

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday, 12 November 2009
TRIBUNAL SITTING No. 40 / CASE 1
CASE REFERENCE: 792423/DL

Service Provider:	2 Ergo Limited, Manchester
Information Provider:	Mobile CRM LLC, New York, USA
Type of service:	Subscription service-/Mobile downloads
Service title:	Mobile Shop (aka Tonesite)
Service numbers:	700138151, 300010007, 800288
Cost:	£3 every seven days
Network operator:	All Mobile Network Operators
Number of complainants:	393

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 393 complaints between 16 January 2009 and 2 September 2009 relating to a range of payment codes that did not resemble the usual five-digit shortcode. The Executive was first made aware of this matter by complainants on the O2 network who were being charged £3 via Payment SMS ('PSMS') on payment code 30010007. The service referred to in the PSMS message was called 'Mobile Shop'/'Tonesite'. The Service Provider identified the Information Provider as Mobile CRM LLC, which is based in the US. PhonepayPlus also discovered that Expanding Vision Ltd had been contracted to supply customer care services for the US based Information Provider in relation to 'Tonesite'.

Complaints related to alleged unexplained chargeable PSMS or Payforit charges that had appeared on the complainants' mobile phone bills. Complaints were varied: some stated not to have received the initial Wireless Application Protocol ('WAP') push message with site address; some said they had received the WAP-push message but had ignored it; and some said they had accessed the WAP site but had downloaded the 'free' content without knowledge of the subscription element of the service. All complainants stated they had been charged £3 per week, or to have been informed (via a reminder message issued on 11 February 2009) that charges were due for a service to which the recipient was already subscribed.

(i) The Service

Payforit payment mechanism

In relation to the Payforit scheme, Mobile Networks are known as 'Operators', service providers are known as 'Accredited Intermediaries', and information providers are known as 'Merchants'.

In this case, the Service Provider was an Accredited Payment Intermediary in partnership with all of the Mobile Network Operators under the scheme. The service was operated by the Information Provider via the Service Provider's platform, and was described by the Service Provider to be a service involving the Payforit facility. The Service Provider had supplied the Executive with a copy of the Trusted Mobile Framework Rules ('TMF Rules') and a contract between 2 Ergo as the Service Provider and Mobile CRM LLC as the Information Provider. According to the Service Provider, the service was provided under the terms of the contract, and in conjunction with the TMF Rules which are applicable to Accredited Payment Intermediaries.

The TMF Rules are not enforced by PhonepayPlus, and this case was presented by the Executive solely for an adjudication to be made on potential breaches of the PhonepayPlus Code of Practice. Having said that, all the parties involved expected the technology to be as prescribed in those TMF Rules, so they were considered by the Executive when analysing how the service should have operated.

The accessibility of the service

The Mobile Shop service appeared to be accessible where (i) a consumer had discovered a WAP banner advertisement, which by the Information Provider's own statement was not widely available; or (ii) it was promoted by WAP-push messages sent to consumers' handsets along with consumer-specific WAP URL addresses relating to the Mobile Shop landing pages, some of which were related to 'mshop.tv' and others related to '150mob.com' (however, the Service Provider had suggested that the Information Provider was able to use a variety of landing pages to attract users to the download service). Regardless of the method of discovery, the Service Provider stated that, when an item such as a ringtone was selected by a consumer, they would go through the process of subscription via the Payforit platform and would then be taken back to the 'mshop.tv mobile content download service' to complete their download.

The promotional WAP push messages and banner advertisements

The Mobile Shop service was advertised by four WAP-push promotional messages. According to the Service Provider, these were issued using marketing data obtained through Message Originating (MO) transactions for existing services, or to consumers who had accessed a content store previously. Existing services included mobile entertainment services, such as content and alert services. The WAP-push messages were worded as follows:

- ***FreeMsg: Gr8 tones (WAP link)***
- ***FreeMsg: Best xmas music (WAP link)***
- ***FreeMsg: MP3's here (WAP link)***
- ***FreeMsg: Free top tones (WAP link)***

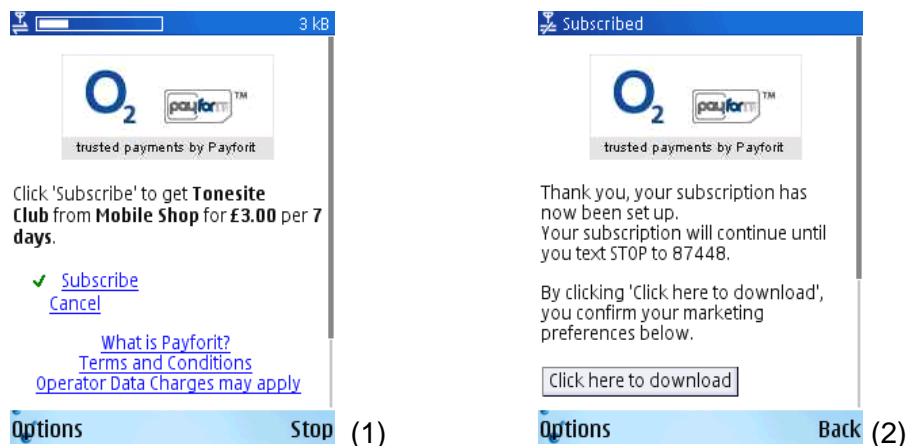
Four banner advertisements were produced and setup on various WAP sites:



