

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

**Thursday 9 October 2008**  
**TRIBUNAL SITTING No. 12 / CASE 1**  
**CASE REFERENCE: 743028/GL**

Service provider & area:	mBlox Limited
Information provider & area:	2 Way Traffic NV, Netherlands
Network:	All mobile networks
Type of service:	Mobile content subscription service
Service title:	MyPengo
Service number:	85115 & 85015
Cost:	£5.00 per week and £5.00 sign-up fee
Network operator:	All Mobile Networks
Number of complainants:	255

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 255 consumer complaints regarding the ‘MyPengo’ mobile content subscription service (competitions, games, ringtones etc), which the Executive was told was promoted by banners and web pages. The cost of the service was £5.00 per week, with an additional initial £5.00 sign-up fee.

Complainants reported having received unsolicited text messages, some of which were chargeable. Examples of the SMS messages received by complainants are as follows:

- Free text message. Text YES to 85115 to win big. £5 per week, prizes to be won
- You have joined Game on, compete and win fantastic prize like a Wii, PS3 and more! 5gbp a week until you sent stop to 85115. Helpline 02081149478
- New round! Which operatic character commits hara-kiri? A: Madam Butterfly, B: Miss Moth C: Grandma Beetle + last round score 0

Many complainants also expressed concern that they had experienced difficulties in contacting the information provider, 2 Way Traffic NV’s, customer service department.

### The Executive’s Understanding of How the Service Was Intended to Operate

Consumers entered their mobile number into a box within the website promotion. Consumers were then sent a mobile terminating (“MT”) message, which required them to send a mobile originating (“MO”) message with the keyword ‘YES’ or ‘OK’ to initiate the service.

Examples of the initial MT message sent to mobile numbers have been extracted from message logs supplied by the information provider and are as follows:

Free msg! Text YES to 85115 if you want to compete and win this great prize!  
Info: [www.smsgameon.com](http://www.smsgameon.com) Participate? Text YES now and win big!

Free msg! Text YES to 85115 to compete and win this great prize! Info:  
[info.mypengo.com](http://info.mypengo.com). Participate? Text YES now and win big!

Please text OK now to 85115 if you want to receive your free bonus item now!  
Text OK to 85115

Free message: Please text OK now to 85115 if you want to receive your free  
bonus item now! Text OK to 85115. Info: [info.mypengo.com](http://info.mypengo.com)

Users who responded with the required keyword, were then entered into a subscription service charged at £5.00 per week with an additional £5.00 initial sign-up fee.

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

Under paragraph 8.3.3 of the Code, the Executive wrote to the service provider on 8 July 2008, requesting information on the service and its promotion, including message logs and opt-in details. The information provider responded on behalf of the service provider on 12 May 2008, also enclosing terms and conditions for the service and message logs.

In a letter to the service provider dated 5 September 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1b, 5.7.1, 5.8, 5.11a, 7.6.2 a and b, 7.6.3a, 7.6.3b, 7.6.5, 7.12.3a-c, 7.12.4a-f and 7.12.5 of the Code. The information provider responded on 12 September 2008 on behalf of the service provider, also supplying further message logs.

Throughout the investigation, the Executive had been in regular communication with both the service provider and information provider in respect of ongoing problems with customer service arrangements for the service. These problems had been reported by complainants and PhonepayPlus' own contact centre.

The Executive gave the service provider and information provider an opportunity to resolve the matter, but thereafter continued to receive complaints about the customer service arrangements. Consequently, the Executive raised a breach of paragraph 3.3.5 of the Code. The service provider supplied a response to the additional breach on 25 September 2008, along with a submission for compliance advice for the service including flowcharts of the customer service experience.

