

• THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday, 12 November 2009
TRIBUNAL SITTING No. 40 / CASE 2
CASE REFERENCE: 811536/AM

Information provider:	Enhanced Network Services Ltd, Cheshire
Service provider:	Dialogue Communications Ltd, Sheffield
Type of service	Missing car log book service – Mobile-based reverse-billed SMS
Service title:	Missing car log book service
Service numbers:	84010
Cost:	£1.50 per message
Network operator:	All Mobile Network Operators
Number of complainants:	19

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 19 complaints from consumers regarding the receipt of an unsolicited reverse-billed text message on 21 May 2009 which stated as follows:

"If you have purchased a car online between 10/05 & 11/08 and are missing a log book call 08442274004, we may be able to help. For our cust svcs call 08715629999"

The service was operated by the Information Provider and was the initiative of Stockport Car Rental Ltd (SCR). SCR sold 'executive-fleet' vehicles without their log books, meaning that the seller would have to retain the vehicle for a minimum period of time before it could be sold on. The service offered buyers who had bought an 'executive-fleet' vehicle online the opportunity to have their missing log books sent to them in the post. According to the Information Provider, the cost of the text message was intended to cover the cost of sending out the log books.

During the course of its investigation, PhonepayPlus established that, despite SCR having approximately 2,000 consumer log books to forward on, the Information Provider obtained an opt-in list from SCR that contained 19,904 mobile phone numbers to which the reverse-billed message was sent. The Information Provider submitted that the opt-in list was obtained in good faith, but accepted that it was not accurate and that users who were not buyers of vehicles had been included in the list. The complainants stated to have received an unsolicited text message with no pricing information which cost £1.50.

(i) The service

- The service was operated and provided by Enhanced Network Services Ltd (the 'Information Provider').
- The Service Provider contracted with BT agilemedia, which had contracted with the Information Provider. The Information Provider had contracted with Stockport Car Rentals ('SCR'), which had provided it with the opt-in list and requested that the text message was sent to its customers.
- How the service was supposed to work (the service model according to the Information Provider):
 - a. The service was intended to offer people who had bought vehicles online the opportunity to have their missing log books sent to them in the post. The cost of the £1.50 reverse-billed text message was intended to cover the cost of sending out the log books.
 - b. A database of subscribers who had recently purchased cars online was created by SCR.
 - c. A reverse-billed text message was then sent to that database of users, prompting them to call an 0844 number (costing 5p per minute) to leave some personal information to obtain their log book.

(ii) The Opt-in list

- The Executive noted that the opt-in list contained 19,904 mobile phone numbers to which the reversed-billed text message had been sent, despite the fact that SCR only had approximately 2,000 log books that they wished to forward onto their customers.
- The Information Provider stated they had obtained the opt-in list from SCR in good faith and had been informed by their client that the list consisted of buyers of vehicles who may still be waiting to receive their log books. They further stated: "*Sadly the database that was used was not accurate and users that were not buyers of vehicles were included in their number listings*"
- The Service Provider instigated its own investigation and stated:
 - I. *"It became apparent that some MSISDN's (mobile phone numbers)[sic] were obtained by users enquiring through other related websites and who had not even purchased a car. ENS have been unable to get exact information from SCR as to where each of the MSISDN's in the list came from" and " It became clear that there were issues with the data, message content and opt-ins for charging consumers. All parties agreed that we should immediately progress a full refund process with the UK operators."*
 - II. *"The messages were picked up by Dialogue support teams and escalated to myself 30 minutes after the single broadcast on Thursday 21st May 2009. We*

immediately suspended the accounts ability to send PSMS messages based on the concerns about the messages that were sent”.

(iii) 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 23 September 2009 to the Service Provider, raising potential breaches of paragraphs 5.2, 5.4.1b, 5.7.1 and 5.8 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) (‘the Code’). The Service Provider provided Information Provider pass-through forms on 29 September 2009. The Information Provider pass-through was granted by the Executive and the breach letter was re-issued on 2 October 2009. A full response was submitted by the Information Provider on 9 October 2009.

The Tribunal made a decision on the breaches raised by the Executive on 12 November 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 Regulation 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, 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 known as the ‘soft opt-in’).

It submitted that all of the 19 complainants stated they had received the unsolicited reverse-billed text message in relation to a service they had not signed up to. The Executive submitted that the 19,904 text messages sent to consumers, costing £1.50 per text, had been unsolicited communications for the purposes of direct marketing.