The Payforit scheme as described by the Service Provider

The Service Provider indicated that, regardless of the method of discovery of the service, and, indeed, which landing page had been viewed by the consumer, whenever a consumer selected his/her first ringtone, they ought to be taken through two standard Payforit WAP screens:

1. The subscription offer page showing service description and pricing information with the invitation to “Subscribe” or “Cancel” (See Subscription Set up, R3.2.1 and R3.2.2 of the TMF Rules).
2. The subscription confirmation page telling the consumer: “Thank you, your subscription has now been set up. Your subscription will continue until you text STOP to 87448.” (See Subscription Set up, R3.4.1 of the TMF Rules).



A third stage in the Payforit process is that the consumer ought to receive a subscription initiation message to his/her handset using the same, or similar, terms as seen on the subscription offer page (at 1). (See Subscription Set up, R3.5.2 of the TMF Rules).

The service provider stated that the following message was used:

“[FreeMsg] You are subscribed to Logos & Ringtones for £3.00 per 7 days until you text STOP to 87448. Helpline 0844 5796359.”

The Executive noted that Section D of the TMF Rules, in relation to Subscription Payments, includes various TMF Rules prescribing how to bill subscribers using the Payforit facility.

The Executive noted that responsibility for appropriate billing resides with the Accredited Payment Intermediary; however, “a merchant can request a payment from the Operator via the Intermediary”. The overriding responsibility is in Subscription Payments, R4.1 of the TMF Rules, which states API’s must “ensure that only payment requests for valid, active subscriptions are communicated to the Operator”.

When levying a payment, API’s may “optionally, send an SMS to the consumer, indicating that either a charge has successfully applied or has failed to be applied to their mobile phone account” (Subscription Payments, R4.2 of the TMF Rules).

The Executive noted that some complainants' comments suggested that no messages were received to the handsets, yet charges were levied. Some Networks appear to have levied charges by way of PSMS, such as O2. In the case of O2 consumers, PSMS messages were issued by the API, indicating a charge of £3 had been successfully levied. These messages were labelled 30010007 and led to the initial complaints being received by the PhonepayPlus Contact Centre. In the case of Virgin and Vodafone consumers, almost all complainants specifically said the charges were not visible on the handset and were noticed either on the bill when it was received, or by the repeated need to top-up pre-pay accounts.

The operation of the service, with 10 days free access prior to billing being initiated

The Service Provider stated that the service was promoted from 5 December 2008, yet no billing mechanism was set up until January 2009. This was because the service was to be promoted by offering an introductory offer of 10 days free access prior to the subscription billing (£3 every seven days) commencing. However, there appeared to have been a longer than 10-day delay period in some cases.

The Service Provider and Information Provider both suggested consumer complaints were premised upon the delay in billing being initiated.

The changes in operation over the course of the investigation

When the investigation began in January 2009, dialogue between PhonepayPlus and the Service Provider led to the Service Provider allegedly making various changes to the service:

1. The ten days free access offer was withdrawn (dated 9 February 2009);
2. The terms and conditions changed on the WAP site (dated approx. 9 February 2009);
3. Additional reminder messages were issued to O2 customers (dated approx. 11 February 2009);
4. The subscription initiation and reminder messages were taken under the control of 2 Ergo, as opposed to the Information Provider (dated approx. 23 March 2009);
5. The subscription initiation process was later suspended for new subscribers (dated approx. 1 April 2009).

(ii) The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Service Provider on 28 July 2009, raising potential breaches of paragraphs 3.3.3, 5.4.1a, 5.7.1, 5.7.2, 7.12.3a-c, 7.12.4a-f, 7.12.5, and 3.3.5 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided a formal response to the breach letter on 5 October 2009.

The Tribunal made a decision on the breaches raised by the Executive on 12 November 2009, having heard an Informal Representation from the Service Provider.

SUBMISSIONS AND CONCLUSIONS

PRELIMINARY MATTERS FOR DECISION

(I) REGULATION OF THE 'PAYFORIT' PAYMENT FACILITY

The Payforit payment facility falling within the definition of a Premium Rate Service

Following concerns raised by the Service Provider as to whether the Payforit payment facility and, consequently, the 'Mobile Shop'/'Tonesite' service, was regulated by PhonepayPlus, the Executive submitted that the payment service fell within the definition of a Premium Rate Service for the following reasons:

1. The Payforit facility provided by Service Provider to the consumer falls within subsection 120(8)(b) of Communications Act 2003 ('the Act') (read together with subsection 120(14)(a) of the Act). The service involves the user of an electronic communications service ('ECS') (in other words the customer of the relevant mobile network) making a payment for products or services by the making of a transmission on his/her network, accepting the obligation to pay and triggering the inclusion of the amount in question on the customer's bill. Such making of a payment is a "facility" contemplated under subsection 120(14)(a), and section 120(8)(b) specifically provides that allowing a customer to make use of such a facility by the making of an ECS enabled transmission is a service falling within subsection 120(7)(a) of the Act.

