

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

**Thursday 6 November 2008 TRIBUNAL SITTING No. 14 / CASE 1
CASE REFERENCE: 745754/AC**

Service provider & area:	mBlox Limited
Information provider & area:	Info-Download Limited
Type of service:	Competition
Service title:	Daily Million/Grab a Grand
Service number:	86000
Cost:	£4.50 per week
Network operator:	Mobile Operators
Number of complainants:	71

BACKGROUND

The PhonepayPlus Executive ("the Executive") received 71 complaints in respect of a competition service which offered consumers the opportunity of winning £1,000,000 ("£1m"), whilst simultaneously entering them into a subscription service. The subscription service provided 3 weekly chances weekly of winning £1,000 and cost £4.50 per week. The consumer was sent multiple choice questions to answer and the winner was the first person after 8pm to get the answer right. Although the £1m element of the competition was promoted as 'free', in order to access this consumers were required to sign up to the subscription element of the service.

The consumer complaints related to the receipt of unsolicited messages and lack of awareness of the subscription element and cost of the service. The service was promoted mainly through Internet sites dedicated to competitions and prize draws.

The Promotion

The Executive was alerted to the service following a complaint made by the mobile network 3 ("3"), in the course of their 'Red Card' procedure. This was in respect of an Internet promotion entitled 'win £1 Million - Free entry' on the website www.myoffers.co.uk ("myoffers") a 3rd party site offering entry to numerous competitions and quizzes. The promotion was one example of a number of 3rd party entry points.

There were various methods of entry to the service in question. Method 1 invited users to select a combination of numbers (similar to selecting lottery numbers) after which they were invited to enter their mobile number, "so that we can contact you if you have won". Upon entering a mobile number into the site, the user was sent a free MT message, for example:

FreeMSG > to validate this is your mobile simply reply MILL to this message, or send MILL to 86000. Good Luck! 10/12p Ticket 03 12 18 20 33 - 03 06

If the user responded by texting the keyword to the shortcode, they were signed up to a quiz service called 'Grab a Grand', charged by a £4.50 weekly subscription.

During its investigation of the service, the Executive was alerted to other methods of promoting, including banner advertising (method 2). Consumers were invited to enter their mobile number directly into the banner advert (which was in fact a link and did not allow consumers to do so). Clicking the banner would result in the user being taken to the information provider's website www.thedailymillion.co.uk, ("the dailymillion") whereupon they were asked to choose their numbers for the draw and provide their mobile number. The consumer could also enter the service by going directly to the dailymillion website (method 3).

The Executive understood that the information provider had purchased SMS data (namely 30,000 mobile numbers) from the myoffers website provider (method 4). The information provider stated that an undefined proportion of these numbers received a WAP message promotion. By entering the WAP page and clicking 'enter' the user was taken to information provider's website, the dailymillion.

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

In a letter to the service provider dated 3 April 2008 the Executive issued a request for information on the service and its promotion including message logs and opt-in details, under paragraph 8.3.3 of the Code. The service provider responded on 16 April 2008, supplying a response compiled by the information provider. The Executive made a further request for information on the 30 May 2008, to which the service provider responded (as above) on 11 June 2008. The service provider requested that the matter be dealt with as an information provider case, but this request was refused by the Executive on grounds of the service provider's escalating breach history.

The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.7.2, 5.7.3, 5.8, 7.6.3, 7.6.7b, 7.12.3a, 7.12.3b - 7.12.3c in a letter to the service provider dated 15 July 2008.

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

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 a breach of paragraph 5.2 of the Code for the following reasons:

Reason 1

Consumers alleged to have received unsolicited promotional SMS messages, for example:

Freemsg> To validate this is your mobile simply reply MILL to this message, or send MILL to 86000. Good Luck! 10/12p Ticket 03 12 18

20 33

- 03 06

The Executive asserted that consumers who were part of the purchased list of numbers, had not opted in to receiving marketing messages from the service. The majority of consumers who registered a complaint, had provided their full name at some stage when using one of the 3rd party websites. Therefore it appeared that the complainants were, on the whole, those who had been marketed to as a result of registering on the third party website (hard opt-in). The Executive considered that the detail of the registration page as completed by the consumer could not be verified by the Executive. The myoffers website appeared to require registration detail for a number of different competition services.