The Tribunal heard informal representations from both the information provider and service provider on 9 October 2008. All written or oral statements made by the information provider or documents supplied, have been attributed accordingly throughout this report. The Tribunal made a decision on the breaches raised by the Executive on 9 October 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **CUSTOMER SERVICE ARRANGEMENTS (Paragraph 3.3.5)**

*“Service providers must ensure that there are in place customer service arrangements which must include a non-premium rate UK customer service phone number and an effective mechanism for the consideration of claims for refunds and their payment where justified.”*

1. The Executive noted that both the complainants and the PhonepayPlus' Contact Centre had reported being unable to connect to the information provider's customer services, despite repeat attempts. Callers reported that upon reaching the front of the call queue (after being on hold for a number of minutes) they were informed that they needed to call back later, or in 15 minutes. The Executive discussed the matter with the service and information provider and although it appeared that action was being taken, the Executive continued to receive complaints.
2. The information provider commented that, having evaluated the quality of its existing off-site call centre, it had decided to replace it with one which was more professional and better equipped to fulfil recent growth and present needs. It stated that the new system would go live during the first week of October. In the meantime, callers who had additional questions after speaking with its current first line customer care helpline were connected to its alternative centre and assisted by a dedicated customer care manager. The information provider stated that it was confident that its new customer care call centre operation was of the highest quality and would solve the current problems.
3. The Tribunal noted the reports of the complainants and the PhonepayPlus Contact Centre, that the customer service arrangements were inadequate and callers had been unable to connect with an advisor, despite repeated attempts. The Tribunal also noted the information provider's admission, during the informal representations made to the Tribunal (also acknowledged by the service provider), that it had, at the material time, failed to provide an adequate customer service call centre. The Tribunal upheld a breach of paragraph 3.3.5 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 many complainants had stated that the initial MT message they received was unsolicited and that they had not entered their mobile number on any website for the service. On this basis, the Executive considered the initial MT message received by these complainants to be a promotion under paragraph 11.3.27 of the Code, for the purposes of its investigations and in respect of all relevant breaches raised. The Executive noted the information provider's argument that the MT messages were not unsolicited promotions as users had directly consented to receiving them by entering their mobile number into the promotional website. However, the information provider had been unable to supply evidence to counter the statements of those consumers who had not entered their numbers onto the website and still received the initial MT message.

The Executive considered that there was an intrinsic risk that such a service would result in a considerable number of mistyped or mistakenly input valid mobile numbers being entered on the website with the result that those mobiles would receive an unsolicited promotional text message. The Executive also noted that according to the complaints received and the message logs supplied, recipients had not been given the opportunity within each promotion to opt-out (without charge), of further promotions.

2. The information provider emphasised that it did not send unsolicited promotional messages and that recipients of the initial MT had entered their number on a landing page. The purpose of the initial message was to confirm subscription and ensure that the person who had entered the mobile number on the website was the actual user of the phone. The information provider stated that it had the IP addresses of the computers from which it had received the mobile phone numbers. It stated that it also had the times and dates indicating when the user had i) entered the mobile number, ii) ticked the checker box to agree to the terms and conditions and iii) clicked 'continue' in order to trigger the confirmation MT.

The information provider explained that only one mobile number could be entered per IP address per 30 minutes, which prevented people from entering multiple numbers, for example, entering someone else's number after their own. The information provider had made queries on the database to check the number of mobile numbers that were received per IP address and concluded that there were hardly any IP addresses which delivered multiple numbers. Furthermore, it had a check in place which prevented user's numbers from receiving more than two initial confirmation messages per service per landing page; the average number of delivered free confirmation MTs being 1.2 per mobile number. The information provider acknowledged that there was a small chance that a

consumer could enter a wrong number which actually existed, which might lead the recipient to reply with OK without having viewed the website supplied in the message. Upon replying to the initial message and being subscribed to the service, the user would then receive a welcome message which contained the following information: price, billing frequency, contact details (customer care number and website), and opt-out information. The information provider commented that it also had a refund policy and was willing to compensate people who claimed never to have visited its website or subscribed to its service.

The information provider emphasised that if consumers did receive an unsolicited message (as a result of an incorrectly entered number), they would receive no more than two messages if they opted out immediately and, consequently, there was no consumer harm. The information provider reiterated that the promotional message was not the initial promotional material and therefore opt-out information was not required. The information provider emphasised that it was happy to discuss ways to improve its service with the Executive.

