

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 15 October 2009**

**TRIBUNAL SITTING No. 38/ CASE 3**

**CASE REFERENCE: 785830/AC**

Information provider:	Reach Communications Limited, Isle of Man
Service provider:	Zamano Limited, London
Type of service:	SMS points incentive gift claim – subscription service
Service title:	'Pointfactory'
Service numbers:	87333
Cost:	£3 per week
Network operator:	All Mobile Network Operators
Number of complainants:	300

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

#### **BACKGROUND**

The PhonepayPlus Executive (the 'Executive') received more than 300 complaints from November 2008 onwards in relation to a subscription service operating on shortcode 87333. These complaints related to the receipt of unsolicited or misleading messages from the service. Consumers were opted into a subscription via a premium rate text message, through which they accrued 'points'. Consumers were then able to exchange these points for gift items on the 'Pointfactory' website. Consumers could also play games on the website to accrue extra points. Consumers were reportedly also able to accrue points through inviting their friends to sign up, or through completing online surveys. The Service Provider informed the Executive on 20 April 2009 that marketing of this service had ceased through its systems, but it allowed the service to continue to operate for those consumers who were already opted into the subscription service.

During the course of its investigation, the Executive became concerned that consumers had received marketing messages or charged text messages without providing full verifiable opt-in confirmation, and that consumers were not being provided with sufficient details of the service (i.e. how it worked, how much it cost and what was being offered to users). In addition, the Executive was concerned about the identity of the Information Provider as the individuals involved appeared to have historically been involved in non-compliant services.

#### **(i) The Service**

This was a service whereby subscribers earned points to their mobiles and were then able to exchange them for various product items via the poinc.tv website.

Upon sign-up, every user received 1,500 points, and 1,500 more points were reported to be awarded every week thereafter. Within the website, there were several ways for the users to increase their total points; for example, they could play online games such as 'Hangman',

'Memory' or 'Sudoku'. Users were also awarded points for inviting their friends to join. The site contained a 'Shop' section, where consumers were able to trade their points in for products.

The service operated on shortcodes 80405, 81404, 78181 and 87333. It appeared from the call logs that, at the end of March, Tanla Mobile Limited ('Tanla') subscribers were migrated onto shortcode 87333 (which belongs to Zamano Limited). This coincided with Tanla discontinuing the service on its shortcodes, following the notice of investigation. The service then continued to operate on Zamano shortcode 87333.

According to the Information Provider, the service was promoted in a variety of ways, including through the sending of a promotional message by a third party called Froggie S.L. This marketing text message read as follows:

*“FreeMsg: You have 1,500 unredeemed value Points. Txt: VALUE to 80405 and redeem for Products. www.poinc.tv Subscription3gbp/wk Stop?txt stop Support08448714032”*

## **(ii) The Investigation**

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.7 of the Code.

The Executive gave preliminary warnings to the Information Provider on 7 January 2009, and advised it that this service should be suspended. Having sent a request for information under paragraph 8.3.3 of the Code, the Executive subsequently sent a breach letter dated 26 June 2009 to the Service Provider raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.2 and 7.12.3a of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code'). The Service Provider provided a formal response to the breach letter, including an Information Provider pass-through undertaking on 6 July 2009. The Executive sent the same breach letter to the Information Provider including further questions in accordance with paragraph 8.3.3 of the Code on 22 July 2009. The Information Provider responded to these further questions on 3 August 2009.

The Tribunal made a decision on the breaches raised by the Executive on 15 October 2009.

## **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 Section 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, either where the recipient has not specifically consented to receiving such unsolicited promotions or where the recipients details were not obtained whilst purchasing a similar, or related, product or service to that being promoted.

The Executive submitted that it received a large number of complaints (more than 300) from consumers, a large proportion of which stated that they did not solicit the promotional text message. The Executive made reference to ten specific examples of the complaints received, including the following complaint:

*'The complainant has been sent unsolicited text from the shortcode 87333 which has not been requested. O2 advised the complainant to text STOP which they did and received a confirmation text back that it has been cancelled. The complainant also advised that they received another from a different shortcode which O2 have advised is for 'Smart text.'*

The Executive submitted that the complainants' testimonies, together with a lack of substantive evidence produced to show that consumers had opted into receiving text messages of a promotional nature from the Information Provider, indicated that these promotional text messages had been sent unsolicited.

2. The Information Provider stated that the information already provided to the Executive in response to its preliminary investigation demonstrated that the provision of Section 22 of the Regulations had been complied with fully. It stated that it had been able to demonstrate that every subscriber who joined the service did so by sending in a valid user text message.

