

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 19 March 2009 TRIBUNAL SITTING No. 23 / CASE 4

CASE REFERENCE: 765298/DM

Service provider & area:	Ericsson IPX AB, Sweden
Information provider & area:	Funmobile FZ-LLC, Dubai and Hong Kong
Type of service:	Subscription service – Ringtone Downloads
Service title:	Funmobile – Fun for Life
Service number:	88838
Cost:	£4.50 connection fee; £4.50 per week
Network operator:	Mobile Operators
Number of complainants:	155

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

The PhonepayPlus Executive ('The Executive') received 155 complaints relating to the Funmobile 'Fun for Life' (funmobileuk.com and uk.goringtonego.com) mobile content download subscription service operated by the information provider on shortcode 88838. Complaints raised included difficulties with the operation of the STOP command, the receipt of unsolicited chargeable SMS text messages and misleading promotional material due to use of the header 'complimentary ringtones' on the registration page which many complainants had believed meant there was a completely free ringtone available, when in fact they had been charged upon registering with the service. Complaints were also received stating that children had been particularly misled by the promotional material. A small number of complaints stated that downloads had not been delivered and/or that they could not get through to customer services despite several attempts.

(i) The promotional material

The service was operated and charged via shortcode 88838 and was promoted on the funmobileuk.com and uk.goringtonego.com websites. These websites were different in style and layout, yet when accessed by consumers would initiate the same service.

According to some complainants, internet pop-up window messages promoting the service appeared on websites such as 'craftbits.com', 'music.com', 'addictinggames.com' and 'ultimate-guitar.com'. Some complainants also referred to web-based quiz competitions relating to 'Hannah Montana' and 'Titanic Facts'. When users entered their mobile number on the internet pop-up window the registration process for the service would be initiated.

The uk.goringtonego.com website included a free ringtone offer. At the foot of the webpage for registration, below the terms and conditions it was stated "*Free Ringtone Offer*" which invited users to "*send 'GIFT' to 88838*" to get a free ringtone. The terms and

conditions for this offer stated: *“No sign up necessary to receive a FREE ringtone”* and *“this offer applies solely to one polytone chosen by Funmobile and is wholly separate from any other offers of content on this page.”*

(ii) The service

The service offered a range of ‘downloadable’ entertainment content with a particular emphasis on ring tones. Consumers were invited to subscribe into this service by paying a weekly subscription fee of £4.50. For all new subscribers a further ‘one off’ registration fee of £4.50 was incurred. A total of £9.00 was charged for all new users upon registration.

The registration process involved the consumer entering their mobile number on to the funmobileuk.com and goringtnego.com web pages or on to the internet pop up window advertisement. The service supplied the consumer with a free message that instructed the user as to the next steps:

“FreeMsg: PIN is [xxxx]. Pls enter @ funmobileuk.com or reply OK to 88838. CS 08082341402”

It appeared that, following the above instructions, when the user sent a confirmatory ‘OK’ text the service supplied a free subscription initiation message which stated:

“FreeMsg: U have joined Polytone Club for 450p weekly until u send STOP PL to 88838. CS: 08082341402. Join BABE club for 450p/wk for Unlimited Wallpapers!”

It appeared that a series of chargeable MT messages (usually six in total) were sent out by Polytone Club to consumers in the first instance, one of which informed the recipient that s/he would receive their order/download in due course:

“Thanks for ur order! U will receive ur order(s) shortly. Type RING and text to 88838 for Unlimited Ringtone Downloads & More! 450p/weekly”.

It appeared from message log information that had been provided, as well as the complainant reports that had been received, that no ringtone or download was in fact ever sent to the consumer.

(iii) Investigation under Standard Procedure

The Executive monitored and tested the service (1 July 2008 – 3 July 2008) in response to the complaints that it had received.

In a formal breach letter sent to the service provider dated 7 November 2008, the Executive raised potential breaches of paragraphs 3.3.3, 5.4.1a, 5.12, and 7.12.5 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008) (“the Code”). Upon receiving the breach letter, the information provider contacted the Executive directly on 27 October 2008 requesting a four week extension to the stipulated deadline. A four week extension was refused but the deadline was extended to 14 November 2008.

