- Until a consumer has texted AGREE to the shortcode concerned, they should not be charged.

5.24 As before, service providers should seek a separate Prior Permission Licence (Licence) in respect of each information provider with whom they contract. Alternatively service providers can require information providers to complete and pay for an application request which they endorse. In this latter scenario information providers would be expected to complete an application for each service provider with whom they connect, in respect of subscription services which cost more than £4.50 in any given week, and the service providers to countersign the application to indicate they have read and endorsed it. Again, where service providers or information providers submit multiple applications at once, we will permit them on such an occasion to pay one Licence fee rather than a separate fee for each application.

5.25 Prior Permission applications will also be required to list all the company directors of an information provider, and all managers of an information provider having any responsibility whatsoever for pay-per-page services. Where a Licence in respect of an information provider is withdrawn, no service provider will be permitted to provide the information provider named in such a licence with an interconnect to supply subscription services which cost more than £4.50 in any given week.

5.26 Once any previously granted Licence is withdrawn, all future applications for Prior Permission will be checked to discover if the company directors or managers involved were linked to a previous, withdrawn licence. Should a Prior Permission application be linked in any way to a previously withdrawn licence, the risks associated with granting the application will be assessed and if appropriate the application may be refused.

5.27 Whilst, in the first instance, Prior Permission will only be required for services which cost more than £4.50 in any given week, the PhonepayPlus Code Compliance Panel may

require as a future sanction that a service provider seeks a Licence – either in respect of a particular information provider or universally - to provide all subscription services, regardless of cost.

5.28 As with all regulation which PhonepayPlus introduces, we will continue to keep this Prior Permissions requirement under review.

Section 6

Regulatory Impact Assessment

6.1 The Review had proposed a number of Statement of Expectation conditions, a Helpline, and two Prior Permissions regimes in order to reduce the consumer harm we had identified. In proposing these changes to the existing regulation of mobile phone-paid services, we recognised that some of the changes would carry compliance costs.

6.2 For this reason, the last section of the Review assessed the tasks or obligations that we expected to arise from compliance with our proposals, and estimated the costs of such compliance wherever possible.

6.3 The Review's conclusion was that many of the costs involved in compliance with the proposals would be negligible, on the grounds that they would arise from relatively straightforward alterations to the information presented on websites or in marketing campaigns. In all these cases the Review concluded that the benefits to consumers of enhanced transparency justified the costs concerned.

6.4 The one exception to costs which were assessed to be negligible was the cost of requiring a confirmation SMS from consumers who purchase subscription services. PhonepayPlus recognized that a significant number of industry stakeholders had expressed concern that such a requirement would affect legitimate sales. The Review provided an estimate of such costs, against the estimated savings likely to arise from the prevention of consumer harm, but conceded these estimates were based on a number of qualified assumptions.

6.5 On that basis respondents were invited to provide any market data which gave PhonepayPlus a clearer picture of the following issues:

- The overall size of the subscriptions market
- The average cost of the first week of a subscription service (including joining fees)
- The average cost to a consumer of sending a confirmation SMS message
- The likely drop in subscription transactions directly due to consumer confusion. This is distinct from transactions which fail because the consumer elects to abort them, after reading an initiation text with information about the service, its cost, and the frequency of charging

Q26 – Do you have any evidence of other compliance costs which we have not identified in this Regulatory Impact Assessment? Please provide data where appropriate.

6.6 Relatively few stakeholders provided responses to this question. Whilst we did receive some evidence that indicated a drop in subscription transactions due to the requirement to seek a confirmation SMS, none of this evidence demonstrated what proportion of that drop could be apportioned to consumer confusion rather than increased consumer awareness.

6.7 Other comments were as follows:

- That SMS and website copy would be far easier for a service or information provider to alter than print or TV advertising, which is often booked months in advance. As

such advertising in these arenas may need to be cancelled, at significant cost, if it is no longer compliant.

- That no assessment had been provided of the costs involved to a company when seeking Prior Permission.

6.8 Whilst PhonepayPlus accepts that some advertising mediums have longer lead-in times than others, the Review was published in the middle of July 2008. This would have given anyone involved in advertising a phone-paid service in print or on TV a clear picture of our proposals, and the likely requirements in order to ensure compliance with them, at that time.

6.9 This Policy Statement is published in early January 2009, nearly six months after the Review was first published. In addition the Statements of Expectation and Prior Permissions regimes proposed will not take effect straight away. They are likely to take effect by February 2009, with Prior Permissions possibly not taking effect until later in the year given the time involved in processing a high number of applications.

6.10 Service and information providers have therefore had significant time to consider such issues. As such there should be relatively little need to withdraw non-compliant copy if steps are taken immediately after this Statement is published.