The Service Provider had previously stated that any, and all, engagement with the promotional material on WAP sites led to Payforit screens being viewed, and terms and conditions accepted (i.e. via transmissions made), by the user of an electronic communications service, leading to the making of payments for products or services.

2. With regard to subparagraphs 120(7)(b)-(d), the Executive was of the view that the charge for the Payforit facility provided by the Service Provider (s120(7)(b)) (including the cost of the transmissions made via the mobile network), was included within the total sum paid by the consumer to the mobile network for the product or service. The Executive concluded that the charge paid by the consumer to the mobile network, and which appeared on the customer's telephone bill, represented a charge (or part of the charge) for using the mobile network, thereby satisfying sections 120(7)(c) and (d) of the Act.

The Payforit payment facility falling within the definition of a Controlled Premium Rate Service

The Executive considered that the Premium Rate Services Condition ('PRS Condition'), set by Ofcom under section 120 (1) of the Act, binds all those to whom it is applied. The PRS Condition applies to all those who provide a 'Controlled Premium Rate Service'. Paragraph 2(e)(ii) of the current PRS Condition states:

'Controlled Premium Rate Service' means a Premium Rate Service [...] in respect of which:

- (i) ...
- (ii) *the service is obtained other than through a Special Services Number, and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute inclusive of value added tax.'*

The Executive submitted that the Mobile Shop service (otherwise referred to as Tonesite) was charged at £3 every seven days (via a non Special Services numbers), according to information supplied by the Service Provider. It submitted that this was clearly over the

threshold of 10 pence stated in the above definition of a Controlled Premium Rate Service. Therefore, in the Executive's view, the Mobile Shop service is a Controlled Premium Rate Service, and is thereby subject to regulation by PhonepayPlus and must comply with the PhonepayPlus Code of Practice.

The Tribunal's preliminary finding

The Tribunal considered the Executive's reasoning and decided to accept its conclusions that the Payforit payment facility and, consequently, the 'Mobile Shop'/'Tonesite', fell within the definitions of a Premium Rate Service and Controlled Premium Rate Service for the purposes of the Act and the PRS Condition respectively. The Tribunal, therefore, decided to proceed with the adjudication of the alleged breaches submitted by the Executive in relation to this case.

(II) PRELIMINARY FINDING OF FACT

When considering this case, the Tribunal noted that the alleged breaches of 3.3.3 (Ground 1), 5.4.1a, 5.7.1, 5.7.2, and 7.12.3a-c all turned on a key question of fact: Had all consumers who had been charged for the service seen, and interacted with, the Payforit screens? The Tribunal, therefore, decided to make a preliminary finding of fact, before addressing alleged the breaches in detail.

The Tribunal carefully considered the evidence of the complainants as put forward by the Executive, and the submissions put forward by the Service Provider (both in response to the Executive's letters and during the informal proceedings – see below for details). Based on the evidence before it, including the high number of complainants (and in particular the large number who said they had not seen any information about charges for the service nor that it was a subscription service), the lack of a evidence from the Service Provider to prove that consumers had seen or interacted with the Payforit screens and the Service Provider's failure to provide any details of the actual Payforit screens purported to be have been seen by consumers (showing details of the free trial period), the Tribunal reluctantly concluded, on the balance of probabilities, that not all consumers had seen, and interacted with, the Payforit screens. The Tribunal then proceeded to adjudicate on the alleged breaches on the basis of this finding of fact.

ALLEGED BREACH ONE ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)

"Service providers much use all reasonable endeavours to ensure that all of their services are of an adequate technical quality."

1. The Executive considered there to be a breach of paragraph of 3.3.3 of the Code on the following grounds.

Ground 1

The Executive submitted that evidence from complainants indicated that the promotional material for this ringtone download service had focussed upon the offer of free downloads. The Service Provider and the Information Provider (either directly or via its customer services supplier, Expanding Vision Limited) had consistently provided details of a range of offers in December 2008, and the early months of 2009, advertising free downloads.

The Executive submitted that no complainants referred to having seen any Payforit subscription opt-in screens. It submitted that this was significant as it appeared from

the Tonesite WAP site created on Swiftmob.com that the Information Provider was relying upon the Payforit screens to bring the pricing and subscription elements to the consumer's attention.

It submitted that, where the service had been intended to involve the provision of Payforit screens by the Accredited Payment Intermediary (in this case, the Service Provider), it was of the opinion that the failure to provide consumers with these screens indicated that the service was supplied without the adequate technical quality expected by the Information Provider or consumers.

The Executive made reference to a contract for the "Provision of the Payforit Platform", signed by the Service Provider and the Information Provider. It submitted that, under this agreement, the Mobile Shop service was envisaged as being supplied via WAP services and paid for by consumers using the Payforit Platform. The provision of this service relied upon compliance with the Trusted Mobile Payment Framework, and the Service Provider had supplied its own prospectus relating to how its Payforit Platform sought to achieve this compliance with this framework.

