

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Thursday 5th August 2010 TRIBUNAL SITTING No. 59 / CASE 1
CASE REFERENCE: 837475**

Service Provider & area:	mBlox Limited, London
Information Provider & area:	Solera Solutions Ltd, London
Type of service:	Subscription competition service
Service title:	'Text for Gifts'
Service number:	80160 and all other shortcodes on which the service was available
Cost:	£3 / £1.50 per week depending on which text received.
Network operator:	All Mobile Network Operators
Number of complainants:	41

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received 41 complaints between April and June 2010 from members of the public in relation to a subscription competition service operating on shortcode 80160 and others. All of the complainants stated that they had received a text messaging informing them that they had 'won' and that by texting the keyword 'WON' to the shortcode they would be informed of the nature of their prize.

The service was promoted on the website 'textforgifts.com'. During the course of its investigation, PhonepayPlus texted the shortcode with the keyword and received a text response that contained a non-premium rate customer care number, the website address, the prize code and instructions to enter the code on the website and then, 16 hours later, it received a premium rate text from the Service Provider which did not include contact, subscription or prize information.

PhonepayPlus was concerned by the reports that the messages were unsolicited, did not make clear that by texting keyword 'WON', the complainant was entering a £3 (or in some instances £1.50) per week subscription service, and that several text messages appeared to have displayed incorrect pricing information.

Compliance Advice

On 17 December 2009, the Executive was contacted by an SMS aggregator for advice on a service which its client wished to operate in the UK. The service was called 'Text For Prizes' and advice in relation to the service was provided by PhonepayPlus on 23 December 2009 strongly advising the aggregator not to proceed with the promotion in its current form and outlining potential breaches of the Code under the following headings: competition requirements, pricing, subscription and service model.

On the 20 January 2010, the Executive was contacted directly by a representative of a company linked to the Information Provider, who also sought advice from PhonepayPlus on

the proposed service called 'Text For Prizes'. This service was almost identical to 'Text for Gifts' service that is the subject of this adjudication. Following an exchange of further advice, the Executive made the following statement on the 29 January 2010:

'please be advised that your current service does not comply with our Code of Practice'.

The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Service Provider responded to all the Executive's requests for information dated 11, 20, 26 May 2010. The Information Provider undertaking forms submitted by the Service Provider on the 11 June 2010 were accepted by the Executive. The Information Provider was issued a breach letter on 23 June 2010 to which it responded on 30 June 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 5 August 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE LEGALITY (Paragraph 5.2)

"Service 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. Service and promotional material must not facilitate or encourage anything which is in any way unlawful"

1. The Executive submitted that, under paragraph 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions, or (2) the recipient's details were obtained whilst purchasing a similar or related product and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication (this is known as 'soft opt-in').

The Executive submitted that it received 41 complaints in relation to the service. All complainants stated they received unsolicited text messages from shortcode 80160. It made reference to consumer complaints and complaint reports, examples of which read as follows:

*****51696

'I never subscribed to this service.....From what I read online, this company are scamming people randomly from mailing lists of phone numbers they have bought.'

*****52173

'Summary of complaint: Unsolicited text to number that has been added to all direct marketing opt out lists'

The Executive submitted that the Service Provider, on behalf of the Information Provider, had stated that consumers had opted into the service via a user text message to a third party and that mobile phone numbers had been purchased from a

data broker. The Executive submitted that it had questioned both parties in relation to the data broker and established that it had been a sole trader trading under the name of 'Mobile Media Data'. The Executive submitted that, on further investigation, it had established that the Information Provider and the third party data broker both used the same address in London. It noted that it had been disappointed that the Service Provider or Information Provider had been unable to provide opt-in details in relation to the complainants who had alleged the receipt of an unsolicited text message.

The Executive also submitted that the 'STOP' command had been sent 47,847 times to shortcode 80160 and 'STOP ALL' had been sent on 576 occasions.

The Executive submitted that the Information Provider has been unable to demonstrate that the complainants had opted into receive marketing messages and, therefore, it concluded that the marketing text messages received by complainants were unsolicited.

2. The Information Provider stated that the data had been supplied by a sole trader under the name of 'mobilemediadata.com'. It stated that the London address shared by both it and the data broker was an accountant's office which operated various company formation websites. The Information Provider also stated that mail forwarding and registered office services were also provided out of this address and that it was based in Glasgow, but used the London address as a registered office address. It stated that, on this occasion, the data broker had not been able to provide it with the required opt-in information in relation to this service and that this information had been promised to it when it had purchased the third-party data list. It stated that the data had been older than the six-month opt-in period (it stated to have purchased the data in late 2009) and, as such, the data provider had removed this data from its database as it only dealt with marketing lists that had been opted into within six months.

