

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday, 1 October 2009

TRIBUNAL SITTING No. 37 / CASE 1

CASE REFERENCE: 770506/GL

Information provider:	Cylon Corporation, USA
Service provider:	Ericsson IPX AB, Sweden
Type of service:	Subscription service (provides cheats, hints and tips for video games via mobile text alerts and access to an online database)
Service title:	'gamer-data.co.uk'
Service numbers:	62323 and 80810
Cost:	£10 per month (before mid-April 2009) £2 every four days (since mid-April 2009)
Network operator:	All Mobile Network Operators
Number of complainants:	242

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 242 complaints in relation to a subscription service operating on shortcodes 62323 and 80810 which provided hints, tips and 'cheats' for video games. The service was promoted via the website gamer-data.co.uk and subscription was initially charged at £10 per month. From mid-April 2009 this was changed to £2 every four days.

Complainants stated that they had been charged for receiving unsolicited text messages and that the 'STOP' command had not worked. The Executive also noted during the course of its investigation that the service appeared to be of inadequate technical quality, no pricing information appeared to have been given to complainants prior to incurring charges, the promotional website did not provide contact details and that the service had not sent any free initial subscription text message, or reminder text message, as required by the Code.

How the service was supposed to work

Opt-in before 1 January 2009

Pre-January 2009 opt-in to the service was via a double web opt-in method. Consumers entered their mobile number into the website gamer-data.co.uk. The consumer was then sent a PIN number to their mobile phone which they were required to enter into the website. Once they had done so they were subscribed to the service.

Opt-in on, or after, 1 January 2009

Post-December 2008 opt-in to the service was via MO (Mobile Originating) opt-in. Consumers would go to the website gamer-data.co.uk which was promoting the keyword 'JOIN'. Consumers would send the keyword 'JOIN' from their mobile to the shortcode. They were then informed by text that "*U have subscribed to Gamerdata*" and were then asked to text "*AGREE*" to the same shortcode.

(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 7 July 2009 to the Information Provider (following the Service Provider's request that the case be dealt with as an Information Provider case) raising potential breaches of paragraphs 3.3.3, 5.4.1b, 5.7.1, 5.8, 7.12.4a-f, 7.12.5 and 7.12.6a of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Information Provider provided a formal response to the breach letter via their representative, Enarpee Limited, on 13 July 2009.

The Tribunal made a decision on the breaches raised by the Executive on 1 October 2009 having heard informal representations from the Service Provider and Enarpee Limited as the representative of the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)

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

1. The Executive submitted that the Information Provider had acknowledged improperly charging a user's mobile phone number who was sent many repetitive premium rate text messages. It submitted that the Information Provider had also admitted that a second user's mobile phone number had been accidentally charged multiple times. The Executive made reference to an email sent by the Information Provider that stated as follows:

"This user was accidentally charged multiple times because our system was sending back acknowledgment response to IPX which was not malformed. Thus IPX did not recognize our response, and assumed we did not receive the MO message. IPX continues to notify us of the MO message, until we send a proper acknowledgment. Our system continued to bill the user with each notification of the MO join message that we received from IPX. Once this was noticed, we corrected the acknowledgment, as well as put in other protective measures to prevent duplicate billing."

The Executive submitted that the complaints related to when the service was charged at £10 per month, and was being promoted as £10 per month on gamer-data.co.uk. However, the message logs for this period showed recipients being charged in excess of £10 per month.

2. The Information Provider stated that the user referred to in the Executive's submissions had been refunded in full by its carrier which had withheld payment from the Service Provider, which had subsequently withheld funds from the Information Provider itself in the monthly out payments. The Information Provider provided further examples of users' mobile phone numbers that had been overcharged to illustrate that it would refund any monies validly requested by the customer, providing the mobile user contacted customer support and requested the refund. The Information Provider stated that, while technical issues were encountered, measures had since been put into place to prevent such issues from reoccurring, the most notable of which was auditing software that checked for duplicate billings every five minutes.
3. The Tribunal noted the Information Provider's acceptance that there had been technical problems with the service which had led to it charging some users multiple times by sending them repeat text messages. It found that reasonable endeavours had not been used to ensure the service was of adequate technical quality and upheld a breach of paragraph 3.3.3 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
MISLEADING (FAIRNESS) (Paragraph 5.4.1b)**

'Services and promotional material must not:

b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.'

1. The Executive submitted that complainants had received unsolicited reverse-billed text messages from this service. In these circumstances, consumers' mobile phone numbers had been used without their direct or implied consent to charge the consumer a fee for a service that the consumer had never agreed, either directly or indirectly, to receiving. It submitted that the circumstance which had made these consumers vulnerable was that the Information Provider held their personal data in the form of their mobile phone number, and had the facility or ability to use that data to charge those consumers by reverse-billed text message at any time it choose to do so. The Executive submitted that the Information Provider had taken unfair advantage of that circumstance by using the data in its possession to charge that group of consumers without having first obtained evidence of their consent to being charged.
2. The Information Provider explained its lack of evidence of opt-ins by stating that the message logs that it had provided contained only text messages that were deemed to have been successfully transmitted. It stated that text messages deemed unsuccessful were filtered out before being provided to the Executive, some of which had included some initial subscription text messages. The Information Provider stated that it was more than likely that the text messages providing the PIN number had actually been received and entered into the website; such an action would have indicated to the system that the double service opt-in had been completed. It also stated that, in the event of the first PIN text message being unsuccessfully sent, the system would send another PIN text message, reaching the recipient successfully.
3. The Tribunal considered the evidence and concluded, on the balance of probabilities, that users had received unsolicited chargeable text messages from the Information