The Executive submitted that it was of the opinion that the complainant evidence strongly suggested that the Mobile Shop service was promoted in December 2008, without the Payforit screens set up with the adequate technical quality to ensure each, and every, user who visited the WAP site was only opted into the subscription service after seeing the requisite subscription offer screen, and subscription opt-in confirmation screen. Furthermore, the evidence suggested that this problem had persisted throughout the promotion of the service.

The Executive submitted that complainants had not had access to the WAP site, or had access to the WAP site alone, or had access to the WAP site and the downloading of a ringtone without sight of the subscription screens, and that this led to unsolicited charges being levied by the Service Provider and/or Information Provider.

Ground2

The Executive submitted that the Trusted Mobile Payment Framework called for the provision of subscription initiation text messages to be issued to subscribers by the Accredited Payment Intermediary (API). The service in question, according to the Service Provider, included a free period (Rule 3.5.2 of the TMF Rules). The Service Provider had suggested in correspondence that, up until 23 March 2009, the subscription initiation and reminder text messages were issued by the Information Provider on the API's behalf. The Executive also made reference to a comment made by the Service Provider stating that, after that, it would be "*initiating, for the short term at least, the reminder messages to handset*".

The Executive submitted that the message logs suggested that subscription initiation text messages were being issued by the Information Provider; however, the complainants' evidence strongly suggested these text messages were not received on the handsets of any complainant. This includes the fact that no complaints were received by PhonepayPlus during December 2008, or the early weeks of January 2009.

The Executive made reference a specific individual ('JB') who supplied evidence and granted the Executive access to his handset. JB stated as follows:

"I had a text message from Orange saying that a topup had occurred on my account. I rarely used the phone and so was surprised to get this message. I went online to

look at my account and saw that there were 3 charges of 3 pounds each applied which I knew nothing about.”

The Executive submitted that JB had called PhonepayPlus on 2 March 2009; the log of the complainant was as follows:

“No content messages from 2ERGO OR MOBCOM. However after consumer contacting (sic) them this morning he has received 2 messages which states “(Free MSG) Your subscription to phonesiteclub (sic) has been stopped. Helpline 08445796359”. Received 2/03/09 @ unk. the (sic) next message states “88066 – Free MSG, U have been unsubscribed sorry to see U go!” 02/03/09 @ 09.48.”

The Executive said JB had insisted that he had retained all text messages from the relevant period on his handset. The Executive viewed the handset, and the complainant’s inbox, and found a number of text messages associated with the service, all of which had been provided to PhonepayPlus in other correspondence. The subscription initiation text message was not on the handset when accessed on 12 March 2009. Whilst one conclusion could be that the consumer deleted it from his handset, this was inconsistent with all of JB’s statements made during the course of correspondence. The Executive also submitted that the message logs supplied by the Service Provider in relation to JB’s mobile number indicated that there was no record confirming delivery of the subscription initiation text message, and that this appeared to be the case for all consumers.

The Executive submitted that the Service Provider and Information Provider had not provided clear evidence that the required subscription initiation text messages were received by consumers.

The Executive submitted that it was of the opinion that this element of the Payforit service – the subscription initiation text message – was not set up with the adequate technical quality necessary to ensure that these regulatory text messages was successfully delivered to the consumers’ handsets.

Ground 3

The Executive submitted that a small number of complainants had commented that they had been billed on multiple dates in a period of seven to eight days. This appeared to be at odds with the cost of the subscription service operating with pricing advertised at £3 every seven days. It submitted, therefore, that the billing mechanism of the Payforit service was not set up with the adequate technical quality necessary to ensure that consumers were only charged £3 every seven days, as set out in the terms of the subscription service.

2. The Information Provider responded to the grounds raised by the Executive as follows:

Ground 1

The Service Provider said it refuted the Executive’s submission that the Payforit screens had not been presented to the consumer, and that it appeared that the Executive was accusing the Service Provider of making a deliberate decision to deconstruct the entire Payforit platform for the purposes of committing wholesale fraud.

It stated that, taking into account the detailed explanatory context provided with respect to the Payforit platform, including the exhaustive development and testing process undertaken not only by the Service Provider, but by all the participating Mobile Network Operators with respect to Payforit integration via its operating systems, the Service Provider found the alternative suggestion put forward by members of the Executive at the meeting on 31 March, to the effect that the Payforit platform had been subject to fundamental breakdown without the knowledge of anyone within Service Provider, to be lacking in all credibility and again unsupported by material evidence of any kind.

The Service Provider stated that, despite specific corroboratory evidence as to the presentation of Payforit screens having neither been produced nor indeed requested by the Executive throughout the investigation, it stated that it had submitted evidence with its correspondence, derived from the server engine logs and relating to the core sample of mobile phone data to which the Executive primarily referred, and this had clearly demonstrated that Payforit pages were visited by consumers.

The Service Provider also stated that it had also provided detailed, thorough and compelling evidence, supported by its greater insight and understanding of the applicable technologies, with respect to discrepancies between the comments of consumers as selected by the Executive and the technical evidence and information available.

It also stated that it noted that the Executive was particularly reliant on the comments of one specific consumer, known as JB, whose character and motives it called into question.

