



## **MEF Response to the PhonepayPlus consultation on mobile phone-paid services and their marketing**

### **Introduction**

The Mobile Entertainment Forum (MEF) is a global trade body which, since launching in 2000, has actively promoted the mobile entertainment industry as an identifiable and significant sector, with specific commercial structures and interests. By bringing together thought-leaders from across the value chain, MEF has created a focal point for the industry to work together on global issues and local priorities to accelerate the industry's growth.

MEF has 160 members spanning the whole range of mobile entertainment activities including music, film, TV and video companies who create and package content; the publishers, retailers, service providers and technologists who sell and deliver it; and the network operators who get it to your mobile phone.

MEF also has representation in the Americas, Asia, and EMEA, providing local member benefits, such as workshops, panel discussions and localised initiatives.<sup>1</sup>

### **Summary response to the consultation**

MEF welcomes the opportunity to respond to the Phonepayplus (PpP) consultation and would like to thank Paul Whiteing and Mark Collins for speaking at the event hosted by Denton Wilde Sapte LLP on 1<sup>st</sup> September 2008.

MEF completely agrees with PpP that trust is the key to growing mobile phone-paid services. Our position has always been that consumers must have all the relevant information available so that they can make an informed decision as to whether or not to engage in a service or purchase a product. However, after careful consideration, MEF does not agree with several proposals in the consultation.

This response concentrates on the three main areas of concern highlighted by PpP:

- Unsolicited text message promotions;
- A lack of transparency and of pricing clarity; and
- Subscription services.

It has been difficult to determine whether the proposals put forward by PpP are in keeping with the Better Regulation Executive principles of good regulation because of a lack of information contained in the consultation.

PpP should recognise and appreciate commonality in responses received from other trade organisations. This reflects the open conference of a wide range of mobile stakeholders towards a generally agreed, uniform industry position on the key issues and proposals.

### **Number of complaints**

The significant number of complaints has been hard to understand when there have been no significant increases in the marketing of mobile phone-paid services from the previous year. There is, understandably, an assumption on the part of PpP that the increase in complaints suggests an increase in non-compliance. The consultation document states, "*This suggests that*

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<sup>1</sup> For more details, please visit [www.m-e-f.org](http://www.m-e-f.org).

*some mobile phone-paid services are being marketed more aggressively and with more consumer risk than before*". However, that is not borne from the evidence presented in the consultation document – it is an assumption. As PpP acknowledges, landlines are being used less and less to purchase paid for content. A greater range of technical applications are 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. MEF members have stated that network operators are now sending complaints to PpP instead of sending them to call centres of service/information providers, which may account for the increase in the number of complaints.

Mobile phones have become the main device for such purchases and given that each mobile phone equates to one consumer, it is reasonable to assume that there will be more complaints made without there being an actual increase in harm caused. However, the numbers of complaints also need to be put into context. The consultation states that, *"the public now spends more than £460 million on ringtones, games, wallpapers and other services, a further increase on 2006/7"*. The number of paid for text messages runs in the millions in order to generate such revenues and the level of complaints received by PpP form a very small percentage of these. Clearly, complaints must be investigated and any breaches of the PpP Code must be dealt with effectively, but MEF would ask PpP to realise that there may be reasons other than increased non-compliance that have led to this happening.

For example, the name change from ICSTIS to PhonepayPlus may have served in making PpP more accessible to consumers as was the intention. While the consultation states that PpP 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, MEF suggests that in the interests of proportionality, fairness and transparency, PpP conduct a survey to determine its influence.

Equally, there has been a change in the way complaints are recorded. MEF members have asked PpP to see what the level of complaints would have been for the first three months of 2008 had the old system been used to determine whether the process was a contributing factor.

#### **Mobile phone-paid Services and the PpP Code**

MEF believes that the PpP Code of Practice can adequately deal with all the issues raised in the consultation – whether the concern is marketing of services, use of the word "FREE" or an inability for consumers to exit services. 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. There seems to be no evidence presented for increasing the regulatory burden on the industry. For example, in paragraph 2.7 of the consultation it states:

*"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."*

Each of the above issues can be enforced by the existing Code of Practice. The consultation states:

*“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.”*

Each of the risks highlighted above are currently covered by a Code provision as cited in the consultation. The Sections are 5.2 (legality), 5.4 (Fairness), 5.7 (pricing information), 5.8 (contact information), 5.14 (STOP command) and 7.2 (subscription services).

Perhaps what is needed is greater dialogue and arguably more prescription in helpline notes to state categorically what is required of the industry in order to ensure compliance with, for example, the provision of unambiguous and clear terms. MEF would welcome dialogue with PpP and its members to discuss this option.

There is also a substantial argument for a comprehensive Statement of Expectation on advertising services across all relevant media: Web, WAP, print, and for providing clear best practice examples.

### **MNO enforcement**

The Mobile Operators enforce their contracts individually through the issue of Yellow Cards and Red Cards to aggregators. This is a system that has seemingly worked well. MEF would encourage PpP and the MNOs to combine efforts to ensure Code compliance and that consumers are protected. MEF would be willing to assist in this discussion. Some of the PpP proposals are not integrated with the operator CoP.

### **Promotional messages and consumer opt-out**

Questions 5-7: MEF agrees with the proposals.

Where services:

- a) carry a charge to which the consumer has not consented;
- b) immediately accesses a mobile website when a promotional SMS message is opened and a charge occurs;
- c) do not contain adequate information to consumers on how to opt out of receiving any further promotions; or
- d) are unsolicited,

the industry expects PpP to take firm action.

Question 8:

MEF agrees that 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.

Questions 9-11: MEF agrees.

