

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 18 May 2009 TRIBUNAL SITTING No. 27 / CASE 1

CASE REFERENCE: 715745/JI

Information provider & area:	Roughgate Limited (previously known as Boltblue International Limited) (the 'Information Provider')
Service provider & area:	mBlox Limited
Type of service:	Subscription Service, Mobile content download
Service title:	Boltblue Club
Service number:	85233, 81194
Cost:	£4.50 per week.
Network operator:	Mobile Operators
Number of complainants:	258

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

BACKGROUND

The 'Boltblue Club' subscription service was the subject of a previous PhonepayPlus investigation and adjudication which resulted in sanctions being imposed on the Information Provider (then known as Boltblue International Limited) by the Tribunal. One of the sanctions imposed by the Tribunal, which adjudicated on 8 January 2009, required the Information Provider to seek compliance advice within two weeks from the date of publication of the summary of the decision, and that such advice was to be implemented within two weeks of receipt.

The Information Provider was advised of the above sanction by PhonepayPlus in an adjudication letter sent by post and email on 22 January 2009. The Information Provider sought advice from the Executive within the two week deadline.

Prior to the above adjudication, sanctions had been imposed on the Information Provider in respect of a separate aspect of the service (named 'Boltblue PAYG'), following an adjudication on 17 July 2008 (case reference 730296). Following the receipt of new complaints in relation to the 'Boltblue PAYG' service, the Executive contacted the Information Provider on 15 January 2009 in order to make it aware of the complaints and to express concerns regarding the Information Provider's website promotion.

The Information Provider subsequently met the Executive on 21 January 2009 and 4 February 2009 to discuss the outstanding issues in relation to the 'Boltblue PAYG' service and the 'Boltblue Club' subscription service.

The Executive sent an email to the Information Provider on 5 February 2009 which confirmed a deadline of the same day for the Information Provider to remedy the issue in relation to the word 'free' appearing in Google search engine returns for the 'Boltblue

PAYG' service, and remove the 'free' ringtone offer which had been added to the Information Provider's website after the adjudication of 8 January 2009.

On 10 and 11 February 2009, the Executive became aware through a mobile network and a public complaint that various non-compliant versions of the promotional website for the 'Boltblue Club' subscription service were in the public domain. In addition, a monitoring exercise by the Executive revealed that previous versions of the promotional website for the 'Boltblue PAYG' service were also in the public domain, contrary to the Information Provider's previous assertion that the promotional material had been withdrawn and despite the Information Provider having been informed of the deadline for compliance of 5 February 2009.

As an alternative to raising further breaches of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 ("the Code") in relation to the 'Boltblue PAYG' case, the Executive held a conference call with the Information Provider on 18 February 2009 and raised further concerns in relation to both the 'Boltblue PAYG' service and the 'Boltblue Club' subscription service. The Executive contacted the Information Provider via email on the same date confirming which of the 'Boltblue PAYG' promotional web pages should be removed from the public domain and advising the Information Provider to ensure that all web pages which should not be in the public domain were terminated or suspended. The Information Provider responded on the same date and confirmed that action had been taken and that a search would be carried out to remove any other non-compliant web pages.

On 4 March 2009, the Executive was alerted by a complainant to a non-compliant web page in relation to the 'Boltblue Club' subscription service. A monitoring exercise by the Executive on 6 March 2009 and 19 March 2009 indicated that further promotional web pages existed which contravened the Executive's compliance advice. The Executive received further complaints regarding the 'Boltblue Club' subscription service after the deadline of 10 February 2009 given for the implementation of the compliance advice.

The Executive consequently sent a breach letter dated 20 March 2009 to the Information Provider alleging a further breach of the Code under paragraph 8.9.3b. At the Information Provider's request, a meeting with the Executive took place on 23 March 2009 and the Information Provider formally responded to the breach letter on 6 April 2009.

