

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

**Thursday 10 December 2009 TRIBUNAL SITTING No. 42 / CASE 3
CASE REFERENCE: 807937/AB**

Information provider:	Digital Daze, London
Service provider:	WIN (Wireless Information Network) Plc, High Wycombe
Type of service:	Subscription/mobile content service
Service title:	moblib.co.uk
Service number:	81415
Cost:	£4.00 per service message received (after the first free week)
Network operator:	All Mobile Network Operators
Number of complainants:	15

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

BACKGROUND

By 15 July 2009, PhonepayPlus' Executive (the 'Executive') had received 15 complaints from members of the public in relation to the service operating on shortcode 81415 offering mobile content downloads in return for a subscription fee. All complainants stated that they were first made aware of this service when they received unsolicited text messages, in some cases resulting in a cost of £4 per week. One complainant was charged £4.50 per week. The Executive was also concerned that the service was misleading and that the contact details and pricing information were insufficient.

(i) The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive requested information from the Service Provider in a letter dated 28 July 2009. The Service Provider provided a signed Information Provider undertaking form on 22 September 2009 which was accepted by the Executive. The Executive issued a breach letter to the Information Provider raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.8, 7.12.4a-f and 7.12.5 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). A formal response was received from the Information Provider on 1 October 2009

The Tribunal made a decision on the breaches raised by the Executive on 10 December 2009, having heard an Informal Representation from the Information Provider and its representative.

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 Section 22 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, either where the recipient has not specifically consented to receiving such unsolicited promotions or where the recipients details were not obtained whilst purchasing a similar or related product or service to that being promoted.

The Executive submitted that all 15 complainants stated that the text message(s) they received were unsolicited and that the first they had heard of this service was receipt of a text message from shortcode 81415.

The Executive submitted that it was of the opinion that it was possible for a user of the website ‘moblib.co.uk’ to enter any mobile phone number and therefore considered that if another user’s mobile phone number was entered into the website, the first that person would have heard of the service would have been via promotional text message. The Executive noted that, if this was the case, the text message received by these complainants would have been unsolicited.

The Executive made reference to user text messages sent by some complainants which indicated that these complainants were unaware of this service. Complainants replied with ‘WHAT IS THIS’ or ‘WHAT IS TRIAL FOR’ or ‘NOT NOW’. This indicated that the complainants had not visited the website moblib.co.uk and that their first exposure to the service was via receipt of the unsolicited free text message.

The Executive referred to several complainant examples that read as follows:

The user received the following message:

‘FREE Msg: Text GO to subscribe to your 7 day TRIAL for tones, mobile games and movies. After trial, £4.0pw. To end, reply STOP to 81415’

In response to this, the user sent a text message stating ‘**NOT NOW**’. The user then received the free subscription initiation message and, seven days later, started to receive chargeable text messages at a total cost of £4 per week.

The Executive referred to examples where users had responded to the text with wording such as ‘I DON’T WANT THIS’ , ‘WHAT IS TRIAL FOR’ , ‘Who are you’ and, in all cases, were subscribed into the service.

2. The Information Provider stated that this alleged breach needed to be read in conjunction with its submission in relation to the alleged breach of paragraph 5.4.1a of the Code. It contested that it had breached this section of the Code as, in normal operation, the submission of the reminder text message to “activate” the service was sent in good faith and in accordance with prevailing best practice.

The Information Provider made reference to PhonepayPlus recommendations relating to webmarketing and text messages, which recommend the addition of a second mobile entry box. It stated that it had included this feature on its web page.

It stated that it believed that it had done all that could have been done to reduce the possibility of someone other than the mobile owner receiving the text message.

3. The Tribunal considered the evidence of the relevant complainants and concluded that, on the balance of probabilities, some people had not opted in through the service mechanism and had received a free promotional text message. The Tribunal found that in these cases the free message was an unsolicited promotion. The Tribunal concluded that these examples were evidence that a consumer had initially entered details into an opt-in mechanism of a website but that the recipient of the free promotional text message from the service was not the same person who had entered the mobile number onto the website, as a result of deliberate or accidental inputting of incorrect numbers. The Tribunal, therefore, upheld a breach of paragraph 5.2 of the Code. However, the Tribunal found that there was no evidence that the service was designed to deliberately send 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 the initial free promotional text message received by the complainants stated the following:

“FREE Msg: Text GO to subscribe to your 7 day TRIAL for tones, mobile games and movies. After trial, £4.0pw. To end, reply STOP to 81415”

The Executive noted that the complainants’ message logs, supplied by the Service Provider/Information Provider, indicated that seven of the 15 complainants responded to this text message but had not sent the stated trigger word ‘GO’. It submitted that, nevertheless, the message logs indicated that these complainants were still entered into the subscription service and received chargeable text messages.

The Executive also submitted that, if the text message (as above) was unsolicited, recipients of this text message may have been more inclined to interact with the service as it was offering a free seven day trial.

