



Mobile phone-paid services and their Marketing

**A PhonepayPlus Review and Consultation
document**

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Chairman's Foreword

The PhonepayPlus' Annual Report for 2007/8 highlights areas of growing concern for consumers and those charged with protecting them.

Nowhere is this trend more pronounced than in the mobile market. The public now spends more than £460 million on ringtones, games, wallpapers and other services, a further increase on 2006/7. Unfortunately, this has been accompanied by a significant rise in complaints. We received more than 8,000 about mobile-related services last year, and 4,500 between January and March alone.

Here, as in any consumer-facing business, trust is key. If consumers are to continue to engage with phone-paid services they need to have confidence in the way they are marketed, managed and delivered. If the market is to continue to grow, consumers must get what they expected, at the advertised price, without unreasonable added extras. We as an industry must do away with "bill shock" – a phenomenon that we have seen is being experienced more and more.

This report is the outcome of our Review of mobile phone-paid services that we announced in May. Readers will see that we have gone to great lengths to provide evidence for those issues that are doing most damage to consumer confidence. We have zeroed in on three main concerns:

- Unsolicited text message promotions;
- A lack of transparency and of pricing clarity; and
- Subscription services, especially ringtone services where some providers are operating in a way that is causing widespread consumer harm.

The publication of these proposals marks the beginning of a process to ensure we build trust in mobile phone-paid services. We wish to have a constructive dialogue with all stakeholders, not least mobile network operators which are often the first line of defence against abuses against their customers. We have already spoken to several service providers who share our analysis of the problems.

We are glad that we have, as an industry, addressed this potential harm early, before the issues we have identified can become problems for many more consumers. However, only by working together can we make sure that all mobile users can engage in phone-paid services safely, taking advantage of the undoubted opportunities they present.

A handwritten signature in black ink that reads "Alistair Graham". The signature is written in a cursive style with a large, sweeping initial 'A'.

Executive Summary

Background and Problems

Phone-paid services charged at a premium rate were first made available during the early 1980s. Since then there have been several key developments in technology, to the point where phone-paid services are now provided across a range of platforms including mobile and landline phones, television and the internet.

PhonepayPlus' data shows that in 2007-08 the UK market slightly declined to £1.07bn, with 38% of UK consumers – 18 million people in total - having used a phone-paid service.

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 and young people are especially keen users. Of all UK consumers, for example, 16-19 year olds are most likely to be mobile phone users.

At the same time, mobile handsets are becoming ever more sophisticated. 3G networks allow higher-speed access to the mobile internet, and improvements in computing functionality within the device itself is creating opportunities for innovative, feature-rich applications and content.

Mobile phone-paid services are, by their very nature, spontaneous, low-cost and provide users with instant gratification. Consequently, UK consumers are finding great value in them. As well as downloading ringtones, pictures and games, people are using their mobile phone to participate in television programmes, receive news alerts, find contact details and enter competitions.

As mobile handsets become ever more powerful, innovative new services continue to appear. Location-based services, for example, allow providers to offer services based on consumers' geographic whereabouts.

The result of this is that mobile is now the biggest single segment of the UK phone-paid market. In 2007/8, consumers spent £464m on mobile phone-paid services – 46% of the total market.

The percentage of children (16 and under) regularly using phone-paid services on their mobile phone varied significantly: as many as 32% of children from low-income households compared to 18% for children in more affluent homes.

Unfortunately, a significant increase in complaints has 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 has continued into 2008, where in the first three months we received more than 4,500 complaints.

In addition the number of individual complaints to PhonepayPlus about each service has increased from an average of between 5 and 10 a year ago to as many as 270 complaints now.

This suggests that some mobile phone-paid services are being marketed more aggressively and with more consumer risk than before.

In 2007 PhonepayPlus adjudged 33 mobile services to be in breach and imposed fines of more than £360,000. In the first six months of 2008, we have already adjudicated on 25 mobile phone-paid services with total fines in excess of £390,000.

There is anecdotal evidence of consumers, including young people, being charged several thousand pounds as a result of bad practice by content and service providers. In addition many consumers complain about the nuisance of repeated marketing messages to their handsets from which they have no idea how to opt out or, in some cases, for which they are charged.

The problem is not unique to the UK. Discussions with EU partners and other regulators worldwide indicate that they have received increased consumer complaints, often with the same causes as we identified.

When we analyse these complaints further, the following four main causes emerge:

Promotional SMS Messages

The key issues we identified with regard to Promotional SMS Messages were:

- That they can carry an immediate charge to which the consumer hasn't consented, or "push" the consumer through to a mobile website where they are charged without their consent
- That they often don't contain adequate opt-out information. This is not just required by PhonepayPlus, but also by the Information Commissioner's Office in respect of their enforcement of the Privacy and Electronic Communications (EC Directive) Regulations 2003
- That promotional material can sometimes appear within a charged message which the consumer has accepted – i.e. a message which charges for content the consumer has purchased, or a message that reminds the consumer of how much they have spent so far. This can be confusing if the boundary between advertising and information is not clearly established.

Use of Marketing lists

Marketing lists are closely linked to promotional SMS messages, as complaints we receive about unsolicited promotional SMS can frequently be traced back to the use of an opt-in list of consumers' mobile phone numbers. The Privacy and Electronic Communications (EC Directive) Regulations 2003 allow for the use of opt-in lists, but only where a consumer has either:

- a) previously purchased from a merchant, and been given an opportunity to opt out of future marketing of that merchant's similar products or services which they did not refuse, or

- b) expressly consented to receive marketing from third parties other than the merchant from which they purchased

With this in mind the key issues we identified with regard to the use of marketing lists were as follows:

- That consumers' details have been sold to third parties without their express consent;
- That consumers have consented to marketing, but this was some time ago and they have now forgotten or lost interest. This raised the question of how long an opt-in should be considered valid in the context of the phone-paid services market.

Lack of Transparency

In effect this issue lies at the heart of nearly every issue which this review addresses. The key issues were as follows:

- A general failure to provide adequate pricing and other information to consumers, especially on websites which offer phone-paid services.
- Phone-paid services that charge per page of a website that the consumer views.
- Text-based Chat Services, where we had concerns about the way in which these services were marketed to consumers.

Subscription Services, Joining Fees, and failure of the STOP command

The provision of ringtones, wallpaper or music downloads using a subscription charge or a joining fee is the single biggest cause of complaint about mobile phone-paid services at 51%. The key issues in respect of subscription services are not substantially different from those already outlined, in that often consumers are not provided with adequate information before making a purchase. However subscription services carry a recurring charge, and therefore a greater level of detriment to consumers.

This is compounded where the consumer is unable to instantly stop any charge by texting STOP, or where STOP is replied to with a message which misleads the consumer into texting back and so rejoining the service.

Proposed Solutions

Because this document considered a wide range of different service types and issues, PhonepayPlus proposes a number of different, targeted solutions.

Our proposals are designed to ensure that consumers:

- receive fewer and more targeted promotional text messages;
- are able to make informed purchase decisions; and

- find it as easy to leave a subscription service as it was to join.

In respect of Promotional SMS messages and transparency, PhonepayPlus proposes a Statement of Expectation, a document that allows us to set out how we expect to apply our Code in the context of specific service types, and/or their promotion. A Statement of Expectation, with a number of specific conditions, is attached at Annex A of this review.

In respect of marketing lists, this is an area regulated by the Information Commissioner's Office (ICO) in respect of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). However the ICO and ourselves continue to work closely together in respect of the phone-paid market, with the ICO seeking advice from us in relation to individual cases and to general principles where PECR is interpreted in the context of phone-paid services.

To this end PhonepayPlus proposes a series of principles to be set out in a Helpnote which PhonepayPlus will draft in collaboration with the ICO.

In respect of subscription services and joining fees PhonepayPlus has analysed the potential risk and proposes to require service providers who provide ringtones, wallpaper, or music downloads (the 3 largest causes of complaint) using subscription charges or joining fees to seek Prior Permission from us to operate.

Among the conditions of this prior permission will be the requirement for services to seek confirmation from the consumer before they are charged – i.e. once the consumer has selected a download or service they must immediately be provided with information about the service and then positively confirm their purchase before they are charged. A Notice of Prior Permission is attached at Annex B of this review.

In respect of the STOP command PhonepayPlus considers the requirement to be quite clear, and sees no need to consult on the Notice we propose to the industry. This Notice confirms that any service which does not respond to consumers texting a STOP command will be immediately subject to an Emergency Procedure investigation. During this time the service will be blocked from operating. A copy of this Notice is attached at Annex C of this review.

Consultation

PhonepayPlus has set an 8 week deadline for consultation, and requires all responses to be delivered by 11 September 2008. Whilst this is a quicker response time than usual, we feel it is necessary, and justified, in order to address the identified problems as quickly as possible.

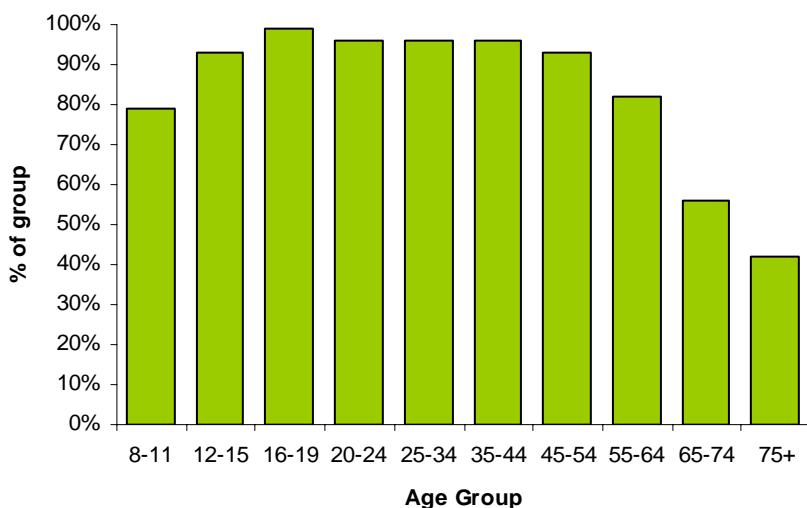
Section 1

Overview of Mobile Phone-paid Services

1.1 Phone-paid services charged at a premium rate were first made available during the early 1980s, either as live or recorded voice-based services accessed from a fixed-line telephone. In the intervening period there have been several key developments in technology, to the point where phone-paid services are now provided across a range of platforms. In the financial year 2006-2007 the size of the UK market for phone paid services was estimated at £1.2bn, with mobile phone-paid services making up £387m of that total. However the most widespread and fastest growing platform on which services were accessed or delivered that year was the mobile phone. In 2007-08 the UK market had declined slightly to £1.07bn, but with mobile phone-paid services having continued to grow into the biggest single segment of the market at £464m.

Usage of Premium Rate Services on Mobile

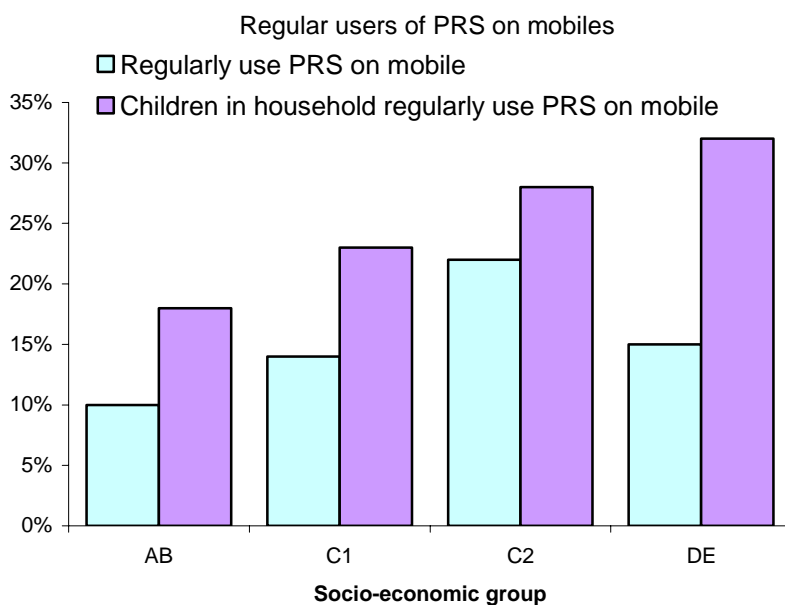
1.2 Mobile phones were first actively marketed during the 1980s, and since the late 1990s have become an essential part of most people's lives in the UK. The figures below demonstrate that ownership is almost universal in many age groups of the UK population. Whilst no total percentage is available for children, 85% of adults in the UK currently own mobile phones. Consequently the potential market for phone-paid services accessed or delivered on a mobile handset is considerable:



Source: Ofcom research, fieldwork carried out by Saville Rossiter-Base, April to December 2007

1.3 Ofcom's Telecommunications Market Data Tables for Q4 2007 indicate that only 35% of mobile phone consumers are billed via a monthly contract, with 65% of consumers opting for Prepay contracts. This is important in regulatory terms because it means the majority of consumers do not receive monthly bills against which they can check phone-paid services and transactions that have been billed to their account (albeit such information may be available upon request subject to each network's policy, but not all bills are then fully itemized). Without a transparent and itemized monthly bill a consumer may find it far harder to produce evidence of the transactions for which they have been charged, which makes complaints more difficult and may discourage the consumer from complaining at all.

1.4 PhonepayPlus research conducted during February-March 2007 suggests that 13% of the UK population have at some point used a phone-paid service on their mobile phone. Within these figures there are noticeable differences in phone-paid usage between individuals within households from different socio-economic groups. Especially notable was the difference in the percentage of children (16 and under) regularly using Phone-paid services, which ranged from 18% for children in AB households to 32% of children from DE households:

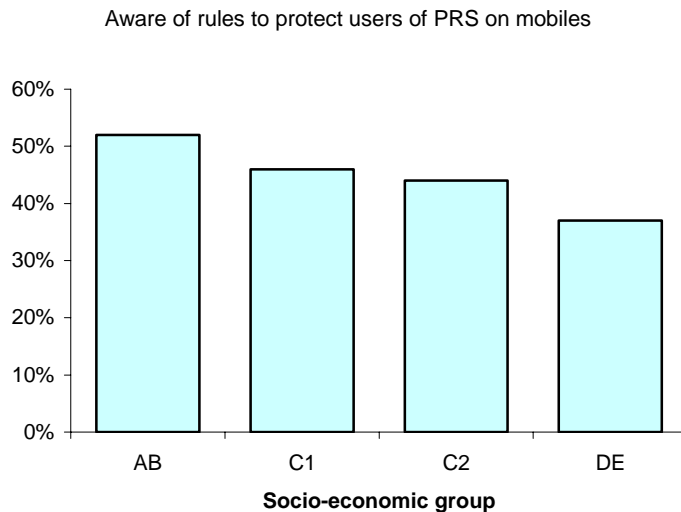


170 respondents have at some point used Mobile phone-paid services, of which 15% use services quite often. 65 respondents have children in the household who have at some point used Mobile phone-paid services, of whom 25% use services quite often – TNS Omnibus Survey 2007.

1.5 These figures are again important in regulatory terms. This is because they indicate that children, a vulnerable group which may be more easily misled and less able, or willing, to complain, are more likely to use Phone-paid services regularly than adults.

