

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Monday 26 July 2010 TRIBUNAL SITTING No. 58/ CASE 1
CASE REFERENCE: 831849**

Service provider & area:	Tanla Mobile Limited, London
Information provider & area:	Switch Call Ltd, Bristol
Type of service:	Glamour/adult content subscription service
Service title:	'Super Star Girls'
Service number:	89160
Cost:	£1.50 per five days
Network operator:	All Mobile Network Operators
Number of complainants:	7

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

PhonepayPlus received seven complaints from members of the public with regard to the 'Super Star Girls' subscription service. This service offered glamour and adult content to consumers by way of a subscription via the premium rate shortcode 89160. The service was billed in increments of £1.50 every five days.

The service was promoted on the websites 'britush.com' and 'superstarmob.com' and had been operational since 16 December 2009. The service was promoted via both calls to action on the websites and by text message promotion directly to mobile phone numbers.

Complainants stated to have received reverse-billed unsolicited text messages to their mobile handsets from shortcode 89160. The service websites did allow users to enter random mobile phone numbers into entry field. Once the 'Send' button on the websites was clicked, the mobile phone number inputted would have received a promotional/service text message.

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 both of the Executive's requests for information dated 30 March 2010 in response letters dated 12 and 20 April 2010.

The Executive issued a breach letter to the Service Provider dated 10 May 2010. The Executive received a response to the potential breaches raised in the letter on 8 June 2010 from the Information Provider on the Service Provider's behalf.

The Tribunal made a decision on the alleged breaches raised by the Executive on 26 July 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE LEGALITY (Paragraph 5.2)

“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”

1. The Executive submitted that, under Regulation 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 or service to that now being promoted 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 the ‘soft opt-in’).

The Executive submitted that it received seven complaints about the ‘Super Star Girls’ subscription service. It submitted that five of these complainants reported that the text messages they had received from the service on shortcode 89160 had been unsolicited.

It submitted that the complainants reported that they had received an unsolicited service text message in the following style:

‘Enjoy this week’s movies here <http://mobileglamour.co.uk> [various titles] CService 08449910707 to end /opt out reply stop MNSLTD WF129AF 1.50gbp’

It submitted that these text messages had been reverse-billed at a cost of £1.50 to the recipient.

The Executive made reference to the following complainant statements that read as follows:

******667*

‘A weekly unsolicited text message inviting me to log on to a website to view adult material that I am charged for’.

‘As I have not signed up for these texts or activated an account or even ever replied or connected to the site I was a little dubious about texting Stop in case I got further into the scam’.

******271*

‘Unwanted SMS directing to website that is possibly sexually orientated in content’.

‘I have not subscribed to this or ANY premium rate text service, nor any other service with my mobile (no competitions, voting entertainment etc). Yet I have received 3 SMS messages from this number costing £1.50 ea. I have their details from your site now and will be calling to get a refund. However, I am making this complaint as they can only have obtained my mobile number illegally (or randomly)’

*****980

'Consumer says she has been receiving these messages for a while. She says she hasn't requested for any services'.

*****917

'I have never knowingly agreed to sign up to a promotional service of any sort'.

*****431

'The complainant has been receiving text messages from the shortcode 89160 which have not been requested'.

The Executive submitted that it had monitored the service and noted that the opt-in route on the websites 'britush.com' and 'superstarmob.com' had enabled users to enter any mobile phone number into the website and enter into the subscription service by clicking the 'Send' button.

The Executive submitted that it was of the opinion that the service text messages received by members of the public whose mobile phone numbers were either maliciously or mistakenly entered into the websites had been unsolicited. Furthermore, it submitted that these text messages had been both service and promotional text messages (as this had been the first contact complainants had with the service).

The Executive submitted that it accepted that the actual input of mobile phone numbers by members of the public had been out of the control of the Service Provider and Information Provider; however, it was of the opinion that the risk of unsolicited text messages being sent should have been acted upon and steps should have been taken to mitigate this risk.

The Executive submitted that, in 2009, PhonepayPlus, had made the industry aware of the risks of web-promoted subscription services and the potential for unsolicited text messages being sent to members of the public and being in breach of the Regulations.

The Executive made reference to its news alert to the industry in June 2009 that addressed the issues in relation to web-based entry of mobile phone numbers. It quoted the following extract:

"Web-based entry of mobile phone numbers

"PhonepayPlus has continued to receive a significant number of complaints regarding unsolicited messages, which arise in part from a consumer's phone number having previously been entered on a website.