Reason 2

The Executive considered that complainants who used the website to register their number and opt-in to the service (either in an informed or uninformed manner), had not been given an opportunity to opt-out of receiving future marketing information, sent by the sender or third parties, prior to charges being made either when the details were collected or in subsequent communications.

The Executive commented that any information regarding marketing opt-ins/outs should not be hidden away in the terms and conditions. Ideally this should be prominently displayed, perhaps by way of a tick box which could either be ticked or un-ticked to show intention to receive or to not receive future marketing material, either from the provider of the service or third parties.

2. The information provider responded to the Executive's assertions as follows:

Reason 1

The information provider strongly denied any suggestion of a breach of the Regulations. It stated that the first contact to the service was always initiated by the consumer, by entering their phone number into the dailymillion website, or from the referred third party websites such as myoffers. It stated that had never randomly entered consumers' numbers or spammed customers who had not opted-in. The information provider also commented that the consumer needed to reply to its validation message, effectively providing the so-called 'soft opt-in'.

Reason 2

The information provider asserted that the opt-out information was clearly visible on the website and that marketing messages were only sent to existing customers, thus relying upon the soft opt-in. The information provider stated that it had never sent or sold its customer's details to 3rd parties.

3. The Tribunal considered the evidence and concluded the information provider had not sent unsolicited messages to consumers. The promotional SMS messages had been sent as a result of consumers actively inserting their own details into the websites (hard opt-in) and in

replying to the validation SMS message (soft opt-in). The Tribunal did not uphold a breach of paragraph 5.2 of the Code.

Decision: NOT UPHELD

ALLEGED 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 the service to be misleading for the following reasons:

Reason 1

The Executive noted that the initial promotional SMS message failed to state what the service was and merely asked consumers to validate their mobile number:

Freemsg> To validate this is your mobile simply reply MILL to this message, or send MILL to 86000. Good Luck! 10/12p Ticket 03 12 18 20 33 - 03 06

The Executive commented that where a consumer's numbers had been entered into the website by a third party, maliciously or through random selection, then the recipient would know nothing of the service upon receipt of the above message.

Reason 2

The Executive considered the use of the word 'Free' on the website to be misleading. The 'Free' referred to a £1m draw (which the information provider confirmed had never been won to date). Upon entering the service, the consumer was automatically entered into a charged subscription service of 3 draws per week, charged at a rate of £1.50 per draw. The Executive was of the opinion that the service was not free, nor did it have any substantive element which was free.

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

Reason 1

The information provider stated that the purpose of the first message was not to incite consumers to enter the service, but was in order to validate their numbers and provide them with a free draw. The information provider stated that the initial message sent to consumers who had entered their own numbers into the website, could not be considered to be promotional material or misleading. In the rare instance that a 3rd party entered a consumer's number, the consumer would not immediately be charged following the initial message, but would receive a prior "information message" containing pricing and subscription details.

Reason 2

The information provider stated that the use of the word "free" in the website was not misleading, as the consumer had a free chance to win the £1m prize plus a chance to participate in the first quiz for free, prior to receiving the first billing message. The information

provider commented that it had supplied numbers for 4 people who had won £1,000 without being charged, having cancelled the subscription before a charge was made.

