

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 16 April 2009 TRIBUNAL SITTING No. 25 / CASE 2

**CASE REFERENCE: 772223/DL**

Service provider & area:	mBlox Limited, London
Information provider & area:	Aquila Worldwide Holdings Limited, Tortola, British Virgin Islands.
Type of service:	Subscription Service
Service title:	SMS Auction Club
Service number:	80708
Cost:	£1.50 per MT message issued. £12.00 per auction or £6.00 per week.
Network operator:	Mobile Operators
Number of complainants:	33

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

### **BACKGROUND**

The PhonepayPlus Executive (“the Executive”) received 33 complaints regarding the receipt of unsolicited promotional and chargeable service messages. These messages related to a ‘live auction’, accessed by way of SMS bids made in response to chargeable SMS auction updates sent by the Information Provider using the Service Provider’s SMS platform. The service was titled ‘SMS Auction Club’ within SMS service messages received and appeared to be linked to a website called bargainbid.net. Complainants stated that they had not engaged with the service prior to receiving messages, promotional or service, on their handsets.

Consequently, the sending of these messages appeared to the Executive to have contravened the PhonepayPlus Code of Practice 11<sup>th</sup> Edition Amended April 2008 (“the Code”).

### **The Service**

The Service Provider provided a Customer Care Form completed by the Information Provider which showed that the service was called “SMS Auction” and ran in conjunction with a website “www.bargainbid.net”. This Customer Care Form was dated 6<sup>th</sup> Aug 2008 and was provided to the Executive as part of the Service Provider’s response to a request for information issued under paragraph 8.3.3 of the Code of Practice.

The Customer Care Form showed a date range for the start of the service as “Jul-08” and was stated to be “ongoing”. It was the Executive’s understanding that the service

was terminated by the Service Provider following an audit of the service in early September 2008.

The Service Provider's response contained some information obtained from the Information Provider. According to the Information Provider, *Google* advertising had made users aware of the website – [www.bargainbid.net](http://www.bargainbid.net). Users could then enter their number into the website to receive the WAP page for the auction. Users could then enter the service via the WAP page. According to the Service Provider and Information Provider, users had every opportunity to view terms and conditions on both the website and the WAP page before deciding whether to enter.

The Customer Care Form stated that after initiation via WAP there was a third stage to the opt-in, which appeared to be a requirement for the user to send a confirmatory message to the service having been prompted by a message received from the service which stated- *“(FreeMsg) Important. Please reply with OK to confirm”*. This message appeared to change on or about 1<sup>st</sup> September 2008 to *“(FreeMsg) Important confirmation message. Please reply with YES to confirm you wish to subscribe to the Bargain Bid Auction service”*. There also appeared to be a second message initiating the subscription service which also changed on or about 1<sup>st</sup> September 2008 from:

*“(FreeMsg) There r mobiles MP3 players waiting 4 u here in SMS Auction Club.Sub service.2 auctionsmonth.Max 4 msgswk.£1.50msg.Help: 08444994762:2eStop to end”*

to

*(FreeMsg)U have joined the Bargain Bid auction subscription service for £6.00 per week until u send STOP to 80708. Run by Aquila Holdings. Helpline: 08444994762.*

Once subscribed, the service appeared to work by providing the user the opportunity to bid on items using premium SMS in an (up to) 8 stage bidding process with subscription charged at £6 per week.

## **Complaint Investigation**

### **Standard Procedure**

The Service Provider confirmed that whilst it was responsible for the service running on the shortcode, the content was provided by the Information Provider. In support of this, the Service Provider provided the Executive with contractual documents relating to the Information Provider.

The Executive subsequently attempted to monitor the website relating to the service ([bargainbid.net](http://bargainbid.net)) and discovered that it was no longer accessible. The Service Provider confirmed this to be the case in an email dated 10<sup>th</sup> November 2008. The Executive obtained information relating to the operator of the website and the date of its creation – which was registered as 30<sup>th</sup> July 2008. Wireless International.

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the Code. In a formal breach letter dated 19<sup>th</sup> January 2009, the Executive raised breaches of paragraphs 8.3.3, 5.2, 5.4.1a, and 7.12.3 of the

Code. The service provider responded on 23<sup>rd</sup> January 2009 and requested that PhonepayPlus should deal directly with the Information Provider under section 8.7 of the Code. However, the Information Provider refused to provide the requisite undertaking required under paragraph 8.7.1 of the Code and the case was progressed against the Service Provider.

