

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 19 March 2009 TRIBUNAL SITTING No. 23 / CASE 3

CASE REFERENCE: 750389/DM

Information provider & area:	Funmobile FZ-LLC, Dubai and Hong Kong
Service provider & area:	mBlox Limited, London
Type of service:	Subscription service – Ringtone Downloads
Service title:	Funmobile – Fun for Life
Service number:	81288
Cost:	£4.50 connection fee; £4.50 per week
Network operator:	Mobile Operators
Number of complainants:	72

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 72 complaints relating to the Funmobile ‘Fun for Life’ (uk.funmobile.com) mobile content download subscription service operated by the information provider on shortcode 81288. 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.

(i) The promotional material

The Funmobile service operating on shortcode 81288 was accessed by consumers via the website uk.funmobile.com. The website offered a “complimentary” ringtone on registration. The service had also been promoted on the internet via search engines and through the use of pop-up windows on various other websites. Before mid-2008 the website had not been widely advertised.

(ii) The service

The service offered a range of ‘downloadable’ entertainment content with a particular emphasis on ring tones. Consumers were invited to subscribe to the 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 therefore charged for all new users on registration, which included the first week’s subscription.

The registration process involved the consumer entering their mobile number on the uk.funmobile.com webpage or on the pop-up window advertisement on a third party

website. The service then sent the consumer a free message which instructed the user as to the next steps:

"From: 81288 Type OK to 81288 to get ur complimentary ringtone @ uk.funmobile.com hurry! Type OK to 81288 before U can get ur complimentary download"

It appeared that, following the above instructions, the user would send a confirmatory 'OK' text enabling the user to receive his/her personalised four digit PIN code which was the 'password' by which the user was then able to activate the service and could obtain the complimentary ringtone/download by accessing the 'My Profile' page on the website.

Consumers would select their complimentary ringtone on the website and 'purchase' it using two complimentary credits. Each user received 6 credits per week.

It appeared that a series of chargeable MT messages (six in total) were sent out to consumers in the first instance, one of which confirmed to the recipient that s/he has been successfully registered:

'From: 81288. You have joined FMVC for £4.50 p/wk until you send STOP to 81288. Join BABE club for £450p/wk for Unlimited Wallpapers! CS: 08082341402.'

(iii) Investigation under Standard Procedure

This case was investigated under the standard procedure. The Executive monitored and tested the service (1 July 2008 – 3 July 2008) in response to a number of complaints that had been received following which the Executive requested information under paragraph 8.3.3 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008) ("the Code") in a letter dated 11 July 2008.

The Executive granted the service provider an extension to the stipulated deadline until Friday 1 August 2008. A formal response was received from the information provider on Saturday 2 August 2008.

In a formal breach letter to the service provider dated 9 October 2008, the Executive raised potential breaches of paragraphs 5.4.1a, and 5.7.1 of the Code. Upon receiving the breach letter the information provider contacted the Executive directly on 14 October 2008 requesting a four week extension be granted. The request was subsequently refused by the Executive.

A further e-mail was received on 22 October 2008, together with a signed information provider undertaking form requesting that PhonepayPlus dealt directly with the information provider. The Executive also received the required service provider undertaking form.

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

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

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 service were misleading for the following reasons:

Ground 1

The Executive submitted that the promotional material used in this instance was potentially misleading; particularly with regard to the emphasis placed on the availability of ‘complimentary ringtones’. The Executive was concerned that use of the words “complimentary ringtones” on both the website and the internet pop-up windows, would cause consumers to be misled into thinking the service (or some part of it) was in some way free. The Executive stated that the problem was exacerbated by the prominent placement of the words “complimentary ringtone” and the distinctive colours used to divert the readers’ attention to the offer. The Executive stated that the pop-ups clearly sought to entice consumers with the complimentary download offer but failed to do enough to make the pricing information clear to consumers. The Executive relied upon various comments made by complainants regarding their experiences.

