

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

Thursday 6 November 2008 TRIBUNAL SITTING No. 14 / CASE 3
CASE REFERENCE: 760581/AB

Service provider & area:	mBlox Limited, London
Information provider & area:	Starwire Limited, Essex
Type of service:	Mobile Content: Adult glamour videos/pictures
by	subscription
Service title:	www.stars18.net
Service number:	80160
Cost:	£1.50 per week
Network operator:	Mobile Operators
Number of complainants:	54

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 54 consumer complaints in relation to a mobile content service, charged by weekly subscription, which invited consumers to “view the best models online”.

The service operated on shortcode 80160 and was advertised across multiple web-based media including Google Adwords, magazines such as Bizarre’, ‘FHM’ and ‘NUTS’ and via the website www.stars18.net. The service was also promoted via text to opted-in users.

After signing up to the service on the website or by sending a trigger word to the shortcode, users were sent one chargeable SMS message per week, which cost £1.50. The message contained a user name and password for entry to the stars18.net website, which enabled users to view images of glamour models.

The complainants stated that they had never heard of or previously registered to the service and that the messages received were unsolicited.

The Executive’s understanding of how the service operated

The information provider informed the Executive that the service was a subscription service, which enabled subscribers to view glamour/adult content on the website www.stars18.net. In order to join the service it appeared that users could either:

- a) Respond to the static adverts and text the keyword ‘LINK’ to 80160; or
- b) Visit www.stars18.net where they could either:
 - i. Text the keyword ‘LINK’ to 80160 in order to effect immediate subscription, or
 - ii. Accept an invitation to register their name, email, mobile number and mobile operator and click on the button ‘Subscribe’.

Upon joining the service, the user was sent a chargeable weekly mobile terminating (“MT”) message costing £1.50. This message contained a user name and password, which when entered into the website, enabled the user to view models on-line.

By 29 July 2008, the Executive had received approximately 23 consumer complaints. All of the complainants said that they had never registered for any service of this nature and that the first they had heard of this service was via an unsolicited chargeable message, which cost £1.50 to receive. An example of such a message is as follows:

80160: You can now visit www.stars18.net your password is xxxxxxxx to unsubscribe send STOP to 80160. Helpline 08445590200 T&C www.stars18.net

By 15 September 2008, the number of complaints had risen from 23 to 51, which increased to 54 by 17 October 2008.

Service Content

On 1 September 2008, the Executive actively subscribed to the service in order to monitor its operation. The Executive entered a password and viewed video content, which it considered to be adult material, and thus should have been offered on the designated shortcode prefix 69***, 79*** or 89***.

The Executive raised its concerns with the service provider who responded that the content was, and should only be, still-shots of glamour models. The information provider via the service provider supplied the Executive with another password and on 9 September 2008 the Executive monitored the service again. On this occasion the Executive viewed still shots of glamour models.

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code of Practice (“the Code”) 11th Edition (amended April 2008).

In a letter dated 29 July 2008, the Executive requested information from the service provider under paragraph 8.3.3 of the Code, to which the service provider responded on 15 August 2008.

On 2 September 2008, the Executive made a further request for information from the service provider under paragraph 8.3.3 of the Code, to which the information provider responded on 8 September 2008.

In a letter to the service provider dated 17 September 2008, the Executive raised potential breaches of paragraph 3.3.1, 5.2, 5.7.1, 7.12.3c, 7.12.4b, c and d of the Code. The service provider replied on 10 October 2008, providing a response to the information requested by the Executive, but not the specific breaches raised.

On 20 October 2008, the Executive received a separate response from the information provider on behalf of the service provider. The service provider requested for the investigation to be conducted as an information provider case, which the Executive considered and subsequently refused. The Executive considered that it could not ignore the fact that despite having granted a generous extension of time to the deadline given for response to its breach letter, the service provider’s response generally indicated that it had difficulties in obtaining the information provider’s comments. Due to the apparent difficulties faced by the service provider in relation to

its client, the Executive decided it to be appropriate to pursue the matter directly against the service provider.

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

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

GENERAL DUTIES OF SERVICE PROVIDERS - DEDICATED PREFIX (Paragraph 3.3.1)

“Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service... those codes or number ranges must not be used in contravention of these restrictions....”

1. During the course of the Executive’s monitoring of the service, it visited the website www.stars18.net and entered a password. The Executive viewed an adult video entitled ‘dildo’, which showed a woman lying naked on a bed, masturbating with a dildo. The Executive also observed that the website had an ‘18+ warning’.

The service provider initially responded that the content should only be ‘mid-shelf glamour’. The Executive tested the password used by the service provider and viewed content which indeed fell within the ‘glamour’ category. The Executive noted the different content and that towards the top of the page, it clearly stated that the site had been ‘Updated: 05/09/2008’. The Executive repeated its monitoring 6 days later, and again viewed glamour as opposed to adult content.

The Executive noted that the Mobile Network Operator Code of Practice for Service Delivery on Common Mobile Shortcodes, requires that Adult and Sexual Entertainment Services should only be made available on Codes behind the 69XXX, 79XXX and 89XXX ranges. As the service offered adult content for a period of time, via a non-adult short code, it appeared that that the service had been operating on an incorrect prefix.