1.6 These figures also indicate that regular usage of phone-paid services, especially among children, increases from socio-economic group AB to DE. This is important when placed

against the table below, which indicates that consumer awareness of a phone-paid services regulator and framework to protect them declines by socio-economic group. Therefore the highest regular usage of phone-paid services occurs among the consumers who are least likely to be aware of the framework that governs them:



1202 respondents stated that they were aware of Mobile phone-paid services - TNS Omnibus Survey 2007

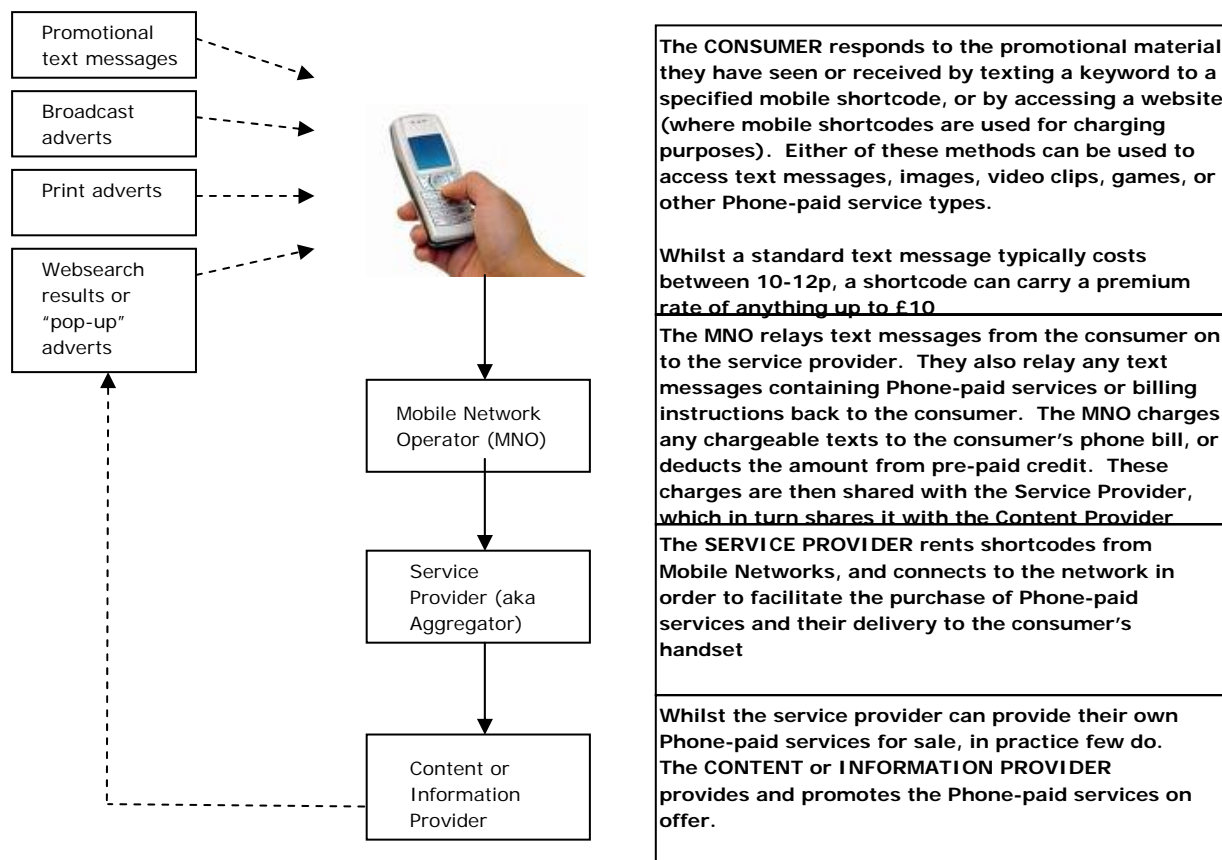
1.7 Research conducted more recently (November 2007) for PhonepayPlus by Fathom Partners indicates that 38% of people over 18 had used some form of phone-paid services in the six months to November 2007. This leaves 62% that hadn't used any; a significant area for potential market growth.

1.8 In a sample of people who had not used phone-paid services in the 6 months leading up to November 2007, by far the most common reason was a lack of interest at 69%. However 26% of those questioned highlighted a lack of trust in phone-paid services, 10% uncertainty about costs, and a further 3% the complexity involved, as reasons for their non-usage.

1.9 Whilst these reasons for non-use of phone-paid services were not mutually exclusive (i.e. those interviewed could give more than one reason) the percentages still represent a significant block of potential consumers who do not use phone-paid services because they cannot currently do so with complete confidence, and should be a concern to providers.

Structure of Phone-paid services on Mobile

1.10 There a number of different stages in the promotion and delivery of mobile phone-paid services to a consumer, each of which is regarded differently in terms of PhonepayPlus regulation. This supply chain is illustrated in the diagram overleaf:



1.11 In practice PhonepayPlus' regulatory powers are focused primarily on the Service Provider, albeit the obligations set out in our Code extend along the value chain. In practice Mobile Operators also offer their own Phone-paid services to consumers who contract with them, and in this case the Mobile Operators can be considered to be a Service Provider for the purposes of the Code.

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

1.12 The following headings offer a more detailed description of each component of the promotion and delivery of phone-paid services on mobile. We have excluded voice based services from these descriptions, on the grounds they are not unique to mobile:

Marketing

1.13 As with most transactions, the majority of phone-paid services are purchased by consumers who are responding to a call to action. These calls to action generally take three main forms, some specific to mobile phone-paid services and some non-specific. They are:

- Advertising – through a variety of mediums including Broadcast, Publication, the Web, and outdoor advertising such as posters or billboards.
- Web Search – through the use of keywords or “metatags” to place a website selling phone-paid services high on a list of search engine results.
- Promotional SMS – where an SMS promoting a specific phone-paid service, or link to a mobile website selling a variety of different phone-paid services, is sent directly to an individual’s mobile handset.

Purchase and Payment Methods

1.14 Once a consumer has responded to marketing, they will typically purchase mobile phone-paid services in one of three ways:

- By using their handset to text a keyword to a mobile shortcode, after which content is typically delivered and billed to the consumer’s phone account or prepaid credit balance.
- By using their handset to access a mobile website, where they browse and select content. This content is, again, then delivered and billed to the consumer’s phone account or prepaid credit balance.
- By using their PC to access a non-mobile website, where they browse and select content. Content is, yet again, delivered and billed to the consumer’s phone account or prepaid credit balance, although the consumer’s mobile phone number must be verified by the website before they are billed. The methods by which this verification is carried out, and specific, associated risks, are addressed in Section 6 of this review.

1.15 Because of the variety of forms and genres of phone-paid services, and the consequent variety of ways in which services are delivered to a consumer’s handset, there are different methods by which a consumer is billed. These differences in billing can be split into the following categories:

- a. Mobile Origination (MO) Billing – A consumer is billed as soon as their Mobile Origination text is received by the relevant shortcode, or their selection is made on a relevant mobile website. In practice this is used in areas such as TV voting or competitions, where the service to the consumer is having their vote or entry received and counted as opposed to content being delivered to their handset. One drawback of this method is that the consumer does not always receive a return text, and so has no record of the transaction they can save on their handset.
- b. Mobile Termination (MT) Billing – A consumer sends a Mobile Origination text to a shortcode, or makes a selection on a mobile website. At this point a Mobile Termination text is sent in reply by the shortcode or website which has received the MO, or consumer selection. The consumer is only billed once this MT text (which often carries the paid-for content) is received by their handset. Whilst this method

does provide the consumer with a receipt, it is technologically possible to send an MT text without first receiving an MO text. This makes it possible that businesses will charge consumers without their consent, either through error or deliberately.

- c. Subscription Billing – where a consumer sends a text to a shortcode, or makes a selection on a mobile website, and is then sent repeated content at a series of defined intervals and billed through a series of MT texts to which content is attached. The consumer can end the repeat deliveries by texting STOP to a designated shortcode. This main drawback of this method is that consumers are not always clearly informed that they are agreeing to a subscription service. Also, as with MT billing, it is possible for consumers to be sent repeated billed content without their consent. This is compounded when texting STOP does not stop the service concerned.
- d. Payforit – Payforit is a relatively new method of payment, supported by all the major Mobile Operators in the UK, which offers a payment facility for consumers of phone-paid services delivered through mobile websites. Payforit can provide facility for Subscription billing or for a billing method akin to MT billing – albeit where the MT message sent to the consumer’s handset remains invisible to the consumer. However the risks attached to MT Billing and Subscriptions, as outlined above, are lessened by Payforit’s payment structure, as billing messages are initiated by the Accredited Payment Intermediary – typically an aggregator (see earlier value chain diagram) - and not the content or information provider.

Forms of Mobile Phone-Paid Service

1.16 The majority of phone-paid services specific to mobile are both paid for and delivered to a mobile handset. The most common types are:

- SMS text – Typically containing a form of information, such as sports results, news updates or answers to a consumer’s previously texted question, or a single text as part of a chat or dating service.
- Images – Typically pictures designed to be saved in the memory of a mobile handset, or to be used as the handset’s “wallpaper” screen display.
- Video – Video footage, again typically designed to be saved to a mobile handset.
- Other digital content – Most usually video games which may be saved and played on the mobile handset.
- Off-handset product – Products which are billed to a consumer’s mobile handset, but are either physical – e.g. books or CDs, or payment for services such as parking or road tolls – or virtual images/video/games that are delivered to a medium other than the consumer’s handset such as a PC. At present this is a small part of the Mobile phone-paid services market.

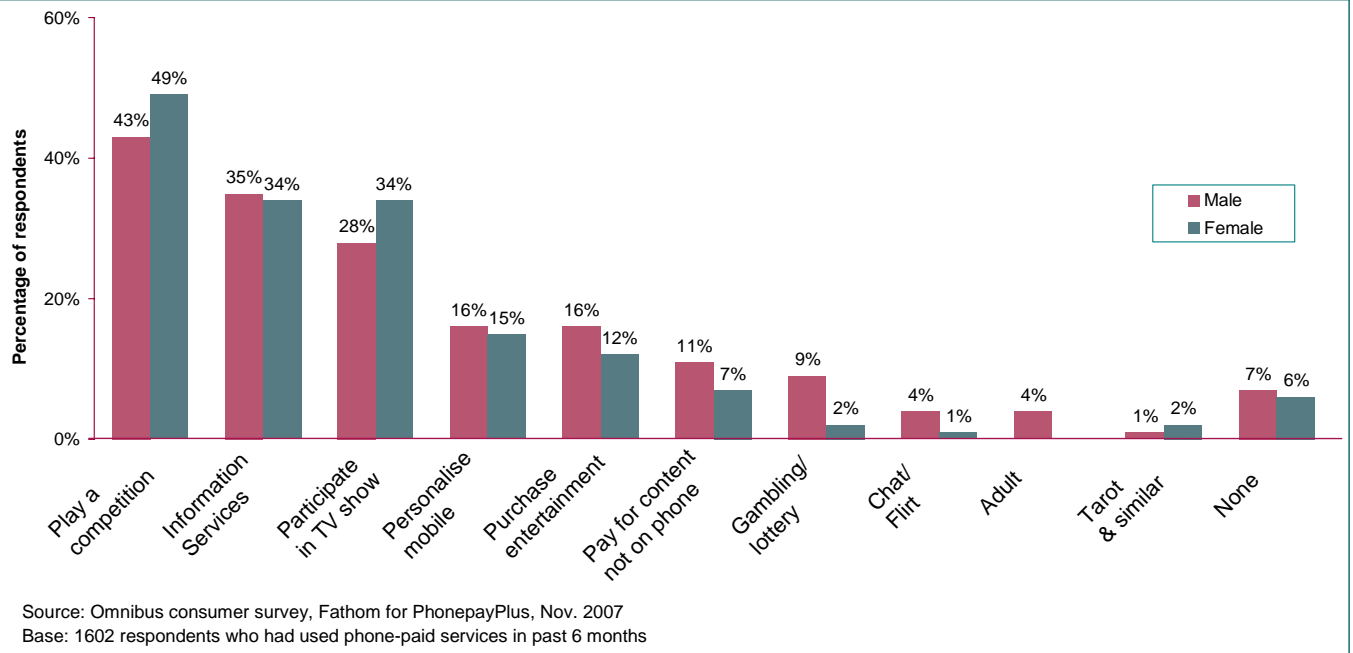
Types of Mobile phone-paid Content

1.17 As touched upon under the previous heading, mobile phone-paid services encompass a wide variety of different types and genres. These include, but are not limited to, the following popular genres:

- Voting/Competition Entry. Including, but not limited to, participation in TV shows.
- Chat/Dating SMS interaction
- Information Services – e.g. news and weather updates, goal alerts, traffic alerts
- Handset Personalisation – e.g. downloading of wallpaper or ringtones
- Entertainment – e.g. downloading of music, images, video, or video games
- Adult Services. This can include any images, video, or SMS interaction with an adult theme
- Off-handset content – e.g. images/video clips/games/information delivered to a medium other than the consumer's mobile handset, such as a PC. This can include examples of information services, handset personalization, entertainment, or adult services as above.
- Remote gambling and lotteries
- Psychic or Tarot

1.18 According to research carried out for PhonepayPlus in November 2007, the popularity of these genres can be broken down according to the figure overleaf:

Phone-paid services used by respondents



1.19 The greater range of technical applications facilitated by a mobile handset, as opposed to a fixed telephone line handset, and the handset's greater level of personalisation than a fixed line handset or PC means that the mobile phone-paid market has a faster level of innovation and change than the phone-paid services market as a whole. The level of innovation is heightened even further by a highly competitive environment in which mobile network operators continue to develop revenue streams outside the "core" area of person-to-person communication.

Characteristics that create Consumer Risk

1.20 So far we have outlined the current market for mobile phone-paid services in terms of handset ownership; consumption of phone-paid services; the structures by which these services are marketed, delivered, and paid for, and; the variety of different services on offer to consumers. Whilst we have touched on areas of consumer risk, the characteristics of the mobile phone-paid services market can create areas of consumer vulnerability. This is especially because mobile phone-paid services are low-cost instant-gratification products which are often particularly attractive to younger people including children – an increasing number of which own mobile handsets.

1.21 Having provided an overview of the mobile phone-paid market, and set out the factors within that market which may lead to consumer harm, the next section of the review will examine the current problems UK consumers are experiencing in relation to mobile phone-paid services.

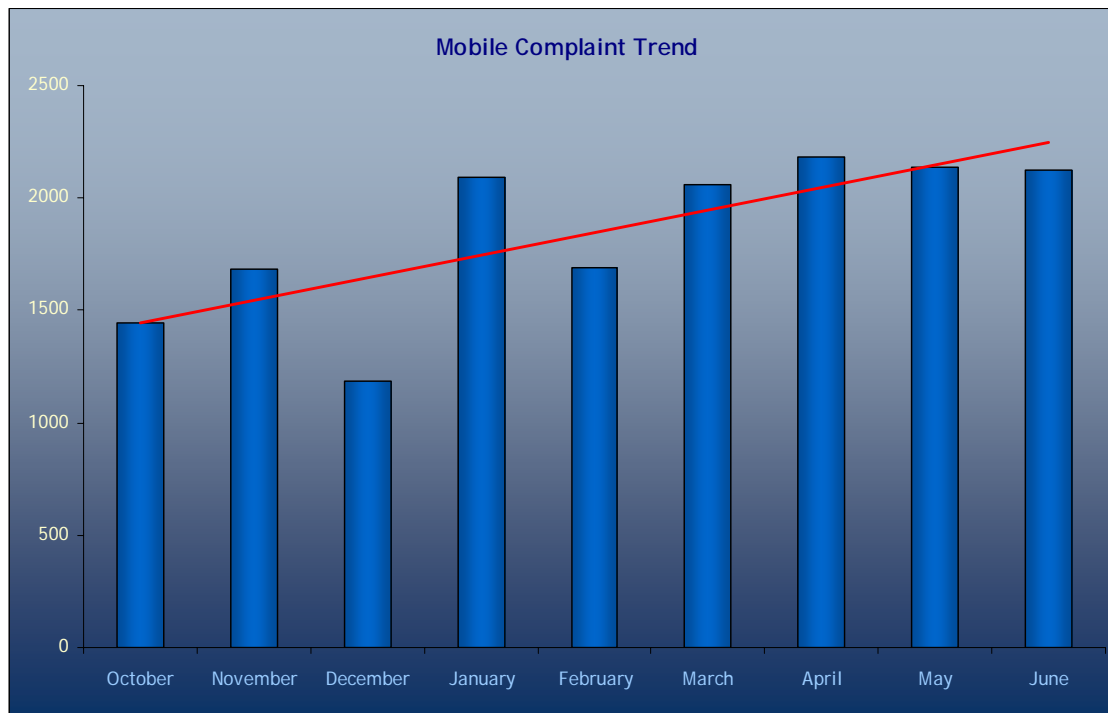
Section 2

Types and Scale of Consumer Issues in the Mobile Phone-paid services Market

Consumer Complaints Synopsis

2.1 From October 2007 to June 2008 there has been a significant increase in individual consumer complaints per month about mobile phone-paid services. This is set out in the table and graph below¹:

Month	Mobile
October	1446
November	1685
December	1187
January	2095
February	1690
March	2059
April	2184
May	2137
June	2122



¹ PhoneyPayPlus changed the criteria by which complaints are recorded in February 2008. In order to compare like for like, data from October 2007 to January 2008 has been adjusted to match the new criteria.

