

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 23 July 2009

TRIBUNAL SITTING No. 32 / CASE 1

CASE REFERENCE: 796008/AC

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| Service provider: | Sybase (UK) Limited |
| Information provider: | M.E Media Market, Tel Aviv |
| Type of service: | SMS quiz subscription |
| Service title: | TriviCell |
| Service number: | 80210 and 83900 |
| Cost: | £5 initial join up fee and £4 per week (Four £ messages) |
| Network operator: | All mobile operators |
| Number of complainants: | 70 |

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

BACKGROUND

The PhonepayPlus Executive ('the Executive') received 70 complaints regarding a service operating on shortcodes 80210 and 83900. The TriviCell service was promoted through internet web banners and operated through a website and through premium rate text messages. The service asked consumers to answer true or false trivia questions that had been sent to their phones in order to win a prize. Winners were chosen at the end of a two-month period from the pool of participants who had answered the most correct questions over the period. The service cost £4 per week with an initial joining fee of £5. The service was voluntarily deactivated by the Service Provider on 24 April 2009 following notification by PhonepayPlus.

The majority of complainants were consumers who stated they had received unsolicited premium rate text messages or stated they had been misled into opting into a service which they had not realised was subscription-based.

Promotion

The Service was promoted through various online marketing campaigns operated through affiliate marketers. Marketing had also been reported as having appeared on Facebook, online forums and blogs, which direct consumers to various website landing pages. On the landing page the consumer was asked to answer a question and then, on the next screen, to provide their 'operator' (mobile service provider) identity and their mobile phone number. There were different landing pages which led the consumer to be entered into competitions for different prizes, such as soccer tickets, films, PS3s, computers, iPhones, BlackBerrys, holidays, shopping and fashion items. Each landing page would have had its own subject linked feed-in banner heading.

The Service

Following the consumer entering their mobile number and the identity of their operator (mobile network) into the website they received a message to their mobile which stated:

*"The password for winning great prizes is *****. Insert the Pin online or Reply with OK to 80210"*

The consumer then had the choice of opting in through either entering their pin into the website or by sending the keyword 'OK' to the shortcode provided. None of the complaints received by PhonepayPlus related to the shortcode opt-in method.

Having opted in, the next message the consumer received (from shortcode 83900) was:

"U have joined Trivicell, answer daily Q and win great prizes. For 4Q per week, £1., / MSG received until you send STOP to 80210. Helpline 08458678121"

This message was charged at £5.

The consumer then began to receive true or false questions charged at £1 each until they sent 'STOP' to the shortcode. Examples of these messages are as follows:

"Little Richard was 3ft tall?"

"Supergrass is also the name for an informer in the UK?"

Complaint Investigation

Standard Procedure

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

The Executive sent a breach letter dated 18 May 2009 to the Service Provider raising potential breaches of paragraphs 5.2, 7.6.2a, 7.6.2b, 7.6.3a, 7.12.2, 7.12.4 and 7.12.5 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). A formal response was received from the Service Provider on 28 May 2009.

The Executive issued an addendum to the breach letter to the Service Provider raising a further potential breach of paragraph 7.6.5 of the Code on 29 June 2009. The Service Provider responded to the addendum to the breach letter on 6 July 2009.

The Tribunal made a decision on the breaches raised by the Executive on 23 July 2009 having heard informal representations 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 47 of the complainants had stated that they had not solicited the service's marketing text messages at all, whilst a further 12 complainants had stated that they had visited the service's website and entered their phone number. The Executive made reference to examples of complainants who had stated that they had not solicited the messages and complainants who had stated that they had not entered any details onto the website.

The Executive submitted that the service asked the consumer to enter his or her mobile number into a website. Following this the consumer received a message which stated as follows:

*the password for winning great prizes is *****. Insert the Pin online or Reply with OK to 80210*

The Executive submitted that the complainant logs provided by the Service Provider had shown that no positive opt-in messages had been sent by the complainants either to receive the initial 'PIN' message or the subsequent charged service messages. The Executive made reference to the Internet Service Provider ('ISP') logs provided by the Service Provider as evidence that the consumer had entered the service by entering their mobile number into the website and then confirming this by entering the PIN into the website as provided in the service message. The Executive submitted that ISP logs are not in themselves conclusive evidence of specific consent by an individual to receiving such marketing messages process having taken place.

The Executive stated that it considered that the promotional email which had been sent to recipients of the service to be direct marketing electronic mail for the purposes of the Regulations and that it had been unsolicited.