3. The Tribunal considered the evidence of both the complainants and the information provider and concluded, on the balance of probabilities, that the complainants had received unsolicited promotional messages from the service. The Tribunal commented that it did not consider the IP addresses supplied to be conclusive or sufficient proof of opt-in by the complainants. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **MISLEADING (Paragraph 5.4.1a)**

*“Services and promotional material must not:  
a mislead, or be likely to mislead in any way...”*

1. The Executive noted that the message formats used to encourage consumers to text a keyword and trigger the service were: i) Text ‘OK’ ‘to receive your free bonus item now’ and ii) Text ‘YES’ ‘to compete and win this great prize’. The Executive considered these initial MT messages to be misleading as they led consumers to believe that an appropriate response would result in them receiving a free bonus item or winning a prize, when in fact it triggered sign-up to a subscription service and subsequent charges (of which the consumer was unaware).
2. The information provider commented that the initial MT message was not the first piece of promotional material received by consumers; the confirmation MT was triggered by the consumer entering their mobile number on the landing page of the website. The information provider commented that the website set out pricing information in the following ways: i) a summary of the terms including price in the disclaimer at the bottom of the page, ii) a line of text stating price information and subscription right under the continue button and iii) a tick box which the consumer had to actively check in order to agree with the terms, conditions and age requirements, whereupon the pricing information was stated

right at the top. The information provider considered that these messages adequately informed the consumer of the cost of the service, prior to subscription. The information provider also reiterated its responses made in relation the alleged breach of paragraph 5.2 of the Code above.

3. The Tribunal considered the evidence and concluded that the MT 'sign up' message was a promotional message which was misleading in respect of those complainants who had not entered their details on the website and who had received, unsolicited, the MT 'sign up' message. Those recipients had been misled into the belief that by responding they would obtain a free item and were unaware that they were in fact entering a subscription service, for which they would incur charges. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

### **Decision: UPHELD**

### **ALLEGED BREACH FOUR**

#### **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 noted that complainants stated that the reverse billed SMS they received for the service were unsolicited. The Executive concluded that the mobile phone numbers of those consumers had been used without their direct or implied consent, in order to charge them a fee for a service they had never agreed to receive. The Executive considered that the sending of unsolicited chargeable messages, took advantage of the inability of the consumer to block their receipt, and that a service in which consumers were billed without their consent or knowledge, took unfair advantage of this circumstance.
2. The information provider reiterated that its system did not allow unsolicited premium rate messages and that consumers were made aware of pricing information in three places on the website, as explained in its response to a breach of paragraph 5.4.1a above. The information provider also reiterated its responses made in relation the alleged breach of paragraph 5.2 of the Code above. The information provider also commented that the nature of its business meant that there would always be a small percentage of customers who were not satisfied with the product or service and would complain. Customers who complained were informed that the information provider had a record of the date and time of the users' MO sign up. If the customer was still unhappy after that explanation, it implemented its "no questions asked refund policy".
3. The Tribunal considered the evidence and noted that the call logs demonstrated that the complainants had responded to the free initial message and opted into the service, even if they had not entered their details on the website and had received the sign up MT unsolicited and responded without intending to sign up to a subscription service. In these circumstances, the Tribunal did not find that the service or promotion had taken unfair advantage of any characteristic or circumstance which may make consumers vulnerable, but that any concerns had

been already addressed in its consideration of breaches of paragraphs 5.2 and 5.4.1a. The Tribunal did not uphold a breach of paragraph 5.4.1b of the Code.

**Decision: NOT UPHELD**

## **ALLEGED BREACH FIVE**

### **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 message logs supplied by the information provider demonstrated that complainants who did text back ‘OK’ or ‘Yes’ in response to the initial promotional SMS message, were not aware of the cost of the service prior to incurring any charge. For example:

*‘Please refund the money, 5 pounds that you took without my permission to send me a text message’*

*‘I was never aware of any charges to participate in this competition as you never informed me of any, so can you plz refund the £5 that you have charged/taken off my mobile credit plz’*

*“Please reinstate immediately the 5 pounds worth of call time you illegally took from my phone or I will report your company to the Regulator as well as the radio programme called ‘you & yours’ Thanks”*

*‘If I am not a member then how dare you steal £35 from me with your text 2 my mobil i demant [sic] that u refund of this money asap or this will b taken further’*

The Executive was of the opinion that complainants had not been fully informed, clearly and straightforwardly of the cost prior to incurring a charge.

