

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 8 January 2008 TRIBUNAL SITTING No. 18 / CASE 3

CASE REFERENCE: 761396/GL

Information provider & area:	Danx Limited, Essex
Service provider & area:	MX Telecom Limited, London
Type of service:	Mobile content download service
Service title:	www.hotrealgallery.com
Service number:	84480
Cost:	£1.50 per message
Network operator:	All Mobile Networks
Number of complainants:	64

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

BACKGROUND

PhonepayPlus received a number of consumer complaints in respect of unsolicited reverse billed SMS messages, sent from shortcode 84480. For example:

*Live content download request 1of1 www.hotrealgallery.com to stop at any time
- customer service 08717503155*

*LIVE content download request 1 of 1 -
http://www.hotrealgallery.com/Default.aspx - send STOP at anytime - Cust svc
0871 750 3155*

*Live WAP content download http://gallery.dyndns.biz/gallery/default.aspx - Send
stop at anytime - Cust svc 08717503155*

Complainants stated that when they contacted the information provider, they were informed that the messages had been sent in error.

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

The service was a mobile content download service, which operated under the name *www.hotrealgallery.com*. The service was promoted by SMS messages:

*See SEXY videos on your phone for just 150p -
http://www.hotrealgallery.com/Default.aspx?id=3421 - send stop to 84480 to opt
out - Cust svc on 08717503155*

The URL was clicked in order to access a WAP landing page. By accessing the landing page the user was charged £1.50.

Complaint Investigation

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code Practice 11th Edition (amended April 2008). It became an information provider case.

On receipt of complaints regarding the service and its promotion, the Executive sought to obtain further information from the service provider under paragraph 8.3.3 of the Code. The Executive agreed to the service provider's request to obtain the information directly from the information provider, to which the information provider duly responded. The information provider supplied a copy of the WAP landing page and the message logs for the requested mobile numbers. In an email dated 1 October 2008, the information provider advised that it had been unable to obtain opt-in details from its data supplier.

Following the Executive's preliminary investigations, based on the evidence of complainants, message logs and the information provider's admission of errors, the Executive raised potential breaches of paragraphs 3.3.3, 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8 of the Code, in a letter to the service provider dated 12 November 2008.

The Executive agreed to the service provider's request to deal with the matter as an information provider case, and upon receipt of the appropriate undertaking forms, proceeded to do so.

The Executive reissued the breach letter against the information provider on 12 November 2008, to which the information provider responded only to the information requested under paragraph 8.3.3 of the Code. The Executive granted the information provider a further opportunity to respond to each individual breach, which the information provider duly supplied on 28 November 2008.

The Tribunal made a decision on the breaches raised by the Executive on 8 January 2008.

SUBMISSIONS AND CONCLUSIONS

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 that the fact that the service was not of an adequate technical quality was evidenced by the content of the message logs supplied by the information provider. These demonstrated that two different mobile users who had both only accessed the service on one occasion, were charged four times, which the information provider admitted was an error.
2. The information provider commented that it was a young business and had tried very hard to ensure that its technical standards were of the highest quality. It openly admitted that it had made some errors. However it had sought to rectify its

shortcomings.

3. The Tribunal considered the message logs supplied by the information provider, which clearly demonstrated that multiple charges had been applied to individuals who had only accessed the service on one occasion. The Tribunal also noted the information provider's clear admissions in this regard. The Tribunal upheld a breach of paragraph 3.3.3 of the Code.

Decision: 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."

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"), 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 (this is sometimes called 'a hard opt in'), 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 (sometimes called a 'soft opt-in').

