

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Friday, 18 September 2009

TRIBUNAL SITTING No. 36 / CASE 1

CASE REFERENCE: 791322/JI

Information provider:	Couchplay Limited, London
Service provider:	mBlox Limited, London
Type of service:	(1) Mobile entertainment service, subscription and non-subscription (2) Fundraising, non-subscription
Service title:	(1) 'Handbuzz' (2) Charlie Elphicke Donation
Service numbers:	84300 and 87766
Cost:	(1) 'Handbuzz' £10 per week subscription; £4.50 per week subscription; and £20 one-off payment. (2) Charlie Elphicke Donation - £10 one-off payment.
Network operator:	All Mobile Network Operators
Number of complainants:	50

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 50 complaints in relation to a mobile entertainment service called 'Handbuzz' operating on shortcodes 84300 and 87766. The service offered mobile phone content and used both subscription and one-off payment methods. It was promoted and operated through the website handbuzz.com and could be accessed by visiting the website URL or searching on Google and Yahoo! search engines. When users entered their mobile phone number into the website, they would receive a free text message containing the keyword 'BUZZ'. Once users had sent the keyword 'BUZZ' to any of the shortcodes the subscription service was activated. To activate the non-subscription service, users were sent a free text message containing a personal activation code which, when entered into the website, initiated a one-off payment.

The service entitled members to request downloadable mobile content at a cost of £1.25 per item (previously £2), which was deducted from the member's account. Various packages included a £10 per week subscription, £4.50 per week subscription and a £20 one-off payment (the latter two appear to have commenced from March 2009).

Complaints received regarding the 'Handbuzz' service related to the way in which the service was promoted, and the nature of the reverse-billed text messages received. Complainants considered the promotional website to be misleading and were unaware that sending the keyword to the shortcode would incur charges. The Executive also noted during the course of its investigation that the mechanism for customers to obtain refunds was not effective, the first text message received by users did not contain the correct information and the pricing information was not sufficiently prominent.

The Executive also investigated a second service which also operated on the shortcode 84300. This service allowed users to send a political campaign donation to a political party

candidate by sending the keyword 'TEN' to the shortcode. The Executive was concerned that the promotional website advertising the service did not make it clear what proportion of the donation was being paid to the beneficiary.

(i) The Services

- The services are operated by Couchplay Limited (the 'Information Provider'), under the names 'Handbuzz' and 'Charlie Elphicke Donation'.
- How the 'Handbuzz' service works:

According to message logs supplied by the Information Provider and Executive monitoring of the service, users joined 'Handbuzz' by following a sign-up process:

- i) The user entered his or her mobile number into a field on the main website handbuzz.com and selected 'Go'. The user immediately received the following free message from shortcode 84300: *"Free Msg – To access your download straight away reply to this message with the word BUZZ. Thanks."*

The Executive's monitoring experience in March 2009 indicates that the above message was changed to: *"Free Msg – To access your downloads straight away reply to this message with the word BUZZ. Thanks. Help:08717110162"*.

- ii) The user then replied with the keyword 'BUZZ' to activate the service. The user subsequently received the following free message from shortcode 84300: *"FreeMsg-U have joined Hundbuzz [sic]. Select up to 5 downloads for yr mobile for GBP 10.00 per week until you send stop to 84300. Help 0871 711 0162"*.

The Executive's monitoring experience in March 2009 indicates that the above message was changed to: *"FreeMsg-U have joined Hundbuzz. Select up to 5 downloads for yr mobile for GBP 10.00 per week until you send stop to 84300. Help 0871 711 0162 www.handbuzz.com"*.

- iii) As part of the £10 weekly subscription service, users received two messages per week charged at £5 each.

At the time the complaints were made, the service offered users a free ringtone download when joining the £10 weekly subscription service. As part of the more recent £4.50 weekly subscription package, users are offered three complimentary downloads and, as part of the £20 non-subscription package, users are offered an extra £20 credit to their account. Content can be downloaded via SMS by texting a keyword and the product ID to the shortcode.