6.11 Whilst the basic cost of a Prior Permission application, £352.50, is already known to most service and content providers, we do not have a sound estimate as to the time companies must spend on preparing their actual application. With the two Prior Permission regimes that arise from this Review, we intend to make the application process relatively simple.

6.12 However, it is our belief that the administrative costs associated with a Prior Permission application and modifying relevant services are outweighed by the current consumer detriment arising from subscriptions or WAP pages which have been misleadingly sold. As such it is our opinion that the benefits of Prior Permission in this area outweigh the costs.

Section 7

Next Steps

7.1 The new Statement of Expectation, and Notices of two new Prior Permissions regimes dealing with Pay-per-view Services and Subscription Services are set out at Annexes A, B, and C of this document. The Statement of Expectation takes effect on 18th February 2009, **4 weeks** from the date of its publication. The Prior Permissions Notices take effect on March 4th 2009, **6 weeks** from the date of their publication. This is in order to allow service providers time to make the necessary application for permission from PhonepayPlus, and to make any necessary changes to their systems and procedures in light of the enhanced consumer protection requirements.

7.2 Service providers who make the necessary application, or who require an information provider to complete an application which they endorse, within 6 weeks from the date of the Prior Permissions Notices being published can continue to provide pay-per-view and Subscription services while their application is considered. Providers who apply after 6 weeks has elapsed are at risk of being found in breach if they continue to operate Pay-per-view or Subscription services.

7.3 We will continue to keep the services discussed in the Review of Mobile Phone-paid Services and their Marketing under review, especially over the coming weeks and months. This includes ongoing analysis of complaints to us and other organisations, and random monitoring to ensure compliance with the PhonepayPlus Code of Practice and individual conditions within the Statement of Expectation or in permission certificates.

Annex A

Statement of Expectation in relation to Promotional SMS messages and Transparency

Background

This Statement of Expectation is being issued in order to address various causes of consumer harm attributable to mobile phone-paid services. It follows PhonepayPlus' review of mobile phone-paid services, during which four categories of consumer harm were identified and analysed. These were:

- **Promotional SMS Messages**
- **Use of Marketing lists**
- **Transparency, especially regarding pricing, and**
- **Subscription Services, joining fees, and failure of the STOP command.**

PhonepayPlus proposed a Statement of Expectation covering two of these four categories – Promotional SMS Messages and Transparency.

Recommendations for the Use of Marketing Lists will be set out in a Helpline which PhonepayPlus is currently drafting in collaboration with the Information Commissioner's Office, and will be published shortly.

A Notice of the requirement for providers of Subscription Services which cost more than £4.50 in any given week to obtain prior permission from PhonepayPlus to operate has been published on 22 January 2009, and can be found on the PhonepayPlus website.

A Notice of the requirement for providers of services which charge per page or image of a mobile website which the consumer views to seek prior permission to operate has been published on 22 January 2009, and can be found on the PhonepayPlus website.

A Notice informing the phone-paid industry that PhonepayPlus will initiate an immediate Emergency Procedure against any service which does not immediately respond to the STOP command was published on 17 July 2008, and can be found on the PhonepayPlus website.

Expectations

For ease of reference, our expectations have been divided into two headings below:

Promotional SMS Messages

In order to satisfy the requirements of paragraph 5.7.1 of the 11th Edition of the PhonepayPlus Code (Code) we would expect that:

- Where users are sent promotional SMS messages which carry a charge the user should be informed, clearly and straightforwardly, of the cost of receiving that SMS message, and consent to the relevant charge, prior to incurring it.
- Where promotional SMS messages contain a link to a mobile website, if the user is charged for access to the landing page beyond normal network data rates, the user should be informed of the cost of such access, and consent to the relevant charge, prior to incurring it.
- Where users are sent SMS messages which promote a phone-paid service and do not carry any charge, then the user should be informed, clearly and straightforwardly, that they are free either within the title of the SMS message itself, or in the first words of the message

In order to satisfy the requirements of paragraph 5.2 of the Code we would expect that:

- All promotional SMS messages must ensure that recipients are provided with a shortcode, either in the title of the message or in the remaining characters available in the message itself, as a mechanism by which the recipient may opt out of future promotions by texting STOP to the shortcode, in line with the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended.
- Where SMS messages are used to promote a text-based Betting Service, recipients should be provided with a shortcode as a mechanism by which they may opt out of future promotions by texting STOP to the shortcode, in line with the Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended. This shortcode should be provided, either in the title of the message or in the remaining characters available in the message itself or in a separate message containing clear and unambiguous opt-out instructions which immediately follows a promotional SMS, every third promotional message or 72 hours, whichever occurs sooner.