2. The Service Provider stated that it had supplied copies of ISP addresses as proof of the consumer's opt-in. The Information Provider stated that these entries were double web opt-ins; following entry of a given mobile telephone number on to the relevant website the consumer is sent a text message containing a unique pin code which must then be entered on the same website to activate the service. The Information Provider stated that if the PIN was not entered into the relevant webpage or the consumer did not send a positive user text message in response to the text message containing the PIN the service would not have been activated.

The Service Provider stated that it could not comment on the specific details of the consumer complaints received by the Executive as the detail had been supplied anonymously. In relation to the ISP logs, the Service Provider stated that it had provided details of the double web opt-in process utilised by the Information Provider and stated that it was of the opinion that it was a different opt-in process to that which has been found to be inadequate in previous adjudications; the key difference being the existence of a second stage to the opt-in process where the consumer received a pin code sent to his or her mobile telephone.

3. The Tribunal considered the evidence of the relevant complainants and concluded, on the balance of probabilities, that some who had not opted in through the service mechanism had received the free initial text message and found that in these cases the free message was an unsolicited promotion. The Tribunal noted the ISP logs supplied by the Service Provider but concluded that these were not conclusive that a consumer had initially entered their details into an opt-in mechanism of a website or that the recipient of the initial text from the service was the same person who had entered the mobile number onto the website. The Tribunal therefore upheld a breach of paragraph 5.2 of the Code. However, the Tribunal found that there was no evidence that the service was designed to deliberately send unsolicited text messages and therefore decided not to take into account this breach of paragraph 5.2 of the Code when setting sanctions.

Decision: UPHELD

ALLEGED BREACH TWO COMPETITION SERVICE (DETAILS OF COST OF PARTICIPATION) (Paragraph 7.6.2a)

'Promotional material for competition services which generally cost more than £1 must clearly display:

a. the cost per minute and likely playing time, or the full cost of participation'

1. The Executive submitted that paragraph 7.6.2a of the Code had been breached because the likely playing time (and consequent minimum cost to consumers to win a prize) was not clearly displayed but was hidden away in the terms and conditions.

The Executive submitted that the banner marketing the service mentioned '*three steps*' to winning the prizes on offer, however no details were provided in relation to what the consumer needed to do in order to win the prizes and, more specifically, how much the consumer would be likely to spend before being in with a chance of winning a prize. The Executive made reference to the competition information in the small print at the bottom of the webpage and submitted that this information did not provide the consumer with sufficient information. It did not inform consumers that they would need to answer as many questions as they could from four questions per week for two months in order to win the single prize offered. The Executive further stated that the information did not provide details of how much a consumer was likely to have to spend in order to stand any chance of winning a prize. The Executive made further reference to the wording in the terms and conditions on the webpage and was of the opinion that the '*likely playing time*' information had been hidden away in the terms and conditions and had not been clearly displayed as required by the Code.

2. The Service Provider made reference to the website screenshots submitted by the Executive and stated that they showed not only the detail of the pricing information but also the end date of the relevant competition. The Service Provider made reference to the second webpage image submitted by the Executive which stated that '*The player with the most correct answers in the shortest time wins*'. The Service Provider stated that the Information Provider had received compliance advice from the Executive prior to launching the services and that the subscription service pricing requirements had been the focus of that compliance advice, rather than the pricing requirements for competition services. The Service Provider stated that consumers had been free to leave the service at any time and it was possible that, even if a consumer had left the service before the end of the competition period, he or she might win the relevant prize.
3. The Tribunal considered the evidence and concluded that the terms and conditions referred to by the Executive did not clearly display the cost of participating in the competition to the user as the competition duration was unclear. The Tribunal also found that on some computer screens the user had to scroll down to see the competition end date and, as such, this information had not been displayed clearly. The Tribunal therefore upheld a breach of 7.6.2a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE COMPETITION SERVICE (DETAILS OF OPERATION) (Paragraph 7.6.2b)

Promotional material for competition services which generally cost more than £1 must clearly display:

b. details of how the competition operates and an indication of any tie-breakers.

1. The Executive submitted that paragraph 7.6.2b had been breached because the details of how the competition operates are not clearly shown on the promotion and no tie breaker terms are included in the promotion. The Executive submitted that the banner marketing the service mentioned '*three steps*' to winning the prizes on offer, however no details were provided in relation to what the consumer needed to do in order to win the prizes.

The Executive made reference to the competition information in the small print at the bottom of the landing webpage and submitted that this information did not provide the consumer with sufficient information in relation to how the competition operated. This information does not provide any information in regard to tie breakers. The Executive also made reference to the wording in the terms and conditions found after clicking on 'terms and conditions' on the landing webpage and was of the opinion they did not include any tie breaker information or sufficient details of how the service operated.