The Executive noted that the Information Provider had stated that the opt-in list obtained from its client SCR should have been a valid list of website users who had purchased vehicles online. However, following the Executive’s evidence that consumers had not purchased a vehicle online or had a log book outstanding, the Information Provider confirmed that the opt-in list it had obtained from its client had not been accurate and users who were not buyers of vehicles had been included in the list.

The Executive referred to the Service Provider's own investigation into the service that had revealed that some of the mobile phone numbers had been obtained by users enquiring through other related websites and, therefore, did not belong to those people who had purchased a car. Furthermore, the Information Provider had not been able to get exact information from SCR as to the origins of each phone number in the opt-in list.

The Executive said it was of the opinion that the complainants' insistence that they had not opted into the service, nor provided their consent to receive the text message, suggested that consumers' mobile phone numbers were used without direct or implied consent, and had been used to charge consumers a fee for the service to which they had never agreed.

The Executive submitted that, since there was no evidence of consumers consent prior to issuance of the text message, the message appeared to have been sent in contravention of paragraph 22(2) of the Regulations.

2. The Information Provider accepted that it had been involved in a campaign that involved the sending of reverse-billed service text messages to consumers who, it subsequently transpired (and despite assurances from SCR to the contrary), had not opted into receiving such communications.

It stated that these issues had arisen due to the actions of its client, SCR, which it had contracted with to provide certain media services. The Information Provider stated that, although it had not had any prior dealings with SCR, the proprietor of SCR had already been known to it and it had had no reason to suspect that this service would not be a legitimate one. However, it was now apparent that the data submitted to it by SCR for the purposes of the service had been totally inaccurate. The Information Provider stated that it had since terminated all commercial dealings with SCR.

The Information Provider asked that it be noted that the number of service text messages actually delivered to users (on 21 May 2009) had been 14,824, and not 19,904 as suggested by the Executive (this latter number representing the actual volume of mobile phone numbers on the list provided by SCR).

The Information Provider stated that its role in this case had been limited to sending out service text messages to the mobile numbers on the opt-in list provided by SCR (and also collating any customer responses to enable SCR to process them). It stated that it had not purchased this list from SCR and that it had been supplied to it as part of these arrangements.

The Information Provider stated that at no stage was this designed to be a subscription-based service or a source of ongoing revenues for the Information Provider; rather, this was a one-off communication intended to enable people to access their vehicle log books in return for a small charge.

The Information Provider stated that it had taken this matter very seriously and had invested its own financial and operational resources to redress the situation. The Information Provider stated that it had made no revenue from the service, but rather had lost money by ensuring that all customers received refunds.

The Information Provider stated that, prior to receiving the opt-in list from SCR and in accordance with its compliance policy at that time, it had discussed with SCR on several occasions the contents of the opt-in list and how it had generated the numbers included on it. The Information Provider said it had obtained verbal and written assurances from SCR that the customers whose numbers were on that list had previously purchased vehicles and provided their consent to receive further communications.

It stated that it was not given any reasonable grounds to suspect that those customers on the list had not opted into receiving communications, nor that SCR did not have access to log books for each, and every one, of those customers. The Information Provider stated it was not, therefore, aware at that stage that SCR had only 2,000 log books.

The Information Provider stated that it was on the basis of the assurances received from SCR that it decided, in good faith, to proceed with the service. It only became apparent that the assurances it had been given were entirely false when it (together with the Service Provider) carried out an internal investigation into the situation (i.e. after the service text messages were sent out).

3. The Tribunal considered the evidence and concluded that, on the basis of the complainants' evidence and the lack of any evidence to confirm the validity of the opt-in list, complainants had not consented to receive the reverse-billed text message. It followed that there had been a breach of the Regulations and the Tribunal noted this had been accepted by the Information Provider. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO FAIRNESS (UNFAIR ADVANTAGE) (Paragraph 5.4.1b)

“Services and promotional material must not:

b take unfair advantage of any characteristics or circumstances which may make consumers vulnerable.”

1. The Executive submitted that all complainants asserted that a £1.50 charge had been reverse-billed from their mobile phone, without their prior consent.

It submitted that some consumers' mobile numbers were therefore used without their direct or implied consent, and had been used to charge a fee for a service that they had never agreed to receive. Consequently, the Executive submitted that the circumstance that had made consumers vulnerable was that their details were held by the Information Provider, who had the facility to charge them at will using reverse-billed text messages, and that the Information Provider had taken unfair advantage of this circumstance.

