

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

Thursday 28 August 2008 TRIBUNAL SITTING No. 9 / CASE 2
CASE REFERENCE: 720978/AC

Service provider & area:	Tanla Mobile Ltd
Information provider & area:	SMS Digital Future Ltd
Type of service:	Auction PSMS
Service title:	Auction Club
Service number:	81230
Cost:	£6.00 per week
Network operator:	Mobile Operators
Number of complainants:	66

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received complaints from members of the public regarding the receipt of unsolicited reverse billed texts in respect of an SMS auction service called “Auction Club”. The service provided consumers with an opportunity to bid for items in a premium rate, mobile based auction service. According to the service provider the service had only been promoted in Easy Jet in-flight magazines and the promotion had advertised its website www.for-auction.info where registration and sign-up took place. No shortcode details were provided in the print promotion or on the website.

The Executive discovered through its own investigations and searches, that the web site was not significantly promoted via online search engines. When “SMS Auction” was entered as a key phrase on Yahoo and Google, the site details appeared near the top of the list of results, which the Executive considered to be a narrow ended search.

How the service operated

The service provided the user with an opportunity to bid on items using premium rate SMS in a potentially eight stage bidding process, charged at £6 per week. The auction consistently reached the final 8th round, before which point, users could not win the item.

According to the service provider there were tiers to the service opt-in process. It maintained that the process began by the consumer making a web entry, followed by a WAP confirmation to the consumer’s mobile and then finally an SMS mobile originating (“MO”) opt-in from the consumer. If the consumer entered the service via the WAP push by clicking ENTER on the landing page they then received a mobile terminating (“MT”) message to their phone as follows:

FreeMSG> Important. Please reply with OK to confirm

The bidding mechanism was purported to have worked in such a way that once the user had received the first MT message and returned the MO confirmation message,

they received a follow-up confirmation message, which confirmed the details of the service:

[FreeMsg] There r mobiles, MP3 players waiting 4 u here in SMS Auction Club.Sub service.2 auctions month.Max 4 msgswk.£1.50msg. Help:08712222835.Stop to end.

Three days later, a series of free messages were sent to the consumer over the space of approximately one hour. These messages were intended to provide a free demonstration of the service, by leading the consumer through a trial of the rounds of bidding.

The user then received a free message 30 minutes before the auction started, and was kept up to date via premium rate charged texts, with information on the progress of the auction and of the current maximum bid. The user who was first to send the highest bid at the end of the last round, was the winner. The service provider stated that a maximum price would be set which was always lower than the price at which the product was sold in the shops.

In a letter dated 12 June 2008, the Executive sent a request for information dated in accordance with paragraph 8.3.3 of the 11th Edition (amended April 2008) of the PhonepayPlus Code of Practice, to which the service provider responded on 25 June 2008.

The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.7.2, 5.8, 7.6.3a, 7.6.7b, 7.12.3a and 7.12.5 of the Code, in a letter dated 21 July 2008. The service provider responded in a letter dated 30 July 2008.

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

SUBMISSIONS AND CONCLUSIONS

ALLEDGED 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, either where the recipient has not specifically consented to receiving such promotions, or where the recipient’s details were not obtained whilst purchasing a similar or related product or service to that being promoted. Even where such consent or details have been obtained, recipients must be given the opportunity, within each promotion, to opt out (without charge) of using their details for such promotions.

Under Regulation 22(3)(c) a person may send or instigate the sending of electronic mail for the purposes of direct marketing where - the recipient has been given a simple means of refusing (free of charge except for costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time when the details were initially collected,

and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

1. The Executive raised the following grounds in respect of a breach of paragraph 5.2:

Reason 1

The Executive noted the various consumer complaints in respect of unsolicited MT marketing messages. The Executive considered the documents supplied by the service provider to be inconclusive as to whether or not the consumers had previously opted into the service, and noted that no verifiable evidence had been provided to indicate that the consumer ever visited or used the website in question. The information provided did not clarify whether the WAP content provided opt-in details, and if so, whether consumers had opted in via the ENTER push on the WAP landing page, as indicated by the service provider. The Executive considered that regardless of whether the consumer responded with an MO message as a result of receiving an MT, they would have been entered into the service.

Reason 2

Whether or not the users had registered their mobile number via the website and opted into the service (either in an informed manner or a not), they had not been given an informed opportunity of opting out of receiving future or current marketing information, by the sender or third parties. The Executive considered that information regarding marketing opt ins/outs should not be hidden away in the terms and conditions, but should be prominently displayed, perhaps by way of a tick box.

