

**COMPLAINTS PANEL MEETING OF THE INDEPENDENT COMMITTEE
FOR THE SUPERVISION OF STANDARDS OF
TELEPHONE INFORMATION SERVICES (NO.611)**

Thursday 27 September 2007

ADJUDICATION

APPENDIX 7

Case Reference: 702783/GL

Service provider & area: Wireless Information Network (WIN) plc, High Wycombe
Information provider & area: SMS.ac, San Diego, USA
Type of service: Reverse-billed SMS
Service title : SMS.ac
Service number: 62468
Cost: 50p per reversed billed SMS
Network operator: All mobile network operators except Orange and 3
Number of complainants: 73

BACKGROUND

The Executive received complaints for the SMS.ac service and its promotion by the service provider. Complaints were received from the mobile network operators and consumers regarding reverse-billed SMS. Complaints reported that consumers had not consented or requested to receive text messages of this nature.

An extract from the SMS.ac terms and conditions describes the SMS.ac service as:

...an entertainment service that enables users to create unique profiles (which are made available on the Web and/or mobile devices) and provides users with access to a collection of services and resources, including various communications tools, content, applications, and programming offered from time to time through its network of properties (the "Service").

The profile information will be publicly available for viewing... One benefit of the service is to enable users to meet and interact with others. To promote community, we facilitate user interaction and communication by using SMS.ac's proprietary community technology ("community technology").

The purpose of the community technology is to ease the progression for newer community users to become active community participants and to continuously engage all users to use the service. One of the features of the community technology is that it may bring non-participants back to the service or to the forefront of user searches...significantly enhancing the chance of less active users being discovered by other community users, as well as receiving communications. Please note that such users are charged on their mobile phone accounts for many such services and communications.

The Executive found that many of the complainants had either:

- signed up to the SMS.ac service up to 2-3 years ago (or more) and in the intervening period between signing up and suddenly receiving reverse billed SMS in 2007, did not use SMS.ac, never received reverse-billed SMS from SMS.ac and did not recall agreeing to receive reverse-billed SMS when signing up to the SMS.ac service years earlier; or
- denied ever signing up to the SMS.ac service (these complainants included owners of recycled numbers).

The 'Friends Network' service has been suspended since the end of July 2007.

Based on the statements of complainants, the Executive instigated an investigation regarding the receipt of unsolicited reverse billed SMS.

Breaches of paragraphs 5.4.1a, 5.4.1b, 5.4.2, 5.7.1, 5.8, 5.12, 7.12.3a, 7.12.3b, 7.12.4a-f, 7.12.5 of the 11th Edition of the Code of Practice ('the Code') were raised by the Executive in a letter dated 3 August 2007, along with a request for information under paragraph 8.1.3 of the Code. An opportunity was given to the service provider to respond. The service provider responded on 9 August 2007 and included a response supplied by the information provider.

A decision on the breaches raised was made by the Adjudication Panel ('the Panel') on 27 September 2007.

INVESTIGATION AND DECISION

MISLEADING (Paragraph 5.4.1a)

- 1) The Executive was of the opinion that the reverse billed SMS were unsolicited and that the service was misleading for the following reasons:
 - i) a number of complainants, including owners of recycled numbers, reported that they had not signed up to the service but were led to believe they had signed up to a service due to recurring charges and messages received to their mobile phones.
 - ii) The complainants who did sign up to the service years ago but only started receiving messages in 2007 did not recall agreeing to receive reverse billed SMS when signing up to the service years earlier. Where there is likely to be a delay in the commencement of the service it should be detailed on the promotional material. However, no indication of the potential significant delay appeared to have been given nor did the reverse billed SMS give such an indication. This delay, which consumers were not aware of, was likely to have the effect of leaving those in receipt of messages unsure as to when the service was activated if it was activated at all.
- 2) The service provider replied that:
 - i) The reverse billed SMS were not unsolicited.
 - ii) The reverse billed SMS were only sent to users who had signed up to the service and the fact that the user is joining a community and will receive messages from other users is made clear at the time of signing up.

- 3) Based on the evidence from both the mobile network operators and complainants, the Panel found that the service was misleading. The complainants who had not signed up to the service were being misled into believing that they had done so due to recurring charges and messages that they received on their mobile phones. They were likely to be owners of recycled numbers. Even if consumers had signed up to receive reverse billed SMS, it would be misleading to omit details regarding the commencement of the reversed billed SMS and such a long delay between signing up to the service and receiving messages served to obviate a consumer's informed consent. Furthermore, the Panel was not convinced that everyone who received messages had opted in to receive the service. For these reasons, the Panel upheld a breach of this paragraph of the Code.

