

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

Thursday 20 November 2008 TRIBUNAL SITTING No. 15 / CASE 1
CASE REFERENCE: 759300/DL

Information provider & area:	Expanding Vision Limited
Service provider & area:	2 Ergo Limited
Type of service:	Mobile Content – web to mobile SMS messaging and mobile downloads
Service title:	“Claim ur” promotions – Txt1000; Txt250; Webtext.tv; PlanetMob; and TopMob
Service number:	83023/84025/86880/85999/84023
Cost:	Free promotional messages 83023 - £3 per week 84025 - £1.50 per week 86880 - £3 per week 85999 - £4.50 per week 84023 - £3 per week
Network operator:	Mobile Operators
Number of complainants:	542

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 542 consumer complaints in respect of unsolicited promotional messages. The messages related to five different brands but were similar in style and content and were issued by one information provider. Many complainants stated that they responded positively to the promotional message received, but that they did not realise the nature of the service, namely the subscription element or cost.

The promotional material of each of the five brands was styled in a particular manner and contained two elements. These were described by the Executive as being a) the promotional “hook” section and b) the terms and conditions section. The Executive noted that all messages begin with the phrase ‘FreeMsg’ and some went on to state, ‘Claim ur’. Examples of these promotional messages are as follows:

FreeMsg: Claim ur 1000 SMS messages- Text YES to 86880 now! Use web2mobile 2ur mates etc.Join WebText.tv for £3/week. T&CBOX828, LA19GN. 16+.Remove? txt X or stop

FreeMsg: Get unlimited tones, logos n games now! Text XXX to 85999 for unlimited items! Costs £4.50/week. Age 16+ Remove? txt X or stop PlanetMob,Box139,LA32WU

FreeMsg: Claim tones, vids n games now in 24hour free giveaway! Text XXXX to 85999! Costs £4.50/wk after 24-hours. Age 16+ Remove? txt X or stop PMob,Box139,LA32WU

The Executive investigated the two types of service offered by the five brands, namely: a) web to mobile SMS messaging and b) mobile content downloads (music, pictures, ringtones, etc).

The Executive's understanding of how the services operated

The web to mobile SMS messaging element offered consumers the chance to become registered to access a secure website and issue a number of SMS messages per week, on a subscription basis. The mobile content download element offered consumers the chance to become registered to access a WAP site and download items each week, on a subscription basis. The subscription fee for both services was paid by chargeable mobile terminating ("MT") messages sent to consumers' registered mobile numbers.

Consumers received one of the above promotional messages. The complainants stated that these were unsolicited. By responding to the promotional messages the consumers became subscribed to the relevant service. An initial service message was then sent to consumers' handsets. Those subscribed to the web to mobile service were sent a user name and password enabling them to access a secure website. Those subscribed to the mobile content service were sent a WAP link on which they could view and download the items on offer. Similarly for both services, consumers were charged irrespective of their usage of the online SMS service or their usage of the WAP download site.

The following brands of web to mobile SMS messaging services were investigated by the Executive:

- www.txt1000.com – This element of the service (run on shortcode 83023) provided consumers with 1000 SMS messages a week, for a £3 subscription fee (one chargeable MT message at £3.00 per week).
- www.txt250.com – This element of the service (run on short-code 84025) provided consumers with 250 SMS messages a week, for £1.50 subscription fee (one chargeable MT message at £1.50 per week).
- www.webtext.tv – This element of the service (run on shortcode 86880) provided consumers with 1000 SMS messages a week, for £3 subscription fee (two chargeable MT messages at £1.50 per week).

The following brands of mobile content download services were investigated by the Executive:

- PlanetMob – This element of the service (run on shortcode 85999) provided consumers with an opportunity to request unlimited downloads from a WAP site

which contained over 3,000 items, for a £4.50 subscription fee (three chargeable MT messages at £1.50 per week).

- Top Mob – This element of the service (run on shortcode 84023) provided consumers with an opportunity to request unlimited downloads from a WAP site which contained over 3000 items for a £3 subscription fee (two chargeable MT messages at £1.50 each per week).

The Executive conducted the matter as an information provider case under the standard procedure in accordance with paragraph 8.7 of the 11th Edition (amended April 2008) PhonepayPlus Code of Practice (“the Code”).

