

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

Thursday 28 August 2008  
TRIBUNAL SITTING No. 9 / CASE 3  
CASE REFERENCE: 730433/JI

Service provider & area:	Dialogue Communications Limited
Information provider & area:	Bullroarer Corporation Pty Ltd, New South Wales Australia
Type of service:	Subscription – Entertainment, Mobile Content Provision
Service title:	Mobizoids/ZON3D
Service number:	60016 and 82010
Cost:	£5.00 registration fee and £5.00 per week
Network operator:	All Mobile Networks
Number of complainants:	34

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received complaints from 34 members of the public (28 of which formed the basis of the Executive’s preliminary investigations), regarding the receipt of unsolicited chargeable messages from a subscription service called “Mobizoids”. The service was promoted and operated through the website [www.mobizoids.co.uk](http://www.mobizoids.co.uk) and various promotional campaigns. It provided consumers with mobile content such as ringtones and other mobile downloads. Prior to December 2007, the same service, then called “ZON3D”, was promoted and operated through the website [www.zon3d.co.uk](http://www.zon3d.co.uk). The service was advertised using web-based marketing which was outsourced to internet media companies who promoted to websites such as MySpace, Facebook, Yahoo, and Google.

The Mobizoids CLUB service is a weekly subscription plan priced at £5.00 per week with a one-off £5.00 registration fee. Customers subscribing to the service via the promotional campaigns could potentially receive additional bonus downloads, which entitled them to bonus credits on top of their usual monthly/weekly allowance.

**The Executive’s understanding as to the operation of the service** Users joined the service by following the sign-up process as follows:

The user entered their mobile number into a field on the main Mobizoids website or on the landing page of the promotional campaign website and selected the “submit” button. The user subsequently received a free message to their mobile phone, for example:

*“Your PIN is 3789 Enter in web page to get 10 bonus downloads - £5.00 to join & £5.00 per/wk for 5 downloads. To stop send STOP to 60016 or call 0800- 0470955”*

Or, as per the message logs:

*“ZON3D: Your PIN is: 832748. Please enter at the web page to get your content.”*

The user then entered the PIN code into the next page of the website in order to activate the subscription service.

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.7 of the 11<sup>th</sup> Edition (amended April 2008) PhonepayPlus Code of Practice (“the Code”).

The Executive sent a letter dated 18 March 2008 to the service provider, asking a series of questions as well as requesting message logs and other corroborating information to substantiate the claims made by consumers, in accordance with paragraph 8.1.3 of the Code (11<sup>th</sup> Edition, November 2006). In a letter dated 2 April 2008, a comprehensive response was supplied by the information provider on behalf of the service provider, including opt-in records for 6 complainants.

The Executive raised potential breaches of paragraphs 5.4.1a, 5.4.1b, 5.7.1, 5.7.2, 5.8, 7.5.4a, 7.12.3a-c, 7.12.4a-e and 7.12.5 in a letter to the service provider dated 4 June 2008. A formal response was supplied by the information provider on behalf of the service provider on 17 June 2008.

The Tribunal made a decision on the breaches raised by the Executive on 28 August 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **MISLEADING (Paragraph 5.4.1a)**

*“Services and promotional material must not:*

*a misled, or be likely to mislead in any way...”*

1. The Executive considered that the service was misleading for the following reasons:

##### Ground 1

Prior to December 2007, the service operated under the name ZON3D. Consumers received messages from shortcode 82010, which made reference to the website [www.zon3d.co.uk](http://www.zon3d.co.uk). A week after receiving these initial messages, consumers then received messages from shortcode 60016, which referred to ZON3D. After a period of approximately two months, consumers received messages from the same shortcode 60016, the content of which referred to the Mobizoids service and the website [www.mobizoids.co.uk](http://www.mobizoids.co.uk).

As the transition of the service name change from ZON3D to Mobizoids was not made clear to consumers, the Executive considered that consumers might be confused into thinking that they had been subscribed into a new service. The Executive also noted that at the time of monitoring, the ZON3D service

was still in operation and new users were able to sign up to the service, even though the service provider had stated that the ZON3D brand was superseded by the Mobizoids brand in December 2007.