2. The information provider reiterated that the initial MT sign up message was not the first piece of promotional material, and that the pricing information had been provided on the promotional website in: i) a summary of the terms including price in the disclaimer at the bottom of the page, ii) a line of text stating price information and subscription right under the continue button and iii) a tick box which the consumer had to actively check in order to agree with the terms, conditions and age requirements, whereupon the pricing information was stated right at the top. The information provider was of the opinion that, through the information on its website, the complainants were fully, clearly and straightforwardly informed about the cost prior to subscription and incurring any charge and reiterated its previous comments in respect of its “no questions asked” refund policy.
3. The Tribunal considered the evidence and concluded that the message logs clearly demonstrated, that the complainants who had not entered the service through the website but who had unintentionally signed up to a subscription service by responding “yes” or “ok” to the promotional message, were unaware of

the cost of the service, prior to responding. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SIX**

### **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 considered that the MT sign up message was a promotion and that it failed to provide the required contact information details. No customer service phone number was supplied in the promotional message, nor was the identity of either the service provider or information provider.
2. The information provider again reiterated that the MT sign up message was not a promotional message. It maintained that the website was the promotion and that it provided the relevant contact details, terms and conditions. The information provider commented that the contact information details and customer service number were communicated not only on the website landing page but also in the welcome message, received directly after subscribing to the service. It also stated that it provided a help or information message, triggered by texting ‘HELP’ or ‘INFO’, which included the website and the customer care number. The information provider stated that it would add the customer care number to the initial confirmation message.
3. The Tribunal considered the evidence and concluded that the MT sign up message was a promotion, most obviously for those who had not entered the service through the website. This MT message did not include the identity and contact details in the UK, of either the service provider or information provider as required by the Code provision. The Tribunal noted that the message also failed to provide a customer services number, which had not previously been brought to the attention of recipients who had not visited the website. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SEVEN**

### **USE OF THE WORD ‘FREE’ (Paragraph 5.11)**

*“No premium rate service or product obtained through it may be promoted as being free unless:*

- a *a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge.”*



1. The Executive noted that the ringtone subscription service offered one free bonus item, however it was not possible for 'one free bonus item' to be of an equal or greater value to the subscription service.
2. The information provider acknowledged that it had made use of the wording 'Free Extra' or 'Free Bonus' ringtone. The information provider believed that the use of 'Free Extra' covered exactly what was on offer, namely a free extra ringtone upon subscription to the service. The information provider stated that the word 'Extra' was stated in the same sentence and in the same size as the word 'Free' and was always used in combination. To prevent any future misunderstandings, the information provider confirmed that it had changed all 'creatives' and landing pages to exclude the word 'Free' altogether. The information provider commented that it wished to seek compliance advice from the Executive, but noted that it was unable to do so whilst the service was under investigation.
3. The Tribunal considered the evidence and noted that there was no free second product or service which was equal to the minimum £10.00 that users would have to spend in order to subscribe to the service (£5.00 weekly charge and £5.00 sign-up fee). The Tribunal also noted that the information provider had removed the word 'free' from the promotional material. The Tribunal upheld a breach of paragraph 5.11a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH EIGHT**

### **COMPETITION PROVISIONS: COST AND OPERATION (Paragraphs 7.6.2a and b)**

*"Promotional material for competition services which generally cost more than £1 must clearly display:*

- (a) *the cost per minute and likely playing time, or the full cost of participation...."*
  - (b) *details of how the competition operates and an indication of any tie breakers."*
1. The MT sign up message for the subscription competition received by complainants was promotional material and gave no indication of the required information in respect of competition services, namely in respect of pricing and operation.
2. The information provider reiterated that the initial MT sign up message was not the first piece of promotional material and was triggered by the users entering their mobile numbers on its website. The information provider stated that the summary terms in the disclaimer explained the game logic. Furthermore, to be absolutely sure that customers were fully informed as to how the game worked, the game logic was also clearly provided in the specific terms and conditions, immediately following pricing information. The information provider commented that customers actively agreed to the full terms and conditions, by ticking the checker box on the landing page. The information provider again acknowledged

the possibility of an incorrect number being entered on the website in its response to the breach of paragraph 5.2 of the Code and again referred to its refund policy.