A formal response to the Executive’s breach letter was provided by the information provider (responding on behalf of the service provider) on 14 November 2008, together

with a signed information provider undertaking form requesting that PhonepayPlus should deal directly with the information provider.

The service provider did not subsequently provide an undertaking form and therefore the Executive sent an e-mail on 20 November 2008 confirming that the request had been rejected.

The Tribunal made a decision on the breaches raised by the Executive on 19 March 2009 having heard informal representations from the information provider (on behalf of the service provider).

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 was of the view that there were a number of technical ‘issues’ which appeared to have resulted in a breach of paragraph 3.3.3 of the Code on the following grounds:

Ground 1

When testing the service, the Executive identified a separate promotion on the goringtonego.com website of a “free ringtone” download which was obtained using the keyword “GIFT”. When the Executive sent the keyword to promoted shortcode 88838, no ‘free’ ringtone was received. The Executive also questioned whether any ringtones had in fact been received by users who had subscribed into the service. It appeared to the Executive that a confirmation message was sent out following registration but no actual download was received in return. The confirmation message was:

“Thanks for ur ordr! U will receive ur order(s) shortly. Type RING and text to 88838 for unlimited Downloads & More! 450p/weekly”.

The Executive also submitted various complaints it had received which suggested that no ringtones were received even though a charged message had been sent saying the “order” would be received shortly. The Executive was therefore of the view that the service provider had not used all reasonable endeavours to ensure the service was capable of delivering the ringtones in relation to the ‘GIFT’ promotion and was therefore in breach of paragraph 3.3.3 of the Code.

Reason 2

In relation to the goringtonego.com website, the Executive inputted the mobile number of a monitoring phone used by PhonepayPlus onto the registration page. However, no PIN code was in fact ever received and therefore, in the Executive’s view, this amounted to a breach of paragraph 3.3.3 as the service provider had not used all reasonable endeavours to ensure the service was of an adequate technical quality.

Reason 3

The Executive stated that complainants had allegedly experienced difficulties in connecting with the customer care services operations; that telephone lines were consistently busy, and where the caller was re-directed to a recorded message and a voicemail service where they could leave details of their enquiry, calls were not returned and no further help or advice was provided..

The Executive added that when it had successfully terminated the service following the instructions given on the recorded message, no confirmation text message was received as stated.

2. The information provider addressed the three grounds separately on behalf of the service provider:

Ground 1

In relation to the "GIFT" promotional offer, the information provider stated that Funmobile would deliver a free ringtone to the user's handset within 30 minutes of receipt of the keyword. It stated that each user could only enjoy the GIFT offer once and a free reminder message was issued if a user sent the keyword more than once. The information provider asserted it had checked the GIFT function and found it to be operating normally.

Ground 2

The information provider explained that the failure to deliver the PIN code to the PhonepayPlus monitoring phone was as a result of an unexpected connection error from the user's mobile network operator. The information provider said that its records showed the relevant SMS message containing the PIN was issued to the user (the Executive) on 13th October 2008 but the Executive had not received the PIN message within the expected time frame. The information provider referred to the message log for the relevant MSISDN as evidence the message was issued but failed to be delivered.

Ground 3

The information provider stated that it had checked that its customer services hotline was operating normally. It admitted that its voicemail service had experienced a system error in October 2008 (which was the month before the information provider's response to the formal breach letter dated 14 November 2008 on behalf of the service provider). It stated that it would continue to monitor the Customer Service system more closely to ensure the system was always operating normally.

