

**ADJUDICATION PANEL MEETING OF PHONEPAYPLUS
(FORMERLY ICSTIS) (NO. 618)**

Thursday 17 January 2008

REVIEW ADJUDICATION

APPENDIX 5

Case Reference: 702783/GL

Service provider & area: Wireless Information Network Limited (WIN), High Wycombe
Information provider & area: SMS.ac Inc, San Diego, USA
Type of service: Reverse-billed text messages
Service description: A social networking service which used reverse-billed text messages

Background

The Executive received complaints for the SMS.ac service and its promotion. Complaints were received from the mobile network operators and consumers regarding reverse-billed SMS. Complaints reported that consumers had not consented or requested to receive text messages of this nature.

An extract from the SMS.ac terms and conditions describes the SMS.ac service as:

...an entertainment service that enables users to create unique profiles (which are made available on the Web and/or mobile devices) and provides users with access to a collection of services and resources, including various communications tools, content, applications, and programming offered from time to time through its network of properties (the "Service").

The profile information will be publicly available for viewing... One benefit of the service is to enable users to meet and interact with others. To promote community, we facilitate user interaction and communication by using SMS.ac's proprietary community technology ("community technology").

The purpose of the community technology is to ease the progression for newer community users to become active community participants and to continuously engage all users to use the service. One of the features of the community technology is that it may bring non-participants back to the service or to the forefront of user searches... significantly enhancing the chance of less active users being discovered by other community users, as well as receiving communications. Please note that such users are charged on their mobile phone accounts for many such services and communications.

The Executive found that many of the complainants had either:

- signed up to the SMS.ac service up to 2-3 years ago (or more) and in the intervening period between signing up and suddenly receiving reverse billed SMS in 2007, did not use SMS.ac, never received reverse-billed SMS from

- SMS.ac and did not recall agreeing to receive reverse-billed SMS when signing up to the SMS.ac service years earlier; or
- denied ever signing up to the SMS.ac service (these complainants included owners of recycled numbers).

The 'Friends Network' service was suspended at the end of July 2007.

Based on the statements of complainants, the Executive instigated an investigation regarding the receipt of unsolicited reverse billed SMS.

Breaches of paragraphs 5.4.1a, 5.4.1b, 5.4.2, 5.7.1, 5.8, 5.12, 7.12.3a, 7.12.3b, 7.12.4a-f, 7.12.5 of the 11th Edition of the Code of Practice ('the Code') were raised by the Executive in a letter dated 3 August 2007, along with a request for information under paragraph 8.1.3 of the Code. An opportunity was given to the service provider to respond. The service provider responded on 9 August 2007 and included a response supplied by the information provider.

A decision on the breaches raised was made by the Adjudication Panel ('the Original Panel') on 27 September 2007. The Original Panel upheld breaches of paragraphs 5.4.1a, 5.4.1b, 5.4.2, 5.7.1, 7.12.3a, 7.12.3b, 7.12.4a-f and 7.12.5 of the Code. It did not uphold breaches of paragraphs 5.8, 5.12 and 8.1.3.

The Original Panel concluded that the breaches taken together were very serious and, having considered the aggravating and mitigating factors, decided to impose a formal reprimand, a fine of £150,000, a bar on the service until compliant and stated that the service provider was to pay all claims made by users for refunds of the full amount spent by them, save where there is good cause to believe that such claims are not valid. [See original adjudication, dated 27 September 2007, for full details of the breaches and sanctions.]

Request for Review

Having received the adjudication of the Original Panel, the service provider formally requested a review of the decision in an email dated 19 October 2007. It requested details of the complainants on 25 October 2007, in order that the information provider could investigate each transaction history. It submitted the substantive information it wished the Review Panel to consider on 8 November 2007, including further information from the information provider. It submitted some further points by email on 12 November 2007.

The case was first submitted for review on 6 December 2007. At that time it was adjourned as the Panel wished to seek further information from the PhonepayPlus Executive concerning whether the service was best defined as a subscription service or a virtual chat service.

A decision on the review was made by a Panel ('the Review Panel') on 17 January 2008.

Service Provider's Case

In its substantive letter of 8 November 2007, the service provider stated that it was seeking a review of the sanction handed down by the Original Panel, specifically the fine of £150,000. It believed the level of fine to be unreasonable, disproportionate,

inconsistent, in contravention of PhonepayPlus's obligations under the Code and not in accord with its Sanctions Guide. It pointed out that there had been a high degree of consultation (between PhonepayPlus, the service provider and the information provider), independent action by WIN in suspending the service and that all consumers who suffered legitimate loss had been reimbursed. It disputed that the case should be classified as 'very serious'.

The service provider also enclosed extensive further information concerning the case from the information provider which is summarised below.

Information Provider's Case

The information provider outlined how its users must follow a multi-step authentication process and confirm they have read pricing information before they can receive reverse-billed text messages. It presented evidence to show that in a substantial number of cases, those who had complained to PhonepayPlus had signed up to the service, even if they had later unwittingly forgotten about it. Furthermore, its investigation showed a very low number of recycled numbers. (Of the 47 complainants disclosed by PhonepayPlus, only one related to a recycled number.) It had no intention of misleading or taking unfair advantage of consumers and intends to run a serious, legitimate, well-regarded business for the long-term in the UK.