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

Reason 1

The service provider stated that it had previously submitted a file entitled "WAP entries", which had been supplied by the information provider and included the consumers' selection of the "ENTER" button on the WAP page. The service provider commented that the WAP push and WAP entries logs were verifiable in the same way as SMS logs; via a query to the mobile network operator ("MNO") in question.

Reason 2

The service provider commented that it was unaware of any query as to the user of the service mobile numbers being used for marketing purposes. It stated that it now required all details of promotional material to be made available prior to launch of a service and on demand, to ensure that the stated terms of a service complied with the Code and relevant legislation.

3. The Tribunal considered the evidence before it and noted in particular the service provider's statement that the information provider had not disclosed the identity of their WAP supplier, which had prevented it from being able to verify the WAP information provided. The Tribunal concluded on the balance of probabilities that the messages received by the complainants were unsolicited. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEDGED 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 considered that consumers had been misled into replying positively to the first free of charge MT SMS, which failed to state the identity of the service: *“FreeMSG> Important. Please reply with OK to confirm.”* The Executive considered that the use of the word “important” in the MT message and lack of further clarification within, could have misled consumers into believing the message was for example, an instructional message from their network. If recipients were misled into responding, they would be unaware of the consequence of their positive response.
2. The service provider stated that even though the initial MT message did not provide details of the service, users would have already been aware of the nature of the service through use of the website and the subsequent WAP message. The service provider acknowledged that the web entry could be made by a third party, but commented that it *had* supplied documentary evidence as to the dates and time when consumers entered their mobile number into the website, and as to when the WAP messages were sent and received. The service provider reiterated that it now required visibility of marketing material and a plan of promotional activity, prior to allowing a service to go live.
3. The Tribunal considered the evidence and concluded in light of its decision that the messages sent to the complainants were unsolicited, that such messages were misleading; firstly, by use of the word “important” which created the impression that the message was a personal and instructional type message which the complainants were required to respond to urgently; and secondly, by not providing information regarding the consequences of replying with the word ‘OK’ as instructed. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEDGED 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 considered that the consumer would not have been made fully aware of the relevant pricing information, due to the limited content of the unsolicited MT messages received to their handsets. The first free MT message did not supply any pricing details. The following free message following MO opt in (on the occasions where there was an MO opt in) contained the wording “4 msgswk.£1.50 ms”, which the Executive considered to be unclear.

2. The service provider acknowledged that while it accepted that the consumer might not have seen the website, a WAP entry was required to prompt the MT message and that the WAP page gave clear unabbreviated pricing information.
3. The Tribunal considered the evidence and concluded that the complainants who had received unsolicited messages had not been fully informed of the cost of participation in the service prior to incurring a cost, as they would not have seen the website or WAP page referred to by the service provider. 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. The Executive noted that on the website “for-auction.info” where the service was promoted, the pricing information appeared in two places on the landing page, referred to below as method 1 and method 2. The Executive raised the following concerns in respect of each:

Method 1

The service cost was presented near the top of the landing page in the form of an advert for “the auction club”. The Executive considered that the chosen colours made the wording very difficult to read. The Executive also considered the quality of the text to be poor; namely faded, blurred and difficult to read. The Executive also noted that the advertisement looked like an advert for another service and was not easily recognised as being related to the actual service. The advert was called “the Auction club” and the service itself called “SMS Flash Auction”. The Executive considered that a potential user would not automatically link the two.

Method 2

The service cost appeared near the bottom of the web page which meant that users were required to scroll down the page, in order to view the information.

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

Method 1

The service provider stated that the information provider had refuted any suggestion that the information was illegible. The service provider commented that the inclusion of method 2, together with the requirement for WAP entry, ensured that consumers were made aware of pricing information prior to selecting “ENTER” and becoming subscribed to the service.

Method 2

The service provider accepted that the consumer was required to scroll down the page in order to read the pricing information. It stated that it was important to recognise that the consumer was also required to scroll down the

page in order to enter their mobile number, and that the relevant pricing information was located directly below the mobile input box. The service provider also reiterated that the pricing information appeared on the WAP landing page.

3. The Tribunal considered the evidence and found that for users who would have viewed the website, the pricing information had been presented in an easily legible, prominent, horizontal way and did not require close examination. The Tribunal also noted that although a user was required to scroll to view the pricing information, the user would nonetheless need to scroll past the pricing information in order to be able to enter a mobile number. The Tribunal did not uphold a breach of paragraph 5.7.2 of the Code.

Decision: NOT UPHELD

ALLEDGED 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 noted that only a contact telephone number was provided in the free MT messages, and that they failed to identify of the service or information provider.
2. The service provider stated that all the contact details, including identity, were available on the WAP push landing page.
3. The Tribunal considered the evidence and found that in respect of the complainants who had not seen the website or WAP page, the identity of the service or information provider had not been provided within the first message received. .

