

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

**Wednesday 29 October 2008 TRIBUNAL SITTING No. 13 / CASE 1
CASE REFERENCE: 751877/AB**

Information provider & area:	Sales and Moderating Services Limited, Jersey
Service provider & area:	Zamano Limited, London
Network operator:	All Mobile Operators
Type of service:	Competition - Subscription
Service title:	Hangman competition for a chance to win £5000.
Service number:	66033
Cost:	£3.00 per game, £3.00 per message, £3.00 sign-up fee
Number of complainants:	88

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received complaints from members of the public about a competition through which they received chargeable SMS messages. The service provider and information provider confirmed that the service was promoted through a website or pop-up.

On 16 June 2008, the Executive contacted the service provider to request further information regarding the complaints received. At this point, the Executive had received 69 complaints. By 17 July 2008, the number of complaints had risen to 101. The service provider confirmed that 13 of the complaints were not in fact associated with the information provider or service. The Executive deducted these from the overall complaints received, resulting in a total of 88 complaints.

Of the 69 complainants, 24 claimed that they had never registered on a website. They claimed to have first heard about the service upon receipt of an unsolicited message, which requested their participation in a hangman competition.

A further 29 complainants stated that they were on the Internet when a pop-up appeared. Some stated that the pop-up requested them to participate in a free IQ test and that part way through the test, a further page appeared giving them the opportunity to win £5000. These complainants were unaware that in completing the free IQ test, they would enter a subscription based, chargeable service. Some complainants stated that pricing information was absent from the initial text message they received, so they

simply ignored or deleted that and subsequent messages, unaware that they were chargeable ones.

A further 15 complainants (out of the 69) stated that they had sent the 'STOP' command on several occasions, but had continued to receive chargeable messages. The maximum a complainant said they were charged was £330.00 in total, which was confirmed by the message logs, supplied by the service provider.

The Executive's Monitoring of the service

In view of the fact that some of the complainants said they had initially entered a free IQ test, the Executive carried out a Google search for "iq test". The Executive selected the first link entitled 'Take a Free **IQ Test**', and entered the requisite details (gender and birth date) in order to participate. Partway through the IQ test, the Executive was presented with the question "Would you like to win £5000?" On responding 'Yes' the Executive was then presented with a screen inviting the user to play an online game called "Shoot 3 Moneybags and win £5000", which instructed the user to click their mouse to fire at images of moneybags on screen.

Terms and conditions at the bottom of the game screen read:

This is a subscription service. Play the game on the website, to qualify and play the mobile game for your chance for several money prizes. A sign-up fee of £3.00 shall apply. £3.00 per daily message-play and £3.00 per game message. You will receive max of 10 game-msgs per game play. Sent text charged at standard operator charge. Min.age 18+ with bill payer's permission. To stop this service? Text STOP to 66033. Helpdesk available at 0845 225 22 44. The wordgame is based on knowledge of the contestant and has multiple levels including final rounds. S2W offers innovative entertainment services for your mobile.

The Executive noted that in order to view pricing information and the terms and conditions, it was necessary to scroll down the page. The Executive incurred costs of £9.23 as a result of entering personal details and engaging in the registration process for a chance to win £5000. Once the Executive had participated in the competition to win £5000, there were no avenues available which returned to the IQ test, and it was impossible to either complete or obtain the IQ test results.

On the 3 June 2008, the Executive contacted the service provider in respect of the high volume of complaints received by the Executive in such a short period of time. The service provider promptly contacted the information provider, who then suspended the service until its investigations had been completed. On 4 July 2008, the service provider confirmed that the service remained suspended.

The Executive's understanding of how the service operated

The Executive noted from the message logs, that there appeared to be two ways of initiating the service:

1. By users entering their mobile phone number on the website, which triggered receipt of a MT message with a pin code for entry into the website.

2. By receiving a free message which requested the user to send 'GO' to shortcode 66033 in order to confirm their participation in the competition.