The information provider went on to state that it believed the service was not a subscription service and detailed its reasons.

Regarding the sanctions imposed, the information provider stated that it felt the fine to be neither proportionate nor appropriate. Furthermore, it detailed its reasons as to why it did not agree with the aggravating and mitigating factors given by the Original Panel.

Review Panel's Considerations

The Review Panel considered all the information which the service and information providers had supplied.

It accepted the evidence presented by the information provider that most of the complainants had opted in to the service. However, that opt-in had occurred so long ago in most cases that many users had completely forgotten about it and the Review Panel believed that the long delay before receiving any chargeable messages had vitiated consent. Based on the information provided by the information provider, it also accepted that there were very few recycled numbers.

The Panel had asked further advice from the PhonepayPlus Executive as to whether the service should be considered a subscription service, and the implications of such a decision. Having reviewed the advice of the Executive and the submissions of the information provider, the Review Panel accepted that the service was *not* best defined as a subscription service, but rather a virtual chat service.

Review Panel's Decision

The Review Panel considered in turn the breaches which had been raised, as follows:

Misleading (paragraph 5.4.1a)

The Review Panel accepted the evidence that there was not a real problem with recycled numbers and that most complainants had opted in to the service. However, it agreed with the reasoning of the Original Panel that the long delay between signing up and receiving the reverse-billed messages served to obviate consumers' informed consent and continued to uphold a breach of this paragraph for that reason.

Unfair advantage (paragraph 5.4.1b)

As there was not valid consent, due to the reason given above, the messages were, in essence, unsolicited. Therefore the Review Panel continued to uphold a breach of this paragraph of the Code. Furthermore, it noted that users were able to send any number of messages to others without being charged. The users who generated the messages were not charged, but the recipients were. This takes unfair advantage of the recipients of the chargeable messages. This was exacerbated by the fact that, until 31 July 2007, there was no £10 spend reminders in place. Because of this, many recipients were not aware that they were being charged for the messages and therefore did not stop them.

Unreasonable delay (paragraph 5.4.2)

The Review Panel upheld a breach of this paragraph of the Code for the reasons given by the Original Panel.

Pricing information (paragraph 5.7.1)

The Review Panel accepted the evidence that there was not a real problem with recycled numbers and that most complainants had opted in to the service. However, it upheld a breach of this paragraph for the reason given by the Original Panel that for those who had signed up to the service, the pricing information would have been seen so long ago that users were no longer aware of it. This was exacerbated by the fact that, until 31 July 2007, there was no £10 spend reminders in place. For these reasons, many recipients were not aware that they were being charged for the messages and therefore did not stop them, unknowingly incurring high bills.

Subscription services (paragraphs 7.12.3a, 7.12.3b, 7.12.4a-f and 7.12.5)

As the Review Panel held that the service should not be classified as a subscription service, breaches of these four paragraphs were not upheld.

The Review Panel accepted the mitigating and aggravating factors listed by the Original Panel, and made the following comments regarding the aggravating factors:

- *The high volume of complaints* – the Review Panel re-iterated that PhonepayPlus considers 73 complaints over all mobile networks except Orange and 3 to be high.
- *The service generated significant revenue* – the Review Panel agreed.
- *The service provider's breach history* – for the avoidance of any doubt, the Original Panel had correctly considered the breach history of WIN and no other service provider.
- *Although the service provider had approached ICSTIS for prior permission and had received compliance advice, the service which was running appeared to be different from the one applied for. ICSTIS gave the service provider permission to operate a chat and dating service, but the service running was not a chat and dating service* - the Review panel commented that, given the further information supplied by the information provider

regarding the service, it did appear to be running largely as set out in the permission certificate. However, it noted that, until 31 July 2007, there had not been any £10 spend reminders in place, as required by the certificate. The Review Panel believed that had this reminder been in place earlier, it is possible that many of the problems of excess bills could have been avoided.

- *The level of consumer detriment was high as many complainants had unwittingly incurred very high bills – see above comment regarding £10 spend reminders.*

As an additional mitigating factor, the Panel noted that the ratio of mobile terminated messages to mobile originated messages was approximately 6.5 to 1. The Panel inferred from this that, although there were problems with the service as set out above, there may have been some degree of purposeful, active involvement in the service by a number of users.

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

The Review Panel therefore decided to impose the following sanctions against Wireless Information Network Limited:

- A formal reprimand;
- A £105,000 fine;
- A bar on the service until it is compliant (the service and/or information provider should work with the ICSTIS compliance team); and
- The service provider to pay all claims made by users for refunds of the full amount spent by them, save where there is good cause to believe that such claims are not valid.

Comment

In considering the case the Review Panel had careful regard to the widespread public use of and rapidly expanding interest in social networking services and contact services with a social networking element. Decisions regarding whether or not to use forms of phone-payment on these services rest with the service providers. In a novel and evolving market where it is likely that many users have low levels of familiarity with the services and any payment aspects it is particularly important that explanations are clear, pricing is prominent, regulatory rules are understood and that every effort is taken to minimise the risk of confusion, frustration and unintended financial costs. The level of fine imposed in this case and the refund requirement reflects the seriousness with which PhonepayPlus viewed the breaches upheld and the level of loss faced by some of the consumers involved.