"Given the risks associated with web opt-in, and the difficulty in proving that a consumer has validly opted into a service (where they have opted in via a website), PhonepayPlus recommends that where users are required to enter in their mobile phone number online, the risk is mitigated by structuring the page as outlined below:

- *A brief statement that confirms where the service content (e.g. an IQ test result) will be displayed (e.g. mobile handset, next screen, etc.)*
- *Mobile number field*

- *Mobile number confirmation field (i.e. a second number field, directly below the first)*
- *A brief paragraph summarising the key terms and conditions positioned directly below the Mobile number and confirmation fields. For example, subscription services should state that it is a subscription service and the cost of participating in the service*
- *An unchecked mandatory tick box stating 'I agree to the terms and conditions', which the consumer must check before being allowed to proceed*
- *Next/submit button*

"After prompting a consumer to enter a mobile telephone number onto the website, the next page generally then requires a user to text a keyword to a shortcode. PhonepayPlus is concerned that on this page key terms and conditions are not made clear to users. PhonepayPlus would expect all key terms and conditions, pricing and subscription information to be included on this page".

The Executive submitted that it was of the opinion that the above guidance had not been taken into consideration by the Service Provider and Information Provider of this service, and it was therefore likely that complainants' mobile phone numbers had been at best mistakenly entered into the service by other individuals. It submitted that this harm was exacerbated by the fact that, following the mobile phone numbers being entered into the websites, recipients of the unsolicited text messages had then been subjected to the receipt of a billed text message without any interaction with the service on their part.

2. The Information Provider responded on behalf of the Service Provider to the Executive's submissions as follows:

The Information Provider stated that it had been approached by one of its resellers who, in turn, had a client looking to move its subscription text message service to another provider. The Information Provider stated that it has a good relationship with the Service Provider and had agreed to offer the service to its reseller using the Service Provider as the gateway.

The Information Provider stated that it had been given the current list of subscribers and had been assured that these were all opted-in clients and had been given the text messages in question to broadcast.

The Information Provider stated that a premium text message subscription service was not its normal day-to-day business and the Service Provider had kindly advised it of some measures that should have been put in place that were overlooked. It stated that the service was paused from 4 February 2010 and throughout the remainder of February while these issues were put right. It also stated that these included removing all web opt-in subscribers from the weekly broadcast. It stated that a free text message was broadcast, confirming the new shortcode and 'STOP' details to the end-users (again under the guidance of the Service Provider).

The Information Provider stated that it had been quick to respond to any issues, quick to refund (in most cases, more than the cost) any subscribers who made complaint regarding the service and that the level of complaints in relation to the number of subscribers had been very low.

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the complainants referred to by the Executive had received unsolicited service text messages from the Information Provider for the purposes of direct marketing without having consented to receiving such a communication (in contravention of the Regulations). The Tribunal noted that the system of double web entry of mobile numbers had not been used at the time of the alleged breaches, thereby increasing the risk of mistaken or 'rogue' mobile phone numbers being entered into the website. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO SUBSCRIPTION REMINDERS (Paragraph 7.12.5)

"Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 must be sent free to subscribers"

1. The Executive submitted that subscription services are required to send a free subscription reminder text message to users either once a month or every time a user spends £20, depending on which occurs first. It submitted that this text message must contain the information required under paragraph 7.12.4 a–f which includes:
 - a. name of 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,
 - f. service provider contact details.

The Executive submitted that, on 12 April 2010, it received a response to its preliminary investigation letter, including full complainant call logs that appeared to show that a subscription reminder text message had not been sent, or that the subscription reminder text message was charged and had lacked the required information.

The Executive made reference to an example from the call logs provided by the Service Provider:

******917 received subscription service text messages on the following dates from shortcode 89160:*

18/12/2009, 24/12/2009, 31/12/2009, 06/01/2010, 11/01/2010, 16/01/2010, 29/01/2010

It submitted that each of the above text messages were billed for at a cost of £1.50 and had contained the following content:

'Enjoy this weeks movies found here <http://mobileglamour.co.uk/poledance> CService 08449910707 to end / opt out reply stop MNSLTD WF129AF 1.50gbp'

It submitted that at no stage did the call logs provided indicate that the mobile phone number was sent a free subscription reminder text message.

2. The Information Provider stated that the reminder text message had been overlooked, although this had not been intentional and had been assumed to have been automated. It stated that it had now put a reminder service in place that read as follows:

'Free reminder of your subscription to Mobile Glamour. Opt out of your subscription any time by sending STOP to 89160 Cust Service 08449910707 MNSLTD WF129AF'

3. The Tribunal considered the evidence and noted the Information Provider's acceptance of the breach. It concluded that the message logs provided by the Service Provider demonstrated that no free subscription text message had been sent to the users once a month or after they had spent £20. The Tribunal upheld a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The behaviour of the Service Provider was careless in that it gave insufficient attention to the value-chain in relation to the multiple information providers involved. In addition, the Tribunal noted that a marketing database was used and the Service Provider had failed to sufficiently examine the integrity of the information within that database.

In mitigation, the Tribunal noted the following factors:

- The Service Provider did co-operate with PhonepayPlus.
- The Service Provider stated that it has offered refunds to users.

The revenue in relation to this service was in the low range of Band 4 (£50,000-£100,000).

Having taken into account the aggravating factors and the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

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 £20,000
- The Tribunal commented that it expected claims for refunds to continue to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.