- How the 'Charlie Elphicke Donation' service works:
 - i) The user sends the keyword 'TEN' to shortcode 84300, after which point the user receives the following messages from shortcode 84300 charged at £5 per message:

"Thanks for donating 10 pounds (via 2 SMS) to Charlie Elphicke and the Conservatives. Your support helps get positive change for our community. www.elphicke.com"

“Thank you for donating to Charlie Elphicke and the Conservatives. Please call 01304 379669 if you would like to get more involved.”

The reason that the Executive combined both services into one investigation was due to the fact that both services were being promoted and operated by the same Information Provider (under the same aggregator) and that both operated on the same shared shortcode. The second service was discovered following Executive monitoring of the ‘Handbuzz’ service.

(ii) The Investigation

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.7 of the Code.

The Executive sent a breach letter dated 21 May 2009 to the Service Provider raising potential breaches of paragraphs 3.3.5, 5.2, 5.4.1a, 5.7.1, 5.7.2, 5.11a, 7.9a and 7.12.3a-c of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) (‘the Code’). The Service Provider supplied the Executive with undertaking forms on 1 June 2009 requesting that the case be treated as an Information Provider case. The Information Provider provided a formal response to the breach letter on 19 June 2009.

The Executive issued a further breach letter to the Information Provider dated 13 August 2009 raising a further potential breach of paragraph 8.3.3 of the Code. A formal response to the further alleged breach was received by the Executive from the Information Provider on 26 August 2009.

The Tribunal made a decision on the breaches raised by the Executive on 18 September 2009 having heard informal representations from the Information Provider.

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 made reference to a phone call from a whistleblower received by a member of PhonepayPlus’ Investigation team on 19 February 2009 suggesting there were problems with the Information Provider’s customer service arrangements.

The Executive submitted that, notwithstanding that the first service text message contained a non-premium rate customer service phone number had been made

available to the users of the service, it was of the opinion that the process available to users in obtaining a refund had not been effective.

The Executive submitted that its evidence suggested that the Information Provider customer service provisions had been conducted in a manner which prevented most users from obtaining a genuine refund, i.e. unless users called the helpline at least twice and stated that they had contacted PhonepayPlus, or the complaint related to a child. The Executive submitted that, even in relation to these two issues, it appeared that few users were able to obtain a refund. The Executive submitted that it was of the opinion that, as many users would not have been inclined to go to such lengths to obtain a refund, these users would have no chance of being recompensed, and therefore there was no effective mechanism for the consideration of claims for refunds and their payment where justified.

2. The Information Provider stated that it was of the opinion that it operated an effective mechanism for the consideration of claims for refunds and payment where justified. It stated that it deployed a methodical refund handling procedure and provided clear communication to customers. It stated that given the refund handling procedure, clear customer communications and the rate of refunds given, the informant's allegations as reported by the Executive were completely at odds to all its customer service procedures.
3. The Tribunal considered the evidence, including the detailed call log of the telephone conversation with the whistleblower, and concluded that, on a balance of probabilities, there was insufficient evidence to establish that the Information Provider had failed to ensure that the correct customer care arrangements had been made in accordance with the Code. The Tribunal did not uphold a breach of paragraph 3.3.5 of the Code.

Decision: NOT 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.”

1. The Executive submitted that under Regulation 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the ‘Regulations’), it is an offence to transmit, or instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or (b) where a valid address to which the recipient of the communication may send a request that such communications cease, has not been provided.

The Executive submitted that the first text message that users received before subscribing into the service read as follows:

“Free Msg – To access your download straight away reply to this message with the word BUZZ. Thanks.”

It submitted that this text message as received on the consumers handset read independently to the promotional material located on the website handbuzz.com, and should therefore be considered to be promotional material for direct marketing purposes. The Executive submitted that this was particularly apparent to consumers who stated to have not seen the promotional website, not to have entered their mobile phone number into the website and who had received the text message as a result of another user erroneously entering their mobile number into the website.

The Executive submitted that the text message concealed the “*identity of the person on whose behalf the communication has been sent*” and appeared to be a direct contravention of section 23 of the Regulations.