The Executive made reference to the Information Provider’s own monitoring exercise in which an actual consumer’s mobile phone number was used, resulting in that consumer receiving a free subscription initiation text message and being subscribed into the service. The Executive noted that the Information Provider had stated that it had been due to human error and that using actual mobile phone numbers was not normal practice and would not happen again. It stated that new safeguards had been put in place to prevent anyone from directly entering mobile numbers into the live system.

The Executive submitted that complainants had not understood what the service involved as demonstrated by their responses to the initial free text message received.

The Executive made reference to complainants who claimed to have not sent the trigger word 'GO' as suggested in the free text message to initiate the subscription service but had responded with a number of other responses. The Executive referred to the following examples:

Example 1

The user received the following message:

“FREE Msg: Text GO to subscribe to your 7 day TRIAL for tones, mobile games and movies. After trial, £4.0pw. To end, reply STOP to 81415”

The user responded with a text message stating 'NOT NOW' and then received the free subscription initiation text message and was subscribed into the service.

The Executive referred to examples where users had responded to the text with wording such as 'I DON'T WANT THIS' , 'WHAT IS TRIAL FOR' , 'Who are you' and, in all cases, were subscribed into the service.

The Executive submitted that recipients of the free text message had been instructed to send the trigger word 'GO' in order to subscribe to the service. Users responding to this message with other wording, either in anger or out of curiosity, were misled into entering into this subscription service. It submitted that users were of the view that responding with something other than 'GO' was not going to initiate the subscription service, rather either stop the service or provide more information.

The Executive submitted that, if the promotional text message had stated, for example, 'please reply to this text message', recipients would have known not to respond and interact as they did and, therefore, they would not have been misled into subscribing to this service.

2. The Information Provider stated that it did not believe that it had breached paragraph 5.4.1a of the Code, as the text message that was sent was clear in respect of the following:

1. It that it involved a subscription service;
2. The service was for a mobile content service;
3. The charges and how often they would be incurred;
4. How to stop the service.

The Information Provider stated that the keywords that were used to register to the service were the following;

'GO', 'NOW', 'WHAT', 'WANT' and 'WHO'

It stated that over the course of the service it had used a number of keywords and tried the service in a range of publications. For example it had promoted the service in:

Now magazine – hence keyword “Now”

What mobile – hence keyword “What”

It stated that it also used strap lines such as 'all you want a service to be' – hence key word “Want”

The Information Provider stated that it had managed promotions around TV programmes such as 'CSI' and 'Dr Who' – hence it had used the keyword "Who" and "CSI". It stated that the procedure known as 'word spotting' that it had used to identify keyword/commands was the same as all other providers.

It stated that the Code did not specify any particular method nor express any concern with this method. It stated that it had, therefore, used the same word spotting method to identify 'STOP' commands and keywords.

The Information Provider stated that it had subsequently taken the following action

1. It had heavily reduced the number of keywords and codes that it has in its system.
2. It had now restricted keywords to access the service to 'YES', 'ACTIVATE' and 'GO'.

3. It had added a secondary mobile number entry form, so as to further reduce the number of incorrect mobile numbers entered via its website.

3. The Tribunal considered the evidence and concluded that consumers had been misled as to the consequences of responding to the promotional text message with any wording other than the word 'Go'. The complainant examples showed consumers requesting further information and being immediately entered into the subscription service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE 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 and easily available to the user."

1. The Executive submitted that the following text message was promotional Material under paragraph 11.3.27 of the Code:

"FREE Msg: Text GO to subscribe to your 7 day TRIAL for tones, mobile games and movies. After trial, £4.0pw. To end, reply STOP to 81415"

The Executive submitted that this text message failed to provide the identity and contact details of either the Service Provider or Information Provider. Even if the recipient had viewed the website moblib.co.uk, these details were not obvious.

The Executive submitted that, on contacting the customer service number, the operator had identified the service as 'The Texting Service'.

2. The Information Provider stated that it agreed that the contact details were not sent to the user in the reminder promotional text message as it believed this information was clearly displayed on advertising material.

It stated that the contact details had been dispatched on the registration text messages together with pricing and full terms of the service.

It stated that it had never in any way sought to hide or prevent the user from contacting the company.

It stated that it was important to note that it did not charge the user until seven days (cooling off period) from registration so, in practice, the user would have had the contact details, and the required information regarding the service and charges, before they would ever be charged.

3. The Tribunal considered the evidence and concluded that consumers that received the promotional text message had not received the identity of the Service Provider or the Information Provider. The Tribunal also found that, even if consumers had visited the website the Information Provider's identity was not present anywhere. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR PRICING (PROMINENCE) (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 made reference to complainant examples as follows:

Example 1

The Executive noted that the website moblib.co.uk had stated that after the initial seven day FREE trial, users would be charged £4 per week. The Executive also noted that one complainant was charged £4.50 as opposed to £4 after the first week free trial. The Executive submitted that this user then incurred the cost of £4.50 four days later, and a further cost of £4.50 three days later, followed by a further cost of £4.50 seven days later. It submitted that at no point was this user informed of the cost of the service in any of the 12 text messages received.