The Information Provider refuted each of the ten sample complaints submitted by the Executive. It refuted the above example by commenting that the Service Provider did not operate any 'smart text' services.

The Information Provider also stated that the marketing of the service was achieved through working with a company called Froggie S.L. in order to invite users to the service. Furthermore, the service was promoted by a combination of text message marketing, and via the website [poinc.tv](http://poinc.tv) and <http://pointfactory.co.uk>.

3. The Tribunal noted that, contrary to the Information Provider's assertion that it had provided valid opt-in evidence, it had actually provided evidence that every user of the service had sent a user text message to the service prior to being subscribed to the service, but this was not the same as providing evidence that the recipients of the first promotional text message (which would have been received before any initial user text message had been sent by the user) had opted-in to receive it. The Tribunal considered the evidence and, on the basis of the complainants' evidence, and in the absence of any evidence of user opt-in in relation to the first promotional text message, concluded that users had been sent unsolicited text messages for the purposes of direct marketing. As a result of this, there had been a contravention of section 22 of the Regulations and the Tribunal therefore upheld 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 mislead, or be likely to mislead, in any way.'*

1. The Executive submitted that the promotional text message had misled

consumers into opting into the service. The promotional text message read as follows:

*“FreeMsg: You have 1,500 unredeemed value Points. Txt: VALUE to 80405 and redeem for Products. www.poinc.tv Subscription3gbp/wk Stop?txt stop Support08448714032”*

The Executive submitted that the promotional text message was worded in such a way as to mislead the consumer into believing it to have been sent by his/her mobile network.

It submitted that it was of the opinion that, to a consumer without any prior knowledge of the ‘Pointfactory’ service, the wording, “*you have 1,500 unredeemed value points*” may have misled the consumer into believing that the text message had been sent from his/her network operator and, therefore, the consumer would not have been on notice to seek out a charge attached to sending the keyword to the shortcode.

The Executive also submitted that it did not believe that providing the website address in the text message had been sufficient to inform the consumer of the nature of the service.

The Executive made reference to a number of sample complainants, such as:

*‘What was the content of any texts received? ‘Dear Points Factory member, 1500 points have been added to your account. Your new balance is 3000. Continue to enjoy at www.pointsfactory.co.uk’ “ Detailed explanation of the problem – “Yesterday I’ve gone on that and put my number in there on the O2 services (O2 surprises).” That was when the messages started. Other than the O2 promotion he has not signed up for any other services.’*

*‘What was the content of any texts received? ‘Dear Point factory member 1,500 points have been added to your new account, your new balance is 3,000 continue to enjoy www.pointfactory.co.uk “ Detailed explanation of the problem – i might have sent them a message, i did know it was them , i thought it was o2. I did not mean to subscribe to the service.’*

2. The Information Provider made reference to its response to the Executive’s breach letter, in which it had stated that it did not agree with the Executive’s belief that the “marketing messages mislead the consumer into opting in to the service by sending a user text message to the shortcode provided”. It further stated that the use of the expression “you have 1,500 unredeemed value Points” was a basic marketing tool, and in no way dissimilar to other well known expressions or marketing ‘hype’, which appeared in all media forms.

It stated that a recipient was given a telephone number that he/she could call for further information regarding the nature/purpose of the service, and/or origin, of the message. The purpose of giving a website address was to provide the recipient with an additional way of obtaining information regarding the service.

Furthermore, there was nothing in the body of the text message which suggested that the recipient’s network operator has sent it to him/her. The text message was very clear in explaining to the recipient that it was a subscription service which charged £3.

It stated that after the initial user text message, subscribers received the following welcome text message:

*“FreeMsg: Welcome to Point Factory! Goto [www.pointfactory.co.uk](http://www.pointfactory.co.uk) Login password 12345678 Subscription 3gbp/wk includes 1500 pts to Stop txt stop Help08448714032”*

It stated that, from the moment of the original user text message, the subscriber had 1,500 value points credited to his/her website account. Users were at liberty at any time to cancel their subscription. If they did so within seven days of receiving the user text message, they would not have been charged anything. They could, in that seven-day period, redeem the value points and then cancel their subscription.