3. The Tribunal considered the evidence in respect of each ground submitted by the Executive:

Ground 1

The Tribunal did not consider that there was sufficient evidence to prove, on balance of probabilities, that the service had failed to deliver free ringtones due to technical issues. Although the Executive said it had tested the free ringtone offer and had not received a ringtone to its mobile phone, the Executive's evidence on this issue was unclear and so the Tribunal decided to disregard it. The Tribunal reviewed the

complainants' evidence on this ground and concluded that it appeared that complainants' were confused as how the site operated, but this did not show, on the balance of probabilities, that the service was not of adequate technical quality. In most cases, complainants who said they did not receive a download straight to their mobile phone were referring to the "complimentary" ringtone (which had to be downloaded) rather than the "free ringtone". Other complainants who mentioned the 'free' ringtone had complained it was not really free, rather than that they did not receive it. The Tribunal therefore decided not to uphold a breach of paragraph 3.3.3 of the Code on this ground.

Ground 2

The Tribunal concluded from the evidence that the service provider had used all reasonable endeavours to ensure the PIN code was sent to users during the registration process. The Tribunal considered that there was no evidence to suggest that the Executive's failure to receive the PIN was anything other than an isolated incident. The Tribunal therefore did not uphold a breach of paragraph 3.3.3 of the Code on this ground.

Ground 3

The Tribunal considered all the evidence, including the acceptance by the information provider that a system error had occurred in relation to its voice mail service. The Tribunal concluded that more could have been done to ensure this aspect of the service was of an adequate technical quality. The Tribunal therefore upheld a breach of paragraph 3.3.3 of the Code on this ground.

DECISION: Upheld in relation to ground 3

ALLEGED BREACH TWO

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 promotion and the service were, or were likely to be, misleading on the following grounds:

Ground 1

The Executive submitted that the promotional websites and internet pop-up windows had misled consumers to believe that a free ringtone was available to them as a result of use of the heading 'Complimentary Ringtones'. The Executive believed this was compounded by the references on goringtonego.com to a "Free Ringtone Offer" which caused further confusion. The Executive believed that use of the term "Complimentary ringtones" caused confusion by misleading consumers into thinking the service was in some way free. The Executive also referred to various complainants who had alleged that they had not been made aware that the service was a subscription-based service for which they would be charged.

Ground 2

The Executive stated that the service also appeared to be advertised elsewhere on the Internet, through the use of 'pop up' windows which appeared on a variety of

different websites and a range of web related competitions. These 'pop up' windows referred prominently to "Complimentary ringtones" which the Executive submitted were misleading. In the Executive's view the misleading nature of these 'pop up' windows was exacerbated by such competitions inferring that the participant was entitled to claim a free ringtone upon successful completion of the quiz. The Executive referred to some complaints received which were in support of this ground.

Ground 3

The Executive said it was concerned about the apparent confusion caused by the automated cancellation confirmation messages sent to consumers following the sending of the STOP command to the service. It appeared that two mobile terminating messages were automatically sent depending on the STOP request sent in the first instance. If the consumer terminated the service by inputting 'STOP' the following message was sent:

'FreeMsg: All ur memberships have been cancelled. CS: 0808 234 1402'

If, on the other hand, the participant sent the advertised STOP command 'STOP PL' a different automated response was received:

'FreeMsg: Ur Polytone Club membership has been cancelled Type RING and text to 88838 to get Unlimited Ringtone Downloads & More! 450p/weekly'.

In this instance it appeared that cross promotional messages were being included within the automated response. The Executive believed that the inclusion of this information was potentially misleading because consumers would believe that they were still subscribed but to a different service (e.g. Ringtone Downloads/ Babes Wallpaper Downloads/Celeb Pics etc).

Secondly, the Executive stated that some consumers perceived that the inclusion of another 'club/service' was somehow a free accompaniment by virtue of them having subscribed and registered into the 'Polytone Club.'

Ground 4

The Executive raised concerns about the use of cross promotional messages being included in the series of service messages sent out to consumers immediately following registration. It stated that after registration a user is informed that he/she has joined the Polytone Club and invited to respond by replying with the word 'OK'. On replying 'OK' the user is sent a free message giving pricing, opt-out and contact information. However, an additional six chargeable messages were also sent which included promotions of three separate 'clubs'; Babes Wallpaper Downloads/ Ringtones Downloads and Celeb Pics. The Executive was concerned that the messages failed to indicate that these services were wholly separate to the Polytone Club service. The Executive considered that the manner in which the messages were sent was potentially misleading to recipients; they appeared on first reading to be 'optional' extras to the subscription they had already joined, rather than additional promotions advertising a range of different subscription services, all of which would cost extra.