In a letter to the service provider dated 16 June 2008, the Executive requested information in respect of the operation of the service, under paragraph 8.3.3 of the 11th Edition of the PhonepayPlus Code of Practice (amended April 2008) ("the Code"). The service provider responded on 4 July 2008, and explained that consumers could qualify by playing a simple game on the Internet, after which, they could subscribe to a skilled text game called Hangman. This was a multilevel text game which enabled consumers to roughly double the money they won in the final, with each correctly guessed word. After every level, the consumer could choose to play in the final round in an attempt to win the prize (for that level), or continue playing to a higher level. In the final, if the contestant responded within 3 minutes, they would win the prize. It appeared there were no restrictions on the number of available prizes, and an element of skill was required to win.

In a letter to the service provider dated 28 July 2008, the Executive raised potential breaches of paragraphs 5.4.1 a, 5.7.2, 5.7.6, 7.6.3b, 7.6.5, 7.12.4 and 7.12.5 of the Code. On 11 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. On 11 August 2008, the information provider responded to the Executive's breach letter originally sent to the service provider.

On 2 October 2008, the Executive sent the information provider an addendum raising additional reasons for the alleged breach of paragraph 5.4.1a of the Code, to which the information provider responded on 10 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 29 October 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 the service to be misleading for the following reasons:

Reason 1

The message logs showed one user to have received the following message:

"FreeMsg: now you have a chance to win 5,000 pounds in a few easy steps. You can leave by sending STOP to 66033. Service costs 300p/day, and 300p per message"

Although the message stated that it was free, the Executive noted that the log showed that the recipient had been charged £3.00, which the Executive considered to be misleading.

Reason 2

The promotional website and pop-ups advertised the service as one which provided a chance of winning £5,000 and consequently this was the consumer's expectation when entering the service. The Executive examined the calls logs and noted that one particular user had received messages such as:

"Congrats, you can play for gbp 200 word or the final for gbp 100. Txt WORD FINAL to 66033 for cash or wait for a gbp 200 word."

The Executive noted that the message made reference to participants winning £200 or £100, but that no reference was made to the £5000 prize as stated on the website, which the Executive considered to be misleading.

Reason 3

The Executive noted that one user received the following message on several occasions:

"Congrats, you can play for gbp 200 word or the final for gbp 100. Txt WORD FINAL to 66033 for cash or wait for a gbp 200 word."

The user also received messages such as:

"q-a—f---- This is your final word to win gbp5000. Txt within 3 minutes the word to 66033. Good luck! You can do it!"

The Executive also noted from the message logs that after receiving the above message and completing the final word question, the user received further 'final word' questions from the service. The Executive considered this to be misleading because the messages implied that the user was only required to complete one 'final word' and would not receive a succession of final messages.

Reason 4

The Executive noted that some of the complainants initially thought that they were participating in a 'Free IQ Test'. Partway through completing the test, a screen appeared which required users to enter their personal information. The Executive considered that users were led to believe that they were just completing a free IQ test, but were actually required to provide personal data in order to obtain their test results. The entry of the personal data in fact resulted in users receiving texts, which when responded to, triggered the subscription service. During monitoring, after entering personal details, the Executive was unable to return to the IQ test and therefore never received the results.

After entering their personal details, users were asked to "SHOOT 3 MONEYBAGS AND WIN £5000". Once three bags had been shot, a pop-up

appeared which stated: “CONGRATULATIONS You have qualified for the £5000 jackpot”. The Executive considered that although this implied that participants would be entered into some sort of draw for a chance to win the £5000, participants had merely ‘qualified’ and had not won anything. The Executive considered it unclear that the qualification process involved participation in the Hangman subscription game.

Reason 5

The Executive noted that complainants were receiving chargeable advertising messages about the service (£3.00 per message). One particular user had received an initial free message regarding their participation in the competition, following which they received a total of 23 messages. Six of the 23 messages were questions relating to the hangman game. Examples of the remaining 17 messages are as follows:

“We hereby confirm your registration of hangman. In just a second you will receive your first word. You can win gbp 5000 today!”