The Tribunal made a decision on the further breach alleged by the Executive on 18 May 2009 having heard informal representations from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAILURE TO COMPLY WITH A SANCTION (Paragraph 8.9.3)

'The failure of any service provider to comply with any sanction within any reasonable time period imposed on it by PhonepayPlus will result in:

- a PhonepayPlus issuing a direction to all relevant network operators requiring suspension of access to some or all of the numbers allocated to the service provider until full compliance with PhonepayPlus sanctions has been achieved,*
- b a further breach of the Code by the service provider, which may result in additional sanctions being imposed.'*

1. The Executive made reference to the Tribunal's reasons for upholding a breach of paragraph 5.11 of the Code in an adjudication of 17 July 2008 and submitted that it had advised the Information Provider to remove the word 'free' and other similar phrases from the 'Boltblue Club' subscription service (and from search engine results) unless a service or product of equal or greater value than that offered through the premium rate service was provided to consumers at no extra charge. The Executive's request included the removal of:
 - (1) the 'free' ringtone offer included as part of the premium rate service, promoted on the website prior to adjudication.
 - (2) the 'free' ringtone offer separate from the premium rate service which consumers would send as a request via a postcard sent to the Information Provider.

The Executive submitted that notwithstanding that the original deadline for the implementation of compliance advice had been 10 February 2009 (four weeks following publication of the summary), the Executive had continued to provide compliance advice to the Information Provider up until 18 February 2009. The Executive submitted that on 4, 6, and 19 March 2009 it became aware that various versions of the website were being promoted in contravention of the decision made by the Tribunal in the adjudication of 8 January 2009.

The Executive submitted that during the course of its monitoring it had established that on entering the phrase 'free ringtone' in the Yahoo search engine, the subsequent search results included the URLs relating to the websites boltblue.com and free-ringtone-mania.com. The Executive submitted that the search result description of the free-ringtone-mania.com website stated: "**Get a free Mobile Phone Ringtone now. +35000 Downloads to choose.**" and that once a user clicked on the web link for free-ringtone-mania.com and proceeded to select 'Download Now!', the user was then diverted to the Information Provider's webpage.

The Executive made reference to the Information Provider's webpage and submitted that the webpage had displayed the text "**1st Download (no charge)**" in large font as the heading of the webpage, and in the following in small print: "*** Boltblue Club is a subscription service with an introductory first download at no extra cost when you join for £9 every five days... To get a no charge ringtone without joining send a postcard with your name, email address and mobile telephone number to "free ringtone offer".**"

The Executive submitted that the Information Provider's webpage was evidence that the 'free ringtone' offer had not been removed and no product or service of equal or greater value than the £9 spent by users was promoted on the website. As the 'free' ringtone offer and the phrases "no charge" and "no extra cost" were being used, it appeared that the compliance advice given was not implemented as required by the sanction imposed by the Tribunal on 8 January 2009.

The Executive also submitted that on selecting the link for 'Free Ringtones' at the bottom of the webpage for free-ringtone-mania.com, the user was diverted to another webpage for gringtones.co.uk (which was not operated by the Information Provider) which advertised ringtones charged at £3.00. The Executive submitted that there had not appeared to be any 'free' item on the www.gringtones.co.uk website. The Executive submitted that as the link promoting 'free' ringtones was being used, it appeared that the compliance advice given had not been implemented as required by the sanction imposed by the Tribunal on 8 January 2009.

The Executive submitted that the Information Provider's apparent failure to adhere to the compliance advice was aggravated by the confusion of the promotional material in displaying various pricing packages within one opt-in process. The Executive submitted that, during monitoring, it had entered a mobile number into a web page advertising the 'Boltblue Club' subscription service as a service charged at £9 per five days and had been automatically directed to a web page which advertised the service as a subscription charged at £4.50 per week. The Executive submitted that as these web pages were linked through the action of entering a mobile phone number and by selecting 'enter' (ie: the first stage of an opt-in process), consumers would be confused having been presented with two different costs.

The Executive therefore submitted that the service was being promoted in contravention of the decision made by the Tribunal on 8 January 2009 to seek and implement compliance advice within the given deadline.