Ground 2

The Service Provider stated that the Executive had submitted that the subscription initiation text messages were not provided. In support of this submission, the Executive had wrongly stated that these text messages were issued by the Information Provider, contrary to statements made by the Service Provider on 23rd March 2009.

It stated that evidence of the issuance of subscription initiation text messages had been provided expeditiously time and again in response to the requests of the Executive, and their issuance was further corroborated by numerous consumer logs including the issuance of 'STOP' messages by consumers, and by detailed submissions earlier in correspondence.

The Service Provider stated that it had, nevertheless, provided additional evidence of the issuance of subscription initiation text messages, via the server engine logs, and had reiterated that these text messages were hard-coded within the Payforit platform prior to launch of services.

The Service Provider stated that the Executive was again heavily reliant in its submissions on the comments of the complainant, JB, and it referred to its previous comment with regard to this individual. The Service Provider stated that, in any event, it appeared from the server engine logs that the subscription initiation message sent to the handset of JB could not be delivered.

Ground 3

The Service Provider stated that it had provided detailed responses in relation to two consumer mobile phone numbers that served to refute the Executive's submission that the billing mechanism was not set up with the adequate technical quality.

The Service Provider stated that there had been a brief period in mid-February during which there was some latency in the billing cycle, resulting in the requirement for billing to catch up with the applicable period of subscription. It pointed out that this billing pattern was triggered by the operation of the service being suspended on 6th February, which was at the request of the Executive.

It summarised that the applicable billing technology had experienced no issues or failures of any kind throughout the lifetime of the service, and nor had a systemic issue been reported, or even suggested, by the many consumer comments provided, which instead corroborated that consumers had been billed correctly on a weekly cycle throughout, or in the case of the period immediately following suspension and re-launch between 6 and 11 of February 2009 the equivalent thereof, such as to be consistent with the applicable billing period.

3. The Tribunal considered the evidence and referred to its preliminary finding of fact that some consumers had not seen or interacted with the Payforit screens. In relation to Ground 1, the Tribunal concluded that, taking into account its preliminary finding of fact, and, on the basis of the complainant evidence, on the balance of probabilities, the service had not been of adequate technical quality as the Payforit screens were not seen by all consumers.

In relation to Ground 2, the Tribunal noted the server message logs provided by the Service Provider and accepted, on the balance of probabilities, that these appeared to show that subscription initiation messages had been sent out and that the vast majority of those messages had been delivered. The Tribunal accepted that the relatively low incidence of non-delivery of messages could be for a number of reasons which were beyond the control of the Service Provider, and this was not evidence that the service was of inadequate technical quality. The Tribunal, therefore, decided not to uphold the breach of 3.3.3 on this ground.

In relation to Ground 3, the Tribunal concluded that the repeated billing of two users within a seven-day period had not been due to a technical failure of the service, but an isolated event caused by the temporary suspension of the service (which was at the request of the Executive). The Tribunal therefore decided not to uphold a breach of 3.3.3 on this ground.

Decision: UPHELD on Ground 1

ALLEGED BREACH TWO PROVISION OF CUSTOMER SERVICES (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 submitted that complainants’ comments suggested that consumers had not received the help they were looking for from the customer services arrangements put in place.

It submitted that the customer services arrangements were the responsibility of the Service Provider. However, in this case, the Information Provider had taken on that responsibility, on behalf of the Service Provider, and had contracted out the customer services arrangements to a UK based company – Expanding Vision Ltd. The Executive submitted that the Service Provider retained the responsibility, under the

Code, to ensure that there are customer service arrangements in place, as well as an effective mechanism for the consideration of claims for refunds.

Ground 1

The Executive submitted that the evidence indicated that there was often a dispute between the consumer and Information Provider relating to the key issue of subscription opt-in. It made reference to complainant remarks, and sample correspondence between a complainant and the third party customer service provider. The Executive also referred to a customer services letter issued on behalf of the Information Provider, which it alleged showed an unhelpful attitude on the part of the customer service agent when dealing with a request for a refund.

The Executive submitted that it was concerned that the third party providing the customer services arrangements had not been in possession of accurate information, thereby making it difficult to supply an effective mechanism for the consideration of claims for refunds and whether payment was justified.

Ground 2

The Executive submitted that the complainants' remarks indicated that the helpline number had been ineffective in giving complainants ready access to customer service advisors.

It further submitted that the staff from the PhonepayPlus Contact Centre had also reported difficulties with provision of customer care facilities. It made reference to three monitoring calls made by the Executive, two on 20 January 2009, and a further call made on 27 January 2009. The first went to an answer machine, attached to 08445796359. The second went to an "overflow" and the person could not assist, offering to get someone from "support" to call back. The third call also went through to the "overflow call centre" and was told that centre could not unsubscribe the mobile phone on request, but would "arrange for this mobile to be unsubscribed".

The Executive said it welcomed the provision of an overflow facility, but noted that a number of complainants found it difficult to speak to an operator when calling the helpline, and said it appeared that this overflow facility was limited in its activities.