2.2 When the Q3 data (October-December 2007) is compared with Q4 (January-March 2008), then it can be seen that complaints increased by 35%. Q1 (April-May 2008) shows a further 10% increase over Q4, and is 49% higher than Q3.

2.3 During the same period there was an overall rise in complaints to PhonepayPlus, but the table below illustrates that the percentage of complaints which were mobile remains constantly, and very, high at between 86% and 91%. When set against the percentage of phone-paid revenue generated by Mobile – approximately 43% - our conclusion is that complaints about mobile phone-paid services have remained disproportionately high.

Month	All	Mobile	%
October	1651	1446	88%
November	1904	1685	88%
December	1385	1187	86%
January	2373	2095	88%
February	1855	1690	91%
March	2428	2059	85%
April	2481	2184	88%
May	2338	2137	91%
June	2432	2122	87%

2.4 Whilst it is possible to argue this increase is partly explained by PhonepayPlus' rebranding (from our former name of ICSTIS) and subsequent increased consumer profile, PhonepayPlus has no data that suggests an increase in consumer awareness significant enough to support this level of increase in complaints about mobile phone-paid services. In addition complaints about mobile phone-paid services began to rise from January 2008, some time after our rebrand.

2.5 Ofcom also report that complaints about Premium SMS (which comprises most types of mobile phone-paid service we consider in this review) have remained consistently high over the past 12 months, and are currently the 8th most common cause of complaint to them. Clearly the consumers who complain to Ofcom, and whose complaints are subsequently referred onto us, are not yet aware of PhonepayPlus as a result of our rebrand.

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

2.6 In 2007 PhonepayPlus adjudicated a total of 33 mobile phone-paid services to be in breach of our Code of Practice, of which 20 services used Subscription Billing, with total fines of £360,000. In the first six months of 2008 we have already adjudicated 25 mobile phone-paid services to be in breach of the Code, with total fines of £393,000. Of these 25 services 18 used Subscription Billing. In addition PhonepayPlus investigations into mobile phone-paid services now carry a higher number of individual complaints. This has risen from a norm of around 10 complaints to as many as 270 complaints attached to just one investigation. This suggests that

a proportion of services are being more aggressively marketed, with subsequent harm becoming more widespread.

2.7 In a week during February 2008 when PhonepayPlus monitored 76 mobile phone-paid services the following concerns were highlighted:

- 54 of 76 services were ambiguous, unclear, or misleading in describing what the cost or billing frequency of the service would be, or what the user would receive for the money, or exactly how the service would operate. In most cases these problems were exacerbated by unclear Terms and Conditions, or misuse of the word FREE, or similar words, when promoting the service.
- 11 of 76 services either failed to include any pricing information at all, provided inconsistent pricing between the advertised and actual cost, or failed to provide pricing in a way prominent enough that the consumer was likely to have seen it.
- 50 services failed to provide any customer service details in order that consumers could easily contact the provider in the event of a complaint.

2.8 When we analysed the causes of complaint to PhonepayPlus further, and the subsequent investigations that arose, then the following main issues emerge:

- **Promotional SMS Messages**
- **Use of Marketing lists**
- **Lack of Transparency, and**
- **Subscription Services, Joining Fees, and failure of the STOP command.**

Mobile phone-paid services in other countries

2.9 In order to ascertain whether the increase that the UK has experienced was unique to our market, PhonepayPlus asked a number of regulators in Europe and beyond whether they had experienced problems with the following consumer harm issues:

- Promotional SMS messages, especially where they are unsolicited or their use is linked to Marketing Lists
- Transparency of consumer information, especially around pricing and the use of the word FREE
- Subscription Services (i.e. services which use the subscription billing method) and the failure of services to stop charging when a consumer texts a STOP command

2.10 As well as their experience of these issues, we also asked what measures they had taken, if any, to prevent consumer harm arising from them.

2.11 Responses were received from 12 other regulators – namely regulators in Austria, Belgium, Czech Republic, Denmark, Germany, Hungary, Ireland, Malaysia, Norway, Slovenia, Spain and Switzerland - and suggest that the UK is not the only market to have experienced rising levels of complaints about Mobile Phone-paid services over the last 6 months, and that the main issues PhonepayPlus has identified for this review were also issues of concern to regulators in other markets. Responses can be broken down as follows:

Promotional SMS Messages

2.12 An increase in complaints was reported by Austria, Germany, Hungary, Ireland, Malaysia, Norway, Slovenia and Switzerland.

2.13 Germany reports that, in response to 3 years of rising complaints about unsolicited promotional SMS messages, the sending of those messages is now prohibited where they promote most forms of Phone-paid services. Switzerland and Norway have recently prohibited all unsolicited promotional messages – i.e. promotional messages which consumers have not previously consented to receive, an action which has already been taken in EU territories, but report that they still see many infringements of these new rules.

Transparency of Consumer Information

2.14 An increase in complaints was reported by Austria, Germany, Hungary, Ireland, Norway, Slovenia and Switzerland.

2.15 Hungary reports widespread misuse of the word FREE, or related words, in promotional material. Most often the consumer will be unable to receive any free content without first opting into a Club or a service which carries a Subscription Charge.

2.16 Norway reports a major increase in misuse of the word FREE over the past year. This was especially so where Phone-paid services were marketed to children. The regulator has made it clear to service providers that it is unacceptable to imply a service is free where the free element is conditional upon purchase. Austria and Germany report that they have taken the same action.

2.17 Switzerland reports that a lack of pricing transparency was a major factor in their decision to cap the maximum amount that a consumer can spend on any phone-paid service at Sfr400 in 2007.

Subscription Services and the STOP command

2.18 An increase in complaints was reported by Austria, Belgium, Germany, Hungary, Ireland, Malaysia, Norway, Slovenia, Spain and Switzerland.

2.19 Switzerland and Germany now require that consumers authenticate their intent to purchase any service which uses subscription charging. This requirement is known as “explicit acceptance” in Switzerland and “handshake SMS” in Germany. In effect this requires the service provider to provide consumers with free information stating the price, frequency of

charge, and how to stop the service, and for the consumer to then confirm by text message that they understand and accept to be charged. Belgium introduced a similar requirement for consumer authentication in April 2008, and Ireland, Malaysia and Spain are currently considering it.

2.20 Norway reports that they are considering whether the purchase of subscription services could be restricted to those over 15 years of age.

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?

Mobile phone-paid Services and the PhonepayPlus Code of Practice

2.21 PhonepayPlus would expect all Phone-paid services to comply with all relevant parts of the 11th PhonepayPlus Code (11th edition as amended - the latest edition of our Code, hereafter referred to as “the Code”). The Code sets the framework for the regulation of the way in which Phone-paid services – defined in the Communications Act 2003 as premium rate services – are promoted and operated, and the content they contain.

2.22 The Code is approved by Ofcom, and Ofcom further define a subset of premium rate services known as Controlled Premium Rate Services. It is these Controlled Premium Rate Services to which PhonepayPlus’ regulatory remit extends.

2.23 This review seeks to identify and analyze the consumer risk attached to mobile phone-paid services and the way in which they are marketed. As such, based on PhonepayPlus’ analysis of complaints, investigations, and monitoring activity, the key risks are considered to be the following:

- That marketing material, including promotional SMS messages, could confuse or mislead recipients. This could apply to single purchase services or services using subscription billing, and is especially relevant where a consumer is billed or signed up to a subscription or SMS chat service without their knowledge.
- That consumers will receive promotional SMS messages which they have not consented to receive. This would not only contravene the PhonepayPlus Code of Practice, but also the Privacy and Electronic Communications (EC Directive) Regulations 2003. Furthermore that consumers may be billed when they receive these messages, against their consent.
- That consumers will be unable to opt-out of subscription services by using the STOP command.

2.24 In any of the above circumstances, PhonepayPlus would investigate whether the following sections of the Code had been breached:

Section 5.2 – Legality

5.2 Services and promotional material must comply with the law [for the purposes of this review, the relevant law is the Privacy and Electronic Communications (EC Directive) Regulations 2003]. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.

Section 5.4 – Fairness

5.4.1 Services and promotional material must not:
a) mislead, or be likely to mislead, in any way,
b) take unfair advantage of any characteristic or circumstance which may make consumers vulnerable

Section 5.7 – Pricing Information (with particular reference to 5.7.1)

5.7.1 Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.

Section 5.8 – Contact Information

5.8 For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user.

Section 5.14 – STOP Command

5.14 Where a STOP command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of STOP within any message to be sent by the user. When a STOP command has been sent, the user must make no further charge for the service.

Section 7.12 – Subscription Services (with particular reference to 7.12.3 and 7.12.6)

7.12.3 Promotional material must:

- a) clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers,*
- b) ensure that the terms of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,*
- c) advertise the availability of the STOP command*

- 7.12.6 a) *after a user has sent a STOP command to a service, the service provider must make no further charge for messages*
- b) *users must be free to leave a service at any time and service providers must do nothing to indicate that this is not the case, unless specific permission to do so has been granted by PhonepayPlus*

Contractual Standards for Mobile Phone-paid Services

2.25 In addition to the regulation carried out by PhonepayPlus, Mobile Operators have the contractual ability to set and enforce standards for mobile phone-paid services. These standards are agreed between all Mobile Operators and the aggregators they partner with, and are set out in the contracts between the two parties. Whilst the standards set out in these contracts do not take precedence over the Code, aggregators who fail to conform to them can have network access temporarily barred to the shortcode used by the offending service.

2.26 The Mobile Operators enforce their contracts individually through the issue of Yellow Cards (cease and desist) and Red Cards (network access is barred until the transgression is rectified) to aggregators. Whilst this supports us in our role, which we welcome, it can sometimes create situations where Mobile Operators have different interpretations of individual standards. Whilst there is no evidence that Mobile Operators experience conflict in considering whether to issue Red or Yellow Cards, due to the service providers concerned being revenue-sharing partners, the potential for such conflict certainly exists. In addition the levels of resourcing that networks provide to monitor whether contractual standards are met can also differ, or change dependent on market performance.

2.27 Whilst the standards set by the Mobile Operators are not a formal part of the PhonepayPlus Code, Mobile Operator contracts with aggregators could be considered as an additional form of contractual regulation which we see as helpful within the framework set out by the PhonepayPlus Code. As such this review will reference some of the individual standards within them where appropriate.

2.28 Having set out the types and scale of consumer complaint, the four main issues which have emerged from those complaints, the underlying risks, and the way in which those risks would normally be investigated the rest of this document will examine each of the four main issues in turn, setting out our analysis and proposed solutions. In undertaking this review we are mindful of the regulatory impact of any proposals we make, as well as the need for those proposals to be targeted and proportionate.

Section 3

Children and Other Vulnerable Groups

3.1 Whenever PhonepayPlus examines issues within the phone-paid services market we are especially mindful of whether the phone-paid services in question pose particular risk to children or other vulnerable groups, such as elderly people or people with learning difficulties.

Mobile Phone-paid services and Children

3.2 Section 1 of this review cites research carried out for PhonepayPlus which demonstrates that children are more likely to use phone-paid services than adults in each socio-economic group. Furthermore this research goes on to demonstrate that the highest users (in group DE) are the least likely to be aware of the existence of a regulator when they have a complaint.

3.3 The Code defines a children's service as follows:

Children's services are services which, either wholly or in part, are aimed at or should have been expected to be particularly attractive to children, who are defined for the purposes of this Code as people under 16 years of age

3.4 The Code then sets out a number of further requirements for service providers operating a children's service. Many of these concern the requirement for such services to be promoted appropriately, but paragraph 7.5.4a states:

Children's service must not:

a) generally cost more than £3, or in the case of subscription services more than £3 per month

3.5 In addition to the requirements set out in the Code, Mobile Operators require that all commercial services which are of an adult nature (e.g. sexual images or video, gambling) verify the age of the consumer before any such service is provided or charged for. In practice this verification is usually achieved by means of an instantaneous check, between the service provider and the consumer's network, that the mobile handset which is being used to purchase the adult service is registered as belonging to a person over the age of 18.

Subscription Services and Children

3.6 The Code already requires that Service Providers take reasonable steps to ensure that Text-based Chat Services are not used by children under the age of 16. And at present the practice of charging consumers per page of a website they view is only found with adult services, which service providers are also required to bar to children. In respect of those services which we consider carry a risk of increased financial detriment this leaves us to consider services which are charged using subscription billing.

3.7 Probably the best known example of a subscription service which caused financial detriment to children was Jamba's "Crazy Frog" images and ringtones during 2005. At this time the ruling of PhonepayPlus' adjudication panel was that whilst this service might have been widely advertised on TV channels which were popular with children, the service had not set out to target children. This view was re-enforced by the large number of adults who suffered financial detriment as a result of unknowingly subscribing to the Crazy Frog services.

3.8 Whilst we do not believe that Subscription Services are necessarily of specific risk to children, it is still of concern to us where they are bought by children. To this end we have recently partnered the Office of Fair Trading in checking websites which offer Mobile Phone-paid services such as ringtones, music, or wallpaper as part of an EU-wide "sweep" – i.e. a systematic investigation coordinated between EU members - into the risk they carry to children.

3.9 Whilst the OFT and PhonepayPlus found a considerable number of websites offering Mobile Phone-paid services which we felt would mislead children, we did not feel in most cases that these sites were specifically aimed at children, as per the definition at paragraph 3.3, but rather were misleading to all consumers. We will continue to investigate these sites in conjunction with the OFT.

3.10 We would welcome feedback or evidence from stakeholders, but at present we do not see any need to introduce regulation specifically aimed at protecting children in respect of subscription services, or any of the other services considered within this review.

Mobile Phone-paid services and other vulnerable groups

3.11 Whilst children are generally thought to be the most "at risk" group, other groups exist whose ability to make an informed decision about purchasing a mobile phone-paid services could be affected by virtue of a defining characteristic they share. PhonepayPlus has identified three such groups:

- Elderly people - whose understanding of mobile technology may not be high, or who may suffer from a lack of credulity
- People with learning difficulties – who may again suffer from a lack of credulity
- People for whom English is a second language – who may have difficulty understanding terminology that is over-complex.

3.12 As regards these groups PhonepayPlus' opinion is that the risk caused to them by the services and issues contained within this review is no greater than the general risk to phone-paid consumers. At the heart of this review is the need for appropriate clarity in order that consumers can make an informed choice, and it is our opinion that the information we propose will make phone-paid services clearer to all consumers - including elderly people, people with learning difficulties, and those who speak English as a second language – by clearly and straightforwardly informing them of the nature and charge of every phone-paid service, how to opt out of it, and how to opt out of future marketing. We will continue to proactively monitor

whether such groups are being specifically targeted by services or marketing which, in our view, is specifically or intentionally misleading to them.

Promotional SMS Messages and Vulnerable Groups

3.13 Promotional SMS messages – i.e. those messages which are sent directly to a consumer’s mobile phone – are of concern to PhonepayPlus where they could be considered to confuse or mislead children, or other vulnerable groups. However two factors appear to us to point away from such a conclusion.

3.14. Firstly that promotional SMS messages are a uniformly worded message sent to thousands of potential customers at once. Where PhonepayPlus saw evidence that such a message was deliberately targeted at children we would take action using paragraph 7.5.3 of the Code, which sets out certain restrictions on Children’s Services and any associated promotional material. Among these restrictions are:

- That such material should not contain anything which is likely to result in harm to children, or exploit their credulity, lack of experience or sense of loyalty
- That such material should not make direct appeals to children to buy, unless the product is one which children could be reasonably expected to afford for themselves
- That such material should not encourage repeat usage of any phone-paid service

3.15 Secondly that promotional SMS messages can only be sent if the consumer has previously bought a similar product. Section 5 of this document seeks to further clarify how the Privacy and Electronic Communications (EC Directive) Regulations 2003 should be interpreted in respect of the phone-paid services industry, but in order for any promotional SMS message to be sent to a consumer they must have previously bought a phone-paid service. Unless they have given their express consent to marketing from other companies, consumers can only receive promotional SMS messages from a company who they have previously purchased from.