2. The Service Provider submitted that the landing webpage stated the pricing information, namely that consumers would be charged £4 per week in addition to a 'sign up' fee of £5 until the user sent 'STOP', and that this information was repeated in the summary terms at the foot of that webpage which also gave the end date of the relevant competition. The Service Provider also relied on the second webpage submitted by the Executive and pointed out that it stated that '*The player with the most correct answers in the shortest time wins*'. The Service Provider stated that the Information Provider had received compliance advice from the Executive prior to launching the services and that the

subscription service pricing requirements had been the focus of that compliance advice, rather than the pricing requirements for competition services. The Service Provider stated that consumers had been free to leave the service at any time and it was possible that, even if a consumer had left the service before the end of the competition period, he or she might win the relevant prize.

3. The Tribunal considered the evidence and concluded that the promotional material did not clearly display how the competition operated and was particularly unclear about how the competition would operate in the event of a tie break. The Tribunal therefore upheld a breach of 7.6.2b of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

COMPETITION SERVICE (KEY TERMS AND CONDITIONS) (Paragraph 7.6.3a)

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

a. any key terms and conditions, including any restriction on the number of entries or prizes which may be won,'

1. The Executive submitted that it had been unable to discover any information on the service's advertising banner or the service's landing page in relation to how many prizes were available to win. The Executive submitted that the quantity of prizes available was only found 'deep' within the terms and conditions of the website. The Executive submitted that in order to see this information the consumer was required to read the small print at the bottom of the webpage and subsequently enter into the terms and conditions by clicking a link within the small print. The Executive submitted that this information was not clearly stated but was difficult to find in the terms and conditions.
2. The Service Provider stated that the number of prizes could be found at the bottom of the various web pages within the sentence, 'The prize will be distributed by Trivicell within 60 days of the win'. It argued that this indicated there was only one prize per competition.
3. The Tribunal considered the evidence and concluded that the terms and conditions referred to by the Executive did not clearly display how many prizes were available to be won. The Tribunal found that the small print was not immediately and clearly accessible to all consumers as some would have needed to scroll down the webpage in order to read the service terms and conditions. The Tribunal therefore upheld a breach of paragraph 7.6.3a of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

COMPETITION SERVICE (CLOSING DATE) (Paragraph 7.6.5)

'Except where there are only instant prize-winners, promotional material for competition services must state when the competition closes. An insufficient number of entries or entries

of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes.'

1. The Executive noted that the Information Provider had stated that each competition lasted two months, which was confirmed in the terms and conditions. However, the competition that should have ended at the end of January 2009 was extended to the end of March 2009. The Executive noted the Information Provider's response of the 23 June 2009 on this point, which stated:

"Dates confusion: Since the number of participants in the Dec – Jan competition was very small our operations manager picked the users with the most amount of correct answers throughout the entire operation period (Dec 8th till April 23rd) and distributed the prizes according to these criteria. As a result we had sent all 8 prizes (2phones, 2 Dell computers, 2 PS3, 1 MacBookAir and 1 Man United ticket package) to users who had played in the service in the Feb – April period rather than 3 prizes to the first period winners and 5 to the second period winners."

The Executive submitted that it appeared from the Information Provider's response that the competition closing date had been altered as a result of an insufficient number of entries.

2. The Information Provider accepted that the closing date of its first competition had been extended. The Service Provider stated that in order to provide context to the Information Provider's statement it had sought further information and had been informed as follows:

"During the first 7 weeks of operation, we had a minimal marketing exposure and therefore the number of participants in the competitions, were very low. As a result, as the end of the first game period (Dec 9th 2008 – Jan 31st 2009) we have the following games results:

"iPhone – 3 users with 1 correct answers and 8-12 wrong answers. All the other users didn't have even 1 right answer.

"Dell laptop & PlayStation 3 – no users with even 1 correct answers. During the last week of January we had started promoting the service more heavily and therefore the number of participants had increased dramatically and as a result the number of users who had answered correctly increased.

"When our operational manager was selecting the winners, he was instructed to award 8 winners (as we had run 3 competitions in Dec- Jan and 5 competitions in Feb – March). Since the number of users with correct answers in the first period was very small (0 in 2 of the 3 competitions and 1 correct answer the 3rd competition), he had decided to award all 8 prizes to the best players throughout the entire period. We understand that this decision might be a breach of the code. However, we distributed more prizes than we actually needed to in order to act in a good faith and to reward the best users who had participated in our service."

3. The Tribunal considered the evidence and concluded that the closing date of the competition had been changed with the effect that those consumers who entered the service in the first two month period had not been told the correct closing date and a

prize had been withheld from whomsoever had been the winner on that date. The Tribunal therefore upheld a breach of 7.6.5 of the Code.