2. The information provider stated that it disputed that the promotion and service were in breach of paragraph 5.4.1a of the Code;

Ground 1

The information provider stated its belief that the use of the word 'complimentary' was allowed. It stressed that the Code of Practice 11th Edition, paragraph 5.11 stated '*no premium rate service or product obtained through it may be promoted as being free*' but use of the word "complimentary" was not expressly prohibited. The information provider added that it had no intention of misleading consumers and had added the words "with paid subscription" in all its web pages. The information provider stated that to improve its existing promotional materials it had now placed the pricing in a more prominent location. It also stated, during informal representations, that it had now stopped using the "free ringtone" offer completely and intended to replace the term "complimentary" with a different word so as to eliminate any possibility of misleadingness.

Ground 2

The information provider response to ground 1 also in essence covered ground 2 i.e. that according to the Code of Practice 11th Edition, paragraph 5.11, "*No premium rate service or product obtained through it may be promoted as being free*" and that but use of the word 'complimentary' was not specifically prohibited. The information provider stated that it had no intention of misleading consumers and had added the words "with paid subscription" in all its web pages. The information provider stated that in order to improve its existing promotional materials it had now placed the pricing in a more prominent location.

Ground 3

The information provider did not provide a specific response to this ground in its response to the breach letter. During information representations, it said that it intended to remove cross promotions in its STOP confirmation messages.

Ground 4

The information provider did not provide a specific response to this ground.

3. The Tribunal considered the evidence decided to uphold a breach of paragraph 5.4.1a on grounds 1, 2 and 4 for the following reasons:

Ground 1

The Tribunal concluded that the use of the word 'complimentary', in this context, was likely to mislead (and, based on the evidence, had actually misled) consumers into thinking they would be receiving a free ringtone by inputting their mobile numbers into the box on the website or pop-up. The Tribunal agreed with the Executive that this was compounded by references to the "free ringtone" offer on goringtonesgo.com. The Tribunal considered that in relation to the funmobileuk.com website the likelihood of consumers being misled was further compounded by the lack of any requirement for the consumer to take any active step, such as ticking a box, to confirm they had read and accepted the terms and conditions, and in particular the pricing information (full details of which were on a different page). The Tribunal upheld a breach of paragraph 5.4.1a in relation to ground 1.

Ground 2

The Tribunal considered all the evidence, and concluded that the use of the word 'complimentary' in the pop-up windows was likely to mislead (and, based on the

evidence, had actually misled) consumers into thinking they would receive a free ringtone by inputting their mobile numbers. The Tribunal considered that in relation to the 'pop-up' windows this was compounded by the lack of any pricing information. The Tribunal noted the number of complainants specifically referring to this method of entry via the internet pop-up windows route was high. The Tribunal upheld a breach of paragraph 5.4.1a in relation to ground 2.

Ground 3

The Tribunal did not consider that the cross promotion contained in the cancellation confirmation message would mislead the majority of consumers into believing that they had been subscribed into another totally different service. However the Tribunal noted that a small number of complainants appeared to be confused or concerned that their subscription had not been completely terminated, and it therefore welcomed the fact that the information provider had stated in its informal representations that it would remove all cross-promotions from future cancellation confirmation messages. The Tribunal decided not to uphold a breach of paragraph 5.4.1a on this ground.

Ground 4

The Tribunal considered the evidence, including the message logs (noting the nature and timings of delivery of the first six chargeable messages), and the complainants' comments and concluded that it was likely that recipients would believe the cross promotional messages referred to were optional extras which they could enjoy as part of the existing subscription service (rather than promotions relating to completely separate services for which they would pay an additional weekly charge). The Tribunal therefore considered that these cross promotions were likely to mislead consumers. The Tribunal upheld a breach of paragraph 5.4.1a of the Code on this ground.