The Executive also submitted that, notwithstanding that the promotional text message had provided instructions as to how to respond, it had failed to provide any address by which the recipient could seek to cease future communications being sent, which appeared to contravene section 23(b) of the Regulations. It submitted that this was further aggravated by the fact that the shortcodes used to operate the service had been shared shortcodes used to operate multiple services by multiple information providers, and hence there was no clear association between the promotional text message received and the identity of the Service Provider or Information Provider.

The Executive acknowledged that in March 2009, users began to receive the same text message which included a customer service number, yet maintained that this was still a breach of section 23(a) of the Regulations.

2. The Information Provider made reference to the written opinion of Counsel instructed on its behalf. It contended that Counsel’s opinion was that the interaction with users was not a marketing activity and was not sent for the purpose of direct marketing and, in these circumstances, section 23 of the Regulations had no application. The Information Provider stated that section 23 of the Regulations was concerned with “a communication for the purposes of direct marketing by means of electronic mail” and that the text message sent by ‘Handbuzz’ was a service text message requested by the user via the website as part of the sign up process. It followed that the text message could not be considered to be promotional material for direct marketing purposes. It stated that, if the text message was sent to the wrong mobile phone number because the person who accessed the website had entered details incorrectly, this did not, in the Counsel’s opinion, alter the purpose of the text message.
3. The Tribunal considered the evidence and concluded that the first text message received from the service had been sent for the purposes of concluding the sale as the entering of a mobile phone number into the website did not do so. The Tribunal therefore concluded that the text message was sent for the purpose of direct marketing in order to encourage the recipient to conclude the sale. Therefore, the message fell within the ambit of the Regulations. The Tribunal concluded that the text message had contravened paragraph 23 of the Regulations as it had concealed the identity of the Information Provider on whose behalf the text message had been sent and had failed to provide a valid address to which the recipient of the communication may send a request that such communications cease. The Tribunal therefore upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

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

1. The Executive made reference to the complainant reports and submitted that extracts indicated that consumers had felt misled as they were not made aware that by entering their mobile number into the promotional website and sending a keyword to a shortcode, they would activate the service.

The Executive submitted that the manner in which the promotional website was presented to consumers had not made it explicitly clear that by following this process, the service would become activated and subscription charges would be incurred. The Executive submitted that this was due to a combination of factors, which included lack of pricing prominence on the website, no pricing information within the free text message users received before activating the service, and the fact that several complainants reported that they were led to the ‘Handbuzz’ website after searching for a free ringtone, for example by running a search in Yahoo! or Google search engines. It submitted that users would have subsequently viewed the phrase “*No charge download*” when visiting the promotional website, which was directly associated and in view with the mobile phone number entry field.

The Executive submitted that the Yahoo! and Google search engine results for the service constituted a promotion within the meaning of paragraph 11.3.27 of the Code and that, as such, the search results for the service containing the word ‘free’ created an expectation on the part of the user that he or she would receive a free download without having to make any payment, whereas this was not the case.

The Executive submitted that the Information Provider had invested in a sponsored link to ensure that the ‘Handbuzz’ promotional website appeared as the top or one of the top results in search engines when consumers searched for ‘free ringtones’.

2. The Information Provider denied the Executive’s submission that the order or subscription was not activated until the user confirmed that he or she wished to join/order. It stated that it operated a ‘double opt-in’ process, meaning that a customer must reply to a text message sent by ‘Handbuzz’ to their mobile phone confirming that they wished to join ‘Handbuzz’. A confirmation text message was then sent to the mobile phone advising on the cost of the service, frequency of billing, cancellation instructions, website address and the helpline contact number.

The Information Provider stated that in relation to the wording “No Charge* Download!”, it was of the understanding that it was possible for a user to search for a free ringtone on a search engine and arrive at its landing webpage. It stated that in order to deal with a user coming to the website in the expectation of something for free, it offered a free download and that this appeared to be best practice as adopted by Jamster, Boltblue and many other leading Service Providers at the time. It went on to add that, however, it was notified by Boltblue on 24 February 2009 that this practice was in breach of the Code. The Information Provider stated that on receipt of this information from Boltblue, it scheduled the removal of the “No Charge” offer which was implemented on the next release of the website, being 2 March 2009.