2. The information provider stated that the ‘service’ was the distribution of a password to access a website from a personal computer (“PC”), in order to view adult content. Whilst the password was sent to the mobile handset, no content of an adult or any other nature, was either sent to or viewable from the handset. The information provider considered that according to the regulations, an adult shortcode was only required if the service supplied adult material directly to the handset. It commented that when the point was initially raised by the Executive, it had sought clarification from the Independent Mobile Classification Body (“IMCB”). The response received led the information provider to deduce that it was correct in its view that an adult short code was only required if the content was on a handset. The information provider confirmed that in order to comply with the service provider’s requirements, the web content was changed to the genre of ‘glamour’.
3. The Tribunal viewed the video clip in question and concluded that the content was indisputably ‘adult’ in nature and not ‘glamour’. The Tribunal considered that the service had been promoted on an incorrect shortcode and should

only have been made available on codes behind the 69XXX, 79XXX and 89XXX ranges. The Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

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 noted that of the 51 complainants (received up to the issue of the breach letter), all had insisted that they had received unsolicited reverse-billed messages for a service that they had never previously signed up to.
2. The service provider did not specifically respond to the breach raised within the breach letter. However, in the Executive’s request for information under paragraph 8.3.3 of the Code, it had sought clarification of the actions taken by the service provider, in order to ensure that reverse billed SMS were not sent unsolicited, and to ensure that they were not received by those who did not request to receive them. The information provider responded on behalf of the service provider, stating that users were sent a free confirmation message prior to subscription, and that a confirmation message was only sent after the initial subscription request from the user.
3. The Tribunal considered the evidence and noted the considerable number of consumer complaints in respect of the receipt of unsolicited SMS messages. The Tribunal determined that the service provider and information provider had both failed to provide evidence of consumers having ‘opted in’ to the service. On a balance of probabilities the Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED 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 noted that the SMS messages received by consumers (which cost £1.50 per message) did not contain any pricing information, for example:

*“You can now access www.stars18.net. Your password is XXXXXXXX
To unsubscribe sent STOP to 80160 Helpline is 0844 559 200 T&Cs
at www.stars18.net”*

The Executive also noted that all of the 51 complainants claimed never to have visited the website www.stars18.net and therefore would not have been aware of the cost of the service, as set out on the site.

2. The service provider did not specifically respond to the breach raised. However, in the Executive’s request for information under paragraph 8.3.3 of the Code, it had sought clarification of the cost to consumer to receive messages and requested evidence that consumers were aware of the cost of the service. The information provider responded on behalf of the service provider that the cost was £1.50 per message received and that the subscription cost was £1.50 per week. It commented that the charges were detailed in every message sent to consumers, and also emphasised that the charges were clearly evident on all of its advertising material and the website.
3. The Tribunal considered the evidence and found that the unsolicited SMS messages failed to contain any pricing information. The Tribunal concluded that recipients of unsolicited messages, who thereby had never viewed the website, had not been made aware of the cost of the service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION SERVICES (Paragraph 7.12.3c)

“Promotional material must:

c advertise the availability of the ‘STOP’ command.”

1. The Executive noted that the promotional material failed advertise the availability of the ‘STOP’ command. The ‘STOP’ command was not mentioned in the promotional material which featured in the following magazines; Bizarre, Daily Star, FHM, Maxim, NUTS or Zoo.
2. Neither the service provider nor the information provider responded to the breach.
3. The Tribunal considered the evidence and found that the promotional material failed to advertise the availability of the ‘STOP’ command. The Tribunal concluded that recipients of unsolicited messages who thereby had never viewed the website, had not been made aware of the availability of the ‘STOP’ command. The Tribunal upheld a breach of paragraph 7.12.3c of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

SUBSCRIPTION INITIATION (Paragraph 7.12.4b,c and d)

“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,*
- 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.”*

1. The Executive noted that the message logs demonstrated that the first message received by the complainants was not free as required by the Code, but was charged at £1.50:

*You can access www.stars18.net Your password is xxxxxxxx
Unsubscribe send STOP to 80160 Helpline is 08445590200 T&C's at
www.stars18.net*

The Executive considered that the message failed to make clear that that the service was subscription based. The message also failed to state what the billing period was, although the Executive noted from the website www.stars18.net that the billing period was in fact £1.50 per week. The message also failed to state the charges for the service.

2. Neither the service provider nor the information provider responded to the breach.
3. The Tribunal considered the evidence and found that consumers had not been sent a free initial subscription message prior to receiving the service. The Tribunal noted that the first message received by users cost £1.50, failed to confirm that the service was subscription based, the billing period for the service or specify the charges for the service. The Tribunal upheld a breach of paragraph 7.12.4b, c and d.

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 information provider had been reckless in sending chargeable messages to consumers, without first having obtained evidence of consent; and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factor:

- The service provider had co-operated with the Executive when notified of the breaches and the information provider indicated that it had refunded 14 users.

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 £30,000. The Tribunal did not impose an additional fine in respect of the service provider's breach history, in view of the service provider's current compliance activity. The Tribunal stated that if future cases were brought to PhonepayPlus involving services which demonstrated a failure in the new compliance structure, it would be open to the Executive to recommend that future Tribunals take into account the fact that there was no additional fine imposed for breach history in this case.
- Claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.