#### Ground 2

The Executive noted that the service provider had confirmed that all 6 complainants, in respect of whom the Executive had requested information, had opted into the service via the “DJ” promotional campaign website. As stated in the terms and conditions of the website, the campaign offered users 5 bonus downloads on top of their weekly entitlement of 5 download credits per week. However, only 3 of the 6 users were notified in the registration message sent following activation of the service, that they could collect their “complimentary” items. The Executive considered that the failure to remind all users of their complimentary items might result in some users not using their bonus entitlements.

When the Executive monitored the service, it was under the impression that it was subscribing to the “ZONE 1” weekly plan which only entitled users to 5 download credits. The fact that the Executive received a message advising it to collect “*your 5 complimentary items*” implied that the user was entitled to 5 additional items to the 5 download credits. Informing the Executive (and possibly other users) that they were entitled to complimentary items despite only signing up to a standard service plan, could mislead recipients into believing that they were entitled to receive additional items on top of their standard credits.

2. The service provider responded to the Executive’s allegations as follows:

#### Ground 1

The service provider stated that ZON3D UK was launched on 4 September 2007, initially on shared short code 82010 and then moved to the dedicated short code 60016 on 12 October 2007. The service provider stated that on 15 December 2007, although it changed its advertising from ZON3D to MOBIZOIDS, the advertising for the two sites did not overlap. The MOBIZOIDS site was a mirror image of the ZON3D site, customers could only be signed up to one service, and content credits issued to customers could be used on either site. The service provider commented that the 0800 number, subscription service, content offering and opt-out procedure, worked in exactly the same way for customers of each service. The service provider had maintained the old ZON3D site in order to provide continuity for previously signed up members, but stopped advertising ZON3D when the change was made.

The service provider stated that in preparation for the brand transition, the service provider had trained its customer service centre staff in Australia, Thailand and the US. It accepted that information on the new site alerting customers of the change would have been beneficial. The service provider emphasised that it valued its customers and their feedback, had not intentionally misled anyone and apologised for any confusion caused.

#### Ground 2

The service provider stated that it had not intended to mislead customers so that they did not use their bonus downloads; the bonus items were not only an incentive to join the service but also a reason to stay with the service. The service provider emphasised that the promotional site mentioned the complimentary items as did the PIN message. The sign up billing message following the entry of the PIN at the website also directed the customer to the site in order to collect their complimentary items. Additionally, customers could log on to the site to see how many credits were remaining. The service provider stated that there was no special procedure required for the customer to redeem their credits; customers were able to download items in the same way in which they could download subscription credits.

3. The Tribunal considered the evidence and concluded that the manner in which the change of service name had been effected was misleading, as in the absence of any specific information regarding the change, consumers could have been confused as to the identity of the service to which they were subscribed. The Tribunal also considered that the information that certain users received, or failed to receive, about complimentary downloads misled those users as to the benefits of the service to which they were subscribed. Those who were not informed of their entitlement were unlikely to claim their entitlement. Those who were wrongly informed that they had an entitlement were misled. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWO**

### **UNFAIR ADVANTAGE (Paragraph 5.4.1b)**

*“Services and promotional material must not:*

- b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”*

1. The Executive noted that 25 of the 28 complainants indicated that they had received unsolicited reverse-billed messages. Based on the majority of the complainants’ insistence that they did not opt-in to the service, and the fact that information received from Mobizoids customer services and the service provider were both contradictory and inconclusive, the Executive concluded that consumers’ mobile numbers had been used without direct or implied consent. The Executive considered that the numbers had been used to charge consumers a fee for a service, to which they had never agreed to receive. By operating the service in such a way that consumers were charged without their consent or knowledge, the service provider took unfair advantage of the circumstance that mobile users were unable to prevent the receipt or charging of, reverse-billed messages.
2. The service provider strongly denied that it had sent any unsolicited messages to customers. It emphasised that all subscriptions to either ZON3D or the subsequently re-branded MOBIZOIDS service, were triggered by the handset billed. The service provider also stated that billing messages had never been sent to handsets which had not completed the double opt in process. The service

provider acknowledged that in some circumstances, the billed party was not the one who had used the handset to opt-in to the service and this was something which the service provider could not control. It commented that in the event that a customer entered their mobile number incorrectly, resulting in the message being sent to another handset, the recipient of the message would not be able to opt-in unless they visited the website, entered their mobile number and then entered their PIN.