In a letter to the service provider dated 3 July 2008, the Executive made a request for information under paragraph 8.3.3 of the Code, to which the service provider responded on 16 July 2008. The Executive made a further request for information in a letter dated 29 July 2008, to which the service provider responded on 7 August 2008.

The service provider requested the investigation be conducted as an information provider case, to which the Executive agreed upon receipt of the appropriate undertaking forms. The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.8 and 7.12.3a in a letter to the information provider dated 27 August 2008. The information provider supplied a response on 12 September 2008.

The Tribunal made decisions on the breaches raised by the Executive on 20 November 2008.

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.”

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, 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. This is sometimes called ‘a hard opt in’, 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 sometimes called a ‘soft opt-in’.

1. The Executive raised a breach of paragraph 5.2 for the following reasons:

Reason 1

The information provider supplied examples of advertisements, which it described as examples of ‘opt-in art work’. The Executive considered that there was no evidence that any individual complainant had seen or engaged with the promotional messages, or any other promotional material (not supplied to the

Executive). The number specific opt-in logs supplied by the information provider only provided general descriptive labels for the products or services, making it impossible for the Executive to check the legitimacy of the information. The logs failed to document or explain the precise nature of the opt-ins.

Reason 2

Without prejudice to the Executive's concerns that neither hard nor soft opt-in consent existed, the Executive considered that the 'number specific opt-in' logs, as supplied by the information provider, indicated that consumers who appeared to have provided consent 'for the time being', had a received a marketing message at a much later time, and therefore the original opt-in was out-of-date.

The Executive disputed the information provider's assertions that where consent to receive marketing messages had not been directly provided, a relevant sale of products or services had taken place, for the following reasons:

(a) The 'number specific opt-in' logs only provided general descriptive labels for the products or services, making it impossible for the Executive to check the legitimacy of the information. Whilst a date of opt-in had been provided on the log, along with the 'transcript of message' for in-house 'transactions', the precise method of sale (or any description of the transactional processes) had neither been explained nor documented. Furthermore, there was insufficient evidence relating to the name and description of any and all third parties involved in the sale of the products and services to each consumer, or relating to the method of transaction by which the consumer had to engage to obtain the product or service from the third party (where that was the suggested opt-in route).

(b) The Executive considered that there was insufficient evidence that the earlier products or services sought by the consumer, (at which point their mobile number was allegedly obtained), were to be provided by the sender of the promotional material, namely the information provider. Furthermore, the information provider had supplied the Executive with insufficient evidence regarding the contractual basis or partnership basis for the relationships established between the information provider, and any third parties involved in the sale of products or services.

(c) The Executive considered that the information provider had failed to supply consumers with an informed opportunity of opting out of receiving future or current marketing information, by the sender or third parties, 'at the time when details were initially collected'.

2. The information provider responded to the Executive's allegations in respect of a lack of consumer consent, as follows:

Reason 1

The information provider stated that the artwork provided did not result in a marketing database opt-in. It merely resulted in the initiation of a free SMS message, which was sent to the consumer as a consequence of them inputting their number into the online promotion. Regardless of whether it had obtained a soft or hard opt-in, all of its promotional messages contained an opt-out command, which provided consumers with a quick and clear way of being

removed from the marketing element of the services, the content of which was approved by the Information Commissioner's Office ("ICO").

Reason 2

The information provider commented that it had only provided logs in relation to these services, and that the mobile numbers in question had received other promotional messages between the original date of opt-in and the date of promotion. These message logs were not provided as the information provider considered that they had no relevance to the investigation.

In respect of the Executive's challenge to the information provider's assertion that where consent to receive marketing messages had not been directly provided, a sale of products or services had taken place, the information provider responded as follows:

(a) The information provider commented that it had provided full details of date of opt-in, method and type of opt-in, as evidence in support of its case. In view of the quantity of logs requested and deadlines set by the Executive, the information provider considered the material supplied to be sufficient evidence in relation to the investigation.

(b) The information provider clarified that the use of the word 'third party' referred to 'third party inventory', i.e. advertising space. This meant the use of affiliates' networks, which captured 'sales or negotiation for a sale' in return for a performance or results based commission. At all times during this 'third party inventory' process, the information provider's products and brand names were used in all marketing material, therefore the product or service in question was its own.