3.16 Whilst PhonepayPlus would take action if we thought promotions were worded in such a way to confuse vulnerable groups, it is our opinion that promotional SMS messages do not carry an enhanced risk where the consumer is fully informed that the message is a promotion, and are given a clear and straightforward method to opt out of future marketing. This should be in language that is as clear and simple as possible.

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

Section 4

Promotional SMS Messages and Consumer Opt-out

4.1 Based on the evidence from complaints we have received, the investigations PhonepayPlus has brought over recent months, and our extensive dialogue with industry and consumer stakeholders the key issues surrounding Promotional SMS Messages for phone-paid services can be set out as follows:

- a) That they sometimes carry a charge to which the consumer has not consented
- b) That in some cases the consumer's handset immediately accesses a mobile website when a promotional SMS message is opened. This practice is known as "pushing".
- c) That they do not always contain adequate information to consumers on how to opt out of receiving any further promotions.
- d) That they are sent as part of a billed message when a consumer is signed up to a phone-paid service which carries a repeat charge. This practice of cross-promotional marketing can confuse the consumer if the charged content and promotional material are not clear and distinct from each other.
- e) That they can be unsolicited. This can cause nuisance and invade privacy, and in most circumstances is not legal

4.2 PhonepayPlus' analysis of each of these issues, and consideration of the action needed to stop consumer harm occurring, is set out below.

a) & b) Charges and "Pushing"

4.3 One significant source of complaint about promotional SMS for phone-paid services is where consumers who receive such a message are charged by the MT billing method (see paragraph 1.15 for more detail), or "pushed" through to a mobile website where they are automatically MT billed for a purchase or subscribed to a service, as soon as they receive or open the promotional SMS they received. This is a breach of our Code, in that the consumer has been billed without first receiving any information about the charge and consenting to it. As such the service provider has taken advantage of technology which allows it to charge consumers without their consent.

4.4 "Pushing" where the consumer is automatically charged should be seen as distinct from a promotional SMS which merely redirects the internet browser in the consumer's handset to the homepage of a mobile website as soon as it is opened. Whilst this may be something of a nuisance to some consumers they can immediately exit the mobile website if they wish, and the important difference is that they have not been automatically charged, or subscribed to a charged service, without their consent.

4.5 Anecdotal evidence from consumers suggests that they can become wary of opening legitimate promotional SMS, for fear that they will be charged or “pushed” upon doing so. Discussions with industry stakeholders, particularly aggregators, suggested they would welcome a requirement for the text of all promotional SMS’ to inform consumers they are free (e.g. “Free Msg” at the start of the text, or in the title). Whilst PhonepayPlus would consider this approach to be good practice, and encourage its universal adoption, we have no powers under our current Code to require this without unduly subjecting all phone-paid services promoted by SMS to a prior permission regime. We recognize that Mobile Operators may choose to mandate this as part of their contracts with aggregators and where they do we welcome this.

4.6 Where PhonepayPlus wishes to amplify how it is minded to interpret the Code in regard of certain types of phone-paid services, we can issue a Statement of Expectation which sets out how we expect to apply the Code in the context of specific service types, and/or their promotion. We are proposing a Statement of Expectation for mobile phone-paid services as a consequence of this review. In light of the above consideration, PhonepayPlus would propose the following Conditions, to be contained within this Statement of Expectation to which those sending promotional SMS messages should adhere:

- 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?

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

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?

c) Lack of Adequate Opt-out Information

4.7 The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) require that for consumers who are opted in by virtue of their having made or negotiated a purchase – i.e. a “soft” opt-in - where any form of promotional SMS is sent directly to them they must be able to opt out of receiving future promotions. PECR also imposes a further requirement that such consumers are specifically given the opportunity to opt out in each subsequent promotional message.

4.8 We do not directly enforce PECR, which applies to promotions in any industry, instead it is enforced by the Information Commissioner's Office (ICO). However the ICO has been working with PhonepayPlus to establish acceptable interpretations of PECR in respect of phone-paid services, and would judge any breaches of PECR against those interpretations. Where PhonepayPlus investigates a complaint in which a Phone-paid service may have breached PECR, we will use paragraph 5.2 of the Code (the requirement that services and promotions comply with the law) to state our view that there has been a breach of PECR. In light of this view we may refer the case onto the ICO.

4.9 When mobile phone-paid services first came to market, promotional SMS messages promoted a specific phone-paid service which the consumer purchased by texting a keyword to the shortcode provided (either the shortcode from which the message was sent or, more often, a shortcode contained within the text of the message itself). Where the consumer had no interest in receiving further promotional messages from the same service, all they had to do was to text STOP back to the originating shortcode (i.e. the shortcode which had sent the message). This is still the most common form of promotional SMS.

4.10 Where promotional SMS messages still promote the texting of a keyword to the shortcode provided, PhonepayPlus would consider it good practice for the originating shortcode (i.e. the shortcode that the promotional SMS was sent from) to be provided as part of the title of the promotional SMS, and simple instructions regarding the texting of STOP to opt-out to be provided within the body of the message itself, if the PECR regulations are to be complied with.

4.11 However the development and growth of mobile websites has led to the development of a second type of promotional SMS messages, which promote a website rather than a specific service. Some of these messages use a coding technology known as binary rather than the coding used in other SMS messages. Binary messages facilitate links to mobile websites by immediately highlighting the link when the consumer opens the SMS, but do not carry any return path to an originating shortcode. To opt-out of a promotion carried by a binary SMS, consumers must often click on its link to a mobile website and use the opt-out facility there. Consumer complaints to PhonepayPlus indicate that this process can often be confusing and that some consumers give up.

4.12 PECR requires that consumers are given a valid and simple means to opt out of receiving future electronic promotional messages (including SMS). So a process that is too difficult or confusing for consumers is clearly unacceptable. In recommending standards for consumer opt-out of promotional SMS where binary messages are concerned, PhonepayPlus has considered the following options to ensure that consumer opt-out is not compromised:

- a) The requirement for binary SMS messages to provide a separate shortcode, either in the text of the message or as part of the link address to the mobile website they are promoting, with instructions that consumers can text this shortcode to opt out of future promotions
- b) The requirement that all mobile websites have an opt-out facility, which can be clearly and unambiguously accessed, without charge beyond network data rates, from the landing page

4.13 Option a) would require the service provider that sends a binary message to maintain a shortcode for the express purpose of receiving opt-out messages. Whilst it was mooted that each service provider need only maintain one shortcode, to act as an opt-out receiver for all its binary SMS promoted services, this may cause difficulties. This is because where a consumer texts a STOP command to a shortcode that covers more than one service, the service provider may not know which of their services the STOP command refers to. The simplest way around this problem would be for each binary service to carry a different keyword (i.e. “text STOP plus keyword”) to receive opt-outs, a requirement that, on the face of it, would not place considerable financial burden on service providers. We would welcome respondents’ technical advice as to the ease of such a method. We would also welcome respondents’ views as to the feasibility, commercial or technical, of carrying a shortcode as part of the link address to the mobile website they promote.

4.14 Option b) would require all mobile websites to carry a clear and unambiguous link to an opt-out facility on their landing page. Whilst this would reduce cost to industry, in that service providers would not have to maintain a specific shortcode just for opt-out, it would require consumers to access a mobile website in which they have no interest in order to opt-out of receiving any future promotions from it. This makes it likely that the consumer will incur a network data charge for accessing the mobile website, which seems to be unreasonable when first considered.

4.15 Whilst option b) seems initially unreasonable browsing charges, as opposed to downloading charges, on mobile websites are extremely small, around 0.002p per kilobyte. Where a consumer quickly accesses a mobile website in order to use a clear and easy opt-out process, their data charge is likely to be less than the carriage cost of a text sent to a shortcode, as at option a).

4.16 At present PhonepayPlus’ would consider option a) to be the best practice example, on the grounds that it is the easiest and most familiar process for consumers to follow, and this is supported by the positive feedback we have had from industry stakeholders regarding it. This is in spite of the potential for consumers to incur a slightly higher cost. However we do not propose to make option a) a specific condition in this area, on the grounds that PECR only requires there to be a valid and simple means of opting out of future promotions. In light of this consideration, we propose the following Condition for opt-out if SMS messages promoting PRS are to continue:

- 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?

d) Cross-promotional marketing within charged messages

4.17 The majority of promotional SMS messages that promote phone-paid services are in response to a consumer opt-in, and are an entirely legitimate form of marketing. Where consumers have opted into a service which uses subscription billing, or a chat service where each chat message received is MT billed, then the business providing that service has the right to send promotional SMS messages to those consumers.

4.18 However promotional material now frequently appears within charged messages, either those delivering content as part of a subscription billed service or chat messages which are MT billed. At present the majority of subscription and chat services investigated or monitored by PhonepayPlus are found to contain some kind of cross-promotion in a charged message.

4.19 In addition chat services and services which use subscription billing are required by the Code to send reminder messages to consumers who are opted-in to receive them. These reminders are dealt with in more detail in later sections of this review, but they must be sent according to the length of time the consumer has subscribed (i.e. every month) or according to the amount of money the consumer has spent on the service (e.g. every £10 or £20 spent).

4.20 These reminder messages are designed to clearly remind consumers they are opted-in to a Phone-paid services which carries a repeat charge, inform consumers of the cost and frequency of charges and, where appropriate, inform consumers of how to opt out of the service or require that consumers send a text message if they wish the service to continue. PhonepayPlus investigations and monitoring has also identified increasing insertion of promotional material into reminder messages.

4.21 Whilst PECR is clear that merchants from whom a consumer has purchased, or negotiated to purchase, have a right to promote similar products to the consumer, the Code is equally clear that promotional material, including that which is contained in charged or reminder messages, does not mislead consumers. A typical example of a cross-promotion likely to mislead is as follows:

*Fancy meeting sxy girls in your area from 25p/txt? Txt DATE to [shortcode]. (£1.50/msg).
This is a billing message for a Ringtone [2nd shortcode] accessed on 01/07/2008.*

4.22 The example above is a message informing the consumer they have been charged for a ringtone downloaded to their phone as part of a subscription service. For the purposes of this Review PhonepayPlus has two concerns. Firstly that the promotional material has been placed before the text which tells the consumer they have been charged. Secondly that there is no text, or spacing, which serves to separate the promotional part of the message from the part which contains charging information.

4.23 In light of this consideration, we propose the following Statement of Expectation condition if promotional material contained within charged or reminder messages sent by a service carrying a repeat charge are to continue:

- 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?

e) Unsolicited Promotional SMS Messages

4.24 This leaves one of the five issues set out at the start of this section which has yet to be analysed. Specifically, the issue that promotional SMS messages are often unsolicited according to the complaints PhonepayPlus has received from consumers. The majority of promotional SMS messages are in response to a consumer opt-in and are an entirely legitimate form of marketing. But where there is no consumer opt-in, or the opt-in was not addressed to the organization promoting a Phone-paid services, or the process by which the consumer opted in was not clear and fair, then both PhonepayPlus and the ICO would regard the message as unsolicited and so illegal.

4.25 When PhonepayPlus investigates complaints about unsolicited promotional SMS messages, they are nearly always traced back to concerns about the use of a Marketing List. Because of this intrinsic link between unsolicited promotion and marketing lists, the issue of Unsolicited Promotional SMS will be considered as part of the next section of this review.

Section 5

Marketing Lists

5.1 The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) set out the following principles to govern the sending of “electronic direct marketing mail messages” outside of a “hard” opt-in context, a definition which includes promotional SMS:

- That the marketer must have obtained an individual’s details through a sale or negotiations for a sale
- That any marketing messages concern only similar products offered by the sender (e.g. it would not be appropriate to send SMSs promoting adult services to someone who had only purchased ringtones previously)
- That the individual was given the opportunity to refuse the marketing when their details were collected, and that where they did not refuse they are given a simple means of opting out of each future promotion

5.2 The last of these principles has been partly addressed during Section 4, where we have set out best practice for how the consumer should be provided with a clear and simple opt-out. Whilst PECR is not directly enforced by PhonepayPlus, where we identify infringements in the Phone-paid services market we may refer cases to the Information Commissioner’s Office, and find service providers in breach of paragraph 5.2 of the Code which states:

Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.

As previously stated the ICO would usually consult us during their consideration of individual cases, and to generally establish what practices are acceptable and unacceptable interpretations of PECR in the context of phone-paid services.

“Soft” and “Hard” Consumer Opt-in

5.3 Where the principles in paragraph 5.1 are adhered to, the ICO accepts the principle of “soft” opt-in – i.e. the consumer is clearly informed that they are passively opted in to receive future marketing and must take the opportunity to opt-out (e.g. by unchecking a pre-checked box on a mobile website) rather than the reverse.

5.4 The ICO accepts the principle of “soft” opt-in where marketing comes from a merchant with which the consumer has directly dealt. However where a merchant intends to pass a consumer’s opt-in details onto third parties the ICO has more stringent requirements, the consumer must have been informed of the merchant’s intention and must have given their consent positively – e.g. by checking an unchecked box on a website or mobile website – rather

than passively as is the case where they accept the merchant's own marketing. This giving of positive consent to receiving marketing promotions (from third party or previous promoters) is referred to as a "hard" opt-in.

5.5 Where complaints to PhonepayPlus about Unsolicited Promotional SMS messages are investigated in more detail, one of four root causes usually becomes apparent:

- a) That the consumer has recently acquired a mobile phone and been allocated a mobile telephone number (also known as a MSISDN) that previously belonged to someone who did opt in to receive promotions.
- b) That the consumer's details, originally obtained from a purchase, have been placed on a list which was then traded with, or sold onto, a third party company even when the consumer did not expressly give their consent to this. The third party company has sent the consumer a promotional SMS message without confirming the consumer's original consent to marketing from a third party.
- c) That the consumer did consent to receive marketing, either from the original merchant or a third party associated with that merchant, but that their consent was given some time ago. They cannot now remember giving their consent (either passively through a "soft" or directly through a "hard" opt-in), and so now regard the promotional SMS messaging as intrusive. This raises the question of how long an opt-in should remain valid in the Phone-paid services market.
- d) That the consumer's MSISDN was entered into a data capture field as part of registration for a non-mobile website, accessed through a PC and linked to a company which provides Phone-paid services. The MSISDN may not have been entered into the website by the consumer themselves, but as a random number by another individual who wished to gain access to the site without giving their own MSISDN details.

5.6 The rest of this section explains each of these issues in greater detail, and in some instances offers proposed guidance standards to prevent consumer harm as relates to the provision of phone-paid services. As previously stated, PECR is not the responsibility of PhonepayPlus to directly enforce. As such any conditions we outline here would take the form of agreed principles on how PECR should be interpreted in respect of phone-paid services, and so we do not propose to include them in the Statement of Expectation attached at Annex A of this document. Instead our intention is to include them in a Help Note to the industry, which clearly sets out the circumstances under which we would use paragraph 5.2 of the 11th Code to take a view on whether PECR has been breached or refer cases to the ICO, and the accompanying advice we would offer.

a) Recycled MSISDN

5.7 Where a consumer gives up their mobile phone – and the number attached to it – then their Mobile Operator will quarantine that number for 6 months before allocating it to a new customer. Where a new consumer receives a recycled MSISDN, it is possible that the previous

owner of the number has consented to promotional messages. Because service providers retain records of MSISDNs that have purchased from them, not individuals, they may not be aware that the MSISDN now has a new owner and so continue to send promotional messages as before once the MSISDN is re-activated.

5.8 PhonepayPlus accepts that service providers do not deliberately set out to send unsolicited promotional messages to recycled MSISDNs, but strong anecdotal evidence suggests that this practice can create consumer confusion, worry (where the recipient perceives that the SMS carries an MT billed charge and so does not open it), and even distress where recipients receive adult SMS promotions to which they have not consented.

5.9 Whilst there will often be a clear opt-out process (as set out in Section 4) on a promotional message erroneously sent to a recycled MSISDN, there is no guarantee that the recipient will be familiar with Phone-paid services and be confident enough to use it. In addition the privacy of an individual has been disturbed by marketing to which they have not consented, which is in breach of PECR and contrary to the Code.