3. The Tribunal considered the evidence and concluded that the MT sign up message was a promotion, as found above, and that it did not contain the information required by paragraphs 7.6.2 a and b of the Code. Therefore, recipients of the message who had not viewed the relevant webpage would have been unaware of the cost and operation of the competition. The Tribunal upheld a breach of paragraphs 7.6.2a and b of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH NINE**

### **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 noted the website [www.smsgameon.com](http://www.smsgameon.com) stated that participants must be 16 years plus or have parental permission, whilst the website [www.info.mypengo.com](http://www.info.mypengo.com) stated that participants need to be 18 years or older to participate. However, the MT sign up promotional message for the subscription competition received by complainants, failed to state the minimum age of participation.
2. The information provider reiterated that the initial MT message was not the first piece of promotional material. It commented that the age requirements were specifically and separately stated in the tick box the customer agreed to on the website and were also contained in the full terms and conditions. The information provider again acknowledged the possibility of an incorrect number being entered on the website (as stated in its response to the breach of paragraph 5.2 of the Code) and again referred to its refund policy.
3. The Tribunal considered the evidence and concluded that the MT sign up message was a promotion, as found above, and that it did not contain the information required by paragraph 7.6.3a of the Code. Therefore, recipients of the message who had not viewed the relevant webpage would have been unaware of any information which was likely to affect their decision to participate, such as key terms and conditions and any available prizes. The Tribunal upheld a breach of paragraph 7.6.3a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TEN**

## **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 noted that MT sign up promotional message for the subscription competition failed to provide an adequate description of prizes or the number of major prizes but merely stated ‘win this great prize’.
  2. The information provider again reiterated that the initial MT message was not the first piece of promotional material, and was only received upon the customer entering his number on the website and agreeing to the terms and conditions. The information provider emphasized that the landing page clearly indicated the prizes to be won. The information provider again acknowledged the possibility of an incorrect number being entered on the website (as stated in its response to the breach of paragraph 5.2 of the Code) and again referred to its refund policy.
  3. The Tribunal considered the evidence and concluded that the MT sign up message was promotional material, as found above, and that it did not contain the information required by paragraph 7.6.3b of the Code. Therefore, recipients of the message who had not viewed the relevant webpage would have been unaware of any information which was likely to affect their decision to participate, such as an adequate description of prizes and the number of available prizes. The Tribunal upheld a breach of paragraph 7.6.3b of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH ELEVEN**

### **COMPETITION PROVISIONS: CLOSING DATE (paragraph 7.6.5)**

*“Except whether there are only instant prize winners, promotional material for competition services must state when the competition closes. An insufficient number of entries of an adequate quality are not acceptable reasons for changing the closing date of a competition or withholding prize”.*

1. The Executive noted that the MT sign up promotional message for the subscription competition failed to state when the competition closed, despite it being a monthly competition with a new quiz each and every month.
2. The information provider reiterated that the initial MT message was not the first piece of promotional material, and was only received upon the customer entering his number on the website, after agreeing to its terms and conditions. The information provider commented that the landing page described the game logic and the customer competed for the prize they had responded to on the landing page. Every week a new round started and users were rewarded with points for answering questions correctly. The highest weekly score of the month won the

prize responded to upon subscription. If multiple users in a week, or weekly winners at the end of the month had the same score, a tiebreaker question was played to determine the winner. The information provider explained that each month had a winner, but the competition for the specific prize never closed as the customer could keep playing for the prize the following month.

The cost of participation was £5.00 per round with an additional £5.00 sign up fee. All questions after the first question of the round were sent as free messages. The information provider again acknowledged the possibility of an incorrect number being entered on the website (as stated in its response to the breach of paragraph 5.2 of the Code) and referred to its refund policy.