The Information Provider stated that it had no control over when the word “free” was inserted by the search engines Google or Yahoo! into the search results.

3. The Tribunal took into account the Information Provider's submissions made at the informal hearing and considered the evidence submitted by the Executive, including a copy of the HTML coding of the website. The Tribunal concluded that given the Information Provider's admission that the word 'free' had previously appeared in the meta-tag and, given the wording of the sponsored search engine links, consumers had been misled into believing that a free ringtone would be provided when, in fact, this was not the case. The Tribunal did not accept that the Information Provider had no responsibility for how this appeared to the user when searching. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR PRICING INFORMATION (Paragraph 5.7.1)

"Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge."

1. Ground 1

The Executive submitted that the free text message users received prior to activation of the service did not contain any pricing information. It submitted that, if a user entered an incorrect mobile phone number into the website, then the user of that mobile phone number would receive a text message from the service, having not viewed the website advertising and that, in this scenario, the text message sent to the handset may have been read independently to the website and was therefore considered to be promotional material.

The Executive submitted that once users were subscribed into the service, they received a second free text message before incurring charges. However, the Executive submitted that the wording of that text message was not sufficiently clear in informing the user that they had joined a subscription service. Furthermore, the text message appeared to indicate that the user had joined a service and that if they wished to select additional downloads, they would be charged £10 per week for this service. The Executive submitted that it was of the opinion that the wording implied that, if users did not choose to select these additional downloads, they would not incur the £10 per week charge. Whilst not entirely absent, the Executive maintained that the pricing information as contained in the specific wording had failed to fully inform users that they would incur a charge.

Ground 2

The Executive submitted that the webpage promoting the 'Handbuzz' non-subscription service referred to two different prices on the same page, namely £15 and £20. The initial webpage users saw before entering a mobile number onto the website stated that users were charged £20 for receiving four text messages charged at £5 per text message, whereas the subsequent webpage users would have seen after entering a mobile phone number, contained both prices but referred to the breakdown as "3 x £5.00".

The Executive submitted that this was further exacerbated by the two discrepant amounts of additional credit which users are stated to receive upon activation of the service, and therefore it was not clear exactly how much additional credit users would receive.

2. The Information Provider responded to the Executive's allegations as follows:

Ground 1

The Information Provider stated that, given it was of the opinion that customers had been fully informed of applicable pricing and the nature of the service on the website and, given the use of the double opt-in sign up process, it maintained that it had done everything necessary to ensure that users were fully informed, clearly and straightforwardly, of the cost of using its service prior to incurring any charge.

Ground 2

The Information Provider addressed the issue of the two different prices, namely £15 and £20, and stated that there had been a copy error which it had identified and corrected through system integrity checking. It stated that it was corrected after being on the website for a short period of time on 15 May 2009 and that its customer service had been alerted that this minor error existed and had been instructed to issue a £10 refund (including £5 for goodwill) for any customer affected.

3. The Tribunal considered the evidence and concluded that in relation to Ground 1, the text message was a promotion within the meaning of paragraph 11.3.27 of the Code as it encouraged users to enter a premium rate service. The Tribunal found that the wording of the text message had not been sufficiently clear in informing the user that he or she was entering a subscription-based service. In relation to Ground 2, the Tribunal concluded that the pricing information, as presented on the website, had not fully informed users, clearly or straightforwardly, of the costs of using the service prior to incurring any charges. The Tribunal upheld a breach of paragraph 5.7.1 of the Code on both grounds.

Decision: UPHELD on both grounds.

ALLEGED BREACH FIVE PRICING PROMINENCE (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 that it appeared that written pricing information was not easily legible due to the font size used to display the information which was either unclear or too small to read, and not prominent in terms of placement and the requirement for users to scroll down to find the information.

The Executive submitted that it was of the opinion that the first reference to pricing information on the landing page of the website, which users were directed to following a search for a ringtone in the Google or Yahoo! search engines, had not been placed in sufficient close proximity to the mobile phone number entry field, and therefore it was not clear that the £10 per week charge was associated with the entering of a mobile phone number. It submitted that this was particularly significant to users who had visited the website on the basis that they believed they would be obtaining a free ringtone. The Executive made reference to a screenshot taken by the executive during the course of its monitoring of the service (791322_5-7-2 App A).

