

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 9 July 2009 TRIBUNAL SITTING No. 31 / CASE 4
CASE REFERENCE: 785095/CB

Service provider & area:	Tanla Mobile Limited, London
Information provider & area:	Global Port SL, Spain
Type of service:	Virtual Chat Service
Service title:	Global Port Chat Service
Service number:	80018
Cost:	£1.50 per user text message
Network operator:	All mobile operators
Number of complainants:	39

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 39 complaints regarding a service operating on shortcode 80018. These complaints related to a virtual chat service called Global Port Chat Service. The Information Provider's service was brought to the attention of PhonepayPlus by the Service Provider prior to an investigation because the shortcode had appeared on the Service Provider's internal complaint monitoring system.

Complainants stated that they had been misled into entering the service by responding to an unsolicited marketing text message that read as follows:

'free msg.: m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)

When complainants replied 'Yes' to the message they were automatically entered into a virtual chat service and charged £1.50 for each text message they sent, including when they sent a text message which only contained the word 'END'

The Service

The Global Port chat service is a 'fantasy chat service' which offers consumers the opportunity to engage in text chat with operators via text messages. The service is a user text message service, which means that no charges are made for text messages received from the service and consumers are only charged for sending a text message to the shortcode. The service is charged at a cost of £1.50 per user text message sent.

The Information Provider is a Spanish registered company which marketed the service by sending promotional text messages to mobile phone numbers and also by advertising in national publications. The service operated from April 2008 until a suspension was imposed by the Service Provider on 6 January 2009.

The Complaints about the service appeared to be as a result of 10,000 bulk marketing text messages which were sent out through the mBlox platform in November and December 2008.

Complaint Investigation

Standard Procedure

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

The Executive received a phone call from a member of the Service Provider's staff informing the Executive that the service had been internally suspended.

A breach letter dated 1 April 2009 was sent by the Executive to the Service Provider raising potential breaches of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 ('the Code').

The Executive received the respective undertaking forms from the Service Provider and the Information Provider on 1 April 2009 and a response from the Information Provider in relation to the breaches raised by the Executive's letter.

The Executive re-issued the breach letter and sent it to the Information Provider on 8 April 2009 raising potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8, 5.14 and 7.3.3 of the Code. A formal response to these breaches was received from the Information Provider on 8 and 14 April 2009 and a further response was received from the Service Provider dated 16 April 2009.

The Tribunal made a decision on the breaches raised by the Executive on 9 July 2009.

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 (sometimes referred to a 'hard opt-in'), 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").

The Executive submitted that it had received 39 complaints from members of the public who stated that they had received unsolicited promotional text messages from the Information Provider's service on shortcode 80018. The Executive noted that the Information Provider had confirmed these unsolicited text messages were not sent directly from the shortcode 80018 but were bulk text messages sent through the mBlox platform and headed up to appear as if they were from shortcode 80018. The bulk text message read as follows:

'free msg.:m-box info:one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

The Executive referred to a complaint that had been received from a company which operated satellite navigation services. Mobile phone sim cards were placed within these devices in order to enable GPS tracking and the company stated that three of its devices had received text message promotions from the Information Provider. The Executive submitted that there had been no human interface with the three mobile phone numbers and as such could not have been used to access any service that would have opted them in to receiving text message marketing.

The Executive stated that it had requested evidence from the Service Provider which would demonstrate that complainants had consented to receiving promotional text messages but that the Service Provider had failed to provide any evidence of opt-ins.

The Executive noted that it had been informed by the Information Provider that the mobile phone numbers to which the service had been promoted had been provided by a third party data provider. The Executive submitted that under the Regulations this type of consumer opt-in was regarded as a 'hard opt-in' and as such there was a requirement of specific consent to such marketing that would need to have been obtained prior to promoting the service. The Executive noted that it was an offence under the Regulations to send unsolicited promotions by text message for direct marketing purposes *'unless the recipient has specifically consented to receive such promotions'*.