Decision: UPHELD

**ALLEGED BREACH SIX
SUBSCRIPTION ('STOP' COMMAND) (Paragraph 7.12.2)**

'It must always be possible for a user to leave a subscription service by using the 'STOP' command.'

1. The Executive submitted that complainants alleged that they had sent 'STOP' to the service shortcode but had continued to receive text messages. In addition, the Executive submitted that complainants stated that when they had sent the 'STOP' command they were sent a text message stating that it was the wrong answer.
2. The Service Provider stated that the Information Provider had reviewed its message logs and found no records of such occurrences. The Service Provider stated that, had such an incident occurred, it would have resulted in a 'bounceback' text message containing the text 'wrong answer' or equivalent. The Service Provider stated that it was true that one complainant had continued to receive questions after having sent 'cancel' and 'dont send any more' to shortcode 80210 but ordinarily a consumer who sent 'STOP' or a text message containing the word 'STOP' would receive a 'bounceback' text message confirming that the service had been terminated. The Service Provider stated that they had been advised by the Information provider that the 'STOP' command had functioned as it should in 99.7% of all instances and that any text message containing the word 'STOP' would have resulted in the service being terminated and the same is also true of the word 'quit' and 'exit'. The Information provider has since added the word 'cancel' to its systems.
3. The Tribunal considered the evidence and concluded that there was no evidence in the message logs to indicate that the 'STOP' command was not working. The Tribunal considered the evidence of the complainants to be insufficient to establish the breach raised by the Executive. The Tribunal therefore decided not to uphold a breach of paragraph 7.12.2 of the Code.

Decision: NOT UPHELD

**ALLEGED BREACH SEVEN
SUBSCRIPTION (INITIAL MESSAGE) (Paragraph 7.12.4)**

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

- 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.*

1. The Executive submitted that the subscription initiation message (“*U have joined Trivicell, answer daily Q and win great prizes. For 4Q per week, £1., / MSG received until you send STOP to 80210. Helpline 08458678121*”) was charged at £5 and as such was not free as specified under the Code. The Executive noted that, although sections a, c, d, e and f were present within the charged subscription text message, there was no confirmation that the service was a subscription message (7.12.4b).
2. The Information Provider accepted that the text message should have been sent as a free text message rather than as the first charged billing message. The Information Provider maintained that while setting up the service it had sought to comply with both the PhoneyPayPlus Code and the Operators’ Code of Practice and that, under the Operators’ Code of Practice (both the Operator Code Extension and the Vodafone Premium Rate Code of Practice), the first text message may be sent as a billed text message, rather than a free text message. The Service Provider stated that the introductory text message had started with the words ‘U have joined...’ and had made it clear that there would be four questions a week at £1 per message until the consumer sent the word ‘STOP’. It stated that this had made it clear that the service was subscription based.
3. The Tribunal considered the evidence and concluded that users had been charged £5 for the initial subscription text message contrary to the Code. The Tribunal also found that users were not made aware that the text message was a subscription text message and were subsequently charged £4 per week. The Tribunal therefore upheld a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT 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 above must be sent free to subscribers.’

1. The Executive submitted that the complainant logs supplied to the Executive indicated that the monthly subscription reminder had not been sent during in the period of February to April 2009.
2. The Information Provider accepted that monthly subscription reminders had not been sent during the period February to April 2009 and that subscription reminder messages with the wording “*U are subscribed to Trivicell. For 4Q per week, 1£ per MSG received until you send STOP to 80210. Helpline 08458678121*” should have been sent every 30 days.
3. The Tribunal considered the evidence and concluded that no monthly subscription reminder text messages had been sent in the period February to April 2009. The Tribunal therefore 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 Information Provider demonstrated an inappropriate level of ignorance of the Code.
- The cost paid by individual consumers was high – consumers were charged a £5 joining fee and £4 per week after that.
- Subscription services and web opt-in services are examples of services of particular concern to PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had sought compliance advice and continued to do so on an ongoing basis;
- Both the Service Provider and the Information Provider had fully co-operated with the Executive.
- The Information Provider indicated that it had made consumer refunds.

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, but deciding not to take into account the breach of paragraph 5.2 of the Code when considering the sanctions as it found no evidence that the Service Provider had wilfully sent any of the unsolicited text messages, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A £40,000 fine;
- The Tribunal imposed a bar on the service and related promotional material for a period of three months or until the Service Provider seeks and implements compliance advice to the satisfaction of the Executive, whichever is the earlier;
- The Tribunal commented that claims for refunds should 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.