The Executive submitted that, in order to view the second reference to pricing within the terms and conditions, users were required to scroll down and that it was of the opinion that it was not clear that the webpage contained further information at the bottom of the page, and therefore users would be unlikely to scroll down. The Executive made reference to a screenshot it had taken during the course of its monitoring of the service (791322_5-7-2 App B).

The Executive submitted that, even when users visited the landing page of the main website handbuzz.com and selected an item to download, the information as presented did not make it clear that users would be charged, as the reference to the cost was placed outside of the box containing instructions on how to 'get a download'. It submitted that, after selecting 'Join Handbuzz' on the main website, the only reference to pricing was in the small print terms and conditions at the bottom of the page, and hence users may not have associated the cost with the action of entering a mobile phone number.

The Executive made reference to several screenshots taken during the course of its monitoring of the service.

2. The Information Provider stated that the reasons put forward by the Executive, in support of its claim that a breach of Paragraph 5.7.2 had occurred, related to monitoring of its website on 26 February 2009. The Information Provider made reference to the screenshot of the service (App A) and stated that they represented two different sections of the website, both of which had been updated to be compliant. The Information Provider stated that, in both instances, the webpages had been proactively updated following advice passed to 'Handbuzz' by Boltblue and the Service Provider.
3. The Tribunal considered the evidence and concluded that, on the basis of the screenshots taken by the Executive of the promotional web material on 26 February 2009 (App A and App B), no pricing information was visible without the user having to scroll down and was not presented in a way that did not require close examination. The Tribunal also found that, in relation to a screenshot taken on 13 May 2009 (791322_5-7-2 App C), the pricing information was not visible without the user having to scroll down. The Tribunal found that none of the screenshots of the mobile phone number entry field contained any pricing information. In the context of the promotion as a whole, the Tribunal considered that none of the pricing information was sufficiently prominent. The Tribunal also found that the terms and conditions were in small font and required close examination in the context of the overall font size of the promotion. The Tribunal decided to uphold a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX USE OF THE WORD 'FREE' (Paragraph 5.11a)

"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 submitted that the Yahoo! and Google search engine results for the service constituted a promotion within the meaning of paragraph 11.3.27 of the Code and that, as such, the search results for the service containing the word 'free',

derived from the HTML coding within the 'Handbuzz' website, was also within the meaning of paragraph 5.11 of the Code. The Executive also submitted that the term "No Charge" used in the website had the same meaning as the word 'free' and therefore was within the ambit of paragraph 5.11.

It also submitted that the terms and conditions on the landing page of the website which users were directed to after searching for a ringtone in the Google or Yahoo! search engine stated that: "After payment you will receive a complimentary first download and you will have credits for 5 downloads weekly." The webpage also contained the heading "No Charge Download!" in large font.

It submitted that, after selecting an item to download on the landing page of the main website handbuzz.com, it stated that: "New members will receive a complimentary download without any deduction from their credit."

The Executive submitted that, according to the terms and conditions of the service, users had to spend £10 in order to become eligible to receive a free download. If the £10 weekly subscription charge entitled users to download five items as part of the package, each of those items would be valued at £2. As the 'free' download item was valued at less than £10, it was therefore not of an equal or greater value than the initial £10 per week charge, and for that reason should not be promoted as being free under the Code.

2. The Information Provider stated that it took issue, insofar as there has been any breach of Paragraph 5.11a by 'Handbuzz', with the Executive's assertion that the Google website search results constituted a promotion within the meaning of paragraph 11.3.27 of the Code and that search results for the service containing the word 'free', derived from the HTML coding within the 'Handbuzz' website was within the meaning of paragraph 5.11 of the Code.

The Information Provider stated that it was evident that the 'free ringtone' gift offers were common practice in the industry and gave the example of a user entering "free ringtones" into either the Google or Yahoo! search engine and clicking on the advertisement.