Example 2

The Executive noted that the first free text message received after sending the trigger word 'GO' to shortcode 81415, read as follows:

*“Welcome back to moblib4 unlimited downloads, ur password is Bird.
www.moblib.co.uk 3pw until you send stop 2 81415 help 08712880843.”*

This message indicated that the cost of using this service was £3 per week as opposed to the advertised £4 per week.

The Executive was of the opinion that users were not clearly and straightforwardly informed of the cost of using the service due to the inconsistency of pricing information given.

2. The Information Provider made reference to Example 1 submitted by the Executive. It stated that this was an extremely unusual case where this particular user registered with a keyword for the show 'CSI' that ran over a year and a half ago via a printed advert.

It stated that this keyword had been set up with a different pricing scheme as originally displayed in the advert and was fully compliant at the time of operation. This resulted in the user being given a free one-week trial and then being charged weekly £4.50 per week with a £4.50 monthly maintenance charge. The billing was correct for the original promotion.

The Information Provider stated that it had removed all previous promotions running from a year ago so that registration can only occur on three keywords 'YES', 'ACTIVATE' and 'GO'.

The Information Provider stated that in relation to Example 2 of the Executive's submissions, the user had received the welcome back text message on 17 August 2009 for £3 per week. That user then downloaded some content, sent the 'STOP' command and the service was stopped.

The user then received a promotional text message, which they replied to with the trigger word "GO" to rejoin the service and was only charged £1.50.

The Information Provider stated that although there had been an error in this text message suggesting that the service would cost £3 per week, the user was only charged £1.50 (also an error). It stated that it had now fixed this issue and, in fact, very few customers would have been affected and those who had, had benefited from this.

3. The Tribunal considered the evidence and concluded that in the absence of the printed advertisement, which the Tribunal expected to be readily available, the Tribunal was not persuaded that the pricing information had been consistent with the prices advertised on the webpage. The Tribunal also found that although one complainant was charged less than advertised the pricing information did not reflect the actual pricing for the service and that £1.50 did not reflect what the user had actually been charged. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE SUBSCRIPTION- INITIAL MESSAGE (Paragraph 7.12.4)

"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 made reference to complainant examples as follows:

Example 1

The Executive submitted that the text message log provided by the Service Provider indicated that the complainant had sent the user text message 'CSIA' to shortcode 81415 and then received a text message charged at £1.50 that read as follows:

“Great news weve expanded your Library with NEW ringtones. Games & images. U can now view 30 more items”

The Executive noted that this complainant did not receive a free initial subscription text message but was immediately entered into a chargeable subscription service.

2. The Information Provider stated that, as mentioned previously, this issue had only affected one user. It stated that it was not a widespread issue and that the user had sent in a command activation text message for a service which was set up over a year and half ago whereby full terms were displayed on the advert relating to the service. It stated that this service was obsolete and no longer advertised and that it had removed all obsolete promotions and, moreover, restricted access to the service to just three keywords ‘YES’, ‘ACTIVATE’ and ‘GO’ to ensure that this did not reoccur.
3. The Tribunal considered the evidence and concluded that this user did not receive a free initial subscription text message and it followed that this user had not received the information required under the Code. The Tribunal upheld a breach of paragraph 7.12.4 of the Code. However, the Tribunal found that this was an isolated technical breach and therefore decided not to take into account this breach of paragraph 7.12.4 of the Code when setting sanctions.

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 made reference to a number of complainant message logs that indicated that, although free reminder text messages had been sent, by the time they were received, users had already spent £24 with the service.
2. The Information Provider stated that it believed that it had misunderstood the ruling when writing its software code in relation to reminder text messages.

It stated that it had set the reminder text messages to all users that had been registered for four weeks or more or had who had spent £20. It stated that that the logic that it had in place, had a small flaw, in that there was a window where a user could register to the service and be charged £24 before receiving a monthly reminder text message.

It stated that this flaw would only occur once to a select group of users on their first monthly reminder and to a select set of users where they had been charged £12 in the first calendar month of registration.

It stated that it had now corrected this by checking every day if any user has been charged £20.

3. The Tribunal considered the evidence and noted the breach was admitted by the Information Provider. It concluded that, on the basis of the complainant message logs, a subscription reminder text message was not sent to complainants after they had spent £20 (and over) with the subscription service as required under the Code. The Tribunal decided to uphold a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

SANCTIONS

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

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 in its operation of the service.
- Subscription services have generally been brought to the attention of the industry and the Tribunal felt that insufficient care had been taken in relation to the operation of the service.

In mitigation, the Tribunal noted the following factors:

- The Information Provider did co-operate with PhonepayPlus.
- The Information Provider has provided refunds to affected users.

The revenue in relation to this service was Band 2 (£250,000-£500,000).

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

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

- A Formal Reprimand;
- An £40,000 fine;
- The Tribunal ordered the Information Provider to seek compliance advice in respect of this service within two weeks of the publication of the Tribunal's decision, such advice to be implemented to the satisfaction of the Executive within two weeks of it being given.
- The Tribunal also ordered that 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.