5.10 If SMS messages promoting Phone-paid services are to comply with PECR, then PhonepayPlus proposes that service providers, or subcontracted parties, have firm evidence – i.e. some substantive record - that the MSISDNs on their opt-in lists have not been recently recycled before the opt-in lists are used. This may include the use of hard opt-in lists passed between organisations, if that practice is robust enough to be allowed to continue. We would welcome suggestions from industry stakeholders as to how firm evidence that MSISDNs are not recycled could be most efficiently gathered.

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

b) Consumer opt-in lists traded or sold to third party companies

5.11 Where a consumer has purchased a phone-paid service (i.e. a “soft” opt-in) or positively agreed to receive future marketing without making a purchase (i.e. a “hard” opt-in) then service providers (or subcontracted parties) will retain lists of those consumers’ MSISDNs. Lists obtained through hard opt-in will frequently be sold or traded with other companies – an action which PECR precludes where the lists are obtained through soft opt-in. In deciding whether PECR has been complied with in respect of reselling hard opt-in details the ICO might consult the Direct Marketing Association, a trade association which sets standards of ethical conduct and best practice for direct marketing. The DMA sets the following standards where hard opt-in lists of consumer MSISDNs are sold:

- That the selling company must be able to prove that all the MSISDNs on the list result from a legitimate consumer opt-in. Legitimate in this case is where a consumer was clearly informed that their details would be passed to third parties, and positively, not passively, opted-in.

- That the buying company must only send promotional messages that are appropriate to the original opt-in. This is particularly the case with gambling or adult services, which may not be appropriate to the original purchase that opted the consumer in.

5.12 These DMA standards cover the selling of hard opt-in lists. They do not currently cover situations where lists are traded, something which does occur in the phone-paid services market.

5.13 Extensive dialogue with industry stakeholders, especially service providers, shows that opt-in lists are most frequently sold or traded by the content providers that connect to the service providers in order to market and sell phone-paid products. We are also advised that a number of service providers, who between them have a dominant share in the mobile phone-paid market, do not buy or trade opt-in lists. Furthermore many of them take the view that selling and trading opt-in lists causes damage to the industry's reputation, and would like the practice banned with regard to phone-paid services.

5.14 Following legal consideration PhonepayPlus has concluded that it is not within our remit to ban the selling and trading of hard opt-in lists. Whilst banning the trade of soft opt-in lists, PECR does not ban the practice where lists obtained through hard opt-in are concerned.

5.15 However the DMA standards set out clear interpretations of PECR in respect of the proof needed to ensure an opt-in list offered for sale is legitimate. In respect of the phone-paid services market PhonepayPlus is of the opinion that this needs to go further, and that organisations should be able to prove legitimate consumer hard opt-in on any list they obtain from another organisation, regardless of whether it is purchased or traded. This level of proof should also apply to the ICO principle that marketing must be appropriate to the product bought during the original opt-in. So PhonepayPlus proposes the following standards for inclusion in a Helpnote:

- That service providers, and/or contracted organisations, must ensure that MSISDNs on any list they use 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 those businesses who sell or trade opt-in lists to also sell or trade appropriate supporting evidence.
- That service providers, and/or contracted organisations, must ensure that promotional messages fall within the parameters of the consumer's original opt-in, and produce evidence confirming this (such as 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 supporting evidence.

5.16 A number of providers of mobile phone-paid services have advised PhonepayPlus that consumers very rarely, if ever, opt to receive marketing information from third parties where they are clearly informed and would have to positively opt-in. One such example is that in the course

of 200,000 purchases using the Payforit billing method, only 0.5%, or 1000 consumers, positively opted to receive third-party marketing in line with PECR requirements.

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?

c) Consumer confusion as to a previous opt-in

5.17 There are instances when a consumer complains to PhonepayPlus of an unsolicited promotional SMS message, only for PhonepayPlus to find on closer investigation that the service or content provider has a clear record of that consumer making a phone-paid purchase, or otherwise opting in to receive future promotional messages. But it is equally clear that the consumer has forgotten the purchase, or was unaware it also entailed a passive opt-in. This creates two issues:

- i. Are consumers aware that a phone-paid purchase has passively opted them in to receive future marketing material?
- ii. How long can a business leave between the consumer opting in and the commencement of promotional SMS messaging? Further to that, how long should a business continue to market to a consumer who does not respond?

5.18 In answer to issue i), the ICO sets out two acceptable methods by which a consumer opts in to receive future marketing or promotions:

- They expressly consent to receive further marketing information. This is the only acceptable method if consumer details are to be sold or traded to third party businesses.
- They are clearly alerted that they may receive further marketing information from the merchant only, and are given a clear and simple route to opt out which they choose not to take.

5.19 As explained in Section 1 of this review there are two methods by which consumers purchase Phone-paid services on their mobile handset. The first is where the consumer texts a keyword to a shortcode, with product being delivered, and the consumer’s handset being billed, as a result. The consumer can be billed by the MO or MT methods, but the key point is that the consumer commits to the transaction at the moment when they text the keyword.

5.20 The second method of purchase is a mobile website. Consumers access a mobile website through their handset, and typically browse before selecting a purchase from one of the products on offer (in some instances consumers are charged per page viewed on a mobile website, we will deal with the issues surrounding this in Section 6). It is only when the consumer has accessed the mobile website and confirmed their purchase that they commit to the transaction.

5.21 There are differences between these two methods from the point of view of passive opt-in, in that a consumer who uses a mobile website generally has a longer period of interaction with the merchant than a consumer who texts a keyword. Because the consumer will need to be informed of the intent to market to them further, and have the chance to refuse it or agree to it as applicable, the business has more time, and choice, to do this when a mobile website is involved.

5.22 So in the context of phone-paid services, PhonepayPlus considers there are three ways to clearly inform the consumer in line with ICO methods, which are not necessarily mutually exclusive of each other:

- a) That promotional material in broadcast or print clearly informs consumers that they will receive further marketing information (on similar products or services) from the merchant when they make their purchase, and how to opt-out of this.
- b) That notice of future marketing from the merchant upon purchase, and opt-out information, is contained, clearly and straightforwardly, in promotional SMS messaging
- c) That notice of future marketing, and opt-out details, are given to the consumer at the point of purchase on any mobile website. The option to positively accept future marketing from third parties – i.e. a “hard” opt-in - could also be provided at this point.

5.23 Where phone-paid services are purchased by texting a keyword it would seem that only a) or b) are feasible from the three options above. For mobile websites all three approaches could be feasible. However we understand option a) is likely to be increasingly redundant as the market develops, given that consumers increasingly access mobile websites through search engines or in response to promotional messages. It would also add to the complexity and cost of advertising in those forms of media.

5.24 Whilst it is important to consider how different types of phone-paid service would be able to provide consumers with information regarding future marketing, and how to opt out of it, PhonepayPlus acknowledges that the soft opt-in requirement under PECR is for consumers to be given a simple means of opting out at time of purchase, and at every subsequent promotion. As such PhonepayPlus considers that we should not prescribe the exact method by which consumers will be informed of an opt-in and given an opportunity to opt out, but would require that the method used is clear and simple to consumers.

5.25 So assuming a consumer has been given clear information that they will receive future marketing, and a clear way of refusing where applicable, issue ii) still exists – i.e. How long can a business leave between the consumer opting in and the commencement of promotional SMS messaging? Further to that, how long should a business continue to market to a consumer who does not respond?

5.26 Past discussions between PhonepayPlus and the ICO have highlighted that the ICO would look at the nature of the product or service provided when considering how long an opt-in should still be considered as valid to begin marketing. For example with a product such as a

couch or fitted kitchen the opt-in could stay valid for a substantial period of time – e.g. one or more years – as those products have substantial retained value, and the customer is likely to clearly remember the name of the merchant who they purchased from.

5.27 Once direct marketing to a consumer has begun within a valid opt-in period, the ICO's position is that marketing can continue indefinitely as long as it is regular (e.g. weekly, monthly) and gives the consumer a simple way of refusing future marketing. A regular promotion that commenced shortly after the consumer had first opted-in would not be adjudged in breach of PECR and, in effect, could continue in perpetuity until the consumer uses the opt-out facility. However a promotion that commenced many months later, or sent messages many weeks or months apart, might be found in breach on the grounds that such practices would not constitute an ongoing marketing relationship with the consumer. The ICO has clearly stated that they are happy to be advised by PhonepayPlus on an acceptable period for opt-in validity where it applies to phone-paid services.

5.28 Phone-paid services are, more often than not, for products that involve instant gratification and consumption. Whilst market developments may change this the majority of phone-paid services have little or no retained value. Because of this we propose that 2 weeks should be the maximum time frame between consumer opt-in and the commencement of regular promotion, and that PhonepayPlus should advise the ICO accordingly in respect of phone-paid services promotions.

5.29 A possible exception to this position could be promotions which are designed to coincide with significant dates such as a consumer's birthday, Easter/Christmas/Valentine's Day, or the start of the football season. We would welcome stakeholder views as to whether 2 weeks should apply as a maximum length of validity for all consumer opt-ins, or whether date-specific promotions should be exempted as long as the consumer is clearly informed, prior to their initial opt-in, of the merchant's intention to use them.

5.30 As previously stated, the ICO's position with respect to their enforcement of PECR is that once marketing has begun within a valid opt-in period then it can continue indefinitely. Industry stakeholders have expressed some sympathy for the view that all promotional SMS should cease after 6 months if no reply is received from a consumer MSISDN. This is partly because this cessation is mandated in the contracts service providers have with Mobile Operators. It is PhonepayPlus' view that, as a regulator rather than a company enforcing the terms of a contract, we should not seek to go beyond the requirements set out in PECR. So we do not propose to mandate a point at which marketing should cease if there has been no consumer response. However we welcome the contract terms which Mobile Operators have put in place, which seem to us to be sensible and pragmatic.

Q15 – Do you agree with PhonepayPlus' assessment of the issues that could lead to consumer confusion about a previous opt-in, and our proposal that marketing must begin within 2 weeks of the consumer opting to receive it? If not, why not?

Q16 – Would you exempt promotions tied to a specific date (e.g. consumer’s birthday, Easter, start of the football season) from the 2 week requirement in Q13, as long as the consumer is clearly informed of the intention to use date-specific promotions when they opt-in? Please give your reasons.

d) Opt-in through websites

5.31 The last root cause of consumer complaint concerning marketing lists concerns the increasing number of websites which are either wholly or partly dedicated to the selling of Phone-paid services, especially content such as ringtones or video games which are downloaded to a mobile handset. These websites, accessed either through a PC or mobile phone, and the different billing methods associated with them were mentioned in Section 1 of this review as being two of the three main avenues by which Phone-paid content is purchased for mobile handsets.

5.32 Where a consumer browses and selects phone-paid content on a website, whether accessed through a mobile handset or a PC, the website will need to verify the consumer’s MSISDN in order to deliver and bill content to the correct handset. This is a relatively easy task for a mobile website, which can bill and deliver content directly to the mobile handset by sending it back through the handset’s connection with the website, and verify the MSISDN in the same way.

5.33 On the other hand a PC based website does not have a direct billing connection with the consumer’s mobile handset, and so has to verify the consumer’s MSISDN by another method. This is most commonly achieved by one of three methods:

- i) the consumer enters their mobile phone number, or MSISDN, 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 the website to confirm that the MSISDN belongs to them.
- ii) similar to i), in that the consumer enters their MSISDN into a data capture field on the website. The number they have entered is then sent a free SMS message. The consumer replies with a standard-rate SMS to the website’s SMS message, thus confirming that they have received it and that the MSISDN is theirs.
- iii) the consumer sends a standard-rate text to a shortcode displayed on the website. They receive an SMS in reply that contains a password. The consumer enters this password into the website to confirm that they have received it, and so that the MSISDN to which the password was sent belongs to them.

5.34 It is important to note that when any of these methods of verification take place, the consumer has not yet made any purchase from the website. Therefore if the merchant connected with the website wishes to place the consumer’s MSISDN on an opt-in list, then they must inform the consumer of this, and obtain a “hard” opt-in – i.e. a positive confirmation from

the consumer. As we have already identified, failure to do this would breach PECR, which otherwise requires there to have been a purchase or 'negotiation' for purchase.

5.35 A significant number of consumers, supported by extensive PhonepayPlus monitoring, have highlighted that many PC-based websites selling phone-paid services require the consumer to verify their MSISDN before they are able to access the full website and browse the products/services on offer. This verification is most often by method i), as set out above.

Risks Associated with website verification

5.36 The investigations PhonepayPlus' has undertaken into services using website verification have some of the highest amounts of multiple consumer complaints about the same service of any PhonepayPlus investigations over the past year. In each of these investigations an average of 107 complainants insisted they had not opted in to receive promotional material linked to a PC-based website using number verification. This was balanced against the service providers' inability to provide robust proof that the consumers had visited the website concerned.

5.37 If we discount the theory that every complainant is mistaken, then it appears to PhonepayPlus there could be two possible explanations, each of which carries its own risks when considered against the three different methods used to verify consumer MSISDNs on a PC-based website (as set out in paragraph 5.33).

5.38 The first explanation is the risk that a merchant or business will set up a website in order to be able to use opt-in lists which they have purchased from another business, or to market randomly to mobile handsets.

5.39 The logic behind this is that when PhonepayPlus or the ICO asks for proof of consumer opt-in, the merchant or business concerned will argue that each MSISDN on their opt-in list was entered into their website, and produce Internet Provider (IP) addresses as proof.

5.40 This is a risk associated with method i), but not with methods ii) and iii) where the consumer is required to send an SMS message. The SMS message could be used as proof of "hard" opt-in, provided the consumer has been informed of the intent to market prior to sending it.

5.41 Where consumers link to a website it will be through an Internet Service Provider (ISP), which allocates an IP address to the consumer's internet connection for the duration of that connection. IP addresses are drawn from a pool owned by the ISP, and an IP address is not normally permanently attached to a specific internet connection or device. Once the consumer is connected to an ISP, the ISP will route them to their chosen website using a "proxy server". The purpose of a proxy server is to lessen the ISP's workload, by saving routes to websites that the ISP has previously generated and then re-using those routes when another consumer requests to be directed to the same website.

5.42 To place this information in a context which is useful to our consideration of the first risk, a website to which an ISP has linked a consumer will, most often, not have a record of the consumer's IP address, but rather the separate IP address used by the proxy server which relayed the consumer on. This means that in most cases the merchant's website records of IP addresses will not be the same as the IP address which has been allocated to the consumer via their internet connection.

5.43 Technical advice given to PhonepayPlus suggests that the chances of being able to link an IP address held in a merchant's website records to an individual consumer's internet connection or PC is almost zero without the co-operation of several different companies involved in connecting the consumer with the website. In practice this co-operation is almost impossible to guarantee.

5.44 On this basis, PhonepayPlus' adjudication panel has already ruled that an IP address linked to the entry of a MSISDN – or mobile phone number - cannot be used as conclusive proof of consumer opt-in by any business which markets phone-paid services.

5.45 The second explanation for the large numbers of consumer complaints is that someone else has entered the consumer's MSISDN into the website. As a result the consumer whose MSISDN was entered under false pretences has received an SMS message containing a password, and promoting a website in which they have no interest. This is highly likely to contravene PECR. This is a risk carried by methods i) and ii), but not by method iii).

5.46 PhonepayPlus' policy is to avoid overly-prescriptive regulation wherever it is possible to do so and still protect consumers. Based on our analysis, and the adjudication panel ruling, set out above we cannot see how method i), of those set out above, can operate without contravening PECR in the context of the phone-paid market. We would welcome any evidence that suggests a robust audit trail can be constructed using method i).

5.47 Of the remaining methods, our assessment is that method ii) does carry potential consumer risks. However we would like to assess stakeholder's views and evidence of actual consumer harm linked to this method before making a decision as to whether we interpret it to contravene PECR in the context of phone-paid services.

5.48 Method iii) appears to us to comply with PECR in the context of phone-paid services. However we would like to consider stakeholder feedback before setting a condition that proscribes either method iii) alone, or methods ii) and iii). PhonepayPlus would also welcome stakeholders' views on any other methods of ensuring consumer opt-in on a PC based website can be robustly and certainly proven.