2. The Information Provider stated that as described above, it had processed SCR's request to send out service text messages to the mobile phone numbers provided to it. This had been in good faith and on the understanding that all those receiving the service text message had given their prior consent to receiving that communication.

The Information Provider stated that, had the opt-in list been accurate and those on it given appropriate consent to receiving communications, the proposed operation of the log book service was, in its opinion, a genuine one, based on the circumstances in which individuals had first purchased their vehicles. There was never any intention to charge people "at will" for this service. On the contrary, the Information Provider's understanding was that any costs incurred for use of the service (made up of the service message and any costs involved in calling the automated 0844 number) had been intended to reflect the potential value to them in being able to receive a log book for their vehicle.

The Information Provider stated that there never was any intention on its part to deliberately take unfair advantage of consumers, as evidenced by its actions (along with the Service Provider), in taking down the service immediately upon becoming aware of the problems encountered by customers (within 30 minutes of the text messages being sent) and taking extensive steps to ensure that all those affected received a refund.

3. The Tribunal considered the evidence and concluded that consumers had been made vulnerable by virtue of the fact that their details were held by the Information Provider that had the facility to charge them at will using reverse-billed text messages, and the Information Provider had taken unfair advantage of this circumstance by sending them reverse-charged messages without their consent. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

ALLEGED BREACH THREE 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."

The Executive submitted that the complainants stated that the first they heard of this service was when they received a chargeable text message that read as follows:

"If you have purchased a car online between 10/05 & 11/08 and are missing a log book call 08442774004, we may be able to help. For cust svcs call 08715629999"

It submitted that complainants stated this text message cost recipients £1.50 and this had been confirmed by the Service Provider. The Executive submitted that no pricing information had been provided to users prior to incurring a charge.

2. The Information Provider stated that it was never its intention for the service to be a subscription-based service, or to be able to generate any ongoing revenue from it. Nonetheless, the failure to provide people with information of the £1.50 charge was a serious failing, and one that it had since sought to address as fully and as quickly as possible.
3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints and the lack of any evidence that consumers had received any pricing information before they received the reverse-billed message, that users had not

been fully informed of the cost of using the service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 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. 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 the text message received by complainants had failed to provide the identity of the Service Provider or the Information Provider and, as this was the only text message complainants had received, this information should have been clearly stated.
2. The Information Provider accepted that it had failed to comply fully with its obligations under the Code to provide its name, or that of the Service Provider (Dialogue), in the body of the text message.

It stated that its intention in providing a customer service number had been to allow any individual who required further information to be able to call directly. The effectiveness of this approach was demonstrated by the fact that all customers who called to complain about receipt of the text message received a full explanation, assurances that they would not be contacted in this manner again and a payment of £3, which went beyond the actual amount (£1.50) they had been charged for that text message.

3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints, the contents of the reverse-billed text message and the Information Provider's acceptance of the alleged breach, consumers had not been provided with the identity of the Information Provider or the Service Provider. 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 service was valueless to the vast majority of consumers who had received it – the text message was received by many individuals who had not bought a vehicle from SCR.
- The behaviour of the Information Provider was reckless in allowing unsolicited reverse-billed text messages to be received by consumers who had not purchased a vehicle

(and therefore had no need for the service) and who had not consented to receiving reverse-billed messages.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive. The Tribunal noted the Information Provider's comments during the Informal Representations that it had relied on assurances of consumer opt-in from SCR and, therefore, the breach had been caused by SCR. However, the Tribunal concluded this could not be considered as a mitigating factor because the breach had not been caused by a third party beyond the Information Provider's control, but instead by the Information Provider's client over whom it should have had control and for whose actions it had responsibility. The Tribunal commented that proper due diligence by the Information Provider would have revealed the defects in the opt-in list and avoided the most serious breaches.
- The Information Provider (in conjunction with the Service Provider) had offered refunds to all users who had received a reverse-billed text message.

The revenue in relation to this service was Band 5 (£5,000-£50,000).

In assessing the seriousness of case in the round, the Tribunal noted the extent of the refunds that had been made by the Information Provider, and also that some complainants had been refunded twice the sum they had been charged. It also commented that there appeared to have been no deliberate intent on the part of the Information Provider to charge consumers without their consent.

Having taken into account the aggravating factors, mitigating factors and the other assessment criteria listed above, 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 number and seriousness of the Code breaches, and the revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A fine of £5,000.