The Information Provider stated that it was of the opinion that the balance of probabilities was not definitive in relation to the proportion of customers texting in 'STOP', 'STOP ALL' and other various stop commands and did not definitively indicate that the text messages were unsolicited. It stated that 80160 was a shared shortcode and, as such, it received a significant number of 'STOP' commands which did not relate to it. It stated that, out of the 47,847 'STOP' and 576 'STOP ALL' messages that came in to shortcode 80160, only 15,504 and 244 respectively were related to consumers that had received the Information Provider's free marketing text message.

3. The Tribunal considered the evidence and noted that the vast majority of complainants stated they had received unsolicited text messages. The Tribunal found that the Information Provider was unable to provide any evidence to show that the mobile phone numbers promoted to had opted-in to receiving such text messages. The Tribunal concluded, on a balance of probabilities, that the promotional text messages had been sent unsolicited and had, therefore, been sent in contravention of paragraph 22 (2) of the Regulations. It followed that there had been a breach of paragraph 5.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

*"Services and promotional material must not:
a Mislead, or be likely to mislead in any way,"*

1. The Executive submitted that the service text messages had been misleading. It made reference to the following example text messages received by complainants:

FreeMsg: Youve won!Txt WON to 80160 to see what you have won.pvd by Texts4Gifts. over 16. Stop?txt stop to 80160. Chance to win every week. Subscribe for £1.50/week

FreeMsg: Youve won!Txt WON to 80160 to see what you have won.pvd by Texts4Gifts. Over16.Stop?txt stop to 80160. Chance to win every week Subscribe for £3.00/week

The Executive was of the view that a consumer who received one of these text messages would have been intrigued to find out what they had won and was, therefore, more likely to reply to the service text message and, in doing so, was misled into subscribing into the service. The Executive made reference to an example of a complaint that raised these issues, which read as follows:

*****58959

'Service Description: I had a text from 80160 claiming I have won a free gift from texts4gifts entering me into a subscription based product. I never gave them my mobile number and have never heard of them and keep charging me £1.50 for these messages. I have no idea how they obtained my number and I am concerned there [sic] attempting to miss lead [sic] the public.

Summary of complaint: See above, but have no idea why I started to get these messages out of the blue. I am concerned if this message was to go onto someone more vounrable them [sic] myself they may be fooled into thinking they have won some big prize and infact there [sic] scamming people into joining there [sic] service.'

2. The Information Provider stated that all prizes had been listed on the website and WAP site, giving both description and quantity. It stated that this information had been added on the initial advice from PhonepayPlus before the service was run. It stated that all customers could see what prizes were on offer and the quantity of prizes on offer through its website/WAP site.

The Information Provider stated that it had also provided a one-day grace period for consumers to determine if this service was to their liking without charge. Consumers had had time to check the prize without a charge. The Information Provider felt that this acted as an extension to the promotional material as no charge was made on the same day of initiation. It stated that, in addition to this grace period, full details of prize, terms and conditions were set out in both the WAP site and website. It stated that 2,639 user text messages responded with a 'STOP' command to end the service without charge, showing that a large number of customers had understood the service.

3. The Tribunal considered the evidence and found that it was not clear from the contents of the text message that, by replying with the keyword 'WON', consumers would be subscribed into the service. The Tribunal concluded that consumers were likely to have been misled into thinking that responding to the service text message would simply reveal what they had won. The Tribunal found that the one-day grace period was not relevant to the question of whether consumers had been misled by

the text messages they received. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

PRICING INFORMATION (COST) (Paragraph 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.”

1. The Executive submitted that the first two complaints regarding the ‘Text For Gifts’ service had both alleged that pricing information was given as ‘£1.50/week’ and not £3 per week, which was the charge for participating in the ‘Text For Gifts’ service. The Executive made reference to the complainants that read as follows:

*****7924

“Service Description: Informed me I had won and should text back to the number above for £1.50 per week. Have not subscribed to any text services.

Transcript: FreeMsg: Youve won!Txt WON to 80160 to see what you have won.pvd by Texts4Gifts.Over 16.Stop?txt stop to 80160.Chance to win every week Subscribe for £1.50/week2

*****1696

“Service Description: Text for gifts: a weekly prize draw

Transcript: Freemsg: youve won! Txt WON to 80160 to see what you have won. pvd by texts4gifts. over 16. Stop?txt stop to 80160. Chance to win every week. Subscribe for £1.50/week”

It submitted that consumers who received the marketing text message with the incorrect premium rate charge for participating in the ‘Text For Gifts’ service had not been fully informed, clearly and straightforwardly, of the cost of using the service prior to incurring any charge.