“Why wait? text PRIZE and we are sure you will not only enjoy the game but you will see you can win money right away. Txt PRIZE to 66033 now”

“What is your goal? Go for this 5,000 pund [sic] of first focus on 1,000. The choice is all yours, just text PRIZE to 66033”

“Text PRIZE now! because it’s jackpot day. Your new hangman assignment is waiting for you. Txt PRIZE to 66033 now”

The Executive considered the above messages to be advertising and not the service itself for which users would have expected to be charged.

2. The information provider responded to the alleged breaches as follows:

Reason 1

The information provider confirmed that the message was in fact free, and that this had been ratified by the service provider who had advised that the message timed at 09:41 on 6th May was sent over one of its “free binds”.

Reason 2

The information provider stated that Hangman was a skilled game and that there was a potential to win a £5,000 prize. The information provider confirmed that the game did commence with a £100 prize and if that level was successfully completed, the consumer could choose (as demonstrated in the above MT) to progress to the next level, which offered a £200 prize. If a consumer opted to stop at the £100 level they had to text “WORD FINAL” to play the final round, and if successful, won the £100. The information provider commented that it had stated in the confirmation message, that there were steps or levels involved to win the £5,000 pound prize. The amount of money on offer was also stated, so the consumer knew at which level they were participating. The information

provider did not consider its actions misleading, rather it had taken effort to clearly explain the process in messages sent to consumers.

Reason 3

The information provider stated that it was correct that the consumer in question received that message and other final messages, because (as demonstrated by the logs) they had played the game and progressed through the game without seeking to obtain the prize for the lower levels, and consequently reached the highest (£5,000 prize) level. The information provider considered that the correct messages had been sent. It commented that when an end-user did not respond to the final message within 24 hours, the information provider sent (within the daily subscription service) a new final word message. The recipient then only had 3 minutes to reach the final, which was also stated in the message. After 3 minutes, the word was no longer applicable and the information provider sent a new assignment for the final (as per the terms of subscription).

Reason 4

The information provider stated that it had promoted its services through partnerships with affiliate networks. It explained that these networks held large databases of publishers, for example a company with a broad variety of internet-sites or internet-portals. Publishers promoted its mobile services through banner promotions with links to a so-called 'splash-page' where the consumer could play the qualifying game. In this instance, the publisher/owner of the Free IQ Test, had combined their own IQ Test with its Saloon Offer. Although the information provider was the owner of the Saloon Offer, it was not the owner of the IQ Test. Following a review of the information supplied by the Executive, the information provider had terminated the virtual relationship with the publisher. The information provider commented that it considered this particular publisher had been over-creative by combining two offers, something which it sincerely regretted. The information provider also commented that it was currently talking to its networks in order to determine methods to prevent a recurrence of this situation in the marketplace, and that a lot of mobile entertainment companies were negotiating with their affiliate networks to prevent such occurrences in future.

The information provider also commented that in the Saloon promotion, both the terms and conditions and first free subscription initiation message informed the consumer that they had qualified for a chance to win a money prize.

Reason 5

The information provider said that the service costs were £3.00 per day, as explained in both the terms and condition and the free subscription initiation message. Therefore, the messages which the Executive considered to be for advertising purposes were the daily messages used as a reminder and prompt to users to play the game, as each hangman word had a 24 hour life-cycle. When consumers were not playing, the information provider sent (within the terms of subscription) messages to prompt participation. After reactivation, a

new hangman word was sent to the consumer to enable them to play the new game.