3. The Tribunal considered the evidence and concluded that the MT sign up message was promotional material, as found above, and that it did not contain the information required by paragraph 7.6.5 of the Code. Therefore, recipients of the message who had not viewed the relevant webpage would not have been aware as to when the competition closed. The Tribunal upheld a breach of paragraph 7.6.5 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWELVE**

### **SUBSCRIPTION SERVICES (Paragraphs 7.12.3a-c)**

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

1. The Executive noted that the MT sign up promotional messages sent to complainants gave no indication that the service was subscription based and the terms of use of the subscription service were not stated, nor were details of the ‘STOP’ command.
2. The information provider reiterated that the initial MT message was not the first piece of promotional material, and was only received upon the customer entering his number on the website agreeing to the terms and conditions, which stated prize information, frequency etc. The information provider reiterated that it held IP addresses and landing page ID’s of all of its customers. The information provider again acknowledged the possibility of an incorrect number being entered on the website (as stated in its response to the breach of paragraph 5.2 of the Code) and again referred to its refund policy. The information provider also referred to previous communications with the Executive which had led it to believe that it was compliant in relation to the breach raised.
3. The Tribunal considered the evidence and concluded that the MT sign up message was promotional material, as found above, and that it did not contain the information required by paragraphs 7.12.3a-c of the Code. Therefore,

recipients of the message who had not viewed the relevant webpage would not have been aware that the service was subscription based, nor of its terms of use, or the availability of the 'STOP' command. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH THIRTEEN**

### **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 noted that the message logs supplied by the information provider showed that complainants had been charged £5.00 for the initial welcome message, that the user received immediately after sending the MO sign up to subscribe. This message should have been free of charge.
2. The information provider responded that the Code of Operators stated that the initial subscription message, containing all of the abovementioned information, could be billable. The information provider alleged that pricing information in the welcome message stated that it had a £5.00 sign-up fee and a £5.00 per week subscription fee; the initial subscription fee functioning as the sign up fee. The information provider commented that by charging for the welcome message no harm had been caused to consumers. It was a charge to which the consumer had agreed and would be paid at some stage in any event. However, in order to comply with the PhonepayPlus Code of Practice, it had amended its service. The initial message after subscription was now free, and the sign up fee billed in a separate content message received after the initial message. The information provider emphasised that as a Sony company, it placed high importance on compliance and customer satisfaction and had not purposely breach the Code.
3. The Tribunal considered the evidence and concluded that the calls logs supplied by the information provider clearly showed that the initial subscription message was not free of charge. The Tribunal upheld a breach of paragraphs 7.12.4a-f of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FOURTEEN**

### **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 the message logs supplied by the information provider showed that no free reminder messages had been sent to users.
2. The information provider acknowledged that the logs demonstrated that consumers did not receive reminder messages. After testing it discovered that the logic for the reminder message was not implemented correctly in its application. The information provider advised the Executive that it had now implemented the reminder message logic correctly into its applications and that complainants would be refunded.
3. The Tribunal considered the evidence and concluded that the call logs supplied by the information provider clearly showed that consumers had not been sent reminder messages. 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 service caused consumer harm resulting in 255 consumer complaints;
- The cost paid by individual users was high, being a minimum of £10 (£5.00 per week and a £5.00 registration charge); and
- The non-compliant subscription service is one which has been singled out for criticism by PhonepayPlus.

The Tribunal considered the following mitigating factors:

- The service provider had co-operated with the Executive when notified of the breaches, facilitating two meetings between the Executive and the information provider. The information provider had requested compliance advice upon receipt of the breach letter and had demonstrated a positive attitude to future compliance;
- Refunds had been issued by the information provider to complainants who claimed never to have opted into the service; and
- The service provider was in the process of completing a voluntary audit and review of its internal systems and processes in relation to future compliance, a matter on which they were working very closely with the Executive.

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 service provider:

- A formal reprimand
- A total fine of £50,000 (comprising £30,000 in respect of the upheld breaches and an uplift of £20,000 in respect of the service provider's breach history).
- The service provider is to seek compliance advice from PhonepayPlus within two weeks of the summary notification of the decision; such advice to be implemented within two weeks of receipt.
- Any outstanding claims for refunds not already paid by the information provider are to be paid by the service provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.