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

Q18 – Do you have any view or evidence as to whether methods i) or ii) are likely to cause consumer harm? Please provide any viewpoint or material evidence you have.

Section 6

Transparency and Fairness

6.1 There is a strong argument that the requirement for consumers to be given clear, transparent information lies at the heart of nearly every issue which this review addresses. This information can fall into a number of different categories such as pricing; the nature of a service – e.g. does it carry a subscription charge or other repeat charge; how to stop receiving a service; how to opt in or out of future marketing. The key is that the consumer is provided with such information, in a clear and straightforward way, in order that they can make an informed choice about any phone-paid service prior to incurring a charge.

6.2 PhonepayPlus' mission statement, as set out in the Code, is that consumers should be able to use phone-paid services with absolute confidence. It is our view that transparent, prominent information empowers consumers, and so plays a large part in delivering that confidence.

6.3 Our Code seeks to deliver this transparency throughout, and has specific paragraphs that seek to deliver transparency in areas such as subscription billed services, services aimed at children, competitions, and consumer opt-out from future marketing. But outside these specialist areas much of our regulation falls into two main paragraphs. Paragraph 5.7.1 of the Code deals with pricing transparency, one of the biggest single areas of complaint, and states the following:

Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.

6.4 Additionally services must not mislead consumers in any way. Paragraph 5.4.1 of the Code states:

Services and promotional material must not:

- *mislead, or be likely to mislead, in any way,*
- *take unfair advantage of any characteristic or circumstance which may make consumers vulnerable*

6.5 Whilst the scope of these paragraphs extends to the promotion, operation and content of Phone-paid services, in practice the majority of consumer complaints and PhonepayPlus investigations in this area are about absent, unclear or misleading information in promotional material. Where consumer complaints are broken down, the main causes of consumer harm around transparency and fairness are as follows:

- a) General failure to provide adequate consumer information
- b) Phone-paid services that charge per page viewed

c) Text-based Chat Services

a) General failure to provide adequate consumer information

6.6 The transparency requirement is straightforward in respect of phone-paid services which are purchased when the consumer uses their handset to text a keyword to a mobile shortcode, in that the advert or promotional SMS to which the consumer responds should state pricing, and other information required by the Code, clearly and straightforwardly, and should not, either by inclusion or omission, mislead.

6.7 Transparency becomes less straightforward where the consumer purchases content through a website, either a mobile website or a website accessed through a PC. Unlike keywords texted to shortcodes, websites offer consumers the chance to browse a range of different phone-paid downloads or services before initiating a purchase. Because PhonepayPlus' requirement is that the consumer be clearly informed of the price of a product prior to incurring any charge, websites could theoretically provide pricing information either in promotional material or on the website itself.

6.8 In practice this choice does not exist because it is possible for consumers to access a website through a search engine or, as we have seen, by following a link set out in a promotional SMS which uses the binary format. In both these cases the limitations on the amount of characters displayed means that the consumer is not provided with any pricing information before accessing a website and browsing. Additionally the range of phone-paid services, and their different prices and/or charging methods, on any one website are likely to be too great for a content provider to list in any promotional material.

6.9 Because a search engine result or promotional SMS using binary cannot display the pricing, and other, information required by the Code, this information must be clearly and prominently displayed on any website offering phone-paid services in order to comply. PhonepayPlus proposes to clarify this through the following conditions:

- Where promotional material acts as a direct link to a website, it must not contain any information that will, or 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 Code of Practice, regardless of whether general information has been provided in promotional material. This information must be provided alongside the description of any phone-paid service/download, and positioned prominently so the consumer is likely to see it in advance of any purchase. It is not acceptable for this information to be included elsewhere on the website, or simply referenced in the website's terms and conditions

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?

b) Phone-paid services that charge per page viewed

6.10 As stated, PhonepayPlus' expectation is that all services provide clear and straightforward pricing information to consumers, prior to them incurring any charge. Where a promotional SMS, or a list of search engine results, link to a website then PhonepayPlus' expectation is that the website carries clear pricing information, regardless of information in the promotional message. Some websites, which usually offer images or video of an adult nature, charge consumers at a premium rate for each page of the site they browse.

6.11 Given its relative newness, this is not a method of charging with which consumers of phone-paid services are likely to be familiar, and as such consumers may view pages without realizing they are being charged for doing so. In a market where 65% of consumers have Pre-pay contracts, and so do not receive an itemized monthly bill which they can check for premium rate transactions, an unfamiliar method of charging will always carry risk to an uninformed consumer. Furthermore PhonepayPlus considers this method to carry additional risk due to the ease with which consumers can access new pages, and the virtually instantaneous billing which results. An example of how consumers may lose track of how much they have spent using this charging method is an adult themed website where a woman starts off fully clothed, and undresses over a number of pages.

6.12 Further consumer confusion can be caused by websites which charge per page viewed, but list the individual price of each image. In practice each screen or page will contain more than one image, so it will be impossible ever to incur a charge for viewing just one image. In addition some websites charge consumers for each page when they retrace their steps to exit the site, in effect charging consumers once more for pages/screens they have already viewed.

6.13 Our current understanding is that phone-paid services which charge per page viewed are browsed through a mobile website, as opposed to a website accessed through a PC or another viewing device such as interactive TV. But it is certainly possible that such alternative browsing platforms could develop. So we consider that our proposals in this area should cover all services, regardless of how they are accessed, that charge a consumer's mobile phone for each image or segment of video footage viewed.

6.14 Based on the analysis above, we propose the following Statement of Expectation condition around pricing transparency for services that charge per image or segment of video viewed:

- 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.

6.15 Where the cost of viewing pages on a mobile website varies, then PhonepayPlus considers that the condition above should be interpreted by informing consumers of the individual cost of any page they select to view, prior to them incurring any charge for viewing it. Consumers should be informed of the price per page, not per individual image.

6.16 In considering the above condition, PhonepayPlus also considered whether Phone-paid services which charge per page viewed carry enough risk to warrant two further conditions:

- That the consumer is 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 charge before each new page is opened, and;
- That the consumer is not charged for pages/screens which they view when retracing their steps to exit a website.

6.17 In order for PhonepayPlus to require these conditions, we would need to require service providers to seek Prior Permission to run services which are charged in this way. We would welcome any views or evidence that stakeholders have in this area.

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

Q21 – Do you have any view or evidence as to whether a Prior Permission regime should be introduced for Services that charge per page viewed? Please provide any viewpoint or material evidence you have.

c) Text-Based Chat Services

6.18 Text-based Chat Services are a subset of the category “Virtual Chat Services”. Virtual Chat Services are defined in paragraph 7.3.1 of the Code as follows:

services [which are] not live conversation services but enable two or more users to exchange separate messages whether by recorded voice, text, or pictures while engaged in the service.

6.19 Whilst Virtual Chat Services utilising recorded voice messages can be accessed from mobile handsets recorded voice is not a delivery method unique to mobile handsets, which places it outside the scope of this review. Where virtual chat is facilitated by means of text messages it becomes unique to mobile handsets, and so is relevant to the review’s consideration. Text-based Chat Services can, in practice, be divided into two categories:

- Services which enable two or more consumers to engage in the exchange of text, and/or pictures, for friendly chat or dating purposes
- Services which enable a consumer to interact with a service providing adult or flirt themed text and/or pictures. The texts and pictures are provided by staff whom the service provider has employed for this purpose

6.20 In the case of both these categories consumers would usually initiate the service by sending a text to a mobile shortcode. They would then receive messages back to their handset, and enter into an exchange of texts. These messages are either routed by the service from other consumers who are signed up to chat or date, or authored and sent by employees of an

adult or flirt service. In all cases the messages delivered to a consumer's handset will be charged using the MT billing method. Paragraph 7.3.3 of the Code sets out a requirement for the consumer to be informed when the charged messages they have received cumulatively total £10, and at each £10 cumulative charge thereafter. Once the consumer has been informed they have spent £10, they must consent each time for the charged messages to continue.

6.21 Based on the increased number of complaints PhonepayPlus has received and investigated in recent months, the risk of consumer harm caused by Text-based Chat Services lies in two distinct areas, both linked to absent or misleading consumer information:

- a. A failure to inform consumers that they are signing up to a Text-based Chat Service
- b. Misleading consumers into believing they can meet the people who they are exchanging texts and pictures with

6.22 Area a) is overwhelmingly caused by the sending of promotional SMS messages direct to consumers' mobile handsets. If the consumer replies to the message, then the service provider will regard this as an opt-in and begin sending or relaying MT billed messages. So it is important that the consumer is aware that by replying to an SMS message promoting a Text-based Chat Service, he or she will consent to receive that service.

6.23 This problem is sometimes compounded by the use of mobile long codes in SMS messages that promote Text-based Chat Services. Mobile long codes are ordinary mobile numbers – as opposed to shortcodes – that begin with 07 dialling prefixes.

6.24 These long codes are increasingly attached to SMS messages promoting adult or flirt Text-based Chat services, which can often confuse the consumer into believing that a seemingly flirtatious or suggestive message has come from another ordinary mobile handset rather than to promote a phone-paid service. A consumer may reply to such an SMS believing it has come from another individual's mobile handset, at which point they are deemed to have initiated the chat service, and will receive an unspecified number of MT billed SMS messages. The MT billed SMS messages appear to come from a shortcode, which suggests the mobile long number in the promotional SMS is being used to disguise the shortcode.

6.25 As well as misleading the consumer, on the grounds that they are unaware their reply will opt them into a Text-based Chat Service, the use of mobile long codes in the promotion and operation of Phone-paid services may be an inappropriate use of that number range. PhonepayPlus is currently discussing this with Ofcom and Mobile Operators.

6.26 In addition to these conditions is the difficulty PhonepayPlus has with tracing the provider of a Text-based Chat Service which promotes itself using mobile long codes. Whilst we have had some successes, success is by no means guaranteed as Mobile Operators are often unable to identify why a mobile number is being used in this way, or who is using it.

6.27 If PhonepayPlus is unable to identify a service or its provider because it cannot trace a number, this clearly puts consumers at risk of further harm. As previously mentioned, this is currently under discussion with Ofcom and Mobile Operators.

6.28 Area b) is a risk associated with all Text-based Chat Services which provide adult or flirt texts. Many services advertise that the consumer will interact with a named person (usually female), in accordance with PhonepayPlus' definition of Virtual Chat Services as vehicles for the exchange of texts between two or more users. But our monitoring suggests that some Text-based Chat services are using automated replies, augmented by personal replies where a consumer texts a specific question.

6.29 Some services suggest they provide an opportunity to "meet local girls in your area". This could clearly mislead consumers who are subsequently unable to meet anybody through opting in to use the service. In light of the above analysis PhonepayPlus proposes the following Statement of Expectation conditions around transparency of information for Text-based Chat Services:

- 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?

Section 7

Subscription Services, Joining Fees, and the STOP command

7.1 The last of our main issues concerns all types of phone-paid services, regardless of the content on offer, which use the subscription billing method. Subscription services are defined by the Code as follows:

Subscription services are those which incur a recurring premium rate charge

7.2 In practice subscription billing is where a consumer sends a text to a shortcode, or makes a selection on a website, and is then sent repeated content at a series of defined intervals and billed through a series of MT texts to which content is attached.

7.3 In order for subscription services to comply with the Code there are a number of other specific requirements, summarized as follows:

- That the consumer can end the repeat deliveries, and the charges, at any time by texting STOP to a designated shortcode.
- That all promotional material, including a website where one is involved, clearly states that the service is a subscription service, its terms of use (e.g. pricing) and the availability of the STOP command.
- That consumers are sent a free initiation text message in between purchasing a subscription service and beginning to receive billed content. This initiation text must clearly state the name of the service; confirm it is subscription charged; give the billing period (i.e. the frequency at which the consumer will be billed for the content they receive); the amount of each charge and how it arises; how to leave the service (i.e. the STOP command), and; the service provider's contact details.
- That once or month, or whenever a consumer has spent a cumulative total of £20 on a service – whichever comes the sooner, the consumer must be resent the free initiation text message as set out above.

7.4 These additional rules were introduced because PhonepayPlus considers 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. Where a consumer has been misled, either intentionally or unintentionally, by promotional material the requirement for service providers to send a free initiation text message before billed content should ensure that the consumer is aware they have joined a subscription service. In theory this allows the consumer the opportunity to stop the service (by texting the STOP command to the shortcode provided) before they incur any subscription charges.

7.5 As highlighted in Section 2 of this review, the last 6 months has seen a significant increase in complaints to PhonepayPlus about mobile phone-paid services as a whole. When we analyse further into the details of these complaints, approximately 51% are about services using subscription billing. The root causes of these complaints appear to be as follows:

- i. Failure to provide pricing or other required information, or providing information which is misleading. This is the biggest single problem and often leads to a consumer signing up to a subscription service (with or without a joining fee) without their knowledge, or in the belief that they are actually purchasing a single download.
- ii. The failure above can be compounded when a joining fee is charged to the consumer before a free initiation text message is sent, or when the delivery of content, and billing, begins within seconds of the free initiation text message being sent. In both cases by the time the consumer has realized they are signed up to a subscription service they have already been charged.
- iii. Consumers are signed up to a subscription service without their knowledge or consent, or sent promotional SMS messages to which they had not consented. This can, as before, often be traced back to misuse of marketing lists.
- iv. Billing does not cease in response to the consumer texting the STOP command. Or the consumer receives an SMS message in response that states they have unused credit, and to use it they should text REJOIN, or a similar keyword. Consumers who do so are then re-subscribed to the service.

False or misleading implication that a product or service is free

7.6 Root cause i), the provision of no or misleading information, often occurs because advertising, or other promotional material, states or implies that the Phone-paid services on offer are free.

7.7 Paragraph 5.11 of the Code makes a more specific statement in relation to the use of the word "FREE", stating the following:

No premium rate service or product obtained through it may be promoted as being free unless:

A product or service has been purchased by the consumer using a premium rate service, and a second product or service of an equal or greater value is provided at no extra charge, or;

A product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost.

7.8 Paragraph 5.11 of the Code provides a useful confirmation as to when the word “FREE” can legitimately be used to advertise phone-paid services. But in practice most cases in this area which we investigate are more concerned with the implication that a service is free, and the effect this can have on the consumer’s decision to text a shortcode or visit a mobile website, than whether the service is free or not. So in practice most cases involving the use of “FREE”, or similar wording (which is not covered by paragraph 5.11), are investigated using paragraph 5.4.1 of the Code, which sets out the requirement that Phone-paid services must not mislead consumers. Whilst in theory this form of misinformation need not be unique to subscription services, in practice this is the case.

7.9 An analysis of complaints received and investigated by PhonepayPlus shows that expressions such as “FREE”, “BONUS”, or “NO CHARGE” are used to mislead consumers in a number of ways, set out as follows:

- Undue prominence is given in print or broadcast advertising to a claim or implication that a service is free when this is not the case. This is most common in print advertising. Other, less prominent, information in the advertising, or its terms and conditions, may state that the service is not free, or is conditional upon opting into a service which uses a subscription charge. PhonepayPlus’ concern in these cases is that consumers will only digest the most prominent information, and base their decision on the premise that a service is free.
- Websites which sell phone-paid services contain metatags – electronic bookmarks designed to attract search engines to list them high in a list of search results – that state or imply the website offers free content – e.g. FREE RINGTONES. Upon closer monitoring of these websites there is no free content, or the free content is not accessible until the consumer has opted into a subscription service. Again, PhonepayPlus’s concern is that consumers will enter the website on the premise a service is free.
- A service, or website, uses a brand name that contains the word “FREE” or derivatives, or has a name otherwise designed to imply the content the service offers is free. Yet again, this nearly always turns out not to be the case.
- A service, or website, promotes and provides consumers with a free method of interaction such as an IQ test or tarot reading. The consumer is then invited to access an in-depth reading of the results, most often by clicking a link on a mobile website. When the consumer does this they are charged, or registered for a service carrying a charge, without their knowledge or consent.

