

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 18 December 2008 TRIBUNAL SITTING No. 17 / CASE 4  
CASE REFERENCE: 758834/AB

Service provider & area:	Dialogue Communications Limited, Sheffield
Information provider & area:	Innov8 Limited
Type of service:	Horoscopes - Subscription
Service title:	Tarot Text
Service number:	83373
Cost:	50 pence per message received
Network operator:	All Mobile Operators
Number of complainants:	19

### BACKGROUND

The PhonepayPlus Executive ("the Executive") received 12 consumer complaints regarding the receipt of reverse billed SMS messages, which contained their horoscope. The complainants stated that the messages were unsolicited and were charged a rate of 50 pence per message received. Examples of the messages are as follows:

*Astrojune The solar system will be spinning in your sign this month which is beneficial and fabulous. Innov8 CV9 1JN STOP to optout. helpline 01778 726977*

*AstroJune: U're likely to be offered a new job, promotion or be motivated in a new position-just do it. Innov8 CV91JNN STOP to optout. Helpline 01778 726977*

*AstroJune: Most months bring a bag of aspects to sort out. Now the planets have given you a break. Innov8 CV91JNN STOP to optout. Helpline 01778 726977*

*AstroJune: U will be front and centre, perfectly positioned to enjoy every happiness June brings for you. Innov8 CV91JNN STOP to optout. Helpline 01778 726977*

One complainant who tried to unsubscribe, was charged for sending 'STOP' to the service. However, the message logs later supplied by the service provider demonstrated that this particular complainant was charged a standard network rate for sending the command 'STOP' and therefore required no further investigation.

By 8 October 2008, the number of complaints had risen to a total of 19. The additional seven complainants also said that the chargeable messages were unsolicited and that they had never registered to the service.

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

The service provider stated that the information provider had explained that the customer signed up by sending a mobile originating message ("MO") in response to advertisements in local newspapers and magazines via another aggregator, and had provided a list of opt-ins through this other aggregator.

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code Practice 11<sup>th</sup> Edition (amended April 2008) (“the Code”).

In a letter dated 11 July 2008, the Executive made a request for information from the service provider, under paragraph 8.3.3 of the Code, to which the service provider responded on 29 July 2008.

In a telephone conversation with the Executive on 30 July 2008, the service provider explained that the information provider for the shortcode had failed to provide a response to the questions within the Executive’s request for information. The service provider confirmed that it had tried to assist the Executive as much as possible, but without the assistance of the information provider.

In a letter dated 8 August 2008, the Executive raised potential breaches of paragraphs 5.2 and 7.12.4 the Code. The service provider forwarded the Executive the information provider’s response, dated 20 August 2008. On 10 October 2008, the Executive sent the service provider an addendum to the initial breach letter. The Executive withdrew the alleged breach of paragraph 5.2 on the basis that the messages sent to complainants were service not promotional messages and raised additional breaches of paragraphs 5.4.1b and 7.12.3a and c of the Code. The service provider responded on 17 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 18 December 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **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 raised concerns that all complainants asserted that a 50 pence charge had been reverse billed from their mobile phone, without their prior consent. The Executive noted that according to the information provider, such consent had been obtained by the consumer responding to the promotion by texting the keyword ‘ASTRO’ to shortcode 83373. The Executive also noted that the information provider had stated that no other promotions had been made. The Executive was of the opinion that as the message logs supplied by the service provider in relation to that shortcode did not provide evidence of any such MO; this suggested that consent had not been obtained.

The Executive considered that the service provider’s suggestion that ‘opt-ins’ were obtained through a different aggregator was inconsistent with the information provider’s statement that the attached advertisement was the only promotion used (being a shortcode only available to the service provider).

Upon the Executive Google searching the relevant shortcode, it came across an internet forum which contained a posting from someone purporting to be a member of staff, employed by the information provider. The posting stated that it had recognised there was an issue with its opt-in data which had resulted in unsolicited messages being sent to consumers. It invited recipients of these wrongly delivered messages, to contact the company for a refund.

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 circumstances 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.

2. The service provider commented in its general response that it was only able to provide logs for messages which were sent through its own systems. The opt-in information was allegedly obtained through another service, prior to the service moving to the service provider. The service provider commented in relation to this breach, that the fact that the logs could not be supplied by the service provider did not mean that consent had not been previously given.