Question 12:

We agree that where chargeable or reminder messages, either for subscription or Virtual Chat Services, contain promotions for other services, such promotions should be placed after any information given relating to the original service. We also agree that the message should clearly distinguish the original service information from any promotion related information.

### **Marketing lists**

#### **Recycled MSISDN**

As acknowledged in the consultation, because service providers retain records of MSISDNs that have been 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.

If a service provider can show this to be the case, then it is a technical breach of the Code and MEF would expect PpP to treat it as such. MEF is unclear how service providers would be able to present firm evidence or some substantive record that the MSISDNs on their opt-in lists have not been recently recycled before the opt-in lists are used. We would welcome clarification from PpP on this area.

The consultation states:

*“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.”*

MEF would ask PpP to explain how an aggregator can enforce such a rule with its information provider?

Question 15:

Consumer confusion as to previous opt-in.

The PpP consultation states that there are instances when a consumer complains to PpP of an unsolicited promotional SMS message, only for it to then be discovered 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. The consultation then proposes that because phone-paid services are, more often than not, for products that involve instant gratification and consumption, 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.

MEF does not agree with this proposal. The fact is that where evidence shows there has been an opt-in then no breaches have taken place. Adding extra conditions on ensuring that the service should start 2 weeks between the opt-in and commencement of a regular service is arbitrary. A service provider could find themselves in breach for obtaining the required consent but commencing the service after 15 days – not two weeks. Our members have additionally raised the query as to whether such a limit would merely encourage the immediate sending of a promotional text to the consumer in order to comply with this two week opt-in period. It certainly does not seem to deal with the issue of consumer confusion.

Question16:

If PpP decides to introduce the two week rule then MEF would agree to the proposal to exempt promotions tied to a specific date.

### **Transparency and Fairness**

PpP proposes 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.*

We would argue that this is already covered by the Code. Promotional material must not 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.*

MEF would welcome more clarity on how this information would appear on websites and how often.

Question 20:

Phone-paid services that charge per page viewed

MEF agrees that 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.

Question 22:

Text based chat services

MEF agrees with the proposed Statement of Expectation conditions around transparency of information for Text-based Chat Services but wishes that PpP recognise that the majority of text based chat services are NOT subscription based. They are simply 'one in, one out' services requiring MOs, which do not bind a user to a service. Therefore, there is no significant problem across the board with these services.

### **Subscription services, joining fees and the STOP command**

The PpP Code already provides adequate regulations governing the provision of subscription services, both through general requirements around transparency and legality, and a specific set of provisions set out in section 7.12.

MEF would argue that there should not be 'crackdowns' but continued enforcement of the existing rules. It is clear that the current rules work and can be – and are – enforced by PpP. One of the key concerns for members in this area was that the requirement to ensure that a consumer provides extra final confirmation that they wish to subscribe to a service will effectively add another layer to the existing steps which a consumer must take in order to subscribe to such services. It is, as such, not justified.

Our members have made it clear that consumers generally purchased content as an impulse purchase to fill time and therefore they were concerned that any extra barrier to slow the process would make the key difference between a purchase and a non-purchase. They raised concerns that the new requirements would not lead to a consolidation of the current process but would simply add another step to it. There was general concern that the PpP proposals were merely

attempting to patch up the current problem as opposed to attempting to solve the problem from the source.

Concern has been raised by members that, with the increasing number of rules facing the industry, consumers would be placed second in line to abiding by the regulations. It was suggested that the idea to require a second confirmation text was not thought out and this would add no extra consumer protection.

There has been a suggestion by one member that it would be useful to obtain statistics regarding the number of complaints which occur on the same day as the receipt of the text containing the terms and conditions compared to the number of complaints received weeks later when consumers get their phone bill. If most consumers complain when they have received their phone bill it was suggested that this may be an indication that an extra confirmation text sent at the time of purchase would not solve any problems.

As regards the applications process, members have noted the possibility that a dramatic change might occur in so far as it would alter the relationship between information and content providers. A number of issues also arise as to enforcement, for example where a service provider acts for a number of information/content providers, one of whom is in breach. In this scenario what is the impact on the service provider? Many members also queried why the regime applied to certain services only – again this of itself causes problems as to enforcement if a service provider deals with a mixture of services some of which fall inside and some outside the scope of the prior permission regime.

#### **Prior permission**

MEF members have indicated that they do not believe sufficient information has been provided to allow an informed decision on the implementation of a prior permissions regime.

For example:

- Who needs to apply for permission
  - Is it the SP on behalf of the IP/CP?
  - Will it be one PPC per IP?
  - Can an SP have one PPC and then list all the CPs it has operating on its numbers and the service types they offer?
- Will the PPC need to have evidence of all the advertising that is likely to take place before being granted?
- How much is this going to cost?
- How long will it take in practice?
- What happens if a CP breaches the Code? If PPC is withdrawn – will it be just for that one IP for that service type?

All of the above issues should, ideally, have been highlighted in the consultation. There is a big difference for example if the SP has to apply for permission rather than the IP. MEF would welcome a meeting between our members and PpP to discuss the options available and how they would be implemented in practice.

In relation to clarity for re-subscribing to subscription services, MEF does not believe that the additional Notice is required. Where it is clear that the consumer has not been provided with the necessary information and may have been misled, then a potential breach of the Code will have occurred and PpP can take action.

**Conclusion**

MEF would welcome a follow up meeting with PpP to clarify a number of issues. We have asked members to quantify some of their concerns and we hope to be able to provide evidentiary statistics as soon as possible.

If you need any more information or have any questions, please do not hesitate to contact Suhail Bhat at [Suhail@m-e-f.org](mailto:Suhail@m-e-f.org)

MEF  
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