(c) The information provider stated that on each piece of marketing information, it provided the consumer with a clear method of opting out of future promotions. The wording had been reviewed by the ICO and deemed acceptable. A method of initial opt-out was provided at the point of opt-in and was contained on the first and all pieces of future promotion.

3. The Tribunal considered the evidence and commented that a regulation 22(3) consent (a soft opt-in) could not be given as a result of goods or service supplied by a third party. The Tribunal also commented that although the information provider had demonstrated various methods of opt-in (some of which were acceptable in principle), it had failed to provide sufficient evidence to back up its claims. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (Paragraph 5.4.1a)

*"Services and promotional material must not:
a mislead, or be likely to mislead in any way..."*

1. The Executive alleged a breach only in relation to the promotional messages sent by the information provider relating to short-codes 83023, 84025, and

86880. The Executive considered that recipients of the messages had been misled into engaging with a subscription service. For example:

A: *Txt1000.com – 83023*

FreeMsg: Claim ur 1000 SMS messages-Text OK to 83023 now!
Use web2mobile 2 ur mates etc.Join Txt1000.com for
£3/week.T&CBOX139,LA32WU.16+.Remove txt X or stop

B: *Txt250.com – 84025*

FreeMsg: Claim ur 250 SMS messages-Text OK to 84025 now!
Use web2mobile 2 ur mates etc.Join Txt250.com for
£1.50/week.T&CBOX139,LA32WU.16+.Remove txt X or stop

C: *Webtext.tv – 86880*

FreeMsg: Claim ur 1000 SMS messages-Text YES to 86880 now!
Use web2mobile 2ur mates etc.Join WebText.tv for £3/week.
T&CBOX828,LA19GN. 16+.Remove? txt X or stop

The Executive considered it likely that the consumer expectation would be either that i) the SMS messages were offered by their mobile network operator, as part of their current mobile phone package or another associated company, and a response being necessary in order to claim (as confirmed by the complaint logs, in which complainants stated confusion in respect of 'O2 treats' which offered monthly PAYG customers surprise add-ons) or ii) the SMS messages were offered for free as a promotion associated with, but separate from, a 'web2mobile' SMS service, run from a named website which had a subscription fee. The Executive considered the content of the messages to be misleading for the following reasons:

Reason 1

There was a general lack of clarity in the promotional messages, which caused complainants to view the website and pricing as separate from the 250 or 1000 SMS messages, which were to be claimed by responding 'YES' or 'OK' to the promotional messages.

Reason 2

The phrase 'claim ur' implied that available SMS messages were already part of the consumers' mobile package and were merely a mobile add-on, which required a positive response prior to receipt of said messages.

Reason 3

The "promotional hook" was often clearly visible on the users' screen whilst the terms and conditions were viewed upon the user scrolling down. In some cases, complainants comment that they had responded to the promotion, without ever reading of any pricing details. The Executive raised concerns that without scrolling down, a user might not see any identifiable company name or branding.

2. The information provider stated that there had been no intention to mislead any consumer into using its services, and that the services operated in a fair and proper manner. It considered that the messages made the price of the service clear, in a legible fashion and that the mandatory inclusion of the wording

'FreeMsg' appeared to be the source of the confusion. The information provider commented that the wording has been included purely to ensure compliance with the Mobile Network Codes and PhonepayPlus' recommendations. The message contained no mention whatsoever to a mobile network operator and the information provider's brand name(s) were also visible. The information provider commented that it considered the Executive's argument in respect of O2 treats, to be weak.

Reason 1

The information provider disputed that the promotional element of the service could be seen separately to the terms and conditions. The information provider emphasised that there had been no intention to mislead any consumer into its services, which it believed operated in a fair and proper fashion.

Reason 2

The information provider could not see how the wording 'claim ur' meaning 'claim your' could be viewed as part of a mobile package. Furthermore, from its research there was no evidence from the mobile networks to suggest they sent SMS messages to their customers offering additional 'add-ons'.