3. The Tribunal considered the evidence and concluded that the service and promotional material was misleading. The Tribunal upheld reason 1 on the basis of the message logs supplied by the service provider and referred to by the Executive, which showed that the user had been charged £3.00 for the message. The Tribunal considered the mention of the £5,000 prize in the initial promotion but only mentioning lesser prizes in subsequent messages to be unclear and misleading (reason 2). The Tribunal regarded the multiple sending of “final questions” and failure to mention the 3 minute time restriction until the final question, to be misleading (reason 3). The Tribunal considered the website to be misleading because users thought they were participating in an IQ test when, in fact, it was not possible to get any results from that test and because they were misled into believing they had to provide their personal data in order to get those results (reason 4). Although the Tribunal considered that there were confusing elements to the sending of multiple chargeable advertising messages, it decided not to uphold reason 5. For the reasons stated above, the Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

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. The Executive noted that pricing information and terms and conditions appeared at the bottom of the webpage. Users had to scroll down in order to view the information, which was presented in a significantly smaller font size in comparison to all other information on the page and furthermore, was buried in the middle of a block of text. On the several occasions that the Executive visited the promotion, despite scrolling down, it noted that the scrolling stopped just above the pricing information. The Executive was of the opinion that users could attempt to shoot the three bags, without ever scrolling far enough to view the pricing information.
2. The information provider responded that it had sent all promotional URLs but for 90% the following link was used by external promoters:

http://www.skilled2win.com/splash/splash.php?session_id=9ec86ad4165bd0d7f8bc8d51296f1b92

Here it was unnecessary to scroll down as the terms and conditions were automatically shown.

3. The Tribunal considered the evidence and found that the requirement for users to scroll down in order to view the full pricing information meant that such

information was not prominent. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

PRICING INFORMATION – Charging for operational messages (Paragraph 5.7.6)

“All operational or instructional messages necessary to obtain access to a service and provided separately to the service must be available free of charge to a user.”

1. The Executive noted from the message logs provided by the service provider, that many of the users had received the following chargeable message which cost users £3.00:

“Explanation of hangman: we send you a word with some letters missing. Get these letters and win money. Txt PRIZE to 66033.”

The Executive considered that the above message was instructional in nature, as it informed users how to play the game in order to win money. For this reason, the Executive considered that the message should have been free of charge.

2. The information provider responded that the message was not sent as an instructional message, but as a subscription incentive message as part of the service. The aim of the message was to hopefully encourage consumers to re-activate the service and start playing again.
3. The Tribunal considered the evidence and concluded that the message in question was unhelpful and likely to mislead recipients (who already knew how to play the hangman game), but that this point had already been addressed under the breach of paragraph 5.4.1a of the Code. Since the message was not “necessary” to obtain access to the service, the Tribunal did not uphold a breach of paragraph 5.7.6 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3b)

“Promotional material must clearly state any information which is likely to affect a decision to participate, in particular:

b an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restriction on their availability or use.”

1. The Executive considered that the terms and conditions contained in the promotional material failed to state: the number of prizes available to participants, the complexity of the game play, the qualifying stages or how to win the cash, all of which were likely to affect a decision to participate. The key terms and

conditions also failed to inform users as to when and how prizes would be distributed.

2. The information provider acknowledged that it did not provide this information in its terms and conditions, although it did state in the mobile messaging flow directly to the end-user, that if they were a winner, they could call a phone number to provide their personal details and claim their prize.
3. The Tribunal considered the evidence and concluded that the promotional material failed to include salient information which was likely to have influenced a decision to participate, namely the complexity of game play, the number of required rounds to reach the final, and the fact that participants only had 3 minutes to answer the final question. The Tribunal also noted that the promotional material failed to provide an adequate description of available prizes; there was no mention of any prizes lower than £5,000. The Tribunal upheld a breach of paragraph 7.6.3b of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.5)

“Except where there are only instant prize-winners, promotional material for competition services must state when the competition closes....”

1. The Executive noted that the promotional material and the message logs, showed that messages sent to recipients failed to inform them as to when the hangman competition closed. Upon considering the information provider’s response below, the Executive accepted that there was no closing date for the competition and for this reason recommended that the Tribunal did not uphold a breach of paragraph 7.6.5 of the Code.
2. The information provider responded that the competition did not have a closing date, because there were different closure points for each competitor based on what level they had reached and whether they had opted to receive any winnings. The information provider stated that in the final round, it clearly informed competitors that they had to enter their answer within the allotted 3 minutes.
3. The Tribunal considered the evidence and accepted the Executive’s recommendation that a breach should not be upheld, as the competition did not have a closing date. The Tribunal did not uphold a breach of paragraph 7.6.5 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH SIX

SUBSCRIPTION INITIATION (Paragraphs 7.12.4a-f)

“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,
- f service provider contact details.”

