

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 11 June 2009 TRIBUNAL SITTING No. 29 / CASE 1
CASE REFERENCE: 799729/CB

Information provider & area:	Diginetwork Inc, USA.
Service provider:	mBlox Limited
Type of service:	Subscription Service
Service title:	'Krushmut Interesting Fun Facts Alert Service'
Service number:	84300 and 85118
Cost:	£5.00 joining fee, £10.00 per week.
Network operator:	Mobile Operators
Number of complainants:	86

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

BACKGROUND

The Service

The Krushmut Fun Facts service was a subscription service which was operated by Diginetwork Incorporated (the 'Information Provider'). The user took part in an 'IQ Quiz' which consisted of 10 general knowledge questions. When the user had completed the 'IQ Quiz' on the website www.mobile-england.com they were requested to enter their mobile phone number into the website which started the process of entering the subscription-based service.

The service charged consumers a £5.00 sign up fee and a subsequent charge of £10.00 per week. The phone charges were made in increments of £5.00 meaning a £10.00 weekly fee consisted of two chargeable service messages received by the consumer. The fee paid allowed the consumer to receive a 'package' from Krushmut which included: the result of their 'IQ Quiz' score; interesting Fun Facts delivered to the mobile phone via text messages; and access to the website krushmut.com which was a mobile entertainment platform which provided users with 25 'credits' to download mobile content such as ringtones, wallpapers and games.

The Promotion

The Information Provider stated that it had contracted with '*many top tier Affiliate Networks*' to provide advertising for the purpose of prompting consumers to enter its service. The advertising which was brought to the attention of the Executive via public complaints was the Facebook promotion. Complainants informed the PhonepayPlus Executive (the 'Executive') that the promotion had misled them into accessing the 'IQ Quiz' and entering the subscription-based service.

The Executive was concerned that the Information Provider did not have full control of how the Affiliate Network companies (the 'Affiliate Networks') decided to advertise the service and that the Information Provider simply paid commission to the Affiliate Networks for every

user who had been directed to the service website and who subsequently entered the service.

Facebook

The social networking website Facebook was used to promote the service and through the 'There/Their/They're Test' application it asked the question 'are you *SMARTER* than your friends?' The promotion also used the Facebook profiles of named Facebook friends from the user's personal contacts list and stated that they had previously completed the 'IQ Quiz'.

Complaints

43 of the 86 complaints specifically stated that the messages they received were unsolicited and that they had not entered into any service to receive text messages from the service.

31 of the 86 complaints stated that they had entered the subscription service after being misled by the promotion on Facebook.

13 complaints came from parents whose children had accessed the subscription service through the Facebook route.

Complaint Investigation

The service was monitored by the Executive to gain an understanding of the users experience and it was noted that when the 'Krushmut Fun Facts IQ Quiz' website had been accessed by the user the following issues were apparent:

- The service was set up in a manner that allowed the user who completed the 'IQ Quiz' to enter random mobile numbers into the website.
- When the Executive monitored the Krushmut service on the landing webpage www.mobile-england.com it was noted that the terms and conditions including pricing and subscription service notification were not clearly brought to the users attention:
 - Users had to scroll down through the web landing page to see the terms and conditions.
 - It was possible for users to complete the 'IQ Quiz' and enter their mobile phone number without any obvious need or call to action to scroll down to view the pricing and subscription information.

The promotion of this service was wide reaching with the Information Provider confirming that over 200,000 people had visited the website during the time period under investigation.

Standard Procedure

The Executive investigated the service using the standard procedure under paragraph 8.5 of the Code of practice (11th edition) (as amended April 2008) (the 'Code'). A breach letter was raised by the Executive dated 17 April 2009 alleging breaches of paragraphs 5.2, 5.4.1a, 5.7.2, 5.8, 5.14 and 7.12.3a of the Code. On the 13 April 2009, the Executive received undertaking forms from the Service Provider and the Information Provider in support of a request that PhonepayPlus should deal directly with the Information Provider. A formal

response to the Executive's breach letter was received from the Information Provider on the 27 April 2009.

The Tribunal made a decision on the breaches raised by the Executive on 11 June 2009 having heard informal representations from the Information Provider and the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

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 Paragraph 22(2) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), 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, 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. This is sometimes called a 'soft opt-in'.