The Tribunal made a decision on the breaches raised by the Executive on 16 April 2009 having heard informal representations from the Service Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **REQUEST FOR INFORMATION (Paragraph 8.3.3)**

*'During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:*

- call volumes, patterns and revenues,*
- details of the numbers allocated to a service provider,*
- details of services operating on particular premium rate numbers,*
- customer care records,*
- arrangements between networks and service providers,*
- arrangements between service providers and information providers.'*

1. The Executive made reference to a paragraph 8.3.3 letter requesting information dated 29<sup>th</sup> October 2008 and an email that was issued with further requests for information under paragraph 8.3.3 of the Code. The Executive submitted that the responses to these requests had contained inaccurate information or had failed to provide information regarding key issues relating to the checks made prior to starting up the SMS Auction service and indeed the service itself, the website allegedly used during the running of the service and the nature of the service messages. The Executive had not been provided with any information relating to the website, nor any correspondence between the Service Provider and Information Provider during the running of the service to confirm the source of instructions and other service information during the activation of the account.

The Executive further submitted that there were unexplained discrepancies between information provided to the Service Provider during set-up of the account with the Information Provider and the response to the 8.3.3 request relating to client contact details. The Executive submitted that the response to the requests for information had been inadequate and that as a result the Service Provider had been a breach of paragraph 8.3.3. of the Code.

2. The Service Provider stated that it acknowledged that a discrepancy existed between the contact details supplied by the Information Provider on two separate occasions. There were two contacts specified for the Information Provider who were detailed in the Master Services Agreement ("MSA") between the Service Provider and Information Provider. The Service Provider stated that the MSA

was executed on the 29 February 2008 and at this time the contacts were valid. The Service provider stated that by the time the 8.3.3 preliminary investigation had begun on the 29 October 2008, the Information Provider had instructed the Service Provider to use a different person at [aquila.support@googlemail.com](mailto:aquila.support@googlemail.com) as the point of contact. The Service Provider stated that it had no knowledge as to why the Information Provider had changed the contact person and directed the Executive to discuss with the issue with directly with the Information Provider.

The Service Provider stated that the description of the service that it had provided to the Executive was based on a description provided by the Information Provider triggered in response to the 8.3.3 request. The Service Provider stated that it had no grounds to question or dispute the Information Provider's explanation of the service. The Service Provider went on to state that it relied entirely on the Information Provider's support in this matter and that as far as the Service Provider was aware, the service described by the Information Provider was the same service that was in operation during the period under investigation. The Service Provider stated that based on the records available, the Service Provider could not dispute that the service description supplied was inconsistent with the service the Information Provider intended to operate when the MSA was originally executed. Furthermore, any change in the service was transparent to the Service Provider and solely within the control of the Information Provider.

The Service Provider stated that at the time the MSA was executed the Service Provider had not initiated its comprehensive customer audit for regulatory governance. As a result any records that related to compliance checks when the service in question was first introduced were limited. The Service Provider stated that as part of its efforts to strengthen its compliance checks the Service Provider had introduced several new processes for certification and monitoring of content flows. The Service Provider's stated that its current service certification scheme and 'in-life' monitoring program would certainly have identified inaccuracies or inconsistencies had they existed.

The Service Provider stated that it had made a reasonable effort to provide a reliable, useful and succinct response to this investigation and it was through errors or omission that the Service Provider was prevented from providing satisfactory clarification to the 8.3.3 response. The Service Provider stated that errors of commission on behalf of the Information Provider should not subject the Service Provider to a breach of 8.3.3 of the Code.

The Service Provider asked the Tribunal to take into account that the Information Provider had officially confirmed to the Service Provider that it would not provide an Information Provider undertaking. The Service Provider stated that this action had been in direct contravention of the Master Service Agreement and served to highlight the nature of the Information Provider's character and that any failure in the 8.3.3 response was more the fault of the Information Provider than the Service Provider.

3. The Tribunal considered the evidence and concluded that, the Service Provider had provided all the information available to it in response to the questions and information requested by the Executive. The Tribunal considered that the fact

that the Service Provider was only able to provide a limited response did not amount to a failure to provide information but rather a failure of effective due diligence in relation to the Information Provider. The Tribunal therefore decided not to uphold a breach of paragraph 8.3.3.

**Decision: NOT UPHELD**

## **ALLEGED BREACH TWO**

### **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 complainants had commented that they had received unsolicited messages from shortcode 80708. An example given of such comments was recorded as follows: *“This company send me texts that are costing ME £1.50 each when I never asked or subscribed for this company to send me anything”*.

The Executive made reference to the full message logs for the service on 80708 provided by the Service Provider. The Executive submitted that the logs had provided no evidence of any WAP push message being received prior to the service message seeking confirmation by way of reply. These service messages had started to be issued on 5<sup>th</sup> July 2008.

