

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 8 January 2008 TRIBUNAL SITTING No. 18 / CASE 2

CASE REFERENCE: 715747/JI

Information provider & area:	Boltblue International Limited, London
Service provider & area:	mBlox Limited, London
Type of service:	Mobile content - Subscription Service
Service title:	Boltblue Club
Service number:	85233
Cost:	£4.50 per week
Network operator:	All Mobile Operators
Number of complainants:	148

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

BACKGROUND

PhonepayPlus received a number of consumer complaints regarding a subscription mobile entertainment service referred to as 'Boltblue Club'. The service was promoted and operated through the website *www.boltblue.com* and in the magazine 'What's on TV'. Users were also able to gain access to the website via various other promotional websites advertised on Yahoo Search, MIVA, and through sponsored links on Google.

The complaints received were in respect of problems relating to subscription initiation, subscription reminders, pricing information, contact information, 'STOP' commands not being adhered to, elements of the service which appeared to be incorrectly promoted as being free, and the overall misleading nature of the service.

The Executive received 148 complaints with regard the above service. Of these, 93 complaints formed the basis of the Executive's preliminary investigations.

The Executive's understanding of how the service is supposed to operate

The service entitled its members to use Boltblue services and content, at a discounted rate deducted from existing credit. Members built up their credit via a weekly subscription charge. The mobile entertainment services available for download included ringtones, mobile videos, wallpapers, logos and picture messages, PC to mobile text messages, and mobile alerts. The service provider stated that users joined the service by the following sign-up process:

- i) The user entered their mobile number into a field on one of the landing pages on the main website *www.boltblue.com* or via the promotional website *www.boltblue.com/specialoffer/ukysmclb/?c=yahoofrmuk03sb* and selected 'Go'.

- ii) The user's mobile immediately received the following message from shortcode 85233: "*Free Msg – to access your download straight away reply to this message with word OK. Thank you*"
- iii) The user then replied with 'OK' to activate the service and thereby subscribed to the 'Boltblue Club'.
- iv) The user subsequently received the following message from shortcode 85233: "*To check out the latest selection of downloads available on your mobile as part of the club just go to www.boltblue.com. Enjoy!*" This message was reverse billed to the user, costing £1.50.

According to the terms and conditions stated at the bottom of the promotional website and on the main website, subscribers were charged £4.50 per week and received an introductory first download at no extra cost. Content could be downloaded either offline via SMS (by texting a keyword and the product ID to the shortcode 85233), or online by logging into the website and receiving the item directly to the handset. The first download was available to the user free of charge.

Complaint Investigation

The Executive has conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008). The Executive carried out monitoring of the service on 18 February 2008 and 29 May 2008. It came to Tribunal as an information provider case. In a letter to the service provider dated 4 January 2008, the Executive raised a series of questions as well as requesting message logs and other corroborating information, in accordance with paragraph 8.3.3 of the Code. A response including opt-in records for 15 complainants was provided by the information provider on behalf of the service provider.

On 29 January 2008, the Executive made a further request for information from the service provider, including a request for 13 additional message logs, to which the information provider responded on 11 February 2008. As the content of the messages was not included in the submission, the information provider was asked to resubmit the logs on 12 February 2008, to which it responded on 15 February 2008.

In a letter to the service provider dated 17 June 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 5.4.1b, 5.7.1, 5.7.2, 5.8, 7.12.4a-e, 7.12.5, 7.12.6a and 8.3.3 of the Code. Further to the service provider's request and upon receipt of the appropriate undertaking forms, the Executive agreed to pursue the investigation as an information provider case.

The breach letter was re-issued on 23 June 2008 to the information provider, who supplied a formal response on 22 July 2008.

The Tribunal made a decision on the breaches raised by the Executive on 8 January 2009.

SUBMISSIONS AND CONCLUSIONS

PRELIMINARY ISSUE

As a preliminary issue, the Tribunal considered whether the Boltblue service under investigation, was essentially the same service as that previously adjudicated under case reference 730296/JI on 17 July 2008. The Tribunal determined that although the services had different payment mechanisms; PAYG/Pre-Pay in case reference 730296 and subscription payment in this instance, the content of the services made available to users was identical and the two offerings of this service ran contemporaneously. The Tribunal therefore considered there to have been two offerings of the same services.

The Tribunal considered that some of the breaches raised by the Executive in this matter had previously been adjudicated and sanctioned in case reference 730296 (namely paragraphs 5.4.1a, 5.4.1b, 5.7.1 and 5.7.2). The Tribunal therefore determined that it would only adjudicate on the remaining breaches relating to contact information, the subscription element of the service and complaint investigation, as set out below.

ALLEGED BREACH ONE

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 noted the Code requirement that contact information must be clearly stated in any promotion. However, the free message users received prior to activation of the service did not contain any contact details.
2. The information provider stated that the Executive's claim was not credible, in view of the fact that anyone visiting the Boltblue website *www.boltblue.com* would see a very large Boltblue logo on each webpage. If the user typed their mobile number into the website, they would be told to expect to receive an SMS message, sent to that mobile telephone. A few seconds later the user would receive an SMS message containing content, corresponding to instructions on the Boltblue branded webpage. The information provider considered it obvious that the user would know that Boltblue was the sender of the message.

The information provider stated that the contact number was provided in the following section of the website “Full terms, about us, footer, contact us, and help.” The information provider observed that not a single complaint out of the 93 presented, related to anyone unable to find its contact details. The information provider also commented that both its company and trading name, was Boltblue. The information provider stated that it considered there to be no case to answer.