The Executive submitted that in relation to shortcode 84300 and shortcode 85118, 31 out of the 54 complainants had stated that the text messages they had received from the service were unsolicited and that they had never heard of the Krushmut service. Examples of the messages received by complainants were as follows:

Message in relation to shortcode 84300

FreeMsg:3a Welcome to Krushmut mobile content:2e You have joined Krushmut:2e Helpline 0800 0470 955 5 ?+5?2x pwk or www:2ekrushmut:2eco:2euk:2e To end:2c txt stop to 84300

Message in relation to shortcode 85118

You have joined fun facts + 25 bonus credits. £5 registration fee plus 2 times £5 per week until you send Stop to 85118. Helpline 08082387554. To confirm sendAGREE to 85118

The Executive stated that it had considered the whole operation of this service and was concerned with the Facebook application web opt-in route. The Executive submitted that that it was possible for a user on the website to enter any mobile phone number on the sign up page. The Executive stated that if another user's mobile phone number had been entered into the website, the first that user would have heard of the service would have been via a promotional text message. The Executive submitted that if this was the case, the text message received would have been unsolicited.

The Executive's opinion was that the wording of the sign up page "*TO CONTINUE TO YOUR RESULTS ENTER YOUR MOBILE NUMBER*" suggested to users that as soon as a mobile phone number was entered into the website, the results of the IQ test would immediately be made available on the next web page. There was no indication that results would be sent to the handset of the mobile phone number once it had been entered into the website. The Executive stated that it was likely that random mobile phone numbers had been entered into the website simply to enable the user to obtain his or her results and as a result the Executive had received a high number of consumer complaints stating that unsolicited text messages had been received from the service. The Executive submitted examples of the complaints it had received from users in relation to the receipt of unsolicited promotional text messages.

2. The Information Provider stated that the problem of users entering another consumer's mobile phone number was a known risk affecting all subscription-based services that used the web and double opt-in mechanic and requiring a positive reply from the user following the subscription invitation was the safeguard which prevented users from being entered into the service without their consent. The Information Provider stated that it was possible for it to block repeat entry of the same MSISDN to limit the risk and also that the website programming did not allow a user to input an incorrect (i.e. invalid) mobile phone number. The Information Provider stated that in some places it had also used a warning attached to the invite message which asked the user to ignore the message if it was not recognised or expected.

The Information Provider stated that its platform could not have facilitated unsolicited text messages and users had to visit the website and enter a mobile phone number in order for the platform to send an invitation to join the subscription-based service.

The Information Provider stated that over 200,000 people had visited the website during the period in question and in view of this it was possible that users, upon reaching the end of the IQ Quiz, had entered mobile phone numbers that were not their own.

The Information Provider acknowledged that upon completing the quiz some users may have attempted to obtain their quiz result by using an alternative or random MSISDN. The Information Provider stated that a user may have assumed, contrary to the instructions provided, that entering a random mobile phone number would allow access to his or her quiz result, and then when the quiz result was not received the user consequently entered a valid mobile phone number that he or she owned. This would have resulted in an unsolicited message being received by the owner of the random mobile number and the Information Provider acknowledged that this was consistent with the complaints referred to by the Executive.

3. The Tribunal considered the evidence and concluded, on the balance of probabilities, that consumers had received unsolicited text messages and that the Information Provider had facilitated the generation of the unsolicited messages by the wording and mechanics of the promotion. The Tribunal found that the Information Provider had done nothing to discourage the entering of false mobile phone numbers, or mobile numbers belonging to others, and in fact the design of the service had encouraged users to believe that entering any mobile number would enable them to obtain their IQ results. The Tribunal was of the view that as a result of this, unsolicited promotional messages had been received by some consumers, contrary to paragraph 22(2) of the Regulations. The Tribunal therefore decided to uphold a breach of paragraph 5.2 of the Code. However, the Tribunal found that there was no evidence that the Information Provider had wilfully sent any of the unsolicited text

messages and therefore decided not to take into account this breach of paragraph 5.2 of the Code when setting sanctions.

Decision: UPHELD

ALLEGED BREACH TWO

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 submitted that during the Executive's monitoring of the Facebook application it noted that the Facebook user was alerted to the IQ Quiz through the following message which appeared when the 'There/Their/They're Test' application was entered:

[Name], are you SMARTER than your friends?

