

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 20 August 2009

TRIBUNAL SITTING No. 34 / CASE 3

CASE REFERENCE: 796127/CB

Information provider:	Antiphony Limited, Buckinghamshire
Service provider:	Wireless Information Network Limited, Buckinghamshire
Type of service:	Contacting and dating service
Service title:	10p Mobile Dating (text-date)
Service numbers:	69844 and 86111
Cost:	£1.50 per minute
Network operator:	All Mobile Network Operators
Number of complainants:	1

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

The PhonepayPlus Executive ('the Executive') received one complaint from a member of the public in relation to a 10p Mobile Dating (text-date) service operating on shortcodes 69844 and 86111. The service was an adult dating service for over 18s and was promoted via the website text-date.com which featured a selection of male and female profiles. The user would select a male or female profile on the website with whom to chat and would enter his or her mobile phone number in the 'Get in touch' field. Once the user's number was submitted, the user of that mobile phone number would receive a free text message inviting the user to confirm his or her age. According to the Information Provider, if the user did not respond after the first text message, a further two free text messages would be sent inviting the user to respond and, if the user did not reply to any of these text messages, then there was no further interaction with that user.

The complainant stated that he had received three unsolicited text messages from the service as neither he nor any member of his family had entered any mobile number on the website.

The Service

The 10p Mobile Dating service was an over 18s dating service promoted via the website text-date.com. The website required entry of a mobile number to which an opt-in request was sent by the service, followed by two further opt-in requests if no answer was received from the mobile number.

The complainant provided the Executive with a transcript of the three text messages he had received from the service via shortcode 86111:

"Hi there! You've reached 10p Mobile Dating! To get started, reply with your age in numbers and the letter M or F for your gender e.g. 23F"

“free msg - Hi there! Sexy singles are waiting to meet you. Just reply with your age in numbers and the letter M or F for your gender e.g. 23F to get going!”

“free msg - Hi! no reply from u? We have awarded u 3 pounds FREE credit - try out Mobile Dating! Nothing 2 lose! Just reply with yr AGE&SEX 2 get going! e.g. 23F”

The Investigation

Following receipt of the complaint and preliminary contact with the Service Provider, the Executive issued a formal breach letter dated 24 March 2009 to the Service Provider raising an alleged breach of paragraph 5.2 of the Code. The Executive received a formal response from the Information Provider dated 3 April 2009 and received a request for PhonepayPlus to deal directly with the Information Provider on 6 April 2009, together with the undertakings required at paragraph 8.3.4 of the Code.

The Tribunal made a decision on the breaches raised by the Executive on 20 August 2009 having heard informal representations from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE LEGALITY (Paragraph 5.2)

‘Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.’

1. The Executive submitted that under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (‘the Regulations’), 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, 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 known as the ‘soft opt-in’).

The Executive submitted that it had received a complaint from a member of the public regarding the 10p Mobile Dating service and that this complainant had specifically stated to the Executive that the text messages he had received from the service were unsolicited.

The Executive referred to the three text messages received by the complainant and submitted that these text messages had been verified by message logs provided to the Executive by the Information Provider. These message logs had also indicated that the user’s mobile number had been entered into the Information Provider’s website text-date.com on 12 February 2009.

The Executive submitted that the complainant had also stated that his family members were under strict instructions never to enter any personal details on a website (and certainly no mobile phone numbers) and never to have anything to do with 0871, 09, 070 and short codes without first speaking to him.

The Executive made reference to email correspondence from the Information Provider dated 11 March 2009 which had explained that the text-date.com website was not able to log internet IP addresses (i.e. was not able to provide the Executive with evidence of the consumer's opt-in). However, the Executive submitted that, even if an internet IP address had been provided as evidence of the consumer opt-in, it would not have sufficed, as an internet IP address was insufficient to prove that the user had actually physically inputted his or her mobile phone number into the relevant webpage.

The Executive also submitted that it had not been provided with any evidence which showed that the user had specifically consented to receiving the text messages from the service and therefore the messages had been sent in contravention of paragraph 22(2) of the Regulations.

2. The Information Provider stated that it had received no other consumer complaints regarding the website text-date.com and it was of the understanding that the sole complainant in this case was a regular and high-profile campaigner against premium rate services. The Information Provider provided an example of the type of complaint made by the complainant in relation to another premium rate service.

The Information Provider stated that the complainant's mobile phone number was entered into the website text-date.com at 20:08 on 12 February 2009. The Information Provider provided a transcript of the free text messages it had sent to the user. The Information Provider stated that in this instance the user did not respond to the above text messages and did not complete the registration process, therefore no charges were incurred to the user. The Information Provider also stated that it was unable to determine whether the complainant himself entered the number, or whether it had been entered maliciously, but the internet IP address traced back to a server/hosting company in Chicago, USA.

The Information Provider stated that, given the complainant's high-profile, it would not be surprised if the complainant's mobile phone number had been entered maliciously in order to create a reaction, or cause a complaint.

The Information Provider also stated that it could not see how it could have avoided this situation, other than by scrapping the ability for a user's mobile phone number to be entered via a website. The Information Provider stated that it had not caused any intentional harm to the user (from the sending of free text message), nor had it broken any rules in the deployment of its web-based promotion.

The Information Provider further stated that its use of the mobile phone numbers collected from the website was only to send the 'requested' service text message and was not used on an ongoing basis for marketing. Furthermore, it had not caused any harm to the complainant, other than sending an unobtrusive (non-adult, non-explicit) free service message. No further marketing /promotional messages had been sent and the user had not activated any services.

The Information Provider stated that it had been able to trace the IP address of the browser from which the phone number had been entered, and that on 12 February 2009 the user had accessed the text-date.com website using an AppleWebKit and then selected a user profile.

3. The Tribunal considered the evidence and concluded that the text messages sent to the complainant's phone were direct marketing for the purposes of the Regulations. The Tribunal accepted the complainant's evidence that he had not entered his mobile

number of the text-date.com website, nor had he otherwise consented to receive the texts send to him by the service. The Tribunal therefore concluded that, on a balance of probabilities, the text messages had been sent to the complainant unsolicited and were thereby sent contrary to paragraph 22(2) of the Regulations. The Tribunal therefore decided to uphold a breach of paragraph 5.2 of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **moderate**.

There were no aggravating factors found by the Tribunal. The Tribunal noted one previous case in which breaches of the Code had been upheld against the Information Provider but concluded that, as those breaches related to an entirely different service, they were not relevant as an aggravating factor.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had not played an active part in causing the breaches; the breach appeared to have been occasioned by a third party entering the complainant's details into the website for an unknown reason.
- The Information Provider co-operated with the PhonepayPlus Executive.
- There was only one complaint and it appeared that the breach was an isolated event.

Having taken into account the mitigating factors and the revenue generated by the service, the Tribunal concluded that, bearing in mind the lack of active participation of the Information Provider in causing the breaches, the seriousness of the case should be regarded overall as **moderate**.

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand.

The Tribunal decided not to impose any further sanctions as the breach appeared to have been caused by a third party entering the complainant's mobile number on the website without his consent and there was therefore no active participation in the breach by the Information Provider.