2. The Information Provider stated that the third party provider from whom the Information Provider had acquired the mobile phone numbers had assured the Information Provider that there were 'hard opt-ins' in relation to these mobile phone numbers. The Information Provider stated that the breach had occurred as a result of faulty information given to the Information Provider by the third party provider. The Information Provider stated that its only fault had been to trust the Service Provider's recommendation of the third party provider.
3. The Tribunal considered the evidence, including the complainants' evidence and the lack of any evidence of valid opt-ins and concluded that, on the balance of probabilities, consumers had not consented to the receipt of promotional text messages. This meant that the text messages had been sent contrary to Regulation 22 of the Regulations. The Tribunal therefore decided to uphold a breach of paragraph 5.2 of the Code

Decision: UPHELD

ALLEGED BREACH TWO
FAIRNESS MISLEADING (Paragraph 5.4.1a)

'Services and promotional material must not mislead, or be likely to mislead in any way.'

1. Ground 1

The Executive referred to advertisements that had been published in the Daily Star newspaper and submitted that despite having been informed by the Information Provider that the service was a 'fantasy chat' text message service, two of the advertisements provided had clearly stated: 'CONTACT TO SINGLES NEAR YOU!' and 'Singles near you'. The Executive submitted that the two statements clearly implied to potential users of the service that they could contact single people who lived nearby. The Executive submitted that this was further suggested by the detail of the advertisements as the user was asked to provide details of his or her post code by sending a user text message.

The Executive said it was of the opinion that the promotional advertisements suggested that the service operators were genuine users of the service and that they had been matched with service users because of their postal address. This was not the case and as such users were likely to have been misled when joining the service as to the nature of the person with whom they would be interacting.

Ground 2

The Executive submitted that the Information Provider had sent over 10,000 promotional messages in relation to the service to mobile phone numbers through the mBlox aggregator platform during November and December 2008; these were bulk text messages and were headed with the Service Provider's shortcode of 80018.

The Executive made reference to a number of complaints from members of the public who stated that the first contact that they had with the service came in the form of a text message which stated as follows:

'free msg.:m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

The Executive submitted that this text message had appeared on mobile phones and induced a response from recipients which resulted in the user being entered into the Information Provider's chat service. The Executive submitted that the text message did not make consumers aware that it was a promotion for a chat service and had misled complainants into thinking they had a genuine text message waiting for them either from a friend or their network provider.

The Executive also submitted that it did not matter what response users had provided, as either of the requested keyword responses 'Yes' or 'End' resulted in the user being charged £1.50 for the text message sent and entered into the chat service. As the service was billed by user text messages, any response to the service shortcode including 'STOP' was billed at £1.50.

The Executive submitted that the promotional text message which had been sent out over 10,000 times had failed to inform recipients of its actual purpose and as such the Executive was of the opinion that the text message's sole purpose was to mislead the user and induce a response in order to generate revenue.

2. Ground 1

The Information Provider stated that was a Spanish company and was not well informed about the rules in the UK as such it had obtained the Service Provider's approval in relation to all its promotional advertisements for the UK market.

Ground 2

The Information Provider stated that each text message only had 160 characters and this was not enough space to inform the customer about everything and the Information Provider had therefore put a service number in the text message which the customer could call for more information.

3. The Tribunal considered the evidence and concluded that in relation to ground 1, the advertisement would have misled users into believing that the service operators were genuine users who lived near them who had the same intention of contacting other singles. In relation to ground 2, the Tribunal concluded that the bulk text message failed to inform users that the text message was in fact a promotion for a chat service and as such had misled users into believing that they had a genuine message waiting from a friend or their network provider. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code on both grounds.

Decision: UPHELD on all grounds.

ALLEGED BREACH THREE

FAIRNESS – UNFAIR ADVANTAGE (paragraph 5.4.1b)

'Services and promotional material must not take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.'

1. The Executive made reference to complaints from members of the public who stated they had received an unsolicited text message appearing to come from the shortcode 80018. The message reported by complainants read as follows:

'free msg.: m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

The Executive referred to the Service Provider's response to a letter from the Executive which confirmed that the service had been promoted through the mBlox gateway and that the above text message was the promotion that had been sent out (the Service Provider stated it was unaware of the text messages). The Executive submitted that it had since been made aware by mBlox that this promotion was sent out over 10,000 times over the course of November and December 2008.

The Executive submitted that the message had been worded so as to make it seem that users had a genuine message waiting for them from a friend or their network provider. The Executive made reference to several complaints which indicated that the promotional text message had taken unfair advantage of consumers by prompting a user response that was charged at £1.50 per text message. The Executive also submitted that the text message had been set up to induce a reply and take advantage of the general public for whom this text message had not provided enough information to inform them that this was a premium rate service promotion.