To beat, [Name], you need you need to score over 127

To beat, [Name], you only need to get 119!

The Executive submitted that, when the 'Start the IQ Quiz' tab on Facebook was clicked, the Executive was taken to the Information Provider's 'IQ Quiz' on the website www.mobile-england.com.

The Executive stated that the promotion had indicated to the individual who carried out the monitoring on Facebook that two of his Facebook friends had already completed the IQ Quiz. The Executive stated that one of the Facebook Friends displayed was a current member of staff at PhonepayPlus who confirmed that he had never completed an IQ Quiz on Facebook.

The Executive submitted that promoting the service in this manner was potentially misleading and acted to give the service a form of accreditation by indicating that friends of the user had previously completed the IQ Quiz and had registered their scores. The Executive submitted that this reasoning was supported by complaints from members of the public which had stated the following:

- *"I was on Facebook and received a notification that my friend had done a quiz and invited me to challenge his score"*
- *"Consumer did take part in something on Facebook and text the number to get results but never received the results and just started getting the psms where she entered her number in there was no details of charges or what the service was"*
- *"I followed a link from Facebook saying a friend had challenged me to an IQ test"*

The Executive further stated that having clicked on the 'Start the IQ Quiz' tab and having been directed to the IQ Quiz landing page, the Executive was informed of the following:

'Today's high score is 127. See if you can beat it!'

The Executive submitted that following monitoring of the webpage over the course of several days it noted that the day's highest score was constantly 127 which appeared to be misleading as this high score was very unlikely to remain the same every day.

2. The Information Provider stated that Fun Facts was an entertainment service and that as it had obtained all of its subscribers from Affiliate Networks it had notified the main Affiliate Networks of the rules and regulations for operating in a particular market. The Information Provider stated that these obligations were enshrined in its contracts with its Affiliate Networks and behaviours were policed and recorded in order to enforce sanctions on persistent offenders.

The Information Provider stated that the IQ Quiz had a maximum high score of 127. The Information Provider also stated that it had total control of the landing page however not of the Affiliate Network advertising on Facebook or similar social networks or advertising on other affiliate websites. The Information Provider stated that as the advertiser would not have had access to the central application for the highest score of the day, it appeared that the advertiser had assumed that 127 was always going to be the high score.

The Information Provider stated that it was very difficult to get up to date results on static advertising and that once it had been brought to its attention by the Executive that a high score of 127 was being advertised on Facebook, the Information Provider notified the Affiliate Networks that the high score of 127 was in fact the highest score possible and not the high score of the day. The Information Provider stated that the Affiliate Network had the responsibility of notifying all the affiliates in that the particular network that this form of advertising could be misleading and that the Information Provider did not allow this practice.

The Information Provider stated that like many other Information Providers, it promoted its services through affiliate marketing and that this was an established industry practice. The Information Provider stated that this case highlighted the challenge of regulatory enforcement through to the Affiliate Networks and that it did not consider there to have been an explicit breach of the Code on its part.

The Information Provider stated that affiliate marketing was a performance-based marketing and sales solution and that it allowed the Information Provider to connect to networks, publishers and agencies. The Information Provider stated that it did business with large name Affiliate Networks, who were very experienced and diligent when it came to enforcing rules with their publishers and that it had completed contracts with these Affiliate Networks which it enforced and policed regularly to ensure that its agreements were being met.

3. The Tribunal considered the evidence and concluded that the promotion on the social networking site Facebook had misled consumers into believing that their friends had taken the 'IQ Quiz' when this was in fact not the case. The Tribunal also concluded that the daily presentation of the highest score as being 127 was misleading as it was unlikely that the same highest score would have been achieved every day. The Tribunal noted that the high score of 127 had not changed over the entire course of the Executive's monitoring. The Tribunal also noted that it was misleading to suggest that the high score of 127 could be beaten, since it was the maximum score possible. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a.

Decision: UPHELD

**ALLEGED BREACH THREE
PRICING INFORMATION (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 when the promotion was viewed on computer screens at a resolution of 1024 X 784, the Executive was required to scroll down through the web page to view any pricing information.

The Executive stated that users could complete all ten steps of the IQ Quiz and enter their mobile phone number without the need or call to action to scroll down and as such users would not be made aware of the costs involved and would only be alerted to this once they had received the initial subscription initiation text message.

