

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

**Thursday 6 November 2008 TRIBUNAL SITTING No. 14 / CASE 4
CASE REFERENCE: 727899/AC**

Information provider & area:	IMS Limited
Service provider & area:	Zamano Limited
Type of service:	Text and Calls Offer
Service title:	Smart Calls & Smart Text
Service number:	87122 & 68866
Cost:	£3.00 per week
Network operator:	Mobile Operators
Number of complainants:	174

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

BACKGROUND

The PhonepayPlus Executive ("The Executive") received over 170 consumer complainants in respect of a service which provided a facility to make phone calls or send text messages, for a 'bundled' fee of £12 per month for calls and £3 a week for texts.

The majority of complaints related to unsolicited messages sent by the information provider to numbers purchased from a third party supplier. The subscription element of the service appeared to be unclear in the promotional messages received on the complainants' handset.

According to the service provider the service had been promoted in a variety of publications including; the News of the World, The Sun, The Daily Sport, The Metro, The Evening Standard and London Lite. The service was also promoted through SMS marketing to opted-in numbers, which had been supplied by 'DLG', a customer profiling and marketing company and also via the company website <http://www.imob.tv>.

The Executive's understanding of how the service operated

Complainants received the following SMS message:

Freemsg: 1 - week unlimited free Txt Messaging! Activate now, txt: SMS to 87122. subscrip3gbp/wk unlimited 16+ Web/WAP Help 08448714184 Stop? Txt stop gprs apply(appendix 3 - pg 36)

As a consequence of sending the keyword to the shortcode, consumers then received a confirmation message which read:

For SmartCall;Freemsg: You joined SmartCall. 1-month Unlimited Free Calls! FREEPHONE 08081261555 PIN 304852. 12gbp/mnth for unlimited calling 2stoptxtstop Support 08448714184

For SmartText;

FreeMsg: You joined Smart TXT! 1 Week Free Txt Messaging. From WAP/WEB go www.imob.tv PIN45960278 Unlimited Messaging 3GBP/wk 2stoptxtstop. Support 08448714184

Following receipt of this message and expiration of the 'free trial period', the consumer began to be charged for the service. Upon monitoring the service, the Executive followed the instructions and was able to use the website www.imob.tv, in order to send a text message. The website was easy to follow, but the service did not work initially. Following a telephone call to www.imob.tv customer services, the service worked and the Executive's message was delivered successfully and without charge.

In a letter to the service provider dated 3 April 2008, the Executive asked a series of questions and requested message logs and other corroborating information to be forwarded to substantiate the claims being made by complainants, in accordance with paragraph 8.3.3 of PhonepayPlus Code of Practice ("the Code") 11th Edition (amended April 2008). The service provider responded on 15 April 2008. The Executive sent a further request for information on 30 May 2008, to which the service provider responded on 11 June 2008.

In a letter to the service provider dated 15 July 2008, the Executive raised potential breaches of paragraphs 5.2, 7.12.3a, 7.12.3b, 7.12.4b and 7.12.4c of the Code. The Executive received a response on 13 August 2008 from the information provider's legal representatives (all comments therein to be referred to as being made by the 'information provider'). 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 breach letter sent to the service provider was withdrawn and a breach letter was issued to the information provider on 18 August 2008. The information provider responded on 18 August 2008, stating that it had nothing to add to the response provided on 13 August 2008.

An Addendum to the breach letter was sent to the information provider on 11 September 2008, to which it responded on 19 September 2008.

The Tribunal made a decision on the breaches raised by the Executive on 6 November 2008.

SUBMISSIONS AND CONCLUSIONS

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 concerns that the SMS element of the service had been promoted without the appropriate consumer consent. It appeared that the information provider was relying on the 'soft opt-in' exemption, but had failed to demonstrate that users' details had been obtained in the course of or negotiation of a sale for similar products or services. The details had been obtained as a result of users completing an online 'lifestyle' survey or by registering on the Electoral roll, and it appeared that users had not been offered a simple means of refusing at the time their details were taken.
2. The information provider commented that it had acquired the database of numbers from a 3rd party data provider. It stated that it had acted in good faith and was aware that it could only use the data in line with the purposes for which it was collected, and had satisfied itself on this point. The information provider had received assurances that the information could be used for its intended purpose.