In order to satisfy the requirements of paragraph 5.4.1a of the Code we would expect that:

- Where chargeable or reminder messages, either for subscription or Virtual Chat Services, contain promotions for other services, such

promotions should be placed after any information given relating to the original service. In addition, the message should clearly distinguish the original service information from any promotion related information. To do this effectively PhonepayPlus strongly suggests, but does not require, that the words ADVERT or PROMO are inserted immediately before the promotion related information.

Transparency

In order to satisfy the requirements of paragraph 5.4.1a of the Code we would expect that:

- Where promotional material acts as a direct link to a website, it should not contain any information that will, or be likely to, mislead users.
- Promotional messages should make it clear to the consumer if a reply to the message will result in them opting into a service carrying a premium rate charge so as to avoid consumers being misled.
- Services should not imply that consumers are exchanging unique messages with other users, or that users will be able to meet others by using the service, unless that is in fact the case.

As regards Code provisions which raise specific obligations regarding promotional material we would expect that:

- Websites which allow users to browse and purchase different phone-paid services should contain all of the information required by paragraph 5.7 to 5.14 inclusive, of the Code, regardless of whether general information has been provided in promotional material. This information should 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. We would generally not accept such information to be included elsewhere on the website, nor simply referenced in the website's terms and conditions.

Enforcement

PhonepayPlus considers misuse of Promotional SMS Messages, and a lack of transparency, to carry a serious risk of consumer detriment, and will continue to actively monitor services to ensure that the above conditions are complied with.

Annex B

Prior Permissions Notice in respect of Services which charge per page or image viewed

For the attention of all service providers operating services which charge per page or image viewed.

This Notice is being issued to inform all service providers who provide services which charge per page or image viewed that from **4 March 2009** no such services may be provided without PhonepayPlus' prior permission. Service providers are either required to apply for a prior permission licence to offer services which charge per page or image viewed in respect of each information provider to which they provide an interconnect, or alternatively can require the information provider to complete and pay for an application which they must countersign. Such services operating without a license after **4 March 2009** will be considered to be in breach of the 11th PhonepayPlus Code of Practice.

General Conditions applicable to a Licence

- All provisions of the PhonepayPlus Code (as far as they are applicable) apply to the service
- PhonepayPlus may impose such further conditions as it may deem necessary upon reasonable notice
- This Licence may be revoked without notice by PhonepayPlus if any condition is breached
- PhonepayPlus may revoke this permission certificate for any other reason after giving reasonable notice
- This permission is granted to the service provider and relates only to it (and for the avoidance of doubt does not relate to any subsidiary or associated company or any other company) and may not be assigned or otherwise transferred in any way
- The service provider will notify PhonepayPlus of the applicable telephone number(s) or access code(s) when the service commences or be responsible for such a notification being sent by the information provider. Once notified, the telephone number(s) or access code(s) of the service may not be changed without the prior written consent of PhonepayPlus. If, for any reason the service fails to commence within six months from the date of this permission certificate, or, having commenced, does not operate for any continuous period of six months then this permission certificate (in either case) will immediately cease to be valid.

Specific Conditions

- That the nature and content of the services (including price and name) provided are as described in the "pay per page services" application form, copies of which can be found on the PhonepayPlus website.
- That the names of company directors, partners, and/or managers with any responsibility whatsoever for services which charge per page or image

viewed are provided to PhonepayPlus, and that these names are verified by the service providers.

- That the following additional conditions imposed by PhonepayPlus are complied with:
 1. Where consumers are to be charged for each image or segment of video footage they view, then this fact must be clearly and prominently stated, as must the amount that consumers will be charged for viewing each image or video segment, prior to the consumer incurring any charge
 2. Where consumers are charged for each page containing more than one image or segment of video footage, the price of viewing that page must be clearly and prominently stated, prior to the consumer incurring any charge
 3. Where consumers retrace their steps to exit a website, they must not be charged again for pages which they have already viewed

PhonepayPlus recommends that Service Providers who already provide services which charge per page or image viewed submit their applications, or require that the relevant information providers submit an application which they endorse, before **4 March 2009**, in order to expedite our internal administration processes. However, due to the nature of the process by which prior permissions licences are granted, we cannot guarantee that applications received by that date will be fully processed before 4 March 2009, and service, or information, providers will wish to submit their applications as soon as possible.

Service Providers are reminded that the granting of a Prior Permissions Licence by PhonepayPlus to operate services which charge per page or image viewed does not serve as an obligation to any network operator to provide connection or carriage for such services.

Annex C

Prior Permissions Notice in respect of Subscription Services

For the attention of all service providers operating services carrying a subscription charge and/or joining fee which costs a consumer more than £4.50 in any seven day period of their operation.