The Executive referred to a number of specific complaints it had received from users in which complainants alleged they had not been informed there would be a charge and had therefore been misled.

The Executive concluded that there appeared to be a breach of the Code because the pricing information required close examination and, specifically, required users to scroll down the page (where there was no apparent need to do so).

2. The Information Provider stated that it had made the relevant changes on the landing page to ensure that the terms and conditions were displayed in view on computer screens at a resolution of 1024 X 784.

The Information Provider also stated that based on its experience the challenge was to ensure that the Affiliate Networks and their publishers adhere to its terms and conditions. These obligations were enshrined in its contracts with the Affiliate Networks and behaviours were policed and recorded in order to enforce sanctions on persistent offenders.

3. The Tribunal considered the evidence and was satisfied that on some computer screens, users would have needed to scroll down the page in order to view the written pricing information relating to the service. The Tribunal therefore concluded that the pricing information had not been sufficiently prominent on the webpage and decided to uphold a breach of paragraph 5.7.2 of the Code.

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.'

1. The Executive submitted that during the course of monitoring, it had entered the Fun Facts subscription service by engaging the IQ Quiz through the Facebook application. The Executive stated that having entered the mobile phone number into the website it then received the following promotional text message from shortcode 85118:

"Free Msg: U have joined Fun Facts + 25 bonus credits £5 reg + £5 2x/week until u send stop to 85118. Helpline: 0808-2387-554. To confirm reply AGREE to 85118"

The Executive submitted that the promotional text message did not include the identity of the Service Provider or the Information Provider.

2. The Information Provider stated that it had never intended the text message to be misleading. It stated that as users had entered their details on the IQ Quiz which was operating on a Fun Facts service, it was appropriate to put the identity 'Fun Facts' in the initial text message.

The Information Provider stated that it was limited in relation to the amount of characters it was able to input in a text message and that it had concluded that adding the name of the Information Provider or Service Provider to the text message would have confused the user. The Information Provider stated that in subsequent text messages it did notify users of the Krushmut service in order that they would be able to clearly go to Krushmut.co.uk and obtain all the relevant contact information including that of the Information Provider.

The Information Provider stated that it had clearly inputted the helpline in the initial text message to ensure that if a user was to question the origin of the text message he or she could clearly call the helpline to obtain information on the short code and the service.

The Information Provider stated that it believed that its identity was implicit (if not explicit) in the brand name (Fun Facts) and that on many occasions the Information Provider's identity and the brand name were one and the same. The Information Provider stated that the use of the brand name was intended to convey the identity of the Information Provider.

The Information Provider further stated that in the event that its actual name was used there was the risk that the user would not have recognized the invite text message as the one they were expecting. The Information Provider stated that it could take steps to improve the clarity of the identity in the space available, however the identity of the service/brand had been present and that this in turn had carried the identity of the Information Provider.

3. The Tribunal considered the evidence and concluded that the text messages which had been sent unsolicited were promotional messages for the purposes of paragraph 11.3.27 of the Code as these would have been the first communication relating to the service seen by these recipients. The Tribunal further concluded on the evidence before it that the identity of the Information Provider or the Service Provider had not been provided in the unsolicited text messages which had been sent. The Tribunal therefore decided to uphold a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE SUBSCRIPTION SERVICES – STOP COMMAND (paragraph 5.14)

'It must always be possible for a user to leave a subscription service by using the 'STOP' command.'

1. The Executive submitted that six of the 54 complainants had stated that they had sent the 'STOP' command to the shortcode 84300 and shortcode 85118 and continued to receive chargeable text messages.

The Executive also stated that two of the complainants had stated that they sent 'stop' in lower case to the shortcodes and that this had not served to end their subscription to the service and the receipt of chargeable messages. The Executive stated that both of these complainants had stated that they had spoken to the Information Provider's customer helpline representatives who said that the 'STOP' command must be sent in capitals, and that 'stop' in lower case would not allow them to end their service interaction. The Executive submitted that the 'STOP' command was not a case sensitive option and as such any sent command of 'STOP' or 'stop' should have immediately ended the service interaction for the consumer and no further charges should be made following the receipt by the service of a stop command message.

2. The Information Provider stated that, in relation to the mobile numbers provided by the Executive, only one user had experienced a problem with using 'stop' as a command. The Information Provider confirmed that the 'stop' command was not case sensitive and that the predominant case for customers entering 'stop' was lower case which was supported by the Information Provider's system as well as mixed and upper case commands.