The information provider stated that it did not condone marketing activity based on numbers cloned from the electoral roll and commented that the Executive had only found one example of this. The information provider commented that it had since created an algorithm to detect such things as consecutive mobile numbers, and had started conducting random checks on opt-in numbers. The information provider also commented that there was nothing in the Regulations, which expressly prohibited the obtaining of consent via a third party.

With regard to the general lifestyle surveys from which the opt-in details were gathered, the information provider commented that these days, for people who had grown up with the Internet and a dynamic world of phone and mobile communication, texting and phone communication had very much become a lifestyle choice. The information provider stated that many lifestyle questionnaires were aimed at identifying users' mobile and phone usage. It considered its service was "similar", as for many, it was an integral part of their lifestyle.

The information provider also stated that copies of the marketing material clearly set out how a recipient might refuse the use of their contact details, and that this information was given to the recipient on more than one occasion (the promotional message, the print advertising, the website, the signup message and the reminder message).

The information provider also referred the Executive to the terms and conditions on the <http://imob.tv/terms.htm> website which also provided the consumer with details as to how their data might be used, and instructions on how to opt-out.

The information provider emphasised that any 'STOP' request would immediately result in cancellation of all services and the removal of the relevant number from any mailing lists. It stated that there were 5 "simple means" of leaving the service available to recipients of the messages: 1) Sending STOP, STOP ALL, CANCEL, QUIT or EXIT (or any other registered stop command) to the short code, 2) phoning customer support, 3) Entering their number under the "support" section of the website and clicking remove, 4) Sending an email to support@imob.tv or 5) Registering with the Telephone Preference Service.

3. The Tribunal considered the evidence and noted the inclusion of a tick box at the point at which users entered their personal details in the lifestyle survey. This enabled users to

specifically consent to receiving marketing via free SMS messages. The Tribunal was satisfied that the inclusion of the tick box satisfied the 'hard opt-in' requirement of the Regulations. The Tribunal did not uphold a breach of paragraph 5.2 of the Code.

Decision: NOT UPHELD

ALLEDGED BREACH TWO

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 asserted that the subscription element of the service was unclear to consumers. One particular complainant indicated that they had not understood the full implications of replying to the shortcode with the keyword, which resulted in their entry into a charged subscription service. The subscription message stated:

Freemsg: 1 - week unlimited free Txt Messaging! Activate now, txt: SMS to 87122. subscrip3gbp/wk unlimited 16+ Web/WAP Help 08448714184 Stop? Txt stop gprs apply

The Executive considered that only an experienced service user would understand the term's 'subscrip3gbp/wk'. The Executive did not consider that this information clearly indicated that by replying, recipients would enter into a subscription service.

2. The information provider noted that the breach raised by the Executive was on the basis of one consumer complaint. The information provider stated that it took care to ensure that the information stated was as clear as possible, and considered the abbreviations and symbols used to be well known and established. It commented that 'Subscrip3n' was an established abbreviation for 'subscription' just as 'Inc' was an abbreviation of 'Incorporated' or 'T's and C's' were an abbreviation of 'Terms and Conditions'.

The information provider also commented that 'gbp' was the International Organisation for Standardisation (ISO) 4217 and was therefore an acceptable method of displaying the cost of a service. It also stated that 'wk' was defined in the Oxford English Dictionary as meaning 'week'. The information provider explained that the use of the £ sign in short messages was problematic and unreliable due to how it was handled by both networks and aggregators.

3. The Tribunal considered the evidence and concluded that the promotional SMS messages failed to clearly indicate that the service was subscription based. The Tribunal did not consider 'subscrip3gbp/wk' to be satisfactory means of presenting this information to consumers and in their view did not clearly indicate that the service was subscription based. Furthermore, the Executive noted that the complainant had reported that they had to scroll down in order to read the information. The Tribunal upheld a breach of paragraph 7.12.3a of the Code.

Decision: UPHELD

ALLEDGED BREACH THREE

SUBSCRIPTION SERVICES (Paragraph 7.12.3b)

"Promotional material must:

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.”