Decision: UPHELD

ALLEDGED BREACH SIX

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3a)

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

a any key terms and conditions, including any restrictions on the number of entries and prizes which may be won,

1. The Executive considered that although the service was promoted as being an Auction service or “SMS Flash Auction”, it was not necessarily the highest bidder who won the auctioned item; the winner was both the quickest and highest bidder. The Executive considered the service to be more in line with a competition service, due to the required elements of luck and proficiency. The Executive concluded that as arguably consumers had less control over securing the sought after item than in a standard auction service, knowledge of this might affect their decision to participate.

2. The service provider stated that the service in question was an auction and disagreed that the service was a competition or game. It stated that an auction service was one where two equal bids are received, and the first bid received wins. It further commented that any number of bidders could have a ceiling bid of £100 for a lot, and if all three people attempt to make that bid, the winner of the auction (assuming no higher bid was received) would be the person whose bid was first seen by the auctioneer. As at any art sale or other auction, a degree of luck and proficiency was required in order to making a bid at the right time and price. The service provider considered the fact that the winning bidder paid to receive the goods bid for, distinguished the service as an auction.
3. The Tribunal considered the evidence and concluded that the service was an auction service and not a competition service or game within the meaning of paragraph 7.6.1 of the Code. The Tribunal did not uphold a breach of paragraph 7.6.3a of the Code.

Decision: NOT UPHELD

ALLEDGED BREACH SEVEN

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.7b)

Service providers must ensure that:

b all correct entries have the same chances of winning.

1. The Executive noted that the winner was the first correct bid after 8pm. The Executive considered the method of choosing a winner to be flawed, because some entrants might be disadvantaged by the inefficiency of a network, or difficulties with mobile reception. If there was a delay, that entrant would not have the same chance of winning as others.
2. The service provider did not agree that the service was a competition or game. It commented that in an auction, the correct entry was the highest bid received (and in the case of 2 equal bids being made, the first received) at the close of bidding. Whilst some users might experience difficulty with reception or inefficiencies with their mobile network, it would only be under a very distinct and unlikely set of circumstances that a consumer would be disadvantaged. The service provider drew a parallel with online auction sites such as eBay, where any bidder could be inadvertently disadvantaged by the speed of their computer or connection.
3. The Tribunal considered the evidence and concluded that the service was an auction service and not a competition service or game within the meaning of paragraph 7.6.1 of the Code. The Tribunal did not uphold a breach of paragraph 7.6.7b of the Code.

Decision: NOT UPHELD

ALLEDGED 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 noted that although the website stated that the service was a subscription service, the wording was blurred, faded and difficult to read. The Executive also considered that: “4 msgswk.£1.50 msg” (as per the initial free MT message), failed to clearly and plainly advertise the subscription element of the service.
2. The service provider stated that even if it were to accept that the subscription element was unclear from the print advert, the website or the SMS, the fact remained that the subscription element was stated in the first line of the terms and conditions on the WAP site, immediately above the “ENTER” button.
3. The Tribunal considered the evidence and found that although the subscription element of the service appeared to have been indicated in the website and WAP page, this would not have been apparent to those who had not entered the service through the website. For those complainants who received the unsolicited promotional text (see the findings in relation to the breach of Para 5.2) there was none of the required information. The Tribunal upheld a breach of paragraph 7.12.3a 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 from the call logs that subscription reminders had not been sent to consumers by the service provider.
2. The service provider accepted that subscription reminders had not been sent. It commented that the information provider had asserted that the Code requirements had been satisfied through the sending of twice-monthly free messages including STOP data. The service provider confirmed that as part of its review of process, all of its subscription clients must send regulatory messages through their own network, and any regulatory messages must follow the format as specified by MNOs, in order to ensure that the consumer is clearly informed of cost at all stages.
3. The Tribunal found from the evidence before it that the service provider had failed to send the required reminders and also noted that the service provider’s admission of the failure. 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 knowingly or wilfully sent out misleading, unsolicited promotional text messages;
- There was material consumer harm; some complainants had been charged over a 6 month period without realising so;
- 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 which includes four cases since May 2007 regarded as 'serious' by previous Tribunals.

In mitigation, the Tribunal noted the following mitigating factors:

- The service provider had cooperated with the Executive when notified of the breaches; and
- The fact that refunds had been issued to complainants.

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 total fine of £75,000 (comprising £60,000 in respect of the upheld breaches and a breach history uplift of £15,000); and
- The Tribunal also ordered that claims for refunds are to be paid by the service provider for the full amount spent by the complainants, except where there is good cause to believe that such claims are not valid.