Decision: **UPHELD**

UNFAIR ADVANTAGE (Paragraph 5.4.1b)

- 1) It was the opinion of the Executive that the unsolicited reverse billed SMS appeared to seek to take unfair advantage of consumers in the respect that they had never signed up to the service and thus would be unaware that the messages they received were chargeable.
- 2) The service provider responded the pricing displayed during the opt-in process was approved by ICSTIS in June 2006. It also stated that the SMS.ac service has inserted the price in every outgoing premium message as of 31 July 2007.
- 3) The Panel upheld a breach because the consumers were not able to block the receipt of reverse billed SMS. This made them vulnerable and the service provider took advantage of this.

Decision: **UPHELD**

UNREASONABLE DELAY (Paragraph 5.4.2)

- 1) The Executive found that it was clear from the opt-in details and call logs that even if customers had signed up to the service, there was a significant delay between the opt-in date and the receipt of reverse billed SMS. Complainants who advised they did sign up to the SMS.ac service two or more years ago, stated that in the intervening period between signing up and suddenly receiving reverse billed SMS in 2007, they did not use SMS.ac and never received reverse billed SMS from SMS.ac. The Executive was therefore of the opinion that a breach of this paragraph of the Code had occurred.
- 2) The service provider responded as follows:
 - i) As explained under paragraph 5.4.1a above, the service is community based and messages are user-generated. The fact that a user is joining a community and will receive messages from other users is made clear at the time of opt-in. The service provider also stated that the volume of messaging had recently increased due to increased traffic and the new search feature resulting in some users receiving messages for the first time.
 - ii) It was possible that the user had actually been receiving messages steadily since their opt-in date but that the service did not have their message

history prior to 1 February 2007 as it does not retain user data for longer than six months.

- 3) The Panel found a clear breach of this paragraph as the service did not advise that initial reverse billed SMS could be received two or more years after the opt-in. Complainants who advised that they did sign up to the service but did not recall agreeing to receiving reverse billed SMS confirmed they never received any reverse billed SMS in the intervening period between signing up to the service and receiving reversed billed SMS in 2007. The Panel therefore upheld a breach.
Decision: **UPHELD**

PRICING INFORMATION (Paragraph 5.7.1)

- 1) The Executive found that a number of complainants including owners of recycled numbers stated that they had never signed up to the service and were unaware that the service was chargeable prior to incurring any charge. Therefore, it was the opinion of the Executive that the complainants were not fully informed, clearly and straightforwardly, of the cost prior to incurring any charge.
- 2) The service provider responded as follows:
 - i) The pricing information displayed during the opt-in process was approved by ICSTIS in June 2006.
 - ii) The service provider has inserted the pricing information in every outgoing premium message as of 31 July 2007.
 - iii) The service provider has provided a full refund to any customer who received charges due to owning a recycled phone number.
- 3) The Panel was convinced by the evidence from some complainants that the service was unsolicited (for example, for the owners of recycled numbers) and that they were not given the required pricing information prior to incurring costs as they would not have seen any promotional material due to the unsolicited nature of the reverse billed SMS. For those who had signed up to the service, the pricing information would have been seen so long ago that users were no longer aware of it. The Panel therefore upheld a breach of this paragraph of the Code.
Decision: **UPHELD**

CONTACT INFORMATION (Paragraph 5.8)

- 1) A number of complainants, including owners of recycled numbers, stated that they had never signed up to the service at all. These complainants stated that they only received unsolicited SMS and did not receive the required contact details including a customer service phone number. The Executive therefore found a breach of this paragraph.
- 2) The service provider responded as follows:
 - i) The customer service number was included in the standard confirmation message at the time of opt-in for every user. However, these confirmation messages were not retained by the service provider as it does not retain user information for longer than six months.

- ii) The STOP command is included in every message and the service provider has implemented the customer service number in every premium rate message as of 6 August 2007.
 - iii) The service provider has provided a full refund to any customer who received charges due to owning a recycled phone number.
- 3) This paragraph of the Code provides that contact information must be clearly stated in all promotions. The Panel stated that the case in question related to the receipt of service messages and not promotional messages. Service provider contact information is provided on the SMS.ac website which is the only promotional material the service is advertised on. The Panel did not therefore uphold a breach of this paragraph of the Code.

Decision: **NOT UPHELD**

INAPPROPRIATE PROMOTION (Paragraph 5.12)

- 1) As a number of complainants had either not signed up to the service at all or had received reverse billed SMS from the service after a significant delay, the Executive was of the opinion that the service provider did not use all reasonable endeavours to ensure that its services were not promoted in an inappropriate way.
- 2) The service provider responded as follows:
- i) At the time the service was approved by ICSTIS, there was no expiration date for a valid opt-in. It stated that in July 2007, the service provider removed any user with an inactive period of 90 days from the database.
 - ii) The service provider stated that it removes inactive users on a monthly basis.
 - iii) The service provider processes permanent error codes in order to ensure numbers designated as non-billable are not attempted.
- 3) For the same reasons given by the Panel as under paragraph 5.8 above, the Panel did not uphold a breach of this paragraph of the Code.