3. The Tribunal considered the evidence and determined that misleading impression given by the website, was that there was a free entry into a £1 million pound prize draw. In fact, this entry was conditional upon users signing up to a subscription service, which as per the normal user experience, resulted in a weekly charge. The Tribunal took account of the argument put forward by the IP that users could sign up for the draw and then terminate the subscription without incurring any charge. However, the Tribunal took the view that this would require the user to be fully aware that the subscription element was intrinsically linked with the free draw entry. The Tribunal considered that the IP had not taken sufficient steps to ensure that this information was readily apparent to the user on the website. The Tribunal considered that the primary focus of the website as far as users were concerned was to obtain free entry into the draw. The subscription element was not something they were expecting. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

UNFAIR ADVANTAGE (Paragraph 5.4.1b)

“Services and promotional material must not:

b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”

1. The Executive considered that advantage was taken of consumers, by virtue of the fact that that they had no chance to read the pricing mobile terminating (“MT”) SMS message, before being able to make the decision to stop the service and avoid a charge. The Executive noted that according to the call logs supplied by the information provider (via the service provider) the MT message which contained pricing information arrived at the same time, or only moments prior to, the chargeable MT message itself.
2. The information provider stated that it was informed of the short time period between the sending pricing information and charging MT messages, by 3. Upon learning of the issue, the information provider changed this part of the service in March (prior to commencement of the investigation and receipt of the breach letter) to allow nearly an hour between the two elements of the service. The information provider commented that an external company was responsible for the timing issue, but that it accepted full responsibility for the service.

The information provider also commented that the PhonepayPlus Consultation on Mobile Phone-paid Services dated 17 July 2008, did not state a particular length of time between the sending of an initiation message and the sending of billed content. Although the information provider concurred with the paper in that consumers would want to start enjoying the service as soon as possible, it considered that any delay would reduce consumers’ enjoyment of the service and make it more likely that content of the information message would be forgotten. The information provider also commented that consumers had already been informed of the subscription element of the service via the website.

3. The Tribunal considered the evidence and concluded that the misleading aspects of the service had previously been dealt with under the breach of paragraph 5.4.1a of the Code. The Tribunal did not uphold a breach of paragraph 5.4.1b of the Code.

Decision: NOT UPHELD

ALLEDGED BREACH FOUR

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 stated that where it was accepted that a) the consumer might not have seen the website prior to receiving marketing texts and b) the consumer had seen the website but was not properly made aware of the pricing information due to a lack of prominence, the MT messages failed to provide pricing information within a reasonable time prior to a charge being made. The Executive noted that the first mention of pricing information appeared in a message which arrived simultaneously, or one second prior to, a chargeable MT message.
2. The information provider did not accept that the information on the website was not prominent and stated that consumers would be aware of the same when entering their mobile number on the website, after which they were again informed by way of an information message. The information provider also stated that compliance advice was provided by PhonepayPlus and the changes made to the service were accepted by the compliance team.
3. The Tribunal considered the evidence including the complainant logs previously supplied to the information provider, and concluded on the balance of probabilities that there was no pricing information on the myoffers website, prior to April 2008. Accordingly, consumers had not been fully informed in a clear a straightforward matter, of the cost of using the service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEDGED BREACH FIVE

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 considered the pricing information to be in breach of the Code requirements, for the following reasons:

Reason 1

The pricing was not prominent on the dailymillion webpage, and required the consumer to scroll down in order to see the information properly.

Reason 2

The viewable text was too complicated and laborious to read, and it was not immediately obvious how much each service would cost independently of the other.

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

Reason 1

The information provider stated that the scrolling down issue only affected the daily million website, which attracted only 20% - 30% of its customers, and emphasised that the remaining websites were different. The information provider did not accept that the consumer needed to scroll down the page to be made aware that the service was a subscription service. It commented that the word 'subscription' was viewable without scrolling down and was marked with an asterisk, which it considered to be a commonly accepted method of making consumers aware that further information was displayed below.

The information provider stated that depending on the layout of the consumer's computer, the relevant information could be seen without the need to scroll down. It also commented that the information was displayed very close to the boxes where consumers inserted their chosen numbers. The information provider also stated that in any event, scrolling down was an intuitive action which most people would do. The information provider reiterated that the necessary information was provided in the information MT message and that the website had been approved by the Executive.