1. The Executive considered that the terms of the subscription service, including the cost and the period for which it was charged, was not clearly visible. One particular complaint indicated that they did not understand that there was a charge incurred by using the service. The Executive considered that only an experienced service would understand 'Subscriptn3gbp/wk'. The Executive therefore did not consider that this information communicated to the user, the fact that they would be charged £3 per week.
2. The information provider reiterated its comments made in respect of paragraph 7.12.3a of the Code. The information provider again commented that the breach raised by the Executive was on the basis of one consumer complaint
3. The Tribunal considered the evidence and concluded it unlikely that recipients of the message, would understand the terms of use of the service from 'Subscriptn3gbp/wk', unless they were experienced users of such services. The Tribunal upheld a breach of paragraph 7.12.3b of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION INITIATION (Paragraph 7.12.4b)

“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

b confirmation that the service is subscription-based.”

1. The Executive did not consider that the free initial message sent to users prior to receiving the premium rate service, made it clear that the service was subscription based:

For SmartCall;

“Freemsg: U Joined SmartCall. Enjoy this months' FREE trial of unlimited calls/12GBP/mnth thereafter Call 08081261555 PIN47317987 Stop? Reply STOP Help 08448714184”

The Executive noted that the messages did not state subscription at any stage. The only indication of a subscription service was: 'calls/12GBP/mnth'. It is the Executive's opinion that unless the consumer was an experienced user of such services, they would not understand this to be subscription information.

2. This information provider stated that the message was designed to be based on the Mobile Operator Premium Text Code Extension August 2005 paragraph 2.2, which allows the use of the word "U have joined" followed by the name of service, to identify that the service was a subscription service. The information provider also commented that '12GPB/mnth' did indicate that there would be a continuous charge, in no way dissimilar to a standard form mobile phone contract which stated the charge/month
3. The Tribunal considered the evidence and noted that although consumers received an initial free message prior to receiving the premium rate service, the message failed to satisfy the requirements of the Code. The message failed to clearly state that the service was

subscription based on the basis that it failed to state 'subscription'. The Tribunal upheld a breach of paragraph 7.12.4b of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

SUBSCRIPTION INITIATION (Paragraph 7.12.4c)

"Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

c what the billing period is ... or, if there is no applicable billing period, the frequency of messages being sent."

1. The Executive considered that the free initial message sent to users prior to receiving the premium rate service, failed to make the billing period clear.

For SmartCall;

Freemsg: U Joined SmartCall. Enjoy this months' FREE trial of unlimited calls/12GBP/mnth thereafter Call 08081261555 PIN47317987 Stop? Reply STOP Help 08448714184

For SmartText;

FreeMsg: You joined Smart TXT! 1 Week Free Txt Messaging. From WAP/WEB go www.imob.tv PIN45960278 Unlimited Messaging 3GBP/wk 2stoptxtstop. Support08448714184

The Executive considered that only an experienced user of such services, would understand the following abbreviations: 'mnth', 'wk', 'calls/12GBP/mnth' or '3GBP/wk'.

2. The information provider reiterated its comments that: 'wk' was defined in the Oxford English Dictionary as meaning 'week' and that '12/GBP/mnth' indicated that there would be a continuous charge, in no way dissimilar to a standard form mobile phone contract which stated the charge/month.
3. The Tribunal considered the evidence and concluded that although it did not consider that a breach of the Code had occurred, the information was not presented as clearly as it might have been. The Tribunal did not uphold a breach of paragraph 7.12.4c of the Code.

Decision: NOT UPHELD

SANCTIONS

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

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

- The information provider was wilful in inducing consumers to enter the subscription element of the service, without full knowledge of the consequences;

- There was material consumer harm (evidenced by 174 consumer complaints) The cost paid by individual consumers was high, many consumers complained of charges around £20 and more exceptionally, as much as £100; and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following mitigating factors:

- The information provider had co-operated with the Executive when notified of the breaches; and
- A number of complainants had stated that they had received refunds from the information provider.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £25,000.
- The information provider is to seek and implement compliance advice on this service and all related promotional material. Advice must be sought within 2 weeks from the date of this notice and implemented within 2 weeks of receipt.

Comment

The Tribunal noted that refunds had been issued to complainants and commented that it expected the information provider to continue to issue these to users with valid claims.

The Tribunal also noted that the SMS promotional material was not compliant and that any future promotions via this method, may give rise to continuing breaches of the Code.