3. The Tribunal considered the evidence, including the Information Provider's stated efforts to comply with the Code provision, and concluded that the words 'no charge' used on the website had implied that there was a free download available to the consumer which was not possible without a subscription fee of £10. The Tribunal found that each individual item included in the download package had not been of equal or greater value to the initial £10 subscription fee. The Tribunal further concluded that, as the word 'free' had been used in the HTML coding in the Information Provider's website, the Google or Yahoo! search result for the words 'free ringtones' would therefore have derived from the Information Provider's website. The Tribunal also determined that the term 'no charge' used in the Information Provider's website fell within the ambit of paragraph 5.11 because the text of that paragraph does not limit its application to the use of the word 'free'. The Tribunal therefore found that the download product had been promoted as free ('no charge') when in fact this was not the case. The Tribunal decided to uphold a breach of paragraph 5.11a of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

FUNDRAISING AND CHARITABLE PROMOTIONS (PRICING) (Paragraph 7.9a)

“Service providers should be aware that the scope of such services is limited by legislation relating to charities. The promotional material for fundraising (whether or not for charitable purposes) and charitable promotions must make clear:

a either the total sum per call or the amount per minute which will be paid to the beneficiary”

1. The Executive submitted that the website ‘elphicke.com’ had not made it clear how much of the £10 donation spent by users was paid to the beneficiary. It acknowledged that the Service Provider had indicated that the full amount of £10 was paid to the beneficiary, but no evidence had been provided to show that the Service Provider was using a zero-rated shortcode to operate the service.

The Executive submitted that, if such an arrangement had been made, none of the revenue generated from the donations would be paid to the mobile network operators, the Service Provider or the Information Provider, and the revenue would be exempt from VAT. The Executive submitted that it was of the opinion that such an agreement would be unlikely in light of the fact that the campaign was neither high-profile, nor of a charitable nature.

2. The Information Provider made reference to a letter from Charlie Elphicke, the beneficiary, confirming that none of the revenue generated from the donations had been paid to the mobile network operators, the Service Provider or the Information Provider

The Information Provider stated that the arrangement had been run on a trial basis only. Under the trial, it had agreed to use a normal shortcode for donations up to an aggregate total of £500. It confirmed that, under the trial, the beneficiary was in receipt of the full amount donated and that it had agreed to take on the VAT liability. The Information Provider stated that to date the trial service had generated two £10 donations via text message and, given the very low level of take up, it was recommended to the politician that the service should be withdrawn. The full fees of £20 had been passed to Charlie Elphicke.

3. The Tribunal considered the evidence and concluded that, on the basis of the evidence submitted by the Executive and the fact that that the MP appeared to have received all of the money donated, there had been no breach of the Code. The Tribunal did express concerns over this model of service and strongly suggested that compliance advice is sought from PhonepayPlus before starting any similar donation service. The Tribunal decided not uphold a breach of paragraph 7.9a of the Code.

Decision: NOT UPHELD

ALLEGED BREACH EIGHT

SUBSCRIPTION PROMOTIONAL MATERIAL (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 the free text message users received prior to activation of the service had not indicated that the service was subscription-based, contained the terms of use, pricing, opt-out information or advertised the 'STOP' command.

It submitted that, in the event of a user entering an incorrect mobile phone number into the website, the user of that mobile number would receive a text message from the service having not viewed the website advertising the service. It submitted that in this scenario, the text message sent to the handset could be read independently to the website and was therefore considered to be promotional material.

The Executive submitted that, in the absence of the above information, it is particularly significant to users who had entered their mobile number into the website under the belief that they would receive a 'free' ringtone. If the text message contained the requisite information clearly indicating that the service was subscription-based, the risk of these users inadvertently subscribing was likely to have been reduced.

2. The Information Provider stated that it denied that there has been a breach of Paragraph 7.12.3. It stated that it had already explained elsewhere in its responses about the double opt-in process and its compliance with the Mobile Operator Code Extension regarding the content and sequence of free-to-user texts. The Information Provider also made reference to its Counsel's legal opinion.

