

Communications Consumer Panel response to the consultation on the OFT's proposed Principles for online and app-based games

The Communications Consumer Panel welcomes this opportunity to respond to the consultation on the OFT's proposed Principles for online and app-based games.

The Panel is an independent body that works to protect and promote people's interests in the communications sector. We were established by the Communications Act 2003. The Panel carries out research, provides advice and encourages Ofcom, Government, the EU, industry and others to look at issues through the eyes of consumers, citizens and small businesses.

The Panel pays particular attention to the needs of older people and people with disabilities, the needs of people in rural areas and people on low incomes, and the needs of small businesses, which face many of the same problems as individual consumers. There are four members of the Panel who represent the interests of consumers in England, Northern Ireland, Scotland and Wales respectively.

Background

Clarity around potential costs associated with online and app based games is vital for consumers, as is protection - particularly for children - from undue pressure to purchase and the resultant unexpectedly high bills. Such clarity and protection should not impede access to and enjoyment of such games; rather it should inspire confidence in the sector as well as providing proportionate consumer protections. The Panel therefore welcomes and supports the development of these Principles - which address the provision of clear, accurate material information, clear commercial content, avoiding aggressive or exploitative commercial practices and preventing unauthorised payments.

In brief, the Principles require:

1. Information about the costs associated with a game should be provided clearly, accurately and prominently up-front before the consumer begins to play, download or sign up to it or agrees to make a purchase.
2. All material information about the game should be clear, accurate, prominent and provided up-front, before the consumer begins to play, download or sign up to it or agrees to make a purchase. 'Material information' includes any information necessary for the average consumer to make an informed decision to play, download or sign up to the game or to make a purchase.
3. Information about the business should be clear, accurate, prominent and provided up-front, before the consumer begins to play, download or sign up to the game or agrees to make a purchase. It should be clear to the consumer who he/she ought to contact in case of queries or complaints. The business should be capable of being contacted rapidly and communicated with in a direct and effective manner.
4. The commercial intent of any in-game promotion of paid-for content, or promotion of any other product or service, should be clear and distinguishable from gameplay.
5. A game should not mislead consumers by giving the false impression that payments are required or are an integral part of the way the game is played if that is not the case.
6. Games should not include practices that are aggressive, or which otherwise have the potential to exploit a child's inherent inexperience, vulnerability or credulity. The younger a child is, the greater the likely impact those practices will have, and the language, design, visual interface and structure of the game should take account of that.

7. A game should not include direct exhortations to children to make a purchase or persuade others to make purchases for them.

8. Payments should not be taken from the payment account holder unless authorised. A payment made in a game is not authorised unless informed consent for that payment has been given by the payment account holder. The scope of the agreement and the amount to be debited should be made clear to the consumer so he/she can give informed consent. Consent should not be assumed, for example through the use of opt-out provisions, and the consumer should positively indicate his/her informed consent.

Response

In welcoming the development of these Principles, the Panel agrees that they should helpfully make clear the OFT's views on businesses' obligations under consumer protection law. We are pleased that they address many of the points that we raised in our response in June this year¹. In this current response we support the creation of the Principles and make a small number of additional observations.

Looking at the Principles holistically we presume that, from April, any app developers that produce content that does not accord with these Principles could face enforcement action under existing UK consumer protection laws. In order for the Principles to work effectively, it is vital that those who flout them not only face sanctions, but are widely seen to do so.

We note that the consultation document states "*Regulations 5 and 6 of the CPRs refer to the effect of a commercial practice on the 'average consumer'. In general, the average consumer is taken to be 'reasonably well informed, reasonably observant and circumspect', as well as possessing such other material characteristics as are relevant to the commercial practice (Regulation 2(2)). However the test is different where a commercial practice is directed to a particular group of consumers (Regulation 2(4)). The*

¹ <http://www.communicationsconsumerpanel.org.uk/downloads/OFT-June-2013.pdf>

test is also different where a clearly identifiable group of consumers is particularly vulnerable to a commercial practice or product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and that commercial practice is likely to materially distort the economic behaviour only of that group (Regulation 2(5)). In either of these cases the average consumer is taken to be the average member of this group.

The OFT considers that most of the games it has examined are either directed at or likely to appeal to children (and that traders can foresee this). As such, we consider that Regulation 2(4) and/or (5) are likely to apply. The OFT is therefore likely to interpret the ‘average consumer’ in respect of commercial practices contained in those games as referring to the average child.”

In relation to the provision of ‘clear and accurate information’ being provided to the ‘consumer’, we would stress that information provided should be understandable to both the player and the person who is paying. This may also have the additional benefit of helping to ensure that individuals (either an adult or child) with a level of learning disability would not be disadvantaged when accessing such games.

We support strongly Principles 1 and 2. We believe that it is very important for consumers to be fully informed before they make any commitment to purchase.

In relation to Principle 2, we would urge that the material information is provided in an easily accessible format - this should include an accessible length of information in Plain English. This industry is ideally placed to provide well-designed, easily accessible and understandable terms and conditions. The ease of setting up various means of app payment may also be worthy of further consideration - for example how easy it is to create a ‘pay as you go’ account for this purpose rather than providing debit/credit card details.

The consultation concerns children’s online games. Apart from the general question of how such games or apps will be defined objectively, we are unsure to

what extent the Principles will also apply to games created for adults but played by children, or non-game apps that include in-app purchases. A wider point is that we consider that many of the Principles could helpfully be applied to games and non-game apps designed for - and played/used by - adults, and perhaps specifically vulnerable adults. For example, we wonder whether Principles 6 and 7 could be extended to vulnerable adults? Further clarity in this area would be helpful we believe.

Certain research studies have suggested that some parents actively share their account password/PIN with their child. If parents choose to do so, it is vital that they understand the potential consequences of such actions - including for app and in-app purchases. This, together with the extended purchasing 'window', strongly suggests that greater user awareness of the purchasing system would be beneficial.

Further to Principle 3, we welcome the discussion of provision of information in relation to queries/complaints. We would also encourage the provision of information about what steps can be taken by a consumer if they want to request a refund or are not content with a businesses' response - or lack of such. In other words, what other remedies or escalation routes beyond contacting the business might be available to the consumer. The Panel also believes that, in any event, businesses should make available a clear and simple process by which complainants can contact them free of charge.

In Principle 8, we would suggest a small amendment - highlighted in italics below: "Payments should not be taken from the payment account holder unless authorised. A payment made in a game is not authorised unless informed consent for that payment has been given by the payment account holder. The scope of the agreement and the amount to be debited should be made clear to the consumer *at the outset* so he/she can give informed consent. Consent should not be assumed, for example through the use of opt-out provisions, and the consumer should positively indicate his/her informed consent." The Panel strongly supports a robust consent process, which we believe should be supported by good and accurate

record-keeping by businesses. This should, in combination with Principle 6 and 7, militate against unexpectedly high bill and/or billing disputes.

In conclusion, as we stated in our earlier response, we are pleased that the OFT is focussed on this rapidly developing area, and suggest that this is an area that may require further research. We do not believe that in-app purchases should be banned. The important point is that consumers must be made aware of the nature and ultimate costs of an app; and in particular, children must be properly protected.