Decision: **NOT UPHELD**

SUBSCRIPTION SERVICES (Paragraph 7.12.3a)

- 1) The Code defines subscription services as those which incur a recurring premium rate charge. The Executive found it was clear from the complainants and call logs that some consumers had been charged for the receipt of hundreds of reverse billed SMS. Recurring charges had been incurred by the consumers despite no active participation from those who had signed up to the service two or more years ago. The Executive also found that the service website does not make any reference to the fact that the service being received by consumers is a subscription. It therefore was of the opinion that there was a breach of this paragraph.
- 2) The service provider responded as follows:
- i) At the time of service approval by ICSTIS, the service was not classified as a subscription so these requirements were not implemented.
 - ii) The service is community based and the time of user generated messages cannot be predicted.

iii) It was possible that the user had actually been receiving messages steadily since their opt-in date but that the service did not have their message history prior to 1 February 2007 as it does not retain user data for longer than six months.

- 3) The Panel found that although this service was not a typical subscription service with a recurring premium rate, it was nonetheless a subscription service under the definition provided by the Code. Complainants had continued to receive reverse-billed SMS despite having no input into the service. The Panel therefore upheld a breach of this paragraph as the required information was not provided.

Decision: **UPHELD**

SUBSCRIPTION SERVICES (Paragraph 7.12.3b)

- 1) The Executive found that the terms of use of the subscription services (e.g. whole cost pricing and opt-out information) were not displayed within the SMS.ac website and therefore was of the opinion that there had been a breach of this paragraph.
- 2) The service provider responded that the terms of the service were only visible to users who were currently opted-in to that service. However, the service provider stated that since 31 July 2007 it has inserted the price in every out-going premium rate message in order to avoid confusion.
- 3) The Panel found a clear breach as the terms of use of subscription service were not displayed within the service website, as required by this paragraph of the Code.

Decision: **UPHELD**

SUBSCRIPTION SERVICES (Paragraph 7.12.4a-f)

- 1) The Executive was of the opinion that the service provider failed to send to the user prior to receiving the premium rate service a free subscription initiation message containing required information.
- 2) The service provider responded that the required standard confirmation messages were sent to every user at the time of opt-in but these were not included in the call logs because the service provider does not retain this data.
- 3) The Panel found a clear breach as no free initiation messages were sent to the complainants, as required by this paragraph of the Code.

Decision: **UPHELD**

SUBSCRIPTION SERVICES (Paragraph 7.12.5)

- 1) The Executive was of the opinion that the service provider failed to send to the users a free subscription reminder message once a month or every time a user had spent £20 if that occurred in less than a month.
- 2) The service provider responded that the £10 spend reminder is in place as of 31 July 2007. It also stated that monthly subscription reminders were sent on 1 August 2007 and will continue to be sent on a monthly basis.

- 3) The Panel found a clear breach as it was clear from the evidence that no subscription reminder messages had been sent to complainants, as required by this paragraph of the Code.

Decision: **UPHELD**

FURTHER INFORMATION (Paragraph 8.1.3)

- 1) To assist the investigation, the service provider was asked to provide further information about the service and its promotion, including call revenue and volume statistics.
- 2) The service and information providers provided a response to the information requested under this paragraph.
- 3) The Panel decided that the service and information provider had complied with the request to supply information.

Decision: **NOT UPHELD**

The Panel concluded that, overall, the breaches taken together were **very serious**.

SANCTIONS

In determining the sanctions appropriate for the case the Panel took into account the following mitigating factors:

- The service provider has been cooperative.
- The 'Friends Network' service is being shut down over the next 12 months. New SMS.ac members cannot join the 'Friends Network'.

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

- The high volume of complaints.
- The service generated significant revenue.
- The service provider's breach history.
- Although the service provider had approached ICSTIS for prior permission and had received compliance advice, the service which was running appeared to be different from the one applied for. ICSTIS gave the service provider permission to operate a chat and dating service, but the service running was not a chat and dating service.
- The level of consumer detriment was high as many complainants had unwittingly incurred very high bills.

The Panel therefore decided to impose the following sanctions against Wireless Information Network plc:

- A formal reprimand;
- A £150,000 fine;
- A bar on the service until it is compliant (the service and/or information provider should work with the ICSTIS compliance team); and

- The service provider to pay all claims made by users for refunds of the full amount spent by them, save where there is good cause to believe that such claims are not valid.