3. The Tribunal considered the evidence and found, on the balance of probabilities, that a number of complainants had received unsolicited reversed billed messages and that the service had accordingly taken improper advantage of mobile number data it held. The circumstance of being unable to prevent the receipt of unsolicited chargeable messages made the recipients vulnerable. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

### **Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **PRICING INFORMATION (Paragraph 5.7.1)**

*“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”*

1. The Executive did not consider that the service provider had informed users of cost, prior to incurring a charge, for the following reasons:

#### Ground 1

The free message users received which provided them with a PIN code prior to activation of the ZON3D service, did not contain pricing information. If a user entered an incorrect mobile number into the website, that number would receive a message from the service, without having viewed the website. As the message could be read independently from the website, the Executive considered it to be promotional material. Furthermore, the pages (on both the Mobizoids and ZON3D website) where users entered their mobile number, only referred to a “one time registration fee of £5.00”.

#### Ground 2

The Executive did not consider the reference to the cost of the service abbreviated in the “DJ “promotional campaign, as “£5pw”, to be a clear and straightforward description of the weekly recurring charge.

2. The service provider responded to the Executive’s allegations as follows:

#### Ground 1

The service provider acknowledged that from the launch of the ZON3D site on 4th September 2007 until 12th October 2007, the PIN message did not contain pricing information, although this was set out in the terms and conditions on the website. It commented that users were required to agree

that they had read and accepted the terms and conditions before proceeding. The service provider commented that from 13th October 2007 until 12th December 2007, the PIN message did contain pricing information and supplied examples of the content.

The service provider stated that the website page following the mobile number page, did disclose the pricing and conditions of the service. The page had to be navigated and the PIN entered, before any charges were incurred. The customer therefore had the opportunity to review pricing and terms and conditions before continuing. The service provider stated that the design of the page flow in combination with the PIN message, was such that the customer should have been aware of the pricing.

## Ground 2

The service provider stated that it understood the term “pw” to be a commonly used acronym in the UK for “per week”, particularly in relation to the cost of rented accommodation or rates of pay. The service provider confirmed in the hope of avoiding confusion, had changed “pw” to read “per week” and had also changed the pricing information to read: “£5 to join and £5 per week”.

3. The Tribunal considered the evidence and concluded that recipients of the unsolicited charged messages, who had not viewed the website or been given a PIN, would not have been aware of the cost of the service. The Tribunal also noted that the only pricing information available on the Mobizoids and ZON3D web pages, was in respect of a one off £5 fee, and thus did not provide the true cost of the service. The Tribunal rejected the second ground advanced by the Executive in correspondence. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FOUR**

### **PRICING INFORMATION (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. Upon monitoring the websites advertising the four promotional campaigns, the Executive did not consider the pricing information to be fully prominent. Consumers who were subscribed into the service incurred two different costs, namely a £5.00 one-off registration fee and a £5.00 weekly fee. In order to view the reference to the registration fee on the web page, users had to scroll down to the bottom, where the cost was located in the centre of lengthy text in verdana font size 7.5. In the opinion of the Executive, it was not clear that the webpage contained further information at the bottom of the page, and therefore users would be unlikely to scroll down. Given the high cost of registration, the Executive considered that the £5.00 registration fee should have been more prominently positioned on the

website, or at least in the same font as the text stating the £5.00 weekly fee. This was further aggravated by the fact that the text “*BONUS DOWNLOADS*” was presented in a much larger font than the cost of the service.