The service provider emphasised that it had followed all guidelines and best practices by requesting opt-in information, prior to allowing connectivity to its network. It understood its responsibility to provide evidence of MO opt-in information during an investigation, which had not been forthcoming due to the sporadic and then complete loss of contact with the information provider.

The service provider alleged that the information provider had not claimed that the supplied advertisement was the only promotion used. It had been stated in the response to the preliminary investigation, that the service was previously advertised in several regional newspapers via an advertising broker, during dates prior to the service running through the service provider's network. The service provider had sought confirmation from the information provider in respect of all advertisements, but had received no response.

The service provider commented that there was no evidence that the posting on the internet was genuinely from the information provider. It considered that a disgruntled consumer or completely unrelated member of the public could have faked such a response, in order to falsely demonstrate that there was some sort of wrongdoing. In any event, the consumer who had alerted the Executive to the posting had contacted the service provider on numerous occasions and was initially abusive. The service provider considered that the posting should not be treated as evidence in the case, unless proven to be genuine.

3. The Tribunal considered the evidence and found that a number of complainants had received unsolicited reverse billed messages and that the service had accordingly taken improper advantage of mobile data it held. The circumstances of being unable to prevent the receipt of unsolicited chargeable messages made the recipients vulnerable. The Tribunal was unable to ascertain whether or not the internet forum posting was in fact genuine and disregarded this evidence. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWO**

### **SUBSCRIPTION SERVICES (Paragraph 7.12.3a and 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...*

*c. advertise the availability of the 'STOP' command."*

1. The Executive noted that the service was promoted by both flyer and pop-up banner, copies of which were supplied by the information provider. The Executive considered that the promotional material failed to clearly inform participants that the service was subscription based and also failed to advertise the availability of the 'STOP' command.
2. The service provider stated that it had verbally questioned the information provider in respect of the advertisement containing shortcode 83373, during the course of their sporadic communications. The information provider had informed the service provider that this was an 'example' advertisement and accordingly, the service provider advised the Executive that it should be disregarded. No MO opt-ins had been received via that shortcode, which the service provider considered proof that the number had not been used. The service provider also commented that despite its requests, no other advertisements were provided by the information provider, whom it been unable to contact. The service provider commented that it was therefore unable to see whether any other of its advertisements were compliant or not.
3. The Tribunal considered the evidence and noted that the promotional material failed to state that the service was subscription based, or advertise the availability of the 'STOP' command. The Tribunal upheld a breach of paragraph 7.12.3a and c of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE**

**SUBSCRIPTION INITIATION (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 ... 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 considered that the service had failed to comply with the requirements of paragraph 7.12.4 of the Code, because the first message received by complainants received was not free, but charged at a rate of 50 pence. The Executive accepted that the chargeable message did include the name of the service, how subscribers could leave the service and the service providers contact details, however, it was not free of charge. The Executive commented that this failure was evident in the message logs supplied by the service provider.
2. The information provider stated that this would not have been the first message received from the service. All legitimate subscribers (not as a result of the above accepted error) would have received a free message, from another free route. This would have included the correspondence details together with a helpline number. The service provider commented that it had requested the content of the message from another aggregator and would supply the Executive with a copy upon receipt.

3. The Tribunal considered the evidence and noted that the message logs demonstrated that consumers had not received an initial subscription message containing any of the information required in subsections (a) – (f), prior to entering the service. The Tribunal also noted that the information promised by the service provider, from another aggregator, was not supplied. The Tribunal upheld a breach of paragraph 7.12.4 (a)-(f) 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 service was valueless to consumers; and
- The service's use of chargeable MO and MT messages was reckless.

In mitigation, the Tribunal considered the following factors:

- The service provider co-operated with PhonepayPlus when notified of the breaches; and
- The service provider stated that it had contacted many of the complainants and offered refunds.

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 £20,000 fine (comprising £5,000 in respect of the upheld breaches and a breach history uplift of £15,000).
- The Tribunal also imposed a bar on the service until compliant. The Tribunal commented that it doubted whether the service which had been the subject of the complaints could be made compliant with the Code.
- The Tribunal ordered that claims for refunds are to be paid by the service provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.