2. The Information Provider stated that initially the service had been marketed at £1.50 and was then changed at the normal price of £3 per week, although users who subscribed at £1.50 were always charged £1.50 as per the initial campaign text message they had received. It stated in the Informal Representation that the £1.50 and £3 per week services had been run through different service providers.
3. The Tribunal considered the evidence and concluded that there was no evidence that customers who received a promotion text stating the cost was £1.50 per week had actually been charged £3 per week. It accepted the Information Provider’s explanation that the £1.50 per week service had been run through one aggregator as part of a trial of the service and was then moved to a different aggregator at £3 per week. The Tribunal did not uphold a breach of paragraph 5.7.1 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

CONTACT INFORMATION (Paragraph 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 and easily available to the user."

1. The Executive submitted that neither the message transcripts provided by complainants, nor those provided by the Service Provider, had contained a UK non-premium rate customer care telephone number. It made reference to an example of the text messages, which read as follows:

"Youve won!Txt WON to 80160 to see what you have won.pvd by Texts4Gifts.Over16.Stop?txt stop to 80160. Chance to win every week Subscribe for £3.00/week"

2. The Information Provider stated that it had provided sufficient information through the WAP site, which had contained full details of the prizes and a support number with instructions in relation to a 'STOP' command. It stated that the following information had been provided on the WAP site under the 'Support' link:

"Call 0870 479 1158 or email support@textforgifts.com. Or reply back with STOP on the shortcode which you are receiving the messages from."

The Information Provider stated it was not possible to include all this information in a 160 character text message and, therefore, all other relevant information required by the Code had been included on the WAP site, which was made available to the consumer before a charge was made.

It stated that, in addition to the above, every consumer who texted the service received the following text message:

*"Code: *****.Enter prize code via mobile in wapsite or online at textforgifts.com.Prize sent every week.08704791158"*

3. The Tribunal considered the evidence and concluded that contact details had not been provided in the promotional text message, as required by the Code. It noted that providing the information on the WAP site did not meet the requirement of this Code provision. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

DESCRIPTION OF PRIZES (Paragraph 7.6.3b)

"Promotional material must clearly state any information which likely is to affect a decision to participate, in particular:

b) an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restrictions on their availability or use,"

1. The Executive made reference to the text messages received by complainants, an example of which read as follows:

*"You've won! Txt WON to 80160 to see what you have won.pvd by
Texts4Gifts.Over16.Stop?txt stop to 80160. Chance to win every week Subscribe for
£3.00/week"*

It submitted that none of the message transcripts provided by complainants, or those provided by the Service Provider, had contained an adequate description of prizes and other items on offer to all, or a substantial majority, of participants. It also submitted that the message logs had not contained the number of major prizes on offer via the service.

2. The Information Provider stated that, although the initial text message did not include details of the prizes, the WAP site and website featured accurate and descriptive wording regarding all prizes on offer, including the quantity of all prizes on offer. It stated that, due to the vast amount of prizes on offer, it would never be able to list descriptions and quantities within a 160 character text message.
3. The Tribunal considered the evidence and concluded that the text messages did not contain an adequate description of the prizes and that it was immaterial that this information may have been contained on the website and WAP site. The Tribunal noted the difficulty of promoting a competition service using SMS texts without breaching the Code. The Tribunal upheld a breach of paragraph 7.6.3b of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

USE OF WORDS SUCH AS 'WIN' OR 'PRIZE' (Paragraph 7.6.6a)

"Competition services and promotional material must not:

- a) *use words such as 'win' or 'prize' to describe items offered to all or a substantial majority of participants,"*

1. The Executive made reference to the text messages received by complainants, an example of which read as follows:

*"You've won! Txt WON to 80160 to see what you have won.pvd by
Texts4Gifts.Over16.Stop?txt stop to 80160. Chance to win every week Subscribe for
£3.00/week"*

The Executive submitted that it was of the opinion that the use of words such as 'win' or 'prize' would also apply to the word 'won' and, therefore, paragraph 7.6.6a of the Code also applied to the above marketing text message, as all of the message transcripts provided by complainants, and those provided by the Service Provider, had contained the word 'won'.

The Executive made reference to a statement provided by the Information Provider in response to the Executive's query regarding the prize distribution; the statement read as follows:

"Solera: All customers who text the keyword WON were all winners, therefore the prize distribution is 100% to these users. In addition to this these users were pre-determined from a much larger database of users. Our pre-selection process equates to roughly 40% of our total database of mobile users - meaning 40% of our overall database were selected as being winners."

Customers won up to 500 text messages to use from their handset via WAP or online. We can provide the text message sent to them with their winning prize code.”