3. The Tribunal considered the evidence and noted that of consumers would not have been able to see the pricing information at the bottom of the page, without scrolling down further. The Tribunal considered that pricing information had not been made available to consumers in an easily legible, prominent manner which did not require closer examination. The Tribunal also commented that the information provider had sought compliance advice, which advised that consumers should not have to scroll down to see pricing information but had chosen to disregard that advice. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

PRICING INFORMATION (Paragraph 5.7.3)

"In cases where it is unlikely that a consumer will have seen or heard any promotional material containing pricing information, the service provider must place a short, distinct pricing message at the beginning of the service."

1. The Executive stated that where it was accepted that a) the consumer might not have seen the website prior to receiving marketing texts and b) the consumer saw the website but was not properly made aware of the pricing information due to a lack of prominence, the consumer would not know the price of the service. No pricing information was included in the first free MT message or following messages, until the consumer was charged. The Executive considered that the consumer would not be aware of the cost of the service in sufficient time to stop it, prior to being charged, as the pricing information was received almost simultaneously as the chargeable message.

2. The information provider referred to its response to paragraph 5.7.2. It commented that the information was clearly displayed on the website or on the third party's websites, and the consumer was sent a message containing the relevant information, prior to receipt of the first billing message.
3. The Tribunal considered the evidence and concluded that consumers would have seen some form of promotional material, prior to receipt of a chargeable message. Accordingly, the Tribunal did not consider it necessary for the information provider to have placed a short, distinct pricing information at the start of the service. The Tribunal did not uphold a breach of paragraph 5.7.3 of the Code.

Decision: NOT UPHELD

ALLEDGED BREACH SEVEN

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 stated that where it was accepted that a) the consumer might not have seen the dailymillion website prior to receiving marketing texts and b) the consumer saw the website but was not properly made aware of the contact details or identity due to the lack of prominence on the website, then the user would not have had sight of the identity details or contact details before being charged. The contact details were only visible on the charged message itself. The identity details were only visible on the confirmation MT message following receipt of the mobile originating (“MO”) 'STOP' command.
2. The information provider again referred to its response to paragraph 5.7.2. It also commented that its contact details were displayed on the home page of its website as approved by the Executive, and a helpline number was contained in the information message sent prior to the first billing MT message.
3. The Tribunal considered the evidence and concluded that although the identity of the information provider was evident on the promotional website, contact details of the service provider or information provider, as required by the Code, were not. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEDGED BREACH EIGHT

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3)

“Promotional material must clearly state any information which is likely to affect a decision to participate.”

1. The Executive considered that the promotional material failed to clearly state key terms and conditions likely to affect a decision to participate, for the following reasons:

Reason 1

There had been no winners of the £1,000,000. The Executive considered that if this information was made known to the public, it might affect their decision to enter.

Reason 2

If the rules of entry were made more transparent by the information provider i.e. the automatic entry into the 'charged' subscription competition, the Executive considered it likely that a consumers' decision to enter might be affected.

Reason 3

If consumers were made aware that there was no entirely 'FREE' element to the service, their decision to enter might be affected.

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

Reason 1

The information provider submitted that although there had not been any winners of the £1m prize, it was a matter of chance. The draw was managed by a 3rd party and a separate accredited 3rd party had been appointed by the insurers and underwriters, to select the winning numbers and compare them with those drawn. The information provider stated that it would be extremely happy to award the £1 m prize, that it was fully insured to do so, and that doing so would boost its business. It commented that it had given away more than £130,000 in prizes within a year.

Reason 2

The information provider stated that the service was previously approved by the Executive.

Reason 3

The information provider stated that users were given the chance to participate in the first test for free. It commented that there had been winners who participated in the first quiz, opted out and were not charged at all.

3. The Tribunal considered the evidence and noted in mitigation, that compliance advice had been sought by the information provider. The Tribunal did not consider this previous advice to be binding, and commented that as the service operated in practice problems became apparent, namely that the rules of entry to the service were not transparent enough and had this information been clearly stated it may have affected a users decision to participate. The Tribunal was satisfied that the £1m prize was available to be won, and commented that no sanction would be applied to this element of the breach raised by the Executive. The Tribunal overall upheld a breach of paragraph 7.6.3 of the Code.