Ground 2

The Executive also submitted that the problem was being further exacerbated by the ‘confirmatory message’ that the consumer received upon entering their mobile number on the website or pop-up:

‘From 81288 – Type OK to 81288 to get ur complimentary ringtone @ uk.funmobile.com hurry! Type OK to 81288 b4 U can get ur complimentary download.’

The Executive suggested that the content of the message made it a reasonable assumption, from the consumer’s viewpoint, that some sort of ‘physical’ ‘complimentary ringtone/download’ would be received on their handset, whereas no physical ringtone was in fact received. In fact, the ringtone was obtained by successful registration into the service and use of two complimentary credits. The Executive relied upon complainants’ evidence and the message logs which showed that some users had sent several ‘OK’s to the shortcode, presumably because they had not received a ringtone to their phone after sending ‘OK’ the first time. The Executive therefore submitted that the service appeared to mislead consumers into expecting a physical item to be sent direct to the handset on texting the word ‘OK’ to the shortcode.

Ground 3

The Executive was concerned by the apparent confusion caused by the automated responses being sent out to consumers upon initiating the STOP command. The cancellation confirmation messages included cross-promotions for other services:

‘FreeMsg: All ur memberships have been cancelled: Type TONE and text to 81288

to get Unlimited Ringtone Downloads & More! 450p/wk.'

'FreeMsg: Ur WEB membership has been cancelled. Type RING and text to 81288 to get Unlimited Ringtone Downloads&More! 450p/wk.'

The Executive suggested that the inclusion of this information was potentially misleading as it was leading some consumers to believe that they were still subscribed into a totally different service (*Celeb Pics/Babe Club*) from that which they had originally opted out from in the first place (i.e. the Funmobile Ringtones website). This was evidenced by some complainants having issued 'STOP' repeatedly following receipt of the cancellation confirmation message.

Ground 4

The Executive was concerned by the fact that promotional and service messages were repeatedly sent to a particular mobile number over a two year period which, in this instance, led to the consumer being charged for a service by virtue of owning a number that appeared to have been previously subscribed to the service.

It appeared from the message logs that the complainant in this instance was charged as soon as the number had available credit placed on it, some 21 months from when the previous chargeable MT message had been sent. Owing to the volume of texts sent (364) during the relevant period and the protracted time frame (17/07/2006 – 21/04/2008) the Executive argued that more should have been done to corroborate whether this number was still in use, and if not, that further investigation should have been made to check whether the mobile number was still in circulation.

The Executive submitted that in this instance the consumer was misled into thinking that s/he had been registered into a service, by virtue of possessing a recycled number.

2. The information provider stated that it disputed that the service was operated 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. It insisted that it had no intention to mislead customers and had stated that the complimentary ringtone was offered '*with paid subscription*' in all its web pages. The information provider stated that in order to improve its promotional material, it had since placed the pricing information in a more prominent location. It also stated, during informal representations, that it intended to replace the term "complimentary" with a different word so as to eliminate any possibility of misleadingness.

Ground 2

The information provider explained that users could download its complimentary content by accessing the user profile, logging into the website using the PIN code provided; or by clicking on the selected content via uk.funmobile.com and

entering the relevant mobile number and PIN code to download using the complimentary credits made available to the user. It explained that the user could retrieve a lost PIN code by clicking 'Lost your password' in the website.

Ground 3

The information provider stated that under the Mobile Network Operators Code Extension for Premium Rate Services, section 2.5, relating to "STOP" confirmation, it says that '*cancellation resulting from an SMS MO containing STOP must be confirmed by a free MT message. All MT chargeable messages must cease on receipt of STOP command. The STOP confirmation message may also be used to promote other services, but it should also be clear to the recipient that their original subscription has been cancelled.*' It submitted that the free confirmation messages clearly stated that "*All ur membership have been cancelled*" and "*Ur WEB membership has been cancelled*" which was compliant with that rule. During the informal representations, the information provider said it no longer intended to use cross promotions in its STOP confirmation messages.