DECISION: Upheld in relation to grounds 1, 2 and 4

ALLEGED BREACH THREE

INAPPROPRIATE PROMOTIONS (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. The Executive claimed that the 'pop-ups' used to promote the service were being targeted at websites, including online competitions, which were specifically aimed at the younger end of the teenage market. The Executive raised concerns that the potentially misleading use of the word 'complimentary' in the pop-up messages was compounded by the apparent offer of a free ringtone for users who completed a quiz competition.

The Executive noted that the age requirements for uk.goringtonego.com and funmobileuk.com were stated to be 18 and 13 years respectively. It submitted that the way both services had been promoted, in the context of the quiz competitions,

meant that teenagers were likely to interpret the service as being 'free' rather than fully appreciating or understanding the costs associated in using the service or the fact that the service was subscription-based. It suggested that harm would be caused to children as a consequence of where the adverts and pop up windows appeared. The Executive referred to some complaints in support of this ground and stated that in its opinion a potential breach of paragraph 5.12 of the Code had occurred.

2. The service provider and information provider did not provide any specific response to this breach in their response to the breach letter. The information provider commented during the informal representations that greater monitoring of third party affiliate websites was now being undertaken to ensure that such promotional activity did not reoccur. In particular, it stated it had told its third party affiliates not to use a free ringtone offer in connected with quizzes or competitions. It also stated that the 'pop-ups' had been changed since the initiation of the preliminary investigation to make the pricing more prominent.
3. The Tribunal considered the way in which the service had been promoted at the time the complaints arose and concluded that the service provider had not used all reasonable endeavours to ensure that the service was not promoted in an inappropriate way. The Tribunal found that the service had been promoted inappropriately by virtue of it having been promoted on websites which were likely to have a high proportion of children viewing and/or using it. The Tribunal felt it was inappropriate to promote the service to children given the unclear pricing information in the promotions and on the goringtonego.com and uk.funmobile.com websites themselves. The Tribunal therefore upheld a breach of paragraph 5.12 of the Code.

DECISION: Upheld

ALLEGED BREACH FOUR

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 stated that from message log information it had received, the reminder messages sent to consumers (*“ U are subscribed to Polytone Club for 450p weekly. Help 0808 234 1402 STOP PL”*) was charged at £1.50 per text. The Executive was of the view that a breach of paragraph 7.12.5 of the Code had occurred.
2. The information provider initially stated that the message considered by the Executive to be a reminder message was merely a 'renewal message' for the weekly subscription fee and that was the reason users received three charged messages in total for the weekly subscription fee at £1.50 each. During the informal representations, the service provider admitted that no free subscription messages had been sent at the time the complaints arose, but such a message was now in place.

3. The Tribunal considered the evidence including the message logs and concluded that no free reminder messages had been sent by the service. The Tribunal noted the information provider's admission during the informal representations that no free reminder messages had been sent. The Tribunal therefore upheld 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:

- There was material harm caused to consumers as PhonepayPlus had received 155 complaints in relation to this service;
- The cost paid by individual consumers was high (especially since some users were children): there was an initial charge of £9 to cover the registration fee and the first week's subscription. The Tribunal noted that the service had charged complainants on average approximately £20.00; and
- Concealed subscription services have been singled out by PhonepayPlus for criticism.

The Tribunal reviewed the service provider's breach history but decided that the one previous case was not an aggravating factor in this particular case.

The Tribunal noted that the information provider had made initial changes immediately following the initiation of the preliminary investigation undertaken by the Executive and had indicated that further changes to the promotion and service were already in progress. However, whilst the Tribunal welcomed these changes, it noted that this was not a mitigating factor because the changes had been made after the Executive had notified the information provider of its concerns. There were no other mitigating factors for the Tribunal to consider.

Taking into account the aggravating factors, the scale and materiality of the promotional campaign as well as the number of complaints and the inappropriate promotion to children, 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 £75,000 fine; and
- The Tribunal ordered that claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.