Other Causes of Consumer Harm

7.10 Of the remaining root causes – i.e. ii) to iv) - none is unique to services which use subscription billing. Even the texting of a STOP command can also apply to Text-based Chat Services. However where the subscription billing method is used the risk of consumer detriment

is considerably heightened because subscription billing is recurring, and is potentially infinite, rather than once for a one-off purchase.

7.11 In some cases a subscription service may be necessary for the consumer to properly receive the service. An example would be text updates to the consumer's mobile handset every time their football team scores, with the consumer fully aware that they will be charged each time they receive a goal alert. In many other cases, especially where the service provides downloaded content such as music, ringtones, or wallpaper, the main benefit the consumer appears to receive is convenience. A consumer who regularly changes their ringtone or wallpaper will be able to do so without having to make separate purchases on each occasion.

7.12 One last consideration is that the level of consumer harm caused by subscription services varies according to the type of service. For example virtually none of the complaints PhonepayPlus receives are about score alert services, but a high number cite subscription services offering downloads, especially ringtones, music and wallpaper. It is interesting to note that two of these three service types – ringtones and wallpaper – are generally considered to be stagnant markets in overall decline.

7.13 In considering what regulatory action could be taken to reduce the consumer harm evidently caused by some types of subscription service, PhonepayPlus did not rule out a prohibition on any phone-paid service using the subscription model. However we did not believe this to be a proportionate response at this point in time, given that some types of subscription services evidently cause no consumer harm. In addition PhonepayPlus does not feel all other regulatory solutions had yet been exhausted.

7.14 This leaves PhonepayPlus to consider the following options:

- a) To change the current focus of existing regulation
- b) To require a "cooling off" period in between the consumer being sent a free initiation text message and receiving billed content
- c) To introduce a Prior Permission requirement for service content types using subscription charges (and/or joining fees) which are known to cause the most consumer harm, and to make it a condition of prior permission that no subscription charge and/or joining fee may be incurred until the consumer has explicitly confirmed their opt-in to the service through a return message.

a) Use Existing Regulation

7.15 The Code already regulates subscription services, both through general requirements around transparency and legality, and a specific set of provisions set out in section 7.12. In addition the Mobile Operators set out specific contractual obligations on the exact wording used to present pricing and other subscription information in promotional material, and in the initiation message PhonepayPlus requires. These contracts bind aggregators (or service providers as they are regarded by the Code) who are not usually the advertisers of these services. However

the aggregators can pass the contractual obligations onto the content providers with whom they contract in turn.

7.16 Some industry stakeholders have expressed the view that the problems could be eradicated through a concentrated enforcement programme. Whilst we agree, and already focus considerable effort and resources on enforcement activity, we do not believe this on its own will provide a strategic and sustainable long-term solution and build compliance in Phone-paid services. If it would our opinion is that it would already have done so. Since a concentrated enforcement programme has not provided a strategic, long-term solution up until now we conclude there is a need to consider additional regulatory solutions.

7.17 PhonepayPlus is not minded to adopt this approach in isolation because previous “crackdowns” in this area by PhonepayPlus and the Mobile Operators have not eradicated the problems, merely abated them temporarily. We are not convinced that another, similar enforcement drive would yield a more permanent solution. Such an approach is also costly to industry insofar as it would require more resources to be exerted by both PhonepayPlus and Mobile Operators.

b) “Cooling Off” Period

7.18 Because subscription services carry a repeat charge, it is important that consumers are fully informed when they have opted-in to one - and the charges associated with it. In order to provide an extra assurance that consumers are informed, the Code requires the following:

Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

- *Name of the service*
- *Confirmation that the service is subscription based*
- *What the billing period is (e.g. per day, per week, or per month) or, if there is no applicable billing period, the frequency of the messages being sent*
- *The charges for the service, and how they can or will arise*
- *How to leave the service*
- *Service provider contact details*

7.19 At present this paragraph does not stipulate how long a gap should exist between the sending of an initiation message and the sending of billed content as part of the service. A significant number of complaints PhonepayPlus has recently investigated highlight that the consumer is often confused by initial promotional material and only becomes aware they have opted to receive a subscription service when they receive the initiation message. Before they can opt out using the STOP command – i.e. seconds after receiving the initiation message – they begin to receive billed content.

7.20 Mobile Operators have indicated that in almost all such cases the consumer would receive a refund on any charged content they had already received. However this may still have a negative effect on the consumer's perception of phone-paid services, and the subsequent story they tell others. This is important to an industry which can potentially market to any individual with a mobile handset but where nearly two-thirds of mobile handset owners (62%) did not consume any phone-paid services in the last 6 months, and a further percentage of those who did were not repeat consumers.

7.21 By prescribing the length of time between the sending of an initiation message and the sending of billed content consumers would be given time to properly digest the information they were given, and decide whether or not they wished to cancel the service before charging began.

7.22 However PhonepayPlus is not minded to adopt this approach for two reasons. Whilst this approach would ensure that consumers had time to consider their initiation message, it would not ensure they had read and understood it. Secondly because we do not feel this would provide the consumer with the best purchasing experience. Because of the instant gratification aspect of most phone-paid services, our perception is that consumers want content as instantly as possible. Making consumers wait an hour or more to receive content would not improve their purchasing experience in this regard.

c) Requirement for Consumer Confirmation

7.23 Where a particular type or category of phone-paid service causes consistently high levels of consumer harm, or poses a high level of risk or potential detriment to consumers, then PhonepayPlus may require that these categories are not provided unless a service provider or information provider obtains prior written permission from us. In order to allow PhonepayPlus to further protect consumers, prior permission can be issued subject to conditions imposed by us. These prior permission conditions can extend beyond the regulations set out in the Code and all other editions following it.

7.24 Of the root causes outlined above in paragraph 7.5, PhonepayPlus considers that iii) is adequately addressed by the conditions proposed in Sections 3 and 4 around misuse of MT billing and Marketing Lists. Cause iv), the failure of the STOP command, will be dealt with under a separate consideration later in this section. This leaves i) and ii) as the root causes of consumer risk around subscription services which PhonepayPlus would look to address in conditions attached to a prior permission requirement.

7.25 It is PhonepayPlus' view that cause i) could be addressed by conditions which set higher standards, in proportion to the increased potential for consumer detriment, to ensure that consumers make a fully informed consent to subscription services. Such conditions would also have to prevent the various forms of misleading promotion we have outlined above, which PhonepayPlus adjudges to be the leading cause of consumer harm in this area. If cause i) is addressed, then it is our view that the potential for consumer harm in cause ii) will be

eradicated, as the consumer will already have made an informed choice if they opt to receive a subscription service.

7.26 In light of evidence that the majority of consumer harm is caused by ringtone, music and wallpaper download services which use a subscription charge (with or without a joining fee), PhonepayPlus currently proposes that prior permission requirements should extend only to providers of those services. We would welcome evidence or opinions as to whether other types of services using subscription charges or joining fees should also be included in this prior permission requirement. In order that we can assess each individual provider of content on their own merit, and target enforcement accordingly, we propose that the requirement to obtain prior permission should fall to information providers. Proposed conditions are 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 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.

7.27 It is our view that the above conditions will provide consumers with only a minimum disruption to their existing purchasing experience, whilst providing greater assurance, as the consumer will have to positively confirm that they have read and understood the information provided to them before incurring any charge. It could be argued that, in theory, PhonepayPlus requires that promotional material and websites provide all the necessary information set out in

the Code and that consumers indicate that they have read and understood that information when they text a keyword or make a selection. But evidence from our investigations shows that this is not the case in practice where ringtones are sold using subscription billing, as much of the promotional material fails to comply.

7.28 A number of industry stakeholders have expressed the view that introducing a confirmation of the kind outlined above will affect legitimate sales, citing that, in their experience, consumers are more likely to abandon a purchase as the number of clicks or confirmations increases. PhonepayPlus has never been presented with any evidence which conclusively demonstrates this to be true, and we would question whether the reason for a sales decline is an extra click or confirmation, or that the consumer has been provided with enhanced transparency which allows them to make an effective, informed choice as to whether to confirm the purchase. This issue is addressed in more detail during our Regulatory Impact Assessment at Section 8.

Payforit and Subscription Services

7.29 As explained in earlier sections of this review, Payforit provides a facility for subscription billing. Consumers who select a subscription service on a website using Payforit are directed to a secure payment screen where they are provided with all the information set out in paragraph 7.26 above and must click confirm to complete the purchase and opt to receive the service.

7.30 PhonepayPlus considers that consumers who purchase subscription services using Payforit are automatically provided with the information we require when they enter the secure payment screen, and must confirm they have read and understood it. For these reasons PhonepayPlus does not propose to extend prior permission for subscriptions to Payforit.

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 and are facilitated through Payforit should be exempt from any prior permission requirement? If not, why not?

Subscription Joining Fees

7.31 More recently, some subscription services have begun to market themselves as clubs for which the consumer pays a one-off joining fee, as well as subsequent subscription charges every time they receive content. While paragraph 7.12.4 of the Code requires the consumer to be sent a free initiation message prior to incurring a subscription charge, the paragraph does

not specify whether such a message would also apply to a one-off joining fee. This means that a consumer could receive their free initiation text, realize that they were about to incur subscription charges, and elect to stop the service only after they had already been charged for a one-off joining fee.

7.32 Following monitoring of subscription services which charge a joining fee, PhonepayPlus is of the opinion that the fee which consumers pay to join (usually between £3-5) does not benefit the consumer other than granting them the right to subsequently receive subscription charged content. Given that other subscription services allow consumers to receive subscription charged content without paying a joining fee, we cannot immediately ascertain how the joining fee is of additional benefit to consumers.

7.33 On this basis we would welcome stakeholder feedback as to the nature of the additional benefits which consumers derive, beyond the right to receive subscription charged content, when they pay a one-off fee to join a subscription service.

Failure of the STOP command

7.34 This review has highlighted both Text-based Chat Services and services which use a subscription charging model as carrying particular risk to consumers. The common trait that both these categories of services share is that they carry a form of repeat charge. For this reason it is important that consumers are able to halt any further charge by texting STOP to the shortcode from which billing texts originate. Such a requirement is set out as follows at paragraph 5.14 of the Code:

Where a STOP command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of STOP within any message to be sent by the user. When a STOP command has been sent, the service provider must make no further charge to the user for the service.

7.35 Where a service does not respond to a STOP command PhonepayPlus considers this a serious breach of the Code, on the grounds that this is the mechanism which gives consumers the most instantaneous control over how much they spend. We require that all services respond to the word STOP, rather than variations such as HALT, in order to make the process as uniform for hone-paid consumers as possible.

7.36 Our data around investigations indicates that services which fail to respond to the STOP command, as set out in the Code, are on the increase. But a number of technological and commercial developments since the inception of the STOP command require further consideration as we consider how best to deal with this increase. They are:

- a) The practice of shared shortcodes
- b) Responses to a STOP command which are inducements to rejoin or resubscribe

a) Shared Shortcodes

7.37 Service Providers who wish to connect with Mobile Operators to provide phone-paid services specific to mobile handsets will rent shortcodes (5 digit numbers which are easier for consumers to recall) from the Mobile Operators for that purpose. Where Phone-paid services are provided to “fixed” handsets the technology limits numbers to carrying only one service, but mobile technology allows up to 30 different Phone-paid services to run on a single shortcode. All these services can, theoretically, be provided by different content providers.

7.38 Where consumers text a keyword to a shortcode in order to purchase a phone-paid service, the service provider’s technology uses that keyword to provide the consumer with the correct service. Whilst it is a rare occurrence, it is possible for a consumer to have opted into more than one Subscription or Text-based Chat Service which run on the same shortcode. If a consumer texted a STOP command in such a circumstance, the service provider would be unable to know which of the services the consumer wished to stop, and which they wished to continue receiving.

7.39 Mobile Operators have tried to address such a situation with service providers in their contract-based Mobile Code of Practice. The Mobile Code of Practice currently requires that where a consumer is billed for more than one service on the same shortcode, then the service provider should stop the last of the services into which the consumer opted when they receive a texted STOP command. If the consumer texts STOP again, then the service provider should stop the next-to-last service, and so on. Should the consumer text the command STOP ALL, then the service provider is required to stop billing the consumer for any services delivered through that shortcode.

7.40 Whilst the STOP ALL command does provide a solution, it is clear from the contact PhonepayPlus has with consumers that STOP ALL is not a command with which the majority of them are familiar.

7.41 PhonepayPlus has considered the following options in defining what the STOP command should be taken to mean:

- i. That STOP should stop the last service into which a consumer opted, and STOP ALL should stop all services delivered from a single shortcode. This is in line with the current Mobile Code of Practice position, but PhonepayPlus considers this to be flawed in that many consumers are not aware of the difference between STOP and STOP ALL. Until this is the case, consumers will continue to be charged for services they do not wish to receive.
- ii. That STOP should stop all services from a single shortcode, regardless of how many a consumer is billed by. Whilst this would prevent any further charge which the consumer did not want, it may also stop services which they did wish to continue receiving. Whilst the consumer could re-subscribe to services they still wished to receive, this may be as confusing to them as option i).

- iii. That where a consumer is billed for more than one service on a single shortcode, they should receive the following free message in reply when they text the STOP command:

You have texted STOP. You are currently subscribed to more than one service on this shortcode. To stop [name of service] text STOP [keyword] in reply to this message. To stop [name of 2nd service] text STOP [2nd keyword] in reply. To stop all services text STOP ALL.

The consumer should not be charged for any service until they have texted a reply to confirm their intent. If no reply is texted within 24 hours then all billing should be stopped as a precaution. Whilst this option would require the consumer to text two standard rate messages rather than one, PhonepayPlus does not consider the cost of this would cause them undue detriment.

7.42 PhonepayPlus has carefully considered these options, but considers a failure of the STOP command so serious that we are minded to take immediate action. As such we can confirm that a Notice to the Industry will accompany the publication of this review, and take immediate effect. The Notice will state that PhonepayPlus will be minded to raise an Emergency Procedure against any phone-paid service which does not respond immediately to a STOP command, where that command is demonstrably not working effectively and causing serious consumer harm in need of urgent remedy. Where a consumer is billed by more than one service on the same shortcode, then the service provider should use either options ii) or iii) as set out above.

b) Service responses to the texting of a STOP command

7.43 One further issue exists, which is the wording of messages which are sent in response by the service provider or content provider after a consumer has texted STOP and been opted out of a service. The Mobile Code of Practice requires that a free message is sent to a consumer who texts STOP, confirming that they will no longer be billed. However PhonepayPlus is aware that some messages also state that the consumer has unused credit, and to use it they should text USE, REJOIN, or a similar keyword. Consumers who do text one of these keywords are then re-subscribed to the service, something PhonepayPlus considers is misleading.

7.44 In order to avoid the risk that consumers will unwittingly re-subscribe to a service which they have just opted out of by texting STOP, PhonepayPlus intends to include the following conditions as part of the Notice to the Industry which accompanies the publication of this review:

- Messages sent to confirm a STOP command should not state a consumer has unused credit still available unless this is the case
- Messages sent to confirm a STOP command should make clear that by replying the consumer will opt back into the service. To do this effectively PhonepayPlus suggests use of the word “re-subscribe”.

Section 8

Regulatory Impact Assessment

8.1 In light of the wide-ranging nature of mobile phone-paid services this review has proposed a number of Statement of Expectation conditions, a Helpnote, and a Prior Permissions regime in order to reduce the consumer harm caused by a number of different practices. In proposing these arrangements, we recognise that some of them carry compliance costs, and this section looks to address those costs in turn.

Promotional SMS Messages

8.2 In respect of the various types of consumer risk we identified with respect to Promotional SMS Messages, PhonepayPlus has proposed the following Statement of Expectation conditions:

- I. 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.
- II. 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.
- III. 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 (EC Directive) Regulations 2003. This means of opting out should be clearly visible to the consumer.
- IV. 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.

8.3 PhonepayPlus views these conditions as simple requirements to provide information to consumers. Such information can be provided by altering or inserting text into existing websites, or through the re-wording of promotional SMS messages. On this basis, PhonepayPlus considers that the cost will be to information or content providers who need to change existing websites or SMS marketing campaigns in order to make them compliant. It is our opinion that this cost will be negligible, and that the benefits to consumers of enhanced transparency justify such negligible costs. We would welcome feedback from stakeholders which supplies evidence for other costs.