2. The service provider agreed that the joining fee should be displayed as prominently as the weekly fee, and stated that the oversight was not intentional. It confirmed that it had been changed on all of its website and landing pages. In its defence, it stated that the joining fee and weekly fee were explicitly stated in the PIN message.
3. The Tribunal considered the evidence and concluded that the pricing information had not been presented in a sufficiently prominent fashion. It considered that the joining fee should have been displayed as prominently as the weekly fee, and the information in respect of “*BONUS DOWNLOADS*” had been presented in a comparatively large font. The Executive noted the service provider’s acknowledgement of these issues and upheld a breach of paragraph 5.7.2 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FIVE**

### **CONTACT INFORMATION (Paragraph 5.8)**

*“For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user.”*

1. The Executive observed that the free message, which provided users with a PIN code prior to activation of the ZON3D service, did not contain any contact information. As messages sent to the handset could be read independently from the website, the Executive considered them to be promotional material. The Executive also raised concerns that recipients who had never seen the website, would not know what the service was, or how to contact it. The Executive also noted that at least one complainant who had been subscribed into the ZON3D service did not receive any messages containing a contact number until almost three months after subscription was initiated.
2. The service provider stated that only messages sent between 4<sup>th</sup> September 2007 and 12<sup>th</sup> October 2007 failed to contain contact information, and it had relied upon the customer to obtain this from the website (which they had to visit in order to enter their mobile number to trigger the PIN message). It emphasised that all subsequent PIN messages did contain contact information. The service provider also commented that the entry of the customer’s mobile number was not treated by the service as an opt-in to any paid or free service. This was to ensure that if a customer entered someone else’s number, the only message that number would receive was the PIN message.
3. The Tribunal considered the evidence and noted that the service provider acknowledged its failure to provide contact information during the first 5 weeks of the service. Thereafter, it provided a customer services number but, contrary to



Code requirements, provided the service name as opposed to the identity of the service or information provider. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SIX**

### **CHILDREN'S SERVICES: COST (Paragraph 7.5.4a)**

*"Children's services must not:*

- a generally cost more than £3, or in the case of subscription services (see paragraph 7.12), more than £3 per month...."*
1. The Executive noted the definition at paragraph 7.5.1 of the Code, which defines children as "people under 16 years of age." The Executive considered the Mobizoids subscription service to be aimed at children under the age of 16, due to the fact that the small print of the promotional and main websites advised users that they must be at least 13 years of age. Furthermore, the service cost at least £20.00 per month, which meant that children would be paying considerably more than the £3 limit.
  2. The service provider stated that it had in no way intended to target or market to children and that the content on its site was targeted at the general adult population. The service provider stated that it did not campaign or "dress" the site in child appealing logos, music, characters etc. The service provider stated that it understood the breach to have occurred because the terms and conditions erroneously stated a minimum age of 13, which had since been changed to state 16. It explained that the confusion has arisen due to the fact that the terms and conditions on the Mobizoids website reflected that of its sister US site, and were US compliant.
  3. The Tribunal considered the evidence and the service provider's reference to 13 year olds in its terms and conditions. The Tribunal found that the terms and conditions promote the service as appropriate for those as young as 13, and thus encourage its use by children. The Tribunal also noted that the service cost of at least £20.00 per month was in excess of the £3 child spend limit. The Tribunal upheld a breach of paragraph 7.5.4a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SEVEN**

### **SUBSCRIPTION SERVICES (Paragraph 7.12.3a-c)**

*"Promotional material must:*

- a. clearly indicate that the service is subscription based. This information should be prominent and plainly visible and/or audible to consumers,*
- b. ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,*
- c. advertise the availability of the 'STOP' command.*



1. Executive noted that some promotional messages sent to users both prior to activation of the ZON3D service and during the service, failed to indicate that the service was subscription-based. The messages also failed to make reference to pricing, opt-out information, or to advertise the “STOP” command. The Executive raised concerns that recipients of unsolicited messages who had not seen the website, would not know what service they had been opted-in to, whether it was subscription-based, how much it would cost, and how to stop the service. The fact that at least one complainant who had been subscribed into the ZON3D service did not receive any messages containing any of the requisite terms of use until almost three months after subscription was initiated further exacerbated this issue.

The Executive also noted that the main website [www.mobizoids.co.uk](http://www.mobizoids.co.uk) only presented the registration fee, but not the weekly subscription fee. This was further aggravated by the fact that the webpage where users enter their mobile number did not contain any pricing information.

2. The service provider acknowledged that from the launch of the ZON3D site on 4<sup>th</sup> September 2007 until 12<sup>th</sup> October 2007, the PIN message did not contain pricing information and it relied upon the user reading the terms and conditions on the website. From 13<sup>th</sup> October 2007 the PIN message did contain the necessary information, and post 12<sup>th</sup> December 2007 read:

“Your PIN is XXXX Enter in web page to get X bonus downloads - £5 to join & £5 per/wk for 5 downloads. To stop send STOP to 60016 or call 0800-0470955”.