Reason 3

The information provider rejected the assertion that consumers had to scroll down to read its messages. It considered it possible that some consumers might not read the message in full, which was out of its control. All it could do was provide the consumer with complete clarity on the service and service pricing. The information provider commented that it had conducted market research into the mobile phone handset market within the UK, and its findings supported its argument that consumers did not need to scroll to view 160 characters within an SMS message (and had not needed to since early in 2003).

3. The Tribunal considered the wording of the promotional messages to be misleading. It noted the body of evidence from complainants who had been misled into believing that they could get 250 or 1000 SMS messages for free, depending on the brand. It further noted the misleading effect of the words 'claim ur' which followed on from 'FreeMsg'. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 noted that none of the relevant promotional messages sent by the information provider between May and July 2008 on the 5 short-codes in

question, included a customer services phone number as required by paragraph 3.3.5 of the Code.

2. The information provider commented that it had supplied its UK contact details to consumers. These were provided in the form of a postal box address and/or website address, all of which had a process linked to its customer care team, which it considered satisfied paragraph 5.8 of the Code. The information provider commented that the key reference in paragraph 3.3.5 of the Code was the word 'customer'. The information provider did not consider consumers at the marketing stage to be 'customers' of the brand, and were therefore not required to provide them with a customer care contact number. Once a consumer had participated in any of its services, they were immediately given details on how to contact the information provider over the telephone, which the information provider considered to be an effective mechanism for the consideration of claims for refunds and their payment where justified. Without prejudice to this point, the information provider also commented that it did plan to introduce a telephone/IVR facility in its future promotional messages, which would provide the consumer with a means of accessing terms, opt-out information, further contact information etc. at an earlier point in the chain (which it considered to be over and above the requirements of the Code).
3. The Tribunal considered the evidence and noted that the promotional messages did not contain a customer services telephone number, as required by paragraphs 3.3.5, and 5.8 of the Code. It further noted that the required information had not previously been brought to the attention of recipients of the messages. The Tribunal did not accept the information provider's argument regarding the time that a recipient of a promotional message became a customer, noting that the Code refers to the notification of the "customer service phone number". It also observed that the requirements of paragraph 5.8 of the Code referred to any promotion and applied to customers and consumers alike. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT

SUBSCRIPTION SERVICES (Paragraph 7.12.3a)

"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."*

1. The Executive considered that the promotional messages for all five brands, failed to clearly indicate that the service was subscription-based. For example:

A: *Txt1000.com – 83023*

FreeMsg:Claim ur 1000 SMS messages-Text OK to 83023 now!
Use web2mobile 2 ur mates etc.Join Txt1000.com for
£3/week.T&CBOX139,LA32WU.16+.Remove txt X or stop

B: *Txt250.com – 84025*

FreeMsg:Claim ur 250 SMS messages-Text OK to 84025 now!

Use web2mobile 2 ur mates etc.Join Txt250.com for £1.50/week.T&CBOX139,LA32WU.16+.Remove txt X or stop

C: *Webtext.tv – 86880*

FreeMsg: Claim ur 1000 SMS messages-Text YES to 86880 now!

Use web2mobile 2ur mates etc.Join WebText.tv for £3/week.T&CBOX828,LA19GN.16+.Remove? txt X or stop

D - "FreeMsg: Get unlimited tones, logos n games now! Just txt XXX to 84023 for unlimited items! Costs £3/week. Age 16+. Remove txt STOP. TopMob,Box139,LA32WU"

E - "FreeMsg: Claim tones, vids n games now in 24hour free giveaway! Text XXXX to 84023! Costs £3/wk after 24-hours. Age 16+. Cancel txt STOP. TMob,Box139,LA32WU"

F - "FreeMsg: Get unlimited tones, logos n games now! Just txt XXX to 85999 for unlimited items! Costs £4.50/week. Age 16+. Remove txt STOP. PlanetMob,Box139,LA32WU"

G - "FreeMsg: Claim tones, vids n games now in 24hour free giveaway! Text XXXX to 85999! Costs £4.50/wk after 24-hours. Age 16+. Cancel txt STOP. PMob,Box139,LA32WU"

The Executive raised four main reasons as to why it considered the service failed to indicate that it was subscription based:

Reason 1

There was a general lack of clarity in the promotional messages which caused complainants to view the website and pricing as separate from the apparently free SMS messages, ring tones or other items to be claimed, by responding 'YES' to the promotional message. For this reason the Executive considered that the pricing was not clearly indicative of a subscription service.