It submitted that it was of the opinion that either all, or the substantial majority, of participants had been offered the same item; in this case, 500 SMS credits. This appeared to have been confirmed by the Information Provider and supported by the Executive's monitoring of the service.

2. The Information Provider stated that customers were pre-determined from a larger database as winners. It stated that it had ensured that no member of the public who was not pre-determined from its database to be a winner was able to text in the word 'WON' and subscribe to the service.

The Information Provider also stated that the prize was not offered to the majority of its database, as it had selected less than 40% as winners – this 40% then received the “You've won” text message.

3. The Tribunal considered the evidence and concluded that everyone who had participated by texting in the keyword 'WON' to the service had subsequently won a prize. The Tribunal noted that the Code provision was not restricted to use of the word 'win' or 'prize', but also applied to other similar words such as 'won'. It found that, in light of the fact that every participant had won a prize, the use of the word 'won' had breached the Code. The Tribunal upheld a breach of paragraph 7.6.6a of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

SUBSCRIPTION INITIATION (Paragraph 7.12.4b-e)

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

- b) confirmation that the service is subscription based,*
- c) 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 messages being sent,*
- d) the charges for the service and how they will or can arise,*
- e) how to leave the service,”*

1. The Executive submitted that the required information had not been supplied in the free subscription initiation text message, as required under paragraph 7.12.4b-e of the Code. The Executive made reference to its monitoring exercise, as follows:

The Executive texted the keyword 'WON' to shortcode 80160 on 4 May 2010. The Executive then received the following text message, which read as follows:

“Freemsg:Code:342721c9.Enter prize code via mobile in wapsite or online at textforgifts.com.Prize sent every week. 08704791158”

On 5 May 2010, the Executive received two premium rate text messages charged at £1.50 each. The content of the text messages was as follows:

“Thank you for using textforgifts.com. £1.50. Support 08704791158”

On 11 May 2010 the Executive received two further premium rate SMS charged at £1.50 each. The content of the text messages was as follows:

"Thank you for using textforgifts.com. £1.50. Support 08704791158. Claim code : 8933a4ff"

The Executive made reference to further examples and submitted that these text messages had not provided the information required under the Code and set out in paragraph 7.12.4b-e.

2. The Information Provider stated that the confirmation was contained within the bounceback WAP-push text message in the 'Instructions' section of the WAP site that read as follows:

"... You will receive a weekly SMS message with your prize code on for as long as you subscribe to our service for 3 pounds per week...."

It stated that, in addition to this, further details were provided in the 'Support' section that read as follows:

"... Call 0870 479 1158 or email support@textforgifts.com. Or reply back with STOP on the shortcode which you are receiving the messages from..."

In addition, the Information Provider stated that the initial campaign text message contains the phrase "...Subscribe for £3.00/week ..."

3. The Tribunal considered the evidence and concluded that, upon texting the keyword 'WON' and entering the service, the required subscription initiation information had not been provided. It noted that the information provided on the WAP site was not enough to meet the requirements of the Code. The Tribunal upheld a breach of paragraph 7.12.4b-e of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **serious**.

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- The behaviour of the Information Provider was reckless in: (1) its failure to properly implement compliance advice received from PhonepayPlus which had concluded: '*please be advised that your current service does not comply with our Code of Practice*'; and (2) its provision of incorrect information to the Service Provider, i.e. that the service would not be promoted to consumers on a marketing list.
- There was material consumer harm; 395,833 unsolicited text messages had been successfully delivered.
- The cost paid by consumers was high; one complainant was charged £31.50.
- This was a concealed subscription service and similar services have previously been singled out for criticism by PhonepayPlus.

The Tribunal also commented that the Service Provider had been reckless with regard to its lack of due diligence in respect of its client's proposed service.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had stopped marketing the service without being required to do so by PhonepayPlus.
- The Information Provider had provided refunds to users.

The Tribunal noted the Information Provider's statement that it had sought compliance advice and that this should be regarded as a mitigating factor. However, since the advice received was that the service model did not comply with the Code, this could not be considered a mitigating factor.

The revenue in relation to this service fell within the mid range of Band 5 (£5,000-£50,000).

Having taken into account the aggravating factors and the mitigating factors, including the number of unsolicited text messages and the Information Provider's failure to take account of the compliance advice received that the service was non-compliant, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A fine of £35,000
- The Tribunal imposed a bar on the service and related promotional material for a period of 12 months or until the service is compliant, whichever is the earlier. The Tribunal commented it doubted that this service could ever be compliant.
- The Tribunal also ordered that claims for refunds are to be paid by the Information Provider for the full amount spent by all users, except where there is good cause to believe that such claims are not valid.