It re-iterated that in the event that a customer entered an incorrect mobile number, the recipient of the message would have to go to the website to re-enter their number and then enter the PIN, after which they would have been exposed to pricing information.

3. The Tribunal considered the evidence and noted the service provider’s acknowledgement that the promotional text messages had failed to include the necessary subscription, pricing opt-out and “STOP” command information, although it had subsequently amended the content. The Tribunal further noted that the required information was not available to those who had received unsolicited reverse billed messages nor on the promotional web pages. The Tribunal upheld a breach of paragraph 7.12.3 a-c.

**Decision: UPHELD**

## **ALLEGED BREACH EIGHT**

### **SUBSCRIPTION INITIATION (Paragraph 7.12.4a-e)**

*“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 ... 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,*

1. The Executive noted that the initial subscription message sent to users following activation of the service was charged at £5.00 and did not contain the requisite subscription information. All complainants and the Executive (following monitoring of the service) were charged £5.00 to receive the initial subscription message. Contrary to the Code requirements, the message was not free, did not confirm that the service was subscription-based, did not indicate what the billing period was, the charges for the service or how they can arise, and did not contain instructions in how to leave the service.
2. The service provider stated that from 13<sup>th</sup> October 2007, the sign up model employed by ZON3D/Mobizoids ensured that the customer received the free message as stated in its response to paragraph 7.12.3 a-c. The service provider noted that whilst the registration message did not indicate pricing, the first subscription message and every fourth weekly anniversary, did remind the customer of pricing information. It stated that it had changed the service to employ an SMS opt in instead of a web opt in, whereby a free subscription initiation message containing the requisite information was sent to the customer after they had signed up to the service.
3. The Tribunal considered the evidence and noted that recipients were charged £5 to receive the initial message after activation of the service, which should have been provided free of charge and should have contained the requisite subscription initiation information, which it did not. The Tribunal upheld a breach of paragraph 7.12.4a-e of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH NINE**

### **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 7.12.4 must be sent to subscribers.*

1. The Executive noted that from the message logs supplied, 3 complainants were subscribed to the service for over one month and had incurred charges of over £20. At no point during the service did any of the complainants receive a free subscription reminder.
2. The service provider stated that there had been 34,424 sign ups to the ZON3D/Mobizoids service, 3,044 of which exceeded a £20 spend and did not receive a reminder message due to a fault in the system. The service provider stated that this had been rectified so that all users who remained or joined after 19 February 2008, received reminder messages every 4 weeks. It added that since 19 February 2008, every 4<sup>th</sup> weekly billing message was as follows:

“Mobizoids: The CLUB Plan entitles you to 5 ringtones, graphics or games each week. Collect from www.mobizoids.co.uk Billed at £5.00 pw 2 quit reply stop”

The service provider added that since the launch of the MO opt in mechanism, every fourth billing message was preceded by:

“[FreeMsg] Mobizoids subscription collect 5 downloads each week at www.mobizoids.co.uk £5 per week to quit send stop to 60016 or call 0800-0470-955”

3. The Tribunal considered the evidence and noted the service provider’s acknowledgement of a fault in its system, which had resulted in a failure to send a cost reminder to participants, after each £20 spend. The Tribunal 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 **very serious**.

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

- The information provider had wilfully sent out unsolicited promotional text messages;
- There was material consumer harm; namely 34 consumer complaints;
- The cost paid by consumers was high, (£5.00 registration fee and a £5.00 weekly charge);
- The service (namely a concealed subscription service to those who had not had an opportunity to view the website) is one which has been singled out for criticism by the Executive; and
- The service provider’s breach history.

In mitigation, the Tribunal noted that the service provider had cooperated with the Executive when notified of the breaches.

Taking into account the aggravating and mitigating 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 fine of £55,000 (comprising £45,000 in respect of the upheld breaches and a breach history uplift of £10,000);
- The Tribunal ordered the service provider to seek compliance advice from the Executive within two weeks from publication of the full decision. Such advice must then be implemented within two weeks of receipt.

- 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.