The Information Provider further submitted that, in the following weeks and for so long as they remain subscribed, users received weekly text messages, such as:

*“£3 Renewal message #1  
Dear Point Factory Member, 1500 Points have been added to your account. Login to [www.pointfactory.co.uk](http://www.pointfactory.co.uk) to see your new balance. Continue to enjoy the service.”*

*“£3 Renewal message #2  
Dear Point Factory Member, 1500 Points have been added to your account. Login to [www.pointfactory.co.uk](http://www.pointfactory.co.uk) to see your new balance. Continue to enjoy the service.”*

It stated that for, so long as users remained subscribed, and as required by the Code, users received a text message at the end of each month which read (the actual points balance may of course vary between subscribers):

*“£ Renewal message week #3  
Dear PointFactory user New Point balance is 250000 [www.pointfactory.co.uk](http://www.pointfactory.co.uk) Password 12345678 Subscription3gbp/wk and 1500 points to STOP Txt Stop Help08448714032”*

The Information Provider stated that, not only was the service compliant in respect to its submission of text messages and the detail set out in such text messages, but any argument that consumers were ‘misled’, whether by the original marketing text message or subsequently, lacked substance or merit.

The Information Provider responded to the sample complaints submitted by the Executive and commented that, in relation to the first sample complaint, it could not make sense of what the consumer was saying in this instance. In relation to the second sample complaint, it stated that it indicated a perception on the part of the recipient that the communication they received was sent by his/her network operator. However, nowhere in the body of the text message was there any mention made of the network operator.

The Information Provider stated that the recipient made an erroneous assumption as to the origin and nature of the text message, or related service, and this did not mean that the service text message was misleading. It simply meant that the user had made a mistake.

3. The Tribunal considered the evidence and noted that some users had

assumed that the promotional text message was from their network operator. The Tribunal concluded that, whilst there was no evidence of a deliberate intention to mislead consumers into believing the message was from their network operator, the promotional text message did not make it sufficiently clear that it was from a commercial service for which payment was required, and this lack of clarity was, therefore, likely to mislead consumers. The Tribunal also considered that the use of the wording 'unredeemed points' found in certain text messages implied a previous relationship between the user and the service that was also likely to mislead, and had probably contributed to some users believing the message was from their network operator. Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
PRICING (PROMINENCE) (Paragraph 5.7.2)**

*'Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.'*

1. The Executive referred to the subscription element of the promotional text message which stated as follows:

*"...Subscription3gbp/wk..."*

The Executive submitted that the pricing information was written in such a way, without sufficient spacing and with abbreviated words, which together acted to make its meaning confused and hard to decipher without close examination. It therefore alleged that a breach of 5.7.2 had occurred.

2. The Information Provider stated that it felt that the plain meaning of the wording, and the combination of words, was clear on its face. Whilst it was written without spacing, the first letter of the word 'subscription' was capitalised, as opposed to the word being written in 'ALL CAPS', which was less clear. Furthermore, the number '3' was clearly prominent in relation to the letters that surrounded it.
3. The Tribunal considered the evidence and concluded that the wording "*Subscription3gbp/wk*", read in the context of the entire text message, required close examination on the part of the user in order to decipher its meaning. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR  
SUBSCRIPTION PROMOTIONAL MATERIAL (Paragraph 7.12.3a)**

*'Promotional material must clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers.'*

1. The Executive referred to the subscription element of the promotional text message which stated as follows:

*"...Subscription3gbp/wk..."*

The Executive submitted that the subscription information was not clear or plainly visible. It submitted that the subscription information was written in such a way, without sufficient spacing and with abbreviated words, which together acted to make its meaning unclear that it was a subscription-based service.

2. The Information Provider stated that the word 'subscription' was transparent. It was the first word to be used. The presence of '3gbp/wk', immediately after the full spelling of the word 'subscription', was clear in that it informed the consumer that this was a subscription service which cost three Pounds Sterling per week.
3. The Tribunal considered the evidence and concluded that the wording "*Subscription3gbp/wk*", when read in the context of the entire text message, did not clearly indicate to the recipient that the service was subscription-based. The Tribunal noted that insufficient steps had been taken to bring the subscription element to the attention of the recipient, particularly given the overall context of the message which suggested an existing relationship with the sender through the reference to 'unredeemed points'. This meant that it was likely that the recipient would not have expected that replying to the message would initiate a subscription service. The Tribunal upheld a breach of paragraph 7.12.3a 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 Information Provider's behavior was deliberate in relation to the misleading nature of the text messages and the lack of opt-in evidence.
- There was material consumer harm – there were 300 complaints.
- The cost paid by individual consumers was high – some complainants were charged over £20 for subscription to the service.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider informed the Executive that refunds had been made and that there was a good customer service procedure in place for dealing with complaints.

Having taken into account the aggravating and mitigating factors, 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 large number of complaints, the significant scale of the consumer harm and the level of revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A fine of £140,000;
- The Tribunal imposed a bar on all subscription services and related promotional material for a period of 12 months starting from the date of notification;
- The Tribunal ordered that claims for refunds are to be paid by the Information Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.