The Executive submitted that the circumstance which had made the recipients of this text message vulnerable was that the Information Provider held their personal data in the form of their mobile phone number and it had the facility or the ability to use that data to send a text message which misled and induced a response from the recipient user resulting in a £1.50 charge. The Executive submitted that it was of the opinion that the Information Provider had taken unfair advantage of that circumstance by using the data in its possession to send the misleading text message to that group of consumers without having first obtained evidence of their consent to being charged or explaining the purpose of any text message user response.

2. The Information Provider stated that knowing a consumers mobile phone number did not make that user vulnerable. The Information Provider stated that nobody had been charged on the receipt of the promotional text message.
3. The Tribunal considered the evidence and concluded that whilst the wording of the promotional text message had been misleading, these were not circumstances which had made consumers vulnerable and the Service Provider's actions had already been appropriately dealt with under 5.4.1a of the Code. The Tribunal therefore decided not to uphold a breach of paragraph 5.4.1b of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR PRICING INFORMATION - COST (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 submitted that the Information Provider had sent over 10,000 text message promotions to mobile phone numbers through the mBlox aggregator platform. These messages appeared on the recipient's mobile phone and read as follows:

'free msg: m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

The Executive submitted that the pricing in the text message that read '1,5GBP/SMS' was not a straightforward method of clearly informing users of the costs involved in replying to the text message.

The Executive made reference to specific guidance that it had provided on this issue in a 'Notice to Industry' published in November 2006 and this notice had commented on how pricing should be presented.

2. The Information Provider stated that there was no difference between using GBP and the '£' – sign; it stated that 1.50GBP/SMS was sufficiently clear because GBP had the same meaning as the '£' sign.
3. The Tribunal considered the evidence and concluded that, when taken as a whole, the combination of 'GBP' and '1,5' (the Tribunal commented that the use of a comma in representing currency was not UK standard) and 'GBP/SMS' meant that pricing information had not been presented in a way which was clear or straightforward. The Tribunal decided to uphold a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE 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 Information Provider sent over 10,000 text message promotions to mobile phone numbers through the mBlox aggregator platform. These messages appeared on the recipient's mobile phone and read as follows:

'free msg: m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

Ground 1

The Executive submitted that the text message has been used as a promotional tool which had served to induce charged text message responses and in turn enter mobile users into the Information Provider's service.

The Executive submitted that the text message had not contained the identity of either the Service Provider or the Information Provider and the identity of either party had not been otherwise obvious.

Ground 2

The Executive made reference to three print advertisements for the service which had featured in the Daily Star newspaper. The Executive submitted that the three advertisements did not clearly state the identity of either the Service Provider or the Information Provider and had only stated 'GP profiles sent'. The Executive noted that it had sufficient knowledge to understand that 'GP' was short for 'Global Port' however it submitted that the average consumer (without industry knowledge) viewing these advertisements would not have been aware of the relevance of the abbreviation.

2. The Information Provider stated that it believed that the shortcode and the initials were sufficient to identify the provider and that it was not possible to post all provider information in a text message or an advertisement. The Information Provider stated that for this reason it had provided a service number.
3. The Tribunal considered the evidence and found that, in relation to Ground 1, the text message was a promotional message because it had served to induce a text message response charged at £1.50 from the recipient which in turn entered the recipient into the subscription service. The Tribunal found that the text message had not stated the identity of the Information Provider or the Service Provider. In relation to the newspaper advertisements (Ground 2), the Tribunal noted the abbreviation of 'GP' as purporting to represent the Information Provider's company name however it did not consider the abbreviation would be sufficiently clear to a consumer with no industry knowledge. The Tribunal therefore decided to uphold a breach of paragraph 5.8 of the Code on both grounds.

Decision: UPHELD on both grounds.