The Information Provider stated that the issue encountered by one user referred to by the Executive had been after migration of the service from shortcode 84300 to shortcode 85118. The Information Provider stated that this user had been enrolled in the service on shortcode 84300 and upon migration was subsequently billed on shortcode 85118. However, the billing reminder for that customer had continued to refer to 84300 instead of 85118 and as such the 'stop' command had not worked correctly. The Information Provider stated that this was recognized and rectified and refunds were made to customers who were known to have been affected.

The Information Provider stated that in relation to the shortcode 85118 there had been two instances where the customer had sent 'stop.' i.e. the word 'stop' immediately followed by a full stop, and this caused the unsubscribe mechanic to malfunction but the issue was immediately addressed when discovered.

3. The Tribunal considered the evidence and concluded that the 'stop' command had not functioned correctly as evidenced by the message logs provided by the Information Provider. The Tribunal also noted that the malfunction had been admitted by the Information Provider in its response to the Executive submissions. The Tribunal therefore decided to uphold a breach of paragraph 5.14 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

SUBSCRIPTION – PROMOTIONAL MATERIAL/ TERMS OF USE (paragraph 7.12.3a)

'Promotional material must clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers.'

1. The Executive referred to screen shots taken from its in-house monitoring of the service. The Executive submitted that when the promotion was viewed on a computer screen resolution of 1024 X 784, the Executive was required to scroll down to view information relating to the terms and conditions and in particular the fact that the service was a subscription-based service.

The Executive stated that users could complete all ten steps of the IQ Quiz

and enter their mobile phone number without ever being required to scroll down and therefore the users were not made aware that this service operated as a premium rate subscription service and that users would only have been alerted to this when they received the subscription initiation text message.

The Executive submitted that it was of the opinion that with there was no apparent need for users to scroll down the web page and that users would not have associated this promotion with that of a subscription-based service as the information was not made prominently visible to potential users.

2. The Information Provider stated that it had made the relevant changes on the landing page to ensure that the terms and conditions were displayed on computer screens at a resolution of 1024 X 784.

The Information Provider stated that based on its experience the challenge was to ensure that the Affiliate Networks and their publisher adhered to its terms and conditions. These obligations were enshrined in its contracts with the Affiliate Networks and behaviours were policed and recorded in order to enforce sanctions on persistent offenders.

The Information Provider stated that Affiliate Networks would be warned in the future to ensure that window size did not generate a scrolling issue and that the correct information regarding the pricing and subscription element did appear. The Information Provider stated that it was not unreasonable to expect users to scroll down, however on this occasion the relevant price and subscription information had been below the 'fold' of the page, as per the Executive's findings.

The Information Provider stated that had taken immediate steps to notify its Affiliate Networks and that this step had been communicated clearly to the Executive.

3. The Tribunal considered the evidence and found that, on some screens, users would have been required to scroll down the page in order to view the terms and conditions in order to be alerted to the fact that the service was subscription-based. The Tribunal therefore concluded that the webpage did not clearly indicate that the service was subscription based. The Tribunal decided to uphold a breach of paragraph 7.12.3a 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 was deliberate because it had chosen to use a promotional mechanic which involved third parties and which therefore exposed it to regulatory risk;
- There was material consumer harm being that there were 86 complaints and evidence of inconvenience and annoyance to a significant number of people, particularly in relation to unsolicited messages and the failure of the STOP command;

- The cost paid by individual consumers was high; a minimum charge of £15.00 was made for the first week, and many complainants had stated that they had incurred costs ranging from £40.00 to £75.00. Subscription services have been singled out for criticism by PhonepayPlus.
- The service was harmful to children. 13 of the 86 complaints were from parents whose children had subscribed to the service, some of whom were as young as 10 years old.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive when notified of the breaches and took steps to stop the Facebook promotion prior to the adjudication.
- The Information Provider stated that it had made refunds to users affected by the technical issue in relation to the failure of the 'stop' command.

Having taken into account the aggravating factors and the 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 £90,000 fine;
- A bar on the 'Krushmut Interesting Fun Facts Alert' service and any similar service and related promotion material until compliant to the satisfaction of the Executive.
- 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.