1. The Executive considered the information provider had failed to comply with the Code requirements in respect of subscription initiation, for the following reasons:

Reason 1

The message logs supplied by the service provider demonstrated that in some instances, the charges for the sign-up fee and/or the first £3.00 charge were received prior to the free message.

Reason 2

Where the user was sent a free initial subscription message, some messages appeared as follows:

“FreeMsg, now you have a chance to win 5,000 pounds in a few easy steps. You can leave by sending STOP to 66033. Service costs 300p/day, and 300p per message”

This message failed to state the name of the service, that the service was subscription based, the frequency of messages sent, the £3.00 sign up fee or the service provider’s contact details.

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

Reason 1

The information provider commented that as demonstrated in the logs, the two messages were sent within a short time period and it appeared that network operator latency resulted in the premium rate message being delivered first. It stated that in future, a time delay would be inserted to ensure the free message was delivered first.

Reason 2

The information provider acknowledged that it had not stated the service provider’s contact details in the confirmation message. The frequency and cost were provided, being “costs 300p/day, and 300p per message”. The information provider also acknowledged that the message failed to state the sign-up fee, although this was provided in the terms and conditions on the website. The information provider commented that the information provider’s name and customer service number were included in the initial free message sent to users following entry of their mobile number into the website, for example:

“FreeMsg, Hi you just qualified to play Hangman. Your special day prize is 5,000 pounds. Join now: txt GO to 66033. Helpline 0845 2252244 SP SMSLtd.”

3. The Tribunal considered the evidence and noted the information provider's acknowledgement that in some instances, chargeable messages were received by consumers, prior to receipt of the initial free subscription message. The Tribunal also noted that the requisite subscription information as required by paragraph 7.12.4 was spread over several messages, some of which were chargeable and not in the form prescribed by the Code. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

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 paragraph 7.12.4 above must be sent free to subscribers.”

1. The Executive noted that all of the message logs supplied by the service provider showed that none of the recipients had been sent a free reminder message. In particular, the message logs demonstrated that one complainant had participated in the Hangman game and after roughly four hours of playing the game, incurred a total cost of £330. At no point was the complainant sent a reminder message.
2. The information provider acknowledged that the logs demonstrated that it had not sent any free reminder messages. However, it stated that the service had been amended from the end of May 2008 to send free reminder messages. In addition, a decision had been made to include reminder messages in accordance with 'session based' services such as text chat. Consumers were advised when they had spent £10.00 and £20.00, and at £30.00 the game was stopped and could only be restarted by the end user sending in keyword 'GO'. If the user returned to the game it would be at the same level as where their usage was stopped.
3. The Tribunal noted the information provider's failure to send monthly subscription reminder messages (or upon the user spending £20 if that occurred in less than a month) and the information provider's acceptance of the breach. 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 **serious**.

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

- The service was valueless to consumers, none of whom obtained their IQ result or won the subsequent competition.
- The information provider was wilful in its attempt to mislead consumers;
- The service caused consumer harm resulting in 88 consumer complaints;
- The cost paid by individual users was high, being £3 per day (£21 per week). One particular complainant incurred a cost of £330 in a 4 hour session; and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

The Tribunal considered the following mitigating factors:

- The information provider had co-operated with the Executive when notified of the breaches and the service was stopped prior to the adjudication; and
- Refunds had been issued by 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 **serious**.

The Tribunal therefore decided to impose the following sanctions against the information provider:

- A formal reprimand;
- A fine of £40,000;
- Copy advice must be sought by the information provider before running this service and any related promotions in the future, and any new subscription based competition services and related promotions; and
- Claims for refunds are to be paid by the information provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.