3. The Tribunal considered the evidence and determined that the free SMS message consumers received prior to activation of the service were promotions

and failed to contain the name of either the service or information provider, or to provide a customer service phone number. The Tribunal considered the message to be a call to action, which could be sent to the wrong person (for example, if an incorrect mobile number was entered onto the website). In such circumstances, the identity of the sender would not be obvious. Further, the Tribunal noted that the website did not contain or make obvious the required contact details of customer service number. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

SUBSCRIPTION INITIATION (Paragraph 7.12.4a-e)

“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,*

1. The Executive noted that the initial subscription message sent to users following activation of the service cost £1.50 and failed to contain the requisite information required by the Code. The Executive stated that during its own monitoring of the service, it had been charged £1.50 to receive the initial subscription message, which was mirrored by the complainants' evidence. It was the Executive's case that the initial subscription message was not free, it did not confirm that the service was subscription-based, indicate what the billing period was, the charges for the service or how they could arise, and nor did it contain instructions on how to leave the service. Furthermore, it appeared that the free initial subscription message, containing the requisite information was sent to users after they had already been charged £4.50.
2. The information provider stated that the free message *“FreeMsg-U have joined Boltblue Club. Select up to 9 downloads for yr mobile for GBP4.50 per week until you send stop to 85233 Help 0870 020 9312”*, was sent to users prior to the billing message. The information provider stated that SMS delivery order could not be guaranteed and in this case, some of the billable messages arrived prior to those which were non-billable. The information provider stated that it considered there to be no case to answer.
3. The Tribunal considered the evidence and determined that some consumers had received chargeable SMS messages prior to receipt of the initial subscription message. The Tribunal noted that the information provider had instructed the service provider to send the messages in the appropriate order but that, in certain cases, this had not happened and that, in other cases, the two messages had been sent so close together that, although sent in the appropriate order, the

chargeable message was received first. The Tribunal upheld a breach of paragraph 7.12.4a-e of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 according to the message logs supplied by the information provider, three complainants were subscribed to the service for over one month, two of which incurred charges of over £20. At no point during the service did the first complainant receive a free monthly subscription reminder. The second complainant did not receive a free monthly subscription reminder every month, and the third complainant did not receive a free subscription reminder every time £20 had been spent.
2. The information provider accepted that over the course of 2007, 75 users received a number of reminder messages late due to a provisioning error. The information provider stated that these users still received a £20 reminder message. However, this resulted in a small number of messages being sent on average two weeks later than they should have been. The information provider regretted that this had happened and had taken additional steps to ensure that it did not happen again. The information provider emphasised that the extent of this problem was very limited.
3. The Tribunal considered the evidence and noted that the information provider had failed to send appropriate reminders to all its relevant subscribers as required by paragraph 7.12.5 of the Code. The Tribunal accepted the information provider explanation of how the breach had occurred and its limited extent. The Tribunal upheld a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION TERMINATION (Paragraph 7.12.6a)

“a After a user has sent a ‘STOP’ command to a service, the service provider must make no further charge for messages.

1. The Executive noted that of the 93 complaints which formed the basis of the Executive’s preliminary investigations, 28 reported that the ‘STOP’ command was not adhered to, but commented that the remaining complainants might not have been asked if they had received messages after sending ‘STOP’. In any event, the message logs indicated that no further chargeable messages were sent to users after the ‘STOP’ command had been sent. Based on the

complainants' insistence that they continued to receive chargeable messages after sending the 'STOP' command, combined with the discrepancies between at least six message logs and corresponding complainant reports, the Executive concluded that users continued to receive further chargeable messages after sending 'STOP' commands.

2. The information provider stated that it provided the STOP function via web, SMS and IVR (Interactive Voice Response). It noted that the Executive had checked its service on numerous occasions and that 'STOP' had always worked. The information provider stated that some of the evidence provided did not relate to Boltblue services and other evidence was supplied by an anonymous accuser which they could not check. The information provider acknowledged that on one occasion a user was accidentally re-subscribed during a system routine monitoring and surveillance of its systems. That user was promptly refunded. The information provider denied any breach of paragraph 7.12.6a of the Code.
3. The Tribunal considered the evidence and were not satisfied that the Executive had established, on the balance of probabilities that the STOP command had not functioned properly. The Tribunal did not uphold a breach of 7.12.6a of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FIVE

FURTHER INFORMATION (Paragraph 8.3.3)

"During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents."

1. The Executive commented that the information provider failed to supply message logs to show the exact content of MO and MT messages received, in relation to each mobile number logs requested by the Executive. The Executive considered this further exacerbated by the fact that the message content document indicated that consumers who received messages relating to the Boltblue Club subscription service, were charged £3.00 per week. The complainants corresponding to the message logs supplied, indicated that they were charged £4.50 per week, which was supported by the 3 x £1.50 billing records within the message logs.
2. The information provider stated that at the time of the allegation of the breach, the service provider was responsible for responding to directions under paragraph 8.3.3. The information provider commented that the Executive was confused and had disregarded the fact that users could subscribe at either £4.50 or £3.00. The Executive had made the wrong assumption that all users were charged £4.50. The information provider denied any breach of paragraph 8.3.3 of the Code.

3. The Tribunal considered the evidence and determined that the information provider had assisted the Executive and supplied the relevant information. The Tribunal did not uphold a breach of paragraph 8.3.3 of the Code.

Decision: NOT UPHELD

SANCTIONS

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

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factor:

- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The information provider cooperated with the Executive when notified of the breaches; and
- The breaches upheld were largely technical in nature, which the information provider had already taken steps to address.

Taking into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **moderate**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £5,000 fine.
- The Tribunal ordered the information provider to seek compliance advice within 2 weeks from the date of publication of the summary of this decision, such advice to be implemented within 2 weeks of receipt.
- The Tribunal also noted that refunds had been issued to some complainants and commented that it expected the information provider to continue to provide refunds for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.