Pricing Transparency and Fairness

8.4 In respect of the various types of consumer risk we identified with respect to Pricing Transparency and Fairness, PhonepayPlus has proposed the following Statement of Expectation Conditions:

- V. 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.
- VI. 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.
- VII. 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.
- VIII. Where promotional material acts as a direct link to a website, it must not contain any information that will, or be likely to, mislead users.
- IX. 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, regardless of whether general information has been provided in promotional material. This information must be provided alongside the description of any Phone-paid service/download, and positioned prominently so the consumer is likely to see it in advance of any purchase. It is not acceptable for this information to be included elsewhere on the mobile website, nor simply referenced in the website's terms and conditions.

8.5 As with our proposed conditions around Promotional SMS, PhonepayPlus considers these conditions to be straightforward requirements to provide information. Again, it is our opinion that this information can be provided by adapting existing websites or formats for promotional SMS messages. On this basis we consider that any cost will again fall to information or content providers, and will again be negligible and that the benefits to consumers outweigh these costs. Once again we would welcome stakeholder feedback which provides evidence of other costs.

Subscription Services, Joining Fees, and Failure of STOP command

8.6 In respect of the various types of consumer risk we identified with respect to Subscription Services and Joining Fees, PhonepayPlus has proposed the introduction of Prior Permission to operate subscription services or clubs that use joining fees for ringtones, wallpaper and music download content. The Prior Permission would be granted subject to compliance with the following conditions:

- X. 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.
- XI. 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.
- XII. 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.

8.7 Of the three proposed prior permission conditions above, PhonepayPlus considers the first two to be fairly basic consumer information requirements, again with negligible cost. The standard cost of obtaining prior permission from PhonepayPlus (£352.50) will also fall to each information provider. However in respect of the third condition, which would facilitate consumer authentication, a number of industry stakeholders have expressed the view that introducing such a confirmation will affect legitimate sales, citing that, in their experience, consumers are more likely to abandon a purchase as the number of clicks or confirmations increases.

8.8 We have considered these views carefully, as they point to a potentially significant loss of revenue for all parts of the Phone-paid services industry which are involved in the provision of subscription services. Our comment and analysis is as follows.

8.9 We accept that confirmation of purchase will be new to consumers of phone-paid subscription services, but would point out that many of these consumers will have experience of other methods of electronic purchase – for example Amazon or Paypal – where a confirmation requirement is already the norm. In addition Payforit, a method of payment with which consumers are expected to become increasingly familiar, already requires consumers to read

the information about a service which the Code requires and then confirm or abort their purchase.

8.10 We are aware that the introduction of consumer confirmation in other European countries – either through a text message or the need to click “confirm” on a website – has had an effect, at least initially, on the sales of subscription services. However the data does not substantiate whether this reduction results from the increased number of clicks or texts the consumer is required to send, or from increased clarity which leads consumers to have second thoughts about a purchase when they are presented with service information which they must read and confirm.

8.11 Because we currently have no data that allows us to differentiate between sales which are aborted because of “second thoughts” and sales which are aborted because of a lengthier purchase process, we cannot provide an accurate assessment of the impact that a confirmation requirement would have on legitimate sales (i.e. transactions where the consumer is fully informed, but fails to complete the purchase because they grow tired of the extra steps involved). We would welcome any evidence from stakeholders that allows us to better identify the underlying causes of any reduction in sales due to a confirmation requirement.

8.12 Whilst we cannot accurately ascertain an effect on legitimate subscription sales at this point, we can give an assessment of the actual cost of compliance – i.e. the changes that will need to be made to comply – to both the industry and consumers.

8.13 In order to comply with the requirement we have proposed for consumer confirmation, service or content providers will need to either provide information to consumers on a website, with the consumer needing to click a “confirm” icon, or to text information to consumers, with consumers needing in turn to text a reply in order to confirm.

8.14 It is our opinion that the cost of altering a website to contain new information, and provide a “confirm” icon, will fall to content providers and will be negligible. Our estimates for compliance cost where text confirmation is involved are worked out as follows, and are intended only as indicative estimates based upon qualified assumptions.

8.15 For five of the last six months PhonepayPlus has received more than 2000 complaints about subscription services. If we assume a level of 2000 complaints a month for the rest of the year, then we reach a slight under-estimate of 24,000 complaints for the year. Research carried out by the Office of Fair Trading concludes that only 5% of actual consumer harm is ever reported, so if we increase 24000 to equate to 100% we arrive at a figure of 480,000 as an estimated number of actual cases of consumer harm over the year.

8.16 The amount complainants are charged by a subscription service before they are aware of true cost varies according to a number of factors. The cost of a week’s subscription varies from between £4.50 to around £15 for some subscription services which also charge a joining fee, but some consumers lose a much larger amount than just a week’s worth of charges. This can be because they have monthly bills (and so become aware of the charges later than

consumers who have Pre-pay contracts), or because they have unknowingly opted in to a daily, or even hourly, competition which uses Subscription charges.

8.17 We cannot accurately calculate the average amount lost to each consumer where they suffer detriment as a result of a subscription service, but for the purposes of these estimates we have assumed a low number of £5 and a high figure of £15. When we multiply £5 by 480,000 then we estimate that £2.4m is lost to subscription consumers each year. If we multiply £15 by 456,000 then that estimate rises to £7.2m.

8.18 Our discussions with researchers in the phone-paid industry indicate that an exact figure for the number of subscription service transactions per year is not known. Based on Fathom figures for the percentage of the mobile phone-paid market which is spent on ringtones and other personalization services, we have assumed a share of £138m. This is a slightly generous estimate, because whilst the majority of ringtones and other personalization services are purchased through subscription services not all of them are.

8.19 If we divide £138m by our high and low estimates for consumer detriment of £5 and £15 then we arrive at figures of 27.6m individual subscription transactions and 9.2m individual subscription transactions respectively.

8.20 We have assumed that all of these individual transactions would require Service Providers to send out a free text message as per our proposed rules. This is again a generous estimate as many transactions would be conducted on a website, where consumer confirmation could be sought at negligible cost. If we assume that all transactions would require a text message, and the average cost of each message would be 5p, then the cost to the industry would be an estimated £1.38m where there were 27.6m transactions, and £460,000 where there were 9.2m individual transactions.

8.21 The estimates and calculations outlined above are set out below, both for the lowest estimate of the cost to the consumer of the first week of subscription and the highest estimate:

Lowest Estimate - £5

TOTAL ESTIMATED COST TO INDUSTRY = £1.38m

TOTAL ESTIMATED CONSUMER HARM PREVENTED = £2.4m

DIFFERENCE = +£1.02m

Highest Estimate - £15

TOTAL ESTIMATED COST TO INDUSTRY = £460,000

TOTAL ESTIMATED CONSUMER HARM PREVENTED = £7.2m

DIFFERENCE = +£6.74m

8.22 It is interesting to note that as the individual “first week” cost of a subscription service to the consumer rises, so does the estimated cost effectiveness of our proposal in terms of preventing consumer harm. Where this estimate is re-calculated using a smaller market size of £100m per year, then cost effectiveness rises further in respect of both our low and high estimates. However given that this estimate is based on a number of qualified assumptions, we would welcome any data from stakeholders that gives us a clearer picture of the size of the subscription market, the average cost of the first week of a subscription service, and the average cost of a free text message sent to a consumer.

Marketing Lists

8.23 PhonepayPlus identified a number of different types of consumer risk with respect to the Use of Marketing Lists. As previously stated PECR is not directly enforced by PhonepayPlus. However the ICO would usually consult us during their consideration of individual cases, and to generally establish what practices are acceptable and unacceptable interpretations of PECR in the context of Phone-paid services. PhonepayPlus proposes to release a Helpnote which clarifies what this general advice will be. The proposed principle standards within that advice are:

- I. That service providers, or subcontracted parties, have firm evidence – i.e. some substantive record - that the MSISDNs on their opt-in lists have not been recently recycled before the opt-in lists are used
- II. That service providers, and/or contracted organisations, must ensure that MSISDNs on any list they use 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 those businesses who sell or trade opt-in lists to also sell or trade appropriate supporting evidence.
- III. That service providers, and/or contracted organisations, must ensure that promotional messages fall within the parameters of the consumer’s original opt-in, and produce evidence confirming this (such as 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 supporting evidence.
- IV. That 2 weeks should be the maximum time frame between consumer opt-in and the commencement of regular promotion.

8.24 Whilst the ICO is not bound by these standards, it is PhonepayPlus’ expectation that the ICO would apply them in all cases where there were no strong mitigating factors.

8.25 Whilst standards II.) and III.) would theoretically carry an additional cost to any Service or Information Provider which needed to update its records database, it is our opinion that many of them will already have the capability to produce such proof of opt-in. Therefore in industry-wide terms the cost is unlikely to be significant.

8.26 It is PhonepayPlus' assumption that Service Providers could check a list of MSISDNs with Mobile Operators in order to ascertain whether the MSISDN has recently been recycled, and so comply with standard I.). We would welcome evidence as to the feasibility and potential cost involved.

8.27 Compliance with standard IV.) is likely to fall to Information Providers, who will be expected to begin marketing within 2 weeks of receiving a consumer opt-in. Given that we propose to exempt seasonal promotions from this requirement (as long as consumers are informed of the intent to market during a given event or time), we cannot envisage that this requirement will affect legitimate promotional SMS messages sent directly to consumers. Once again, we would welcome any evidence that suggest 2 weeks places an extra compliance cost on Information Providers.

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

Section 9

Responding to the Consultation

We are seeking the views of all stakeholders on the proposals and questions contained in this paper by no later than **Wednesday 10 September 2008 (8 weeks from the date of issue of this document)**.

Where possible, comments should be submitted in writing and sent by e-mail to mcollins@phonepayplus.org.uk . Copies may also be sent by mail or fax to:

Mark Collins, Policy Advisor, PhonepayPlus Ltd., Clove Building, 4 Maguire Street, London SE1 2NQ

Tel: 020 7940 7412

Fax: 020 7940 7456

If you have any queries about this consultation, please telephone or e-mail Mark Collins using the above contact details.

Confidentiality

We plan to publish the outcome of this consultation and to make available all responses received. If you want all or part of your submission to remain confidential, you must make a specific request for this, along with your reasons for making the request.

STATEMENT OF EXPECTATIONS REGARDING MOBILE PHONE-PAID SERVICES

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 certain types of Subscription Service to obtain Prior Permission from PhonepayPlus to operate has been published in addition to this document, 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 has also been published in addition to this document.

Expectations

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

Promotional SMS Messages

- 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.
- 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 (EC Directive) Regulations 2003. The means of opting out should be clearly visible to the consumer.
- 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.

Transparency

- 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.
- 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.
- Where promotional material acts as a direct link to a website, it must not contain any information that will, or 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, regardless of whether general information has been provided in promotional material.

This information must be provided alongside the description of any Phone-paid service/download, and positioned prominently so the consumer is likely to see it in advance of any purchase. It is not acceptable for this information to be included elsewhere on the website, nor simply referenced in the website's terms and conditions.

Enforcement

PhonepayPlus considers misuse of Promotional SMS Messages, and a Lack of Transparency, to be very serious, and will continue to actively monitor services to ensure that the above conditions are complied with.

Prior Permissions Notice

For the attention of all service providers operating services which offer ringtones, music or wallpaper downloads using a subscription and/or joining fee.

This Notice is being issued to inform all service providers who provide ringtones, music, or wallpaper downloads using a subscription charge or a joining fee that from **xxx xxxx 2008** no such services may be provided without PhonepayPlus' prior permission. Service providers are required to apply for a prior permission licence to offer ringtones, music, or wallpaper as downloads charged using a joining fee and/or subscription, and such services operating without a license after **xxx xxxx 2008** will be considered to be in breach of the 11th PhonepayPlus Code.

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 and, 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 in force.

Specific Conditions

- That the nature and content of the service (including price and name) provided are as described in the "Other Services" application form, copies of which can be found on the PhonepayPlus website.
- That the names of each information provider, who offers Subscription Services offering ringtones, music or wallpaper as downloads, with whom service providers contract, and the names of their services, are provided to PhonepayPlus.
- 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 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 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.

These conditions DO NOT apply to services which use the Payforit payment mechanism. This is on the grounds that Payforit already mandates consumer confirmation in the way outlined above.

PhonepayPlus recommends that Service Providers who already provide ringtones, music, or wallpaper downloads that are charged using a subscription or joining fee submit their applications by **xxx xxxx 2008**, 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 by that date will be fully processed before xxx xxxx 2008, and service 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 ringtones, music or wallpaper downloads which carry a subscription charge or joining fee does not serve as an obligation to any Network Operator to provide connection or carriage for such services.

NOTICE REGARDING SERVICES WHICH FAIL TO RESPOND IMMEDIATELY TO THE STOP COMMAND

Background

Where phone-paid services, such as subscription services or Text-based Virtual Chat Services exist, carry a potential repeat charge to consumers, PhonepayPlus considers it extremely important that consumers should be able to opt out of such services immediately, and receive no further charge once they have done so. For this reason paragraph 5.14 of the PhonepayPlus Code (11th Edition Amended April 2008) states the following:

Where a STOP command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of STOP within any message to be sent by the user. When a STOP command has been sent, the service provider must make no further charge to the user for the service.

For subscription services paragraph 7.12.2 of the Code specifically states that:

It must always be possible for a user to leave a subscription service by using the 'STOP' command.

Paragraph 7.12.6a further states that:

After a user has sent a 'STOP' command to a service, the service provider must make no further charge for the messages.

Whilst complaints regarding failure of a STOP command have only recently begun to rise, PhonepayPlus considers such a failure to be a serious breach of the Code on the grounds that this is the mechanism that gives consumers the most instantaneous control over how much they spend. We require service providers to ensure that all services respond to the word STOP, rather than variations such as HALT, in order to make the process as uniform for Phone-paid consumers as possible.

Our Concerns

Our data around investigations indicates that services which fail to respond to the STOP command, as set out in the Code, are on the increase. In addition a number of technological and commercial developments since the inception of the STOP command require further consideration as we consider how best to deal with this increase. They are:

- a) The practice of shared shortcodes, which in a very small number of cases may mean the consumer is subscribed to more than one service using the same shortcode. In such cases the service provider will be unclear about which service (or services) the consumer wishes to unsubscribe from. In such cases shortcodes will currently respond to a STOP ALL command, but qualitative

analysis of our complaints shows that few consumers are aware of this distinction.

- b) Service responses to a STOP command which are inducements to rejoin or re-subscribe. Mobile Operators currently require that consumers are sent a response when they text the STOP command, confirming they will no longer be charged. Where such responses contain statements to the effect that the consumer has unused credit, and to use it they should text USE, REJOIN, or a similar keyword, PhonepayPlus considers that this is likely to be misleading.

Decision

In light of our consideration PhonepayPlus hereby gives notice of the following, to take effect from the date on which this Notice is issued:

- Where a STOP command is demonstrably not working effectively and is consequently causing consumer harm which requires urgent remedy, the service will immediately be subject to an Emergency Procedure and PhonepayPlus will instruct the networks to block that service until an investigation is complete.
- Where a consumer is subscribed to more than one service on a single shortcode and texts the STOP command to the short code, in order to prevent them from being misled service providers should allow them the opportunity to clarify their intention. PhonepayPlus strongly suggests that a free message is sent to the consumer using the following wording:

You have texted STOP. You are currently subscribed to more than one service on this shortcode. To stop [name of service] text STOP [keyword] in reply to this message. To stop [name of 2nd service] text STOP [2nd keyword] in reply [this format should continue according to the number of services to which the consumer is subscribed]. To stop all services text STOP ALL.

The consumer should then not be charged for any service until they have texted a reply to confirm their intent. If no reply is texted within 24 hours then the consumer should be unsubscribed from all services on that shortcode to which they are subscribed.

- Messages sent to confirm a STOP command should not state a consumer has unused credit still available unless this is the case.
- Messages sent to confirm a STOP command should make clear that by replying the consumer will opt back into the service. To do this effectively PhonepayPlus strongly suggests that services use of the word RE-SUBSCRIBE.

This Notice should be considered effective immediately as of its date of publication (16 July 2008).