Provider. The Tribunal further concluded that the Information Provider had taken unfair advantage of the fact that it possessed the mobile phone numbers of the complainants and could send out charged messages to them at will without their knowledge or consent, which had made users vulnerable. The Tribunal therefore upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
PRICING INFORMATION (COST) (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 complainants stated that they had never initiated the service but had nevertheless received unsolicited reverse-billed text messages. The fact that complainants stated that the text message was unsolicited implied that no notice of the cost was given to the recipients. It therefore appeared that complainants were not fully informed, clearly and straightforwardly of the cost prior to incurring any charge.
2. The Information Provider repeated the submission that it had made in relation to the breach of paragraph 5.4.1b and stated that the website fully disclosed the relevant pricing information.
3. The Tribunal considered the evidence and found, on the balance of probabilities, that unsolicited reverse-billed texts had been received by complainants. The Tribunal found that these complainants had not received any pricing information or been made aware of the cost of the service prior to incurring the charges, and therefore upheld a breach of paragraph 5.7.1 of the Code. The Tribunal commented that it was disappointed that the complete message logs had not been supplied to the Executive.

Decision: UPHELD

**ALLEGED BREACH FOUR
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 otherwise obvious and easily available to the user.’

1. The Executive submitted that, prior to it notifying the Service Provider, the promotional website gamer-data.co.uk (770506_5.2_App A) had failed to provide the required customer service phone number contact information details.
2. The Information Provider stated that users could have contacted the customer service through the email address on the website, and that the customer support phone number was added to the website as soon as the Information Provider had been made aware that it was a requirement.

3. The Tribunal considered the evidence and concluded that the website (App A) did not contain the customer service contact details required by the Code, although it noted that this was a technical breach which had been rectified by the Information Provider on notification by the Executive. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

FREE INITIAL SUBSCRIPTION MESSAGE (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 (e.g. per day, per week or per month) 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 submitted that the message logs supplied by the Information Provider showed that, in a number of cases, no free initial subscription text message was sent. It also submitted that, where a free initial subscription message had been sent, the message did not clearly contain all the required information, including identifying the service was subscription-based, the billing period, what the charges for the service were, how to leave the service or the relevant contact details. The Executive submitted that it considered the use of '10.M.O' & '10/mt' in the text messages as insufficient pricing information.
2. The Information Provider stated that, whilst the subscription request text message was not billed (i.e. the PIN text message), the subscription confirmation text message was charged. The Information Provider stated that all of the examples provided by the Executive indicated a subscription confirmation message had been sent, and that the relevant information had since been added to the PIN text messages.
3. The Tribunal considered the evidence and concluded that, in several instances, the initial subscription message sent to users had been charged. The Tribunal also found cases where users had been sent a free initial subscription message after the service texts had been received, and where such messages did not contain the information required under paragraph 7.12.4a-f of the Code. The Tribunal considered that the wording '10.M.O' or '10/mt' did not sufficiently inform the user of the billing period for the service for the purposes of paragraph 7.12.4d. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

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 submitted that the message logs supplied by the Information Provider showed that, in a number of cases, no free subscription reminder text messages were sent. It submitted that, even in cases where subscription reminder text messages appeared to have been sent, they were chargeable messages. The Executive submitted that, for those message logs where subscription reminder messages appeared to have been sent, the message did not clearly contain all the required information, including identification that the service was subscription-based, the billing period, the charges for the service, how to leave the service or the contact details. The Executive submitted that it considered the use of '10.M.O' & '10/mt' in the text messages as insufficient pricing information.
2. The Information Provider stated that it did not send free subscription reminders because the subscription service charged less than £20 per month.
3. The Tribunal considered the evidence and concluded that, in several cases, the service had not sent free reminder text messages to users as required by the Code. The Tribunal therefore upheld a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN SUBSCRIPTION TERMINATION (Paragraph 7.12.6a)

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

1. The Executive submitted that it received 88 complaints regarding the 'STOP' command not working, and that the message logs supplied show consumers continued to be charged after the 'STOP' command was sent.
2. The Information Provider stated that it became aware that the 'STOP' command was not functioning properly in January 2009. It identified the problem as being a software malfunction that had started in December 2008 which it immediately addressed. The Information Provider further stated that it had now installed software applications to ensure that the 'STOP' command was fully functional.
3. The Tribunal considered the evidence and concluded that, pre-January 2009, the 'STOP' command had not functioned correctly and users had continued to be charged after sending 'STOP' to the service. The Tribunal noted the Information Provider's admission that there had been a technical malfunction which had caused this problem. The Tribunal also noted that there was no evidence of the failure of the 'STOP' command after January 2009. The Tribunal upheld a breach of paragraph 7.12.6a of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The behaviour of the Information Provider had been reckless in its approach to its compliance obligations. The Tribunal also noted the lack of effective due diligence by the Service Provider.
- There was material consumer harm in relation to the number of consumers affected. There were 242 complaints received by the Executive.
- The cost paid by individuals was high; one complainant was billed £610 over the course of two days.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

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

- The Information Provider did co-operate with PhonepayPlus. It had added a contact number to the promotional website when notified of its absence by the Executive, and stated that the issues raised had been addressed and mechanisms put in place to prevent any reoccurrence.

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

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

- Formal Reprimand;
- An £80,000 fine;
- A bar for six months on the service and related promotional material commencing 1 October 2009, suspended for one month within which time the Information Provider is to seek and implement compliance advice to the satisfaction of the Executive. If at the end of one month, the Executive is satisfied that the compliance advice that it has given has been implemented by the Information Provider, the bar will be lifted but, if the Executive is not satisfied, the bar is to take effect forthwith and to continue in effect for the remainder of its term.

The Tribunal commented that it expected claims for refunds to continue to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.