It stated that the first text message sent in response to a customer entering his or her number into the website was not a promotional text message – it was a service message requested by the user. It stated that, as such, a 'STOP' command was not required. The sender of the text message ('Handbuzz') was identifiable by the shortcode, the helpline and the web address.

3. The Tribunal considered the evidence and concluded that the promotional material on the website had not clearly stated that the service was subscription-based as the terms and conditions were not sufficiently prominent. The Tribunal also found that the first promotional text message received by the user had not indicated that the service was subscription-based and had not clearly advertised the 'STOP' command. The Tribunal decided to uphold a breach of paragraph 7.12.3a-c.

Decision: UPHELD

ALLEGED BREACH NINE REQUEST FOR 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. This may include, for example, information concerning:

- a call volumes, patterns and revenues,*
- b details of the numbers allocated to a service provider,*
- c details of services operating on particular premium rate numbers,*
- d customer care records,*
- e arrangements between networks and service providers,*
- f arrangements between service providers and information providers."*

1. The Executive submitted that a breach letter containing a request for information under paragraph 8.3.3 was sent to the Information Provider on 2 June 2009 and the Information Provider supplied a formal response on 19 June 2009.

The Executive submitted that the Information Provider failed to answer the following questions sufficiently:

(i) Question 1 – Please supply full message logs, including message content for the following mobile numbers and opt-in logs to show that the users also entered their mobile number into the website.

(ii) Question 3 – Further to your response to question 1 of the 8.3.3 request for information dated 2 March 2009 in which it was stated that each download now costs £1.25, please advise us of the relevant subscription charge. The new subscription charge on the amended version of the website is stated as £4.50 per week, entitling users to three downloads. If each download costs £1.25, please state how users can make use of their remaining 75 pence.

(iii) Question 5 – Further to your response to question 2, Table 1, question 4 of the 8.3.3 request for information dated 2 March 2009, please explain why PhonepayPlus was not informed of the use of a second shortcode 87766 to operate the service. Please inform PhonepayPlus of any additional shortcodes used to operate the service which PhonepayPlus has not been made aware of.

2. The Information Provider responded to the Executive's allegations as follows:

(i) Question 1: The Information Provider stated that the message logs already supplied in its full response contained the opt-in information and message content in compliance with Question 1 as requested under paragraph 8.3.3. The Information Provider presented a table that indicated that the double opt-in process was conditional upon the user first entering his or her telephone number on the webpage.

(ii) Question 3: The Information Provider stated that it had already answered this question in its full response, namely that there was no remaining balance of 0.75p ($8 \times £1.25 = £10.00$ and $3 \times £1.50 = £4.50$).

(iii) Question 5: The Information Provider stated that it had already answered this question in its full response. It stated that the Executive was confusing shortcodes and services. It stated that 'Handbuzz' operated under two shortcodes only and provided the following information:

87766 – this was a £1.50 shortcode application to current subscription services only.
84300 – this was a £5 shortcode that is currently used on pay-as-you-go services. It was previously promoted on higher value subscription services also.

The Information Provider stated that the Executive Investigator had completed the pay-as-you-go ('PAYG') order process by sending the activation keyword "Buzz" within 15 minutes of having entered user details into a PAYG promotional website. This was the reason why the Executive Investigator was signed up to the PAYG service. The Information Provider stated that no other user of any of the PAYG or subscription service has had this experience and the order processing between handset and website was a feature of best industry practice.

The Information Provider also stated that following submission of the Information Provider's full response, it had telephoned the Executive Investigator on 6 August

2009 for confirmation that the information supplied in relation to the request for information under Code Paragraph 8.3.3 was satisfactory. The Executive Investigator confirmed that the information supplied satisfied the Code's paragraph 8.3.3 request requirement.

3. The Tribunal considered the evidence and although it took the view that the Information Provider had not been as transparent in its dealings with the Executive as it would have liked, it nevertheless concluded that the Information Provider had co-operated. The Tribunal decided not to 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 **very serious**.