Ground 3

The Executive submitted that the complainants' remarks indicated that consumers had experienced rudeness from staff providing customer service arrangements, which had hindered, or made impossible, the provision of any refunds.

2. The Service Provider made reference to its response letter relating to individual complaints raised by the Executive, which sought to dismiss the discrepancies identified by the Executive in the breach letter, and which it said showed the complainant evidence to be generally unreliable.

The Service Provider stated that paragraph 3.3.5 of the Code was quite clear in its meaning, namely that a phone number must be provided and claims for refunds must be considered, and made, where justified.

It made reference to the records supplied by Expanding Vision Ltd, on behalf of the Information Provider, which clearly demonstrated that an effective mechanism has been in place and has been consistently applied in terms of the issuance of refunds to consumers who felt a refund was justified.

Ground 1

The Service Provider said that the complainant who had received the customer service letter referred to by the Executive had made contradictory statements and suggested her evidence should be disregarded.

Ground 2

The Service Provider stated that two of the three examples submitted by the Executive suggested a perfectly satisfactory resolution, as one received a prompt call-back from a senior member of staff, and the other confirmed arrangements for a stop to be processed. In the third example, the Executive did not make it clear what the outcome was in the end. It stated that, in relation to consumers having difficulty making contact, it made reference to the volume of refunds issued which it said indicated that this had clearly not been the case in general.

Ground 3

The Service Provider stated that proactive monitoring of these Customer Services provisions by 2 Ergo had found the manner of staff to be generally excellent, polite, diplomatic and fair. It stated that it rejected Ground 3 of the Executive's submissions that it stated were based on comments from consumers who had felt disgruntled from the outset.

3. The Tribunal considered the evidence and found that there had been consumer service facilities in place, and there was evidence that the Service Provider had made over 400 refunds to complainants. As a result, the Tribunal concluded that there had been an effective mechanism for the consideration of claiming refunds. Tribunal did not uphold a breach of paragraph 3.3.5 of the Code.

Decision: NOT 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 submitted that it was of the opinion that, in the absence of the Payfortit subscription opt-in screens, the banner advertisements and the WAP-push text messages had misled consumers into thinking the offer of a free ringtone download was not associated with a subscription service. The evidence suggested that the terms and conditions had indicated that the service was charged, but these were not available on the same page as the list of ringtones to select, according to complainants. The key terms were, therefore, not brought to the attention of the consumer within the promotional material and the WAP site offering the first ringtone downloads.

The Executive submitted that the complainants' comments supported its submission that the promotional material did not bring to the consumers' attention the pricing of the service, nor the subscription element. It submitted that consumers who had followed the banner advertisements or the WAP-push text messages, and accessed the WAP offer page listing ringtones, had been misled into triggering the opt-in mechanism for the Mobile Shop subscription service without any knowledge of the terms and conditions and, in particular, the fact that it was a subscription service..

The Executive submitted that the service appeared to have been promoted and operated in a manner which did, or was likely to, mislead consumers.

2. The Service Provider stated that The Payforit subscription opt-in screens had been presented (as evidenced by the database logs and earlier submissions), and it, therefore, referred to its previous responses in rejecting this alleged breach.

It submitted that, in relation to the specific consumer complaints cited by the Executive in support of this submission, not only had it demonstrated that consumer comments selected by the Executive were consistently unreliable as evidence, but it had investigated specific comments recorded by the PhonepayPlus Call Centre, both in terms of the mobile phone call logs and the Payforit database logs, and also in regard to CDR call records for calls to the advertised helpline number for the entire period of operation of the service, and it had found numerous consumer comments to be contradicted by material evidence.

It stated that it had already commented in-depth in relation to mobile phone call logs. In support of these comments, it made reference to a number of CDR call records (for randomly selected consumers who claimed to have contacted the advertised helpline; many of them on multiple occasions) which indicated that no calls to the helpline had been recorded.

3. The Tribunal considered the evidence and noted that it had made a preliminary finding of fact that some consumers had not seen, or interacted with, the Payforit screens. It also noted the complainant evidence that many users of the service had thought they would be able to obtain a ringtone for free and had not expected further charges to be levied. The Tribunal concluded that the offer of a 'free ringtone' in both one of the WAP links, and in the banner advertisements, had misled consumers because they had not been informed prior to accessing the free ringtone that the service was subscription-based. It followed that consumers had been misled as to the nature of the charges associated with the service, and the fact that downloading a 'free' ringtone would result in activation of the subscription service. The fact that the terms and conditions gave pricing information was not sufficient as those terms were located behind a link on a different WAP page. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR GENERAL PRICING PROVISION (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 submitted that, in the absence of the Payforit subscription opt-in screens, the banner advertisements and the WAP push messages had failed to fully inform consumers, clearly and straightforwardly, of the cost of using the service prior to incurring any charge. The complainant evidence strongly suggested that no terms and conditions had been presented in the WAP landing page. Complainants stated that, at no time during the consumer experience, from receipt of the WAP push message to the receipt of a download, had they been presented with any pricing information for the service.