The Executive submitted that the registration information relating to the website – [www.bargainbid.net](http://www.bargainbid.net) – indicated the website had been registered for the first time on 30<sup>th</sup> July 2008. It was submitted that this was 25 days after the first service messages were issued promoting the shortcode and seeking consumers to confirm/reply by way of a reply message. During this period the Information Provider sent out the first service message seeking a reply to 5093 users. In some cases but not all, the individual message logs showed that no reply message had been sent prior to further promotional messages relating to the SMS Auction service being sent by the service, some of which were chargeable messages that promoted access to the phone-paid SMS Auction service. The Executive submitted that this reflected the comments of the complainants. The Executive further submitted that where there was no evidence of consumer consent, or indeed no website in existence by which consumers could provide consent, the promotional messages evidenced by the message logs as being

sent to consumers had been sent in contravention of paragraph 22(2) of the Regulations and as such were in breach of paragraph 5.2 of the Code

2. The Service Provider stated that it acknowledged the Executive's assessment of the evidence, supported by the message logs provided by the Service Provider and the Service Provider trusted that the Executive had made a safe and impartial review of the facts.

The Service Provider stated that it could provide no further material that could challenge the Executive's submissions in relation to the Legality breach. The Service Provider stated that the Information Provider had indicated by its actions that it would prefer not to respond to this breach or the breach notice overall. The Service Provider noted that the content and operation of the service was solely within the control of the Information Provider and that the Service Provider operated the shortcode for the service and facilitated the content transfer and distribution, but had no control over the marketing activities used to sell the service to end users. The Service Provider stated that it expected all of its customers to abide by the terms of the Master Services Agreement, which prohibits any illegal marketing or advertising in connection with the service.

The Service Provider stated that it had experience of cases where the Information Provider had gone to great lengths to construct a legitimate façade to an otherwise non-compliant service and that the Service Provider is presented with a compliant service description (akin to the Customer Care Form document provided by the Service Provider) that masks any rogue activity on the part of the Information Provider. The Service Provider made reference to the Executive's submissions and stated its opinion that the Information Provider had handled users in different ways and even adjusted the service to cover its tracks. The Service Provider stated that this activity was very difficult to identify when it was submerged in volumes of legitimate traffic and that the Service Provider now has an 'in-life' monitoring program in place with the principal purpose of uncovering malicious activity of this type.

3. The Tribunal considered the evidence and concluded that the messages had been sent as part of a marketing strategy to encourage users to engage with the service. The Tribunal also concluded in the absence of any evidence to the contrary, that complainants had not consented to receiving texts from the service. The Tribunal therefore upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **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 made reference to the first service message evidenced in the logs provided by the service provider that prior to the change of wording in September 2008 had read: *"(FreeMsg) Important. Please reply with OK to confirm."* The

Executive submitted that the consumer expectation on receiving this message in isolation was that they had an important message waiting for them, that this message was not a commercial venture but an alert and that by replying to the service they would receive more information. The Executive submitted that the consumer had not expected to be entered into the service itself and as such had inadvertently triggered the service. The absence of any form of identification of the sender, apart from the shortcode itself, had assisted in building this expectation.

The Executive stated that there was no indication that the important request had anything to do with an SMS Auction service, or any other subscription based service and any response made to this message appeared to be solely based upon the instructions to confirm receipt of the message.

The Executive also stated that the Service Provider had indicated in the Customer Care Form that the message should not to be viewed in isolation, yet no evidence had been provided to show that complainants received any WAP push message or saw a WAP landing page. The Executive made reference to its submissions in relation to paragraph 5.2 (Legality) which had led to the Executive's conclusion that there was no evidence that this website was in existence at the time consumers were said to have opted-in to receive promotional material and engage in the SMS Auction service itself. The Executive submitted that complainants comments indicated that they had no knowledge of the SMS Auction service prior to receipt of these messages, and the Executive made reference to a complaint which stated "*Who r u. please id*", which clearly showed that this user had not associated this message with any website or WAP landing page at the time of receipt. The Executive submitted that this promotional message was deliberately misleading and as such was a breach of paragraph 5.4.1a of the Code.

2. The Service Provider stated that it could not discount the possibility that WAP push messages may have been delivered via another service provider. The Service Provider went on to state that it was unable to render the content of WAP push messages from the message logs in its possession. The Service Provider stated that it did not have the facilities to extract the actual WAP landing page from the content of the historical message logs and that it would only be possible to see the WAP landing page by triggering the service in real time via a handset. The Service Provider then stated that if the resulting WAP landing page was withdrawn/changed, then it would only be possible to retain the original by taking a screen-shot of the page – an option that was not available without an application to do so.