1. The Executive considered that the promotional messages which were sent to recipients of the service were direct marketing electronic mail for the purposes of the Regulations. The information provider advised that the original database was purchased from a 3rd party who had been unable to provide evidence of opt-in to receive the promotional text message in the first place. It appeared that the promotional text messages sent to complainants were unsolicited; the complainants not having consented to receive any promotion for the service, either directly or indirectly.
2. The information provider accepted that it had made a mistake, in not being sufficiently "tough" on its data supplier, in terms of ensuring the integrity of the data. The information provider stated that it could not apologise enough and in no way had intentionally tried to "con" anyone. It commented that it no longer used the data supplier in question.
3. The Tribunal noted that the information provider had obtained a data list for which it could not obtain any evidence of consumer opt-in. Consequently, marketing messages had been sent to consumers who had not opted into the service, in breach of the Regulations. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: 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 considered that the chargeable messages received by recipients were promotional messages in respect of a mobile content download service, and as a result, complainants had been misled as to the nature of the messages. From the content, users expected the messages to be no more than standard promotional texts and simply deleted them (unaware that they were being charged for receipt). In respect of consumers who do not consider that they had subscribed to the service in the first place, the Executive considered that this practice aggravated the situation; users were subscribed for longer periods and lost more money, before realising they were being charged.
2. The information provider stated that all billing messages had been changed to be Code compliant. It commented that the messages would have been reasonable, if received by users who had opted in. Where this was not the case, it could only point to technical reasons and in any event, did not feel that very many people were actually affected by the fault.
3. The Tribunal considered the evidence and concluded that consumers were likely to have been misled into thinking that the messages were merely promotional not chargeable in nature and those who had not previously subscribed would be unaware that they were being charged until a later date. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

UNFAIR ADVANTAGE (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 noted that complainants had stated that the reverse billed SMS messages they received, were unsolicited. The Executive considered that some consumers' mobile numbers were used without their direct or implied consent, and had been used to charge a fee for a service which they had never agreed either directly or indirectly, to receiving. Consequently, the Executive believed that the circumstance which made consumers vulnerable, was the fact that their details were held by the service or information provider, who had the facility to charge them at will using reverse billed messages and that unfair advantage of this circumstance had been taken. The Executive considered this to be evidenced by the message logs supplied by the information provider, which demonstrated that one mobile number failed to receive any promotional messages

(only reverse billed SMS) and that other mobile users who had never accessed the WAP site, were still charged.

2. The information provider accepted that it had made mistakes, but emphasised that there was no intent to harm or deceive consumers. The information provider stated that it was a very young business and had drastically overhauled our procedures.
3. The Tribunal considered the acceptance of this complaint by the information provider and noted that a number of complainants had received unsolicited reverse billed messages. The Tribunal upheld a breach of paragraph 5.4.1 b of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

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. The Executive noted that the message logs demonstrated that one complainant was not sent any promotional messages but received a reverse billed SMS messages. The complainant in question stated that they had never initiated the service and was therefore unaware that the messages received were chargeable, until a later date. The Executive considered the fact that the complainant stated the texts were unsolicited, implied that no notice of the cost was provided to the recipient. It therefore appeared that the complainant was not fully informed, clearly and straightforwardly of the cost prior to incurring any charge.
2. The information provider stated that the WAP site clearly stated the service’s charges and reiterated that it was not a subscription service. The information provider again accepted that it had made technical errors.
3. The Tribunal noted that consumers, who had never previously visited the website and who had only received MT messages to their handsets, would not have been informed of pricing information. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

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 considered that the promotional SMS message failed to provide consumers with the required contact information details. The message failed to state the identity of either the service provider or information provider.
2. The information provider stated that it had tried very hard to ensure that consumers were given a customer service number and that it took exception to the breach raised. The information provider emphasised that the customer service number was clearly part of the SMS message and was also on the WAP page. The information provider added that it dealt with a good deal of its own complaints and resolved them swiftly and fairly.
3. The Tribunal considered that consumers who had not visited the website and who only received an MT message, regardless of being provided a customer services number, had not been informed of the identity of the service or information provider, as required by the Code. The Tribunal upheld a breach of paragraph 5.8 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:

- The information provider had been reckless in using an unverifiable 3rd party opt-in list, which resulted in the sending of unsolicited reverse billed SMS messages to non opted-in consumers; and
- The cost paid by some consumers was high, some reported to being charged £6 per week (4 x £1.50);

In mitigation, the Tribunal noted the following factor:

- The information provider cooperated with the Executive when notified of the breaches.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £3,000 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 ordered that claims for refunds are 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.