It submitted that the evidence suggested that the terms and conditions – found within a separate WAP page with a link on a WAP landing page – indicated that the service would incur charges. The complainant who mentioned this made it clear these were not available on the same page as the list of ringtones. The key terms were not

brought to the attention of the consumer within the promotional material, or on the WAP site which offered the first ringtone downloads.

The Executive submitted that the complainants' comments supported its submission that the promotional material had not brought the pricing information, or the subscription element of the service, to the consumer's attention. Consumers that had followed the banner advertisements, or the WAP-push messages, and accessed the WAP offer page listing ringtones were misled into triggering the opt-in mechanism for the Mobile Shop subscription service without any knowledge of the terms and conditions.

2. The Service Provider stated that the Payforit subscription opt-in screens were presented to users (as evidenced by the database logs) and it, therefore, referred the Executive to its responses above in rejecting this alleged breach.
3. The Tribunal considered the evidence and noted that it had made a preliminary finding of fact that some consumers had not seen the Payforit screens. In the absence of these screens, it followed that some consumers had not been fully informed, clearly and straightforwardly, about the charges relating to this service prior to incurring any charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE PRICING LEGIBILITY PROVISION (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 submitted (in the alternative to the submissions it raised in relation to paragraph 5.7.1 of the Code) that, in the absence of the Payforit subscription opt-in screens, the banner advertisements and the WAP-push messages had failed to provide written pricing information in an easily legible and prominent place that did not require close examination. The evidence suggested that the terms and conditions had indicated that the service would incur charges, but these were not available on the same page as the first list of ringtones (according to complainants). The key terms were, therefore, not brought to the attention of the consumer within the promotional material and the WAP site offering the first ringtone downloads.

The Executive submitted that the complainants' comments supported its submission that the promotional material, as seen during the consumer experience, had failed to bring the pricing for the service and the subscription element to the consumers' attention. Consumers who had followed the banner advertisements or the WAP-push messages and accessed the WAP offer page listing ringtones were misled into triggering the opt-in mechanism for the Mobile Shop subscription service without any knowledge of the terms and conditions.

2. The Service Provider stated that the Payforit subscription opt-in screens were presented (as evidenced by the database logs) and it, therefore, referred the Executive to its responses above in rejecting this alleged breach.

3. The Tribunal considered the evidence and noted that Executive had raised this breach as an alternative to the breach of paragraph 5.7.1 of the Code. It concluded that this alleged breach had already been sufficiently, and more suitably, addressed under paragraph 5.7.1 of the Code. The Tribunal did not uphold a breach of paragraph 5.7.2 of the Code.

Decision: NOT UPHELD

**ALLEGED BREACH SIX
SUBSCRIPTION-BASED SERVICES (Paragraph 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 submitted that, in the absence of the Payforit subscription opt-in screens, the banner advertisements and the WAP-push messages had failed to fully inform consumers in a clear and prominent manner of the nature of the service and the key terms. It said the evidence suggested that the terms and conditions had stated that the service would incur charges. However, according to complainants, this information had not been available on the same WAP page which contained the first list of downloadable ringtones. The key terms were, therefore, not brought to the attention of the consumer within the promotional material, nor on the WAP site offering the downloadable ringtones. Furthermore, the complainants’ comments referred to problems opting out of the service, as the ‘STOP’ command had not been clearly advertised.

The Executive submitted that the complainants’ comments supported its submission that the promotional material, as seen during the consumer experience for this service, had failed to bring the pricing information, the subscription element or the ‘STOP’ command to the consumers’ attention. Consumers who have followed the banner advertisements, or the WAP-push messages, and accessed the WAP offer page listing ringtones were misled into triggering the opt-in mechanism for the Mobile Shop subscription service, without any knowledge of the terms and conditions.

2. The Service Provider stated that the Payforit subscription opt-in screens were presented (as evidenced by the database logs) and it, therefore, referred the Executive to its responses above in rejecting this alleged breach.
3. The Tribunal considered the evidence and noted that it had made a preliminary finding of fact that some consumers had not seen the Payforit screens. In the absence of these screens, the only evidence or notification of the service being subscription-based was in the terms and conditions, which had not been present on the WAP page that set out the first list of downloadable ringtones. Taking into account the complainant evidence, the Tribunal concluded that the subscription element, and the terms of use, of the service had not been clearly indicated in the promotional material because the only reference to these issues was in the terms and conditions, which were behind a link on another WAP page, and which it appeared many complainants had not seen. It also found that the availability of the ‘STOP’ command had not been ‘advertised’ as required by the Code. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN SUBSCRIPTION INITIATION MESSAGES (Paragraph 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 made reference to the message logs supplied by the Service Provider that included a subscription initiation text message that was said to have been issued to all subscribers on the day of subscription. This message stated as follows:

“FreeMsg You are subscribed to Logos & Ringtones for £3.00 per 7 days until you text STOP to 87448”

The Executive submitted that it appeared that this initiation text message had not been successfully delivered to all users. The Executive referred to the complainant evidence including the comments made by the individual complainant known as JB, which suggested that:

1. Complainants who were said to have opted into the service did not complain until they were surprised by the receipt of apparently unsolicited charges, or chargeable PSMS messages, to their SIM cards in early 2009.
2. None of the 356 complainants had referred to receiving a subscription initiation message.
3. Many complainants' comments suggested that the first message received was charged at £3, or stated that they received no messages related to the charges levied at all.
4. Many complainants' expressed confusion regarding how to stop the service.
5. The mobile handset of the complainant known as JB did not contain any subscription initiation message, and the complainants' evidence indicated all messages had been retained.