Ground 4

The information provider stated that the mobile network operators and its aggregator had supplied it with opt-out lists from time to time, and that a process was in place to deactivate the numbers in those lists within 24 hours. It stated the mobile number in question was not included in any of the lists that operators and the aggregator had supplied. It also stated that it will review the re-entry policy to see if it could minimize similar cases from happening in the future.

3. Having considered all the evidence, the Tribunal considered each of the four reasons separately. It upheld a breach of paragraph 5.4.1a of the Code on the grounds raised in reason 1 only. It provided the following explanation for its decision:

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 receive a free ringtone by inputting their mobile number into the box on the website or pop up. The Tribunal considered that the likelihood of consumers being misled was 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 displayed on another page). The Tribunal upheld a breach of paragraph 5.4.1a in relation to ground 1.

Ground 2

The Tribunal found that consumers had not been misled into believing that they would receive a 'physical' ringtone download on their mobile phones. The Tribunal noted that ringtones were available to be downloaded, albeit using two complimentary credits once subscribed into the service, and therefore the text message relied upon by the Executive had not been materially misleading. The Tribunal therefore decided not to uphold a breach of paragraph 5.4.1a on this ground.

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.

The Tribunal noted the information provider's claim that it had the Mobile Operators Code permitted cross promotion in STOP confirmation messages but during the Informal Representations the Tribunal reminded the information provider that compliance with another applicable code of practice was not a defence to an allegation of failure to comply with the PhonepayPlus Code. The Tribunal noted that the information provider had an overriding obligation to comply with the PhonepayPlus Code of Practice.

Ground 4

The Tribunal considered the evidence and concluded that the mere fact that text messages were sent to a mobile phone number over an extended period of time, which continued when the number had been 'recycled' (i.e. given to a new customer of the mobile network), did not in itself appear be misleading or likely to mislead. The Tribunal therefore decided not to uphold a breach of paragraph 5.4.1a on this ground.

The Tribunal therefore upheld a breach of paragraph 5.4.1a of the Code in relation to ground 1 only.

Decision: UPHELD in relation to ground 1

ALLEGED BREACH TWO

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.”

1. The Executive was concerned about the failure of the website to stipulate the costs of the service, and in particular the initial charge of £9.00, prior to and at the point of registration. The Executive acknowledged changes had been made to the website and the 'pop-up' messages since initiating the preliminary investigation. It suggested that prior to these changes being made, more could have been done to inform users that they would incur a charge of £9.00 before being able to obtain the “complimentary” ringtone from the website. The Executive referred to some complainants who had stated that they had no prior knowledge of the costs involved and when entering their mobile number on the website had thought the service was a 'free ringtone service'. The Executive believed that the promotional website was therefore in breach of paragraph 5.7.1

of the Code.

2. The information provider explained how the service operated, stating that to obtain a complimentary ringtone, a user had to log-in to uk.funmobile.com using the valid PIN code and download the selected content using the credit available in its user profile. During the informal representations made to the Tribunal it stated that changes had been made to make the pricing more prominent.
3. The Tribunal considered the evidence and in particular the screen shots of the website and 'pop-up' internet messages as they had appeared before the information provider had made any changes to the service. The Tribunal found that the original uk.funmobile.com website had only stated the initial registration charge of £4.50 in the box below where users would enter their mobile phone numbers. That box had not stated that the first week's subscription charge of £4.50 would be taken at the same time thereby amounting to an initial charge of £9.00. The website also did not state that there would thereafter be a weekly charge of £4.50. The Tribunal therefore decided to uphold a breach of paragraph 5.7.1 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 72 complaints in relation to this service;
- The cost paid by individual consumers was high because 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 each; and
- Concealed subscription services have been singled out by PhonepayPlus for criticism.

The Tribunal reviewed the information provider's breach history but decided that since there was only one previous case and this dated from 2006, breach history 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. Whilst the Tribunal welcomed these changes, it noted 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 Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £50,000 fine; and
- The Tribunal 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.