The following Notice DOES NOT apply to services which use the Payforit payment mechanism. As such service providers who ONLY use the Payforit payment mechanism in order to charge for the services described in the above paragraph should disregard this Notice.

This Notice is being issued to inform all service providers who provide services carrying a subscription charge and/or joining fee which costs a consumer more than £4.50 in any seven day period of operation that from **4 March 2009** no such services may be provided without PhonepayPlus' prior permission. Service providers are required to apply for a prior permission licence to offer services carrying a subscription charge and/or joining fee which costs a consumer more than £4.50 in any seven day period of operation in respect of each information provider to which they provide an interconnect for such services. Alternatively service providers can require information providers to complete and pay for an application which they must countersign. Such services operating without a licence after **4 March 2009** will be considered to be in breach of the 11th PhonepayPlus Code of Practice.

General Conditions

- All provisions of the PhonepayPlus Code (as far as they are applicable) apply to the service
- PhonepayPlus may impose such further conditions as it may deem necessary upon reasonable notice
- This permissions certificate may be revoked without notice by PhonepayPlus if any condition is breached
- PhonepayPlus may revoke this permission certificate for any other reason after giving reasonable notice
- This permission is granted to the service provider and relates only to it (and for the avoidance of doubt does not relate to any subsidiary or associated company or any other company) and may not be assigned or otherwise transferred in any way
- The service provider will notify PhonepayPlus of the applicable telephone number(s) or access code(s) when the service commences or be responsible for such a notification being sent by the information provider. Once notified, the telephone number(s) or access code(s) of the service may not be changed without the prior written consent of PhonepayPlus. If, for any reason the service fails to commence within six months from the date of this permission certificate, or, having commenced, does not operate for any continuous period of six months then this permission certificate (in either case) will immediately cease to be valid.

Specific Conditions

- That the nature and content of the services (including price and name) provided are as described in the “Subscription Services” application form, copies of which can be found on the PhonepayPlus website.
- That the names of company directors, partners, and/or managers with directing responsibility for subscription services which cost more than £4.50 in any given week, are provided to PhonepayPlus, and that these names are verified by the service provider.
- That the following additional conditions imposed by the Board are complied with:
 - 1) Promotional material must not use the words FREE or NO CHARGE, or contain wording that implies the same, except to state that the promotional message itself is free. This extends to promotional SMS messages, search engine metatags, and websites within their control which use these words, or other wording which carries the same implication, in their title.
 - 2) No free service may directly link to another product or service which carries a premium rate charge unless the consumer is made aware of that charge, and has consented to it.
 - 3) Once consumers have selected a service by texting a keyword to a shortcode or by selecting a product on a website, they must be immediately provided with a free text message which states the following:

U have joined/subscribed to [name of service and optional description] for [cost of service in £] per [billing frequency] until you send STOP to [originating service shortcode]. Helpline [UK standard rate or free helpline number]. To confirm text AGREE to this message/shortcode xxxxx.

Until consumers have texted AGREE to the shortcode concerned, they should not be charged

However, service and information providers who provide subscription services, whatever the cost per week, who breach the PhonepayPlus Code following the date at which this Notice takes effect may be required to seek prior permission under the above conditions if required to do so as part of a sanction issued by a PhonepayPlus Tribunal.

PhonepayPlus recommends that Service providers submit their applications before **4 March 2009**, or require information providers submit an application which they endorse, in order to expedite our internal administration processes. However, due to the nature of the process by which prior permissions licenses are granted, we cannot guarantee that applications received before that date will be fully processed before 4 March 2009, and service or information providers will wish to submit their applications as soon as possible.

Service Providers are reminded that the granting of a Prior Permissions license by PhonepayPlus to operate any type of subscription service does not serve as an obligation to any Network Operator to provide connection or carriage for such services.

Annex D

List of Respondents

Responses were received from the following:

Content/Information Providers

Bet Now
K2 Media
Million -2-1
TMG
X-on

Aggregators/Service Providers

4D Interactive
Invomo
MX Telecom
WIN
Zamano

Networks

BT
Mobile Broadband Group (representing 3, O2, Orange, T-Mobile, Virgin and Vodafone)
O2
Orange

Trade bodies

Association for Interactive Media & Entertainment (AIME)
Mobile Data Association
Mobile Entertainment Forum
Premium Rate Association

Consumer interest bodies and individual consumers

Citizens' Advice Bureau
Childnet
Dr. Mike Ward
Information Commissioner's Office
Mr. Cris Page
Mr. Nick Felton

In addition, a number of aggregators and content providers provided written confirmation that they had input to AIME's response, and were happy it represented their views. They were:

2Ergo
D2See
Mobile Interactive Group (MIG)
Netsize
Oxygen8
Transact