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

- The behaviour of the Information Provider was reckless.
- The cost paid by individuals was high as some complainants had incurred charges of over £50, with some as high as £170.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Information Provider failed to remedy the breaches after having received compliance advice.
- The Information Provider failed to remedy the breaches despite being fully aware of a PhonepayPlus adjudication against a linked company found in breach of the Code in relation to the same or similar issues. The directors of the Information Provider are also directors of Roughgate Limited (formerly known as Boltblue Limited).

The Tribunal took into account a list of mitigating factors provided by the Information Provider. The Tribunal took the view that there were no mitigating circumstances to consider.

The Tribunal was disappointed to note that no compliance advice had been sought from PhonepayPlus. The Tribunal took into account that the Information Provider had taken compliance advice from a third party but did not consider it to be sufficient.

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

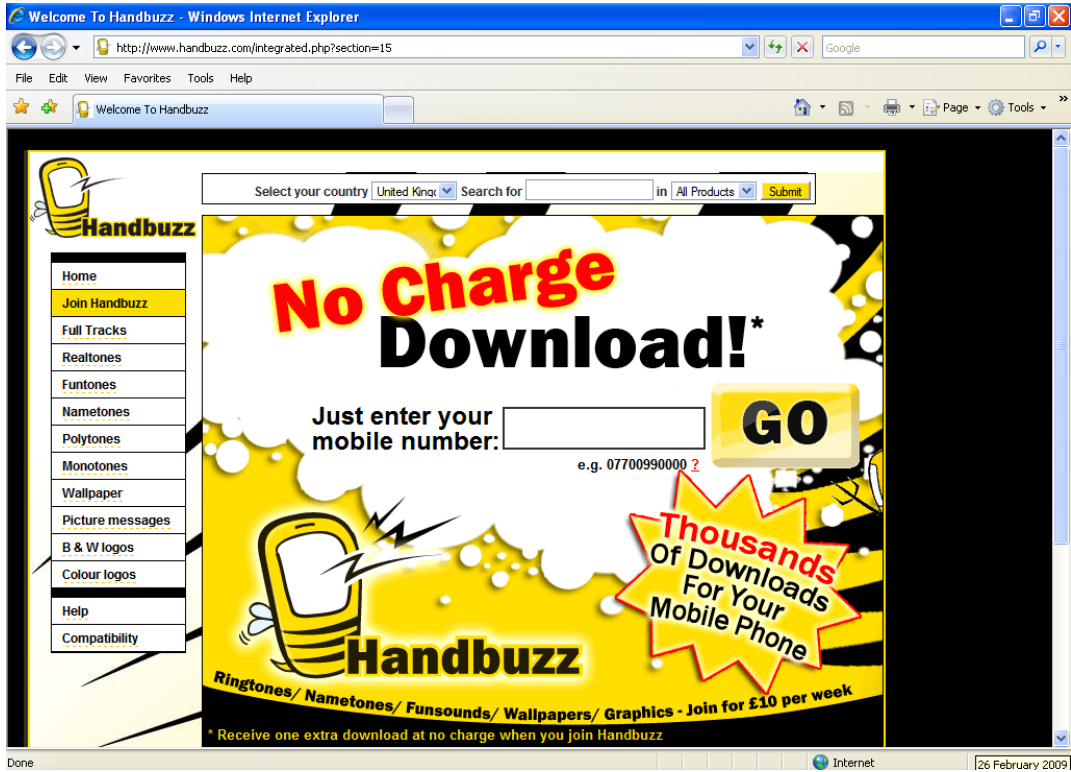
Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A £120,000 fine;
- A bar for six months on the service and related promotional material, suspended until the 1 October 2009 within which time the Information Provider is to seek and implement compliance advice to the satisfaction of the Executive. If, on 2 October 2009, the Executive is satisfied that all advice given has been implemented by the Information Provider, the bar will be lifted but, if the Executive is not satisfied, the bar will take effect immediately;

- Claims for refunds are to be paid by the Information Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.

APPENDIX A

Screenshot of the 'Handbuzz' website gathered as a result of the Executive's own monitoring exercise on 26 February 2009.



APPENDIX B

Screenshot of the 'Handbuzz' website gathered as a result of the Executive's own monitoring exercise on 26 February 2009.