Decision: UPHELD

ALLEGED BREACH NINE

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 entry received after 8pm. The Executive considered this method of choosing a winner to be flawed, because some entrants might be disadvantaged by the inefficiency of a network. Any delay in the consumer's entry being sent, would result in that entrant not have the same chance of winning as others.
2. The information provider stated that it could not be made responsible for the temporary inefficiency of a network, as these were circumstances beyond its control. In order to prevent the situation, the quiz had been designed to operate when traffic was relatively low.
3. The Tribunal considered the evidence and concluded that the dailymillion website did state that the winner would be the first correct entry received after 8pm. The Tribunal considered that it potentially could disadvantage consumers who had not seen the terms and conditions, but determined that consumers overall had the same chance of winning. The Tribunal also noted that the information provider proposed to alter its methods of selection to a draw of correct entries. The Tribunal did not uphold a breach of paragraph 7.6.7b of the Code.

Decision: NOT UPHELD

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. It was the Executive's opinion that the dailymillion website failed to make the subscription element of the service clear. Although there was mention of the word 'subscription' the Executive did not consider it had been presented in a prominent fashion. The Executive considered it possible that the subscription element could be seen to be an optional extra, rather than a service which is automatically entered into and charged, upon entry to the dailymillion website.
2. The information provider noted that the Executive had admitted that the word 'subscription' was on the first page of the website. An asterisk was visible next to the word 'subscription' to indicate that more information was available, and asserted that this was a commonly accepted method. The information provider reiterated that the website had been approved by the Executive.
3. The Tribunal considered the evidence and found that the references made to subscription on the dailymillion website were unclear and neither prominent nor clearly visible. The Tribunal upheld a breach of paragraph 7.12.3a of the Code.

Decision: UPHELD

ALLEDGED BREACH ELEVEN

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 noted that on the dailymillion website, the terms of use of the subscription service (neither the pricing nor opt-out information) were clearly visible. Consumers were required to scroll down the page in order to view the information. Furthermore, no subscription details were supplied in the initial promotional MT message:

FreeMSG > to validate this is your mobile simply reply MILL to this message, or send MILL to 86000. Good Luck! 10/12p Ticket 03 12 18 20 33 - 03 06

2. The information provider reiterated that the terms of the subscription service were available on the websites and were contained in the MT information message.
3. The Tribunal considered the evidence and noted that the terms of the subscription service were not clearly visible on the dailymillion website. The Executive also noted that no subscription details were supplied in the initial promotional SMS message, which failed to state the whole cost as required by the Code. The Tribunal upheld a breach of paragraph 7.12.3b of the Code.

Decision: UPHELD

ALLEDGED BREACH TWELVE

SUBSCRIPTION SERVICES (Paragraph 7.12.3c)

“Promotional material must:

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

1. The Executive noted that the follow up promotional or opt-in message received after consumers entered their mobile number into this version of the website, also failed to mention the STOP command:

FreeMSG> To validate ur mobile & join £1M draw & grab a Grand cash prize for 150p per question reply MILL to this message or send MILL to 86000

2. The information provider reiterated that the opt-out terms were available on the websites and the MT information message.
3. The Tribunal considered the evidence and noted that no mention of the STOP command was made in the initial promotional SMS message. The Tribunal upheld a breach of paragraph 7.12.3c 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:

- There was material consumer harm; there were a high number of complainants, some of whom had been charged over £30 and as much as £90;
- The cost paid by individual consumers was high; namely £4.50 per week; 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 cooperated with the Executive when notified of the breaches and made changes to the service; 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 **serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £40,000. 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.
- The Tribunal imposed a bar on the service for 6 months, suspended by 1 month from the date of this notice to enable the service provider to remedy the breaches.
- The Tribunal also ordered that 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.