

## THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

### TRIBUNAL DECISION

**Thursday, 15 October 2009**  
**TRIBUNAL SITTING No. 38 / CASE 1**  
**CASE REFERENCE: 793734/DL**

Information provider:	Expanding Vision Limited, Lancaster, UK
Service provider:	2ergo Limited, Manchester, UK
Type of service:	Subscription service/ Web2Mobile SMS service.
Service title:	'txt1000.com'
Service numbers:	83023
Cost:	£3 per week
Network operator:	All Mobile Network Operators
Number of complainants:	7

### **THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.9.3 OF THE CODE**

#### **BACKGROUND**

The Txt1000 service was originally considered by a Tribunal on 20 November 2008 and breaches of paragraphs 5.2, 5.4.1a and 5.8 of the Code were upheld. The Tribunal decided to impose sanctions on the Information Provider, one of which was to remedy the breaches by ceasing to promote the service pending receipt and implementation of compliance advice given by the PhonepayPlus Executive (the 'Executive'). The Information Provider subsequently sought compliance advice which was provided by the Executive on 22 December 2008, and further advice was provided on 21 April 2009.

During the course of July 2009, the Executive received seven complaints from members of the public relating to the Txt1000 service operating on shortcode 83023. Complaints received indicated that a new promotional text message had been issued in relation to the service, which was operated by the Information Provider. However, none of the transcripts supplied to the Executive for compliance advice appeared to have been used in this promotional campaign. Instead, two promotional text messages which had not been provided to the Executive for compliance advice were issued to consumers via free-to-receive text messages.

#### **The Investigation**

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.9.3 of the Code.

The Executive sent a breach letter dated 7 August 2009 to the Information Provider raising a potential breach of paragraph 8.9.3 of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code'). The Information Provider provided a formal response to the breach letter on 28 August 2009.

The Tribunal made a decision on the breaches raised by the Executive on 15 October 2009 having heard informal representations from the Information Provider and the Service Provider.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

#### BREACH OF SANCTION (Paragraph 8.9.3)

*'The failure of any service provider to comply with any sanction within any reasonable time period imposed on it by PhonepayPlus will result in:*

- a. *PhonepayPlus issuing a direction to all relevant network operators requiring suspension of access to some or all of the numbers allocated to the service provider until full compliance with PhonepayPlus sanctions has been achieved,*
  - b. *a further breach of the Code by the service provider, which may result in additional sanctions being imposed.'*
1. The Executive submitted that the 'Txt1000' service had continued to operate from 20 November 2008 to the present day. It submitted that the service had been subject to adjudication on 20 November 2009 and sanctions that had been issued as a result. The Executive submitted that one sanction had read as follows: *"remedy the breaches that were upheld by ceasing forthwith to promote the five brands in question, pending receipt and implementation of compliance advice"*.

The Executive made reference to complainants' comments and submitted that there had been breaches of paragraph 5.2 (Legality) and 5.4.1a (Fairness – Misleading) which had not been remedied by ceasing forthwith to promote the five brands in question, pending receipt and implementation of compliance advice. The Executive submitted that compliance advice was not sought regarding the specific 'Txt1000' promotional text message transcripts that were issued to consumers in the last couple of weeks of July 2009 and as such no compliance advice has been provided, nor implemented by the Information Provider. It submitted that where compliance advice had been given in general terms it was not implemented so as to remedy all the upheld breaches.

The Executive submitted that the ongoing non-compliant operation of the 'Txt1000' service was a failure of the Information Provider to comply with a sanction within a reasonable time period and therefore was a breach of paragraph 8.9.3b of the Code.

2. Information Provider's response in relation to 5.2

The Information Provider stated that prompt and appropriate action was taken in response to the compliance advice received, pursuant to the Tribunal adjudication Case Ref 759300 in December 2008. It stated that around 10% of the relevant marketing database was removed in order to proceed with complete confidence in relation to verifiable evidence of opt-in.

Information Provider's response in relation to 5.4.1a

The Information Provider made reference to email correspondence between itself and the Executive and stated that prompt changes were made in order to comply with each specific recommendation of the Executive Compliance team, pursuant to the Tribunal adjudication Case Ref 759300. It also stated that compliance advice continued to be sought in relation to similar 'web2mobile' sms services and brands, and this advice was also followed.

The Information Provider stated that it was not its role to specifically reference an intention to apply compliance advice generically across multiple services. It was, on the other hand, the responsibility of the Executive to make absolutely clear the scope and relevance of all compliance advice requests sought, and responses received, to all relevant future activities. It stated that it was abundantly clear that compliance advice had been sought and followed on at least five separate occasions, each one having material relevance to the promotions referenced in the Executive's submission, and that in seeking this level of guidance it had in fact gone considerably further than the precisely defined requirements of the Tribunal adjudication Case Ref 759300. The Information Provider concluded that it had therefore felt entitled to send out a further trial promotion, taking into account the advice it had received from the Executive Compliance Team.

3. The Tribunal considered the evidence and noted that during the informal representations the Information Provider had admitted that the actual promotional messages used from 26 July 2009 onwards had not been submitted to the Executive Compliance Team for compliance advice, but instead the Information Provider had sought to rely on advice it had received on the content of different text messages for this service and/or advice in relation to other similar 'web2mobile' services. The Tribunal's view was that since the actual text messages used had not been submitted to the Executive Compliance Team, the Information Provider had not sought (and as a result had failed to implement) compliance advice in relation to its promotions dated from 26 July 2009 onwards. The Tribunal upheld a breach of paragraph 8.9.3 of the Code.

#### **Decision: UPHELD**

#### **SANCTIONS**

The Tribunal took the view that non-compliance with any sanction imposed by a Tribunal is **very serious** and could potentially incur a maximum fine, although the circumstances of the individual case should be taken into account when deciding on which sanctions are appropriate.

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- The behaviour of the Information Provider had been reckless in its approach to its compliance obligations.

There were no specific mitigating factors for the Tribunal to consider. However, taking into account the small scale of the promotion and the lack of material consumer harm as a result, the Tribunal decided not to impose a maximum fine, but instead to impose the same sanctions as had been applied in the original case i.e.:

- Formal Reprimand;
- A further fine of £40,000;
- The Information Provider to remedy the breach by ceasing forthwith to promote the service, pending receipt and implementation of compliance advice.
- 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.