Reason 2

The Executive considered that the phrase 'claim ur' implied that the apparently free messages, or other items on offer, were already part of the consumers' mobile package and were a mobile add-on which merely required the consumer to positively respond prior to receipt of said messages. The Executive considered that the phraseology was not in keeping with a subscription service and did not fit with the wording later in the message, such as 'Join webtext.tv' and 'Remove'. Furthermore, for many mobile phone users the words such as "Join" and 'Remove' were not visible until they scrolled down, thereby leaving them with the impression given solely by the phrase 'claim ur'.

Reason 3

The Executive considered that the wording 'Join Txt1000.com for £3/week', was the only indicator within the entire message, that the website based service charged a subscription fee of £3 per week. This Executive noted that the wording appeared towards the end of the message and was not as clear to read

as the earlier 'promotional hook'. Furthermore, many mobile phone users could only view the information upon scrolling down the screen.

Reason 4

The Executive considered the word 'Remove', used to describe the process of unsubscribing from the service, increased to the lack of clarity regarding the nature of the services offered.

2. The information provider disputed the allegations made by the Executive as follows:

Reason 1

The information provider disputed that the promotional element of the service could be seen separately to the terms and conditions. On many mobile phones the message could be viewed as one complete message, without the need to scroll down. The information provider also commented that the price and billing period was notified to the consumer within the promotional material in a clear fashion, and that consumers were also sent a free SMS message alert prior to the initiation of billing, which contained full service information.

Reason 2

The information provider could not see how the wording 'claim ur' meaning 'claim your' could be viewed as part of a mobile package. Furthermore, from its research there was no evidence from the mobile networks to suggest they sent SMS messages to their customers offering additional 'add-ons'.

Reason 3

The information provider agreed that the wording 'Join txt1000 for £3/week' was the only element within the promotional message, which contains information regarding the subscription element of the service. However, it completely disagreed it was unclear. The information provider explained its methodology for the wording 'Join txt1000 for £3/week' as follows a) the consumer was joining the service, hence the word 'Join', b) unit price was £3 and the billing period weekly, hence £3/week. The information provider disputed that the wording of the pricing information came towards the end of the promotional message, but featured in the middle of the message. The information provider again disputed the need for consumers to scroll down.

Reason 4

The information provider stated that the word 'remove' was used in order to give the consumer a method of removing themselves from the promotional marketing of the service not the subscription service itself. It commented that "Remove txt STOP" was a command to stop promotional messaging as per ICO regulations and PECR. The word 'remove' was not intended to describe a process of 'unsubscribing' from the service as, at this stage, the consumer was not engaged in the service and therefore could not unsubscribe. The information provider stated that it had validated the process with the ICO, who did not raise any concerns in this regard.

3. The Tribunal considered the evidence and concluded that, although the Code required the service to clearly indicate that it was subscription based, there was

no specific requirement to use the word 'subscription'. The Tribunal accepted that the expression '£3/week' indicated a subscription element to the web-based service, regardless of its view that the promotional messages could have been worded more clearly. The Tribunal did not uphold a breach of paragraph 7.12.3a of the Code.

Decision: NOT 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 information provider had been wilful in its drafting of messages, which the Tribunal found to be misleading and which led consumers to mistakenly sign up for a subscription service.
- There was material consumer harm; namely a high number of consumer complaints (542);
- The cost paid by individual consumers was high; being up to £4.50 per week;
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus; and
- Consumers faced difficulties in obtaining assistance from the information provider's customer service staff. Certain complainants commented that they received rude or unhelpful responses.

In mitigation, the Tribunal noted the following mitigating factors:

- The information provider had issued refunds to some complainants.

Taking into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £40,000;
- The Tribunal ordered that the information provider remedy the breaches that were upheld by ceasing forthwith to promote the five brands in question, pending receipt and implementation of compliance advice. Compliance advice is to be sought within 2 weeks from the date of publication of the summary of this decision and implemented within 2 weeks of receipt.

Comment

The Tribunal also noted that the information provider had issued refunds to some complainants and commented that it expected the information provider to continue to provide refunds for the full amount spent by users, except where there is good cause to believe that such claims are not valid.