The Executive submitted that it was of the opinion that, on the basis of the evidence, the subscription initiation text message had not been successfully delivered to subscribers.

2. The Service Provider stated that it refuted the Executive's submission that subscription initiation text messages had not been issued to consumers. It stated that this had been refuted by the Executive's own testing of the service on 10 February 2009, and by a considerable weight of additional evidence, including the many consumer 'STOP' command messages which were received both prior to the initiation of the investigation and afterwards.

It stated that it had provided a detailed and consistent refutation of this submission, and the provision of these subscription text messages was also evidenced by the

subscription initiation text message logs it had provided, pertaining to the core sample of mobile phone numbers. It referred the Executive to its earlier responses in rejecting this alleged breach.

3. The Tribunal considered the evidence and found that, on the balance of probabilities, the message logs showed that the subscription initiation text messages had been sent and, in the vast majority of cases, had been received by users. The Tribunal noted that, in some cases, the messages might not be received by users for reasons beyond the Service Provider's control. The Tribunal decided not to uphold a breach of paragraph 7.12.4a-f of the Code.

Decision: NOT UPHELD

ALLEGED BREACH EIGHT SUBSCRIPTION REMINDER MESSAGES (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 submitted that the message logs supplied by the Service Provider and/or the Information Provider had included reminder text messages, and that some complaints had indicated that reminder text messages had been issued. However, it appeared that this had not consistently been the case. The Executive made reference to several complainant examples who had not received subscription reminder text messages.

It submitted that, between February 2009 and June 2009, multiple subscription reminder text messages ought to have been issued and received, yet one complaint suggested that "no texts" had been received. It submitted that this evidence suggested that the subscription reminder text messages had not been consistently issued.

2. The Service Provider stated that the Executive had contradicted its own submission that the subscription reminder text messages had not been issued to consumers in respect of the following points:
 - The acknowledgment by the Executive that reminder text messages were sent to all subscribers on 11 February 2009.
 - The acknowledgment by the Executive that the Service Provider took control of subscription reminder text messages from 23 March 2009, which was welcomed by the Executive in recognition of the fact that these would have been diligently managed and issued by the Service Provider thereafter, as evidenced by all subsequent message logs which subsequently included the monthly text message reminders as sent from the relevant Service Provider platform.
 - The Executive had stated the following in correspondence:

"the message logs provided by the service provider and or the information provider do include reminder messages, and that some complaints clearly indicate that reminder messages are issued"

The Service Provider stated that, although the Executive's case was supported by two message logs that it had supplied, it noted that one message log indicated that the user had not been due a reminder text message, although the Information Provider had still assured the Service Provider that it had still been sent.

The Service Provider also stated that the message logs evidence previously supplied also consistently showed that WAP-push reminders had been regularly sent to consumers, which would also have included the relevant information regarding the service and how to opt out of it.

Furthermore, it stated that the Executive's correspondence confirmed that, during the period in which it was alleged that no reminder text messages were issued, the offering was entirely free to the consumer.

The Service Provider stated that discussions had already taken place with the Executive regarding the issuance of regulatory messages reminding consumers of charging during an initial free period of access to services, and it alleged that this scenario was not specifically covered by the Code. It stated that it was of the opinion that the issuance of reminder messaging in the format currently set out in the Code was not in any case applicable in this unique scenario and may, in fact, have given rise to confusion on the part of consumers as to whether access remained free.

The Service Provider stated that the appropriate reminder text messages had been sent out reminding consumers of the service and how to opt out at least once a month, as necessary, and it rejected this alleged breach. However, during the Informal Representations, the Service Provider admitted that no such messages had been sent out during the initial free subscription period, but it maintained that no consumer harm had resulted from this failure.

3. The Tribunal considered the evidence and concluded that, on the basis of the message logs and the Service Provider's own admission, the subscription reminder text messages had not been sent to all consumers. The Tribunal took the view that such messages were required, even during the free subscription period. 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:

- There was material consumer harm, as there were 393 complaints regarding the service.
- The cost paid by individual consumers was high – consumers were charged £3 a week and one consumer was charged over one hundred pounds.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Tribunal noted the Service Provider's breach history but did not consider it to be an aggravating factor in this case because there had been no recent cases relating to similar issues.

The Tribunal took into account the following mitigating factors:

- The evidence suggested that the Service Provider made refunds to over 400 consumers.

The revenue in relation to this service was Band 3 (£100,000 - £250,000).

Having taken into account the aggravating factors and the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Having regard to all the circumstances of the case, including the number and seriousness of the Code breaches, and the revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A fine of £140,000;
- The Tribunal imposed a bar on this service and related promotional material until compliant to the satisfaction of the Executive;
- The Tribunal also ordered that claims for refunds are to be paid by the Service Provider for the full amount spent by users.