ALLEGED BREACH SIX STOP COMMAND (paragraph 5.14)

'Where a 'STOP' command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of 'STOP' within any message to be sent by the user. When a 'STOP' command has been sent, the service provider must make no further charge to the user for the service'

1. The Executive submitted that the Information Provider sent over 10,000 text message promotions to mobile phone numbers through the mBlox aggregator platform, these messages appeared on the recipient's mobile phone and read as follows:

'free msg: m-box info: one mms could not be delivered. As soon as your mobile will be ready to receive send Yes. To stop send END.Helpline 08719182290(1,5 GBP/SMS)'

The Executive referred to the complaints it had received and submitted that users who had sent 'END', in an attempt to stop the service (as directed), had been charged £1.50.

The Executive submitted that the text message had therefore not contained clear instructions on how to use the STOP command. It submitted that the promotional text message had not clearly informed recipients that using the stop command 'END' in a user text message would incur a charge of £1.50. The Executive also submitted that the promotional text message had stated 'To stop send END', however, the evidence from the call logs suggested that when recipients sent the word 'END' they were then sent a service welcome text message so the service had not been stopped as a result of sending this keyword.

2. part The Information Provider stated that there had been an error in translation of of the promotional text message and the Information Provider had intended to send the wording "To end send STOP" as opposed to "To stop send END".

3. The Tribunal considered the evidence and concluded that the instructions in relation to the STOP command contained in the promotional text message had not been clear; in fact the instructions were incorrect because they stated that users should send 'END' when in fact only sending 'STOP' would work to stop the service. The Tribunal therefore decided to uphold a breach of paragraph of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

VIRTUAL CHAT SERVICES (including text chat) (paragraph 7.3.3)

'All virtual chat services must, as soon as is reasonably possible after the user has spent £10, and after each £10 of spend thereafter:

a inform the user of the price per minute of the call

b require users to provide a positive response to confirm that they wish to continue. If no such confirmation is given, the service must be terminated.'

1. The Executive submitted that users who had responded to the service enough times to have spent over £10 subsequently received a free text message which stated as follows:

'Free Msg! You have spent A,£10 in the Global Port Chat. We hope you enjoy our chat! To unsubscribe call 08719182220'.

The Executive submitted that the £10 spend reminder text message had not stated the cost of the service to users. Furthermore, the spend reminder text message had not requested a positive response from the user to confirm that he or she wished to continue with the service, as required by the Code. The Executive also submitted that the Information Provider continued to send service text messages to users without having received any form of positive confirmation that the user wished to continue interacting with the service.

2. The Information Provider stated that it was of the opinion that paragraph 7.3.3 of the Code applied only to fixed line calls. The Information Provider further stated that in light of the service being billed per user text message, paragraph 11.3.11 of the Code did not apply as the continuation of the service was in the hands of the user as he or she would only be billed if they sent another text message to the service and the Information Provider had been unable to continue or stop the service on its own accord.
3. The Tribunal considered the Code and concluded that paragraph 7.3.3a clearly applies to text messages as well as calls by virtue of the definition of virtual chat services contained in paragraph 7.3.1 of the Code. The Tribunal concluded that whilst the terminology 'price per minute' in paragraph 7.3.3a did not make specific reference to texts this was implicit by virtue of paragraph 7.3.1 and that therefore the reminder message should have stated the cost "per text" of the service. The Tribunal also noted that the intent of paragraph 7.3.3a is to ensure that users are reminded of the ongoing cost of using a service after each £10 had been spent. The Tribunal concluded from the message logs evidence that: the spend reminder message had not stated the cost of the service; the text message had not contained a request for positive confirmation from the recipient to carry on the service and the Information Provider had continued to send service text messages even

though it had received no positive confirmation from the recipient. The Tribunal therefore decided to uphold a breach of paragraph 7.3.3 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 as promoted by the 10,000 bulk promotional text messages was valueless to the consumer.
- The behaviour of the Information Provider had been wilful in relation to the sending of 10,000 bulk promotional text messages which appeared to be deliberately designed to mislead recipients.
- There was material consumer harm on the basis that there were 39 complainants and a very large number of unsolicited promotional text messages.
- The Information Provider failed to provide evidence and information surrounding the third party data supplier.
- The information supplied by the Information Provider had been inconsistent with that provided by the Service Provider including the Service Provider's recommendation of the third party data supplier, the Information Provider's statement that it was unaware of the Code and the provision of inconsistent revenue figures.

There were no mitigating factors for the Tribunal to consider.

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

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A £50,000 fine;
- The Tribunal also 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.