The Service Provider acknowledged that the format of any subscription invite message should make it clear as to the service that the message relates to and provide the cost per billing frequency and information about the STOP command.

The Service Provider stated that it was not unusual for the Service Provider to rely entirely on the Information Provider to ensure that the necessary opt-in data to support promotions and/or reverse billed messages had been legitimately

obtained and remained valid. In the event that opt-ins originated on 3rd-party short codes and other channels, there was evidence to show that respectable Information Provider's were capable of managing this process in a compliant manner. The Service Provider stated that it was not apparent to the Service Provider at the time that the Information Provider in this case would infringe the opt-in requirements that had been made clear to them under their contracts and addenda. To combat this very issue, the Service Provider stated that it now had the ability to identify clients that deliver billable traffic without a corresponding SMS message from the user.

3. The Tribunal considered the evidence and concluded that as there was no evidence that complainants had validly opted-in to the service via a WAP message or landing page, they would not have been aware of the service prior to receiving the first SMS service message. The Tribunal therefore concluded that the first message sent to the complainants had misled them as to its purpose, commercial nature, and the consequence of sending a confirmatory response as encouraged which would subscribe them into an auction service. The Tribunal therefore upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FOUR (paragraph 7.12.3a-c)**

*Promotional material must*

- a. *clearly indicate that the service is subscription-based. This should be prominent and plainly visible.*
- b. *ensure that the terms of use of the subscription service are clearly visible.*
- c. *advertise the availability of the 'STOP' command.*

1. The Executive noted that it had already set out its reasons for concluding that users did not register their details on the website as suggested by the service provider in relation to the alleged breach of paragraph 5.2. The Executive submitted that there had been no evidence provided to confirm complainants received a WAP push message, or went to the WAP landing page and activated the service using the "GO" function that allegedly existed within it. Consequently, the first message, visible on the evidence, which was received by complainants, was the following message:

*"FreeMSG: Important! Please reply with OK to confirm."*

This was changed in later messages to: *"(FreeMsg) Important confirmation message. Please reply with YES to confirm you wish to subscribe to the Bargain Bid Auction service."*

The Executive submitted that replying 'OK' in some cases appeared to have activated the service and associated charges, however for some users who did not reply the subscription service was still initiated. The Executive considered that the consumer expectation on receiving the first of the above messages in isolation was that there was an important message waiting for them, that this message was not a commercial venture but an alert and that by replying to the service they would receive more information – rather than be entered into the service itself and consequently inadvertently trigger the service.

The Executive submitted that the subscription-based service was not prominently or plainly visible, the terms of the service were not clearly visible and the 'STOP' command was not advertised within the message. The Executive further submitted that the later message was an improvement on the first, but did not provide the terms of subscription or the availability of the 'STOP' command. The Executive submitted that both messages amounted to a breach of paragraph 7.12.3 of the Code.

2. The Service Provider stated that it was not within its capability to confirm whether the WAP push messages were issued and the WAP landing page/s to which they would have led the user. The Service Provider stated that it was quite feasible that the Information Provider could deliver WAP push messages via a separate Service Provider. However the Service Provider acknowledged the Executive's assessment that without the WAP push message that led to the appropriate WAP landing page, it was impossible to be sure that the subscription had been initiated correctly.
3. The Tribunal considered the evidence and concluded that neither version of the first message sent by the service to the complainants, as set out in the Executive's submissions, had contained all the information required under paragraph 7.12.3a-c of the Code. The Tribunal decided to uphold a breach of paragraph 7.12.3a-c of the Code.

## **SANCTIONS**

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

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

- The service had provided no value to the complainants, the message logs showed that complainants had not engaged with the service but were receiving unwanted chargeable messages ;
- The behaviour of the Information Provider was wilful and deliberate which was exacerbated by the Service Provider's lack of effective compliance systems;
- There was material consumer harm being that there were 33 complaints;
- The cost paid by individual consumers was high; many complainants indicated receipt of unsolicited charges of approximately £20.00;
- The service is a concealed subscription service and such services have been singled out for criticism by PhonepayPlus; and

The Tribunal noted the service provider's breach history but did not take it into account in this case in view of its current compliance activity.

There were no mitigating factors for the Tribunal to consider.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £25,000 fine. In setting the level of the fine the Tribunal took into account the gross revenue generated by the service.  
The Tribunal did not impose an additional fine in respect of the service provider's breach history, in view of the service provider's current compliance activity. The Tribunal noted that if future cases were brought to PhonepayPlus involving services which demonstrated a failure in the new compliance structure, it would be open to the Executive to inform the Tribunal that no additional fine was imposed for breach history in this case; and
- The Tribunal also ordered that claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.