2. The Information Provider stated that it had not failed to comply with any sanctions imposed by the Tribunal or advice given by the Executive in relation to the applicable deadlines. The Information Provider stated that it had kept in constant communication with the Executive and had complied with all requested changes to its service provision by the deadlines either as originally agreed or as agreed with the Executive to be extended or as required by the Code. The Information Provider stated that its alleged failure to meet certain deadlines was in fact as a result of misunderstandings by the Executive as to the facts of the case.

The Information Provider stated that there had been confusion and genuine disagreements between the Executive and the Information Provider and within the Executive itself as to the meaning of the advice that the Executive had given the Information Provider regarding the advertising of "free" services. The Information Provider stated that this issue was finally resolved after it was raised with the Head of the PhonepayPlus Industry Support and that this example demonstrated the Information Provider's engagement with the issues being

raised and why the original deadlines for compliance had been deferred in certain cases.

The Information Provider stated that it had not taken any action to promote the offering of “free” services on its website, or any other website, in circumstances proscribed by the Code. The Information Provider stated that it did not accept the Executive’s belief that it should be held responsible for links to its website, found on other websites, of which it had no control or relationship. The Information Provider stated that the Executive’s test usage of the Information Provider’s services was evidence of the fact that the cache of the Executive’s web browser had been set up incorrectly.

The Information Provider stated that the Executive had wrongly raised new complaints about its service for the following reasons:

- (a) the complaints bore no relation to the Tribunal’s adjudication of 8 January 2009.
- (b) a number of the alleged complaints had not in fact existed.
- (c) all the other complaints were shown to pre-date the adjudication.

The Information Provider stated that it had addressed all of the sanctions and advice it had received with a real and continuing desire to comply with the Code and the sanctions and to ensure that no issue remained outstanding that would result in further sanctions being imposed upon it.

3. The Tribunal considered the evidence and concluded from correspondence between the Executive and the Information Provider that the actual deadline for implementation of the Executive’s compliance advice was 20 February 2009. The Tribunal considered the evidence of a consumer complaint received on 4 March 2009 which had stated that: the word ‘free’ was used in the URL www.boltblue.com/ringtones/mobile-FREE-RINGTONE and in the site’s metatags; and that the term ‘no charge’ had also been used prominently on the website. The Tribunal was thereby satisfied that post 20 February 2009 a non-compliant website was in the public domain and that as a result some consumers would have viewed the non-compliant pages. The Tribunal also considered the monitoring evidence of the Executive on 6 and 19 March and was satisfied that it had accessed non-compliant web pages which were in the public domain, after the compliance advice deadline had elapsed. The Tribunal took into account the Information Provider’s suggestion that this came about as a result of “cached” web pages. The Tribunal reviewed the evidence from the Service Provider regarding the changes they had stated were made but concluded on a balance of probabilities, taking into account the evidence of the complainant and the Executive, that the changes had not been sufficient. The Tribunal concluded that the Information Provider had failed to implement the Executive’s compliance advice within the required time period and therefore had failed to comply with the sanction imposed by the Tribunal of 8 January 2009. The Tribunal decided to uphold a further breach of the Code in accordance with paragraph 8.9.3b of the Code.

Decision: UPHELD

SANCTIONS

In determining the sanctions appropriate for the case the Tribunal did not consider that there were any aggravating factors to take into over and above those which were already considered by the Tribunal of 8 January 2009.

The Tribunal did not find any mitigating factors to consider.

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- The Tribunal ordered the Information Provider to remedy the breaches in the manner notified by the Executive within two weeks of receipt of that notification;
- The Tribunal imposed a bar on the Information Provider's 'Boltblue PAYG' and 'Boltblue Club' mobile content subscription services and related promotional material for a period of 12 months, suspended for three months (from the date of publication of the adjudication) within which time the Information Provider is to remedy the breaches to the satisfaction of the Executive. If, after three months, the Executive is satisfied that the Information Provider has remedied the breaches, then the bar will be lifted; but, if the Executive is not satisfied, the 12-month bar will take immediate effect.