

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 6 August 2009

TRIBUNAL SITTING No. 33 / CASE 1

CASE REFERENCE: 785533/JI

Information provider:	Inc Media Limited, London
Service provider:	Tanla Mobile Limited, London
Type of service:	Competition subscription service
Service title:	'Competition World'
Service number:	81303
Cost:	£1.50 per message
Network operator:	All mobile operators
Number of complainants:	51

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

#### BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 51 complaints in relation to a service operating on shortcode 81303. According to the Information Provider's description (although PhonepayPlus was unable to find any evidence of this), the service was a competition subscription service called 'Competition World' which was promoted on the website competitionworld.net and offered consumers the chance to win a prize for a £1.50 monthly subscription fee. Consumers were invited to enter their mobile phone number into the website and receive a service text message (charged at £1.50) which contained the keyword 'COMP'. Users that sent the keyword via text message to shortcode 81303 were subscribed into the service.

Consumers stated to receive unsolicited reverse-billed text messages for a subscription-based competition service. Following further investigation, the Executive identified that users had received a free subscription reminder message before subscribing to the service, had received chargeable text messages without being informed of the cost and had not received a free initial subscription message.

#### The Service

The service was operated by the Information Provider under the name 'Competition World'. According to the description provided by the Information Provider the service was meant to operate in the following manner:

- i) Users entered their mobile number into a field on the website competitionworld.net.
- ii) Once users had selected 'ENTER' on the website, they received a chargeable text message from shortcode 81303 instructing them to text the keyword 'COMP' to the shortcode, after which point they were subscribed to the competition.

On suspension of the service by the Service Provider in November 2008, the Information Provider stated that an alternative method of opt-in had been available:

- i) Users text the keyword 'COMP' to shortcode 81303 after viewing the following entry message displayed on the landing page of the website:

*"Win yours now!, TEXT "COMP" TO "81303"*

- ii) Users were then subscribed to the service and were sent the following free subscription text message confirming entry into the competition:

*"FreeMsg. U have joined competition world for £1.50 per month until you send STOP to 81303. Helpline 0844 871 4189"*

Once users had been entered into the Competition World competition service, the following marketing text messages were sent as a regulatory reminder:

*"FreeMsg. U are entered into Competition world for £1.50 per month until you send STOP to 81303. Helpline 0844 871 4189 T&C's competitionworld.net"*

*"This is a FREE membership reminder from competition world. T&C's competitionworld.net. For help, call 0844 871 4189. To unsub txt STOP to 81303."*

Terms and conditions stated on the promotional website also indicated that consumers were able to enter a prize draw by sending an email to a stated email address.

Winners were selected in a random draw from all entries received. Although the Information Provider stated that the prize available was a Samsung flat screen TV, message logs indicated that one of the prizes was a Nokia mobile phone. The terms and conditions also indicated that consumers could have won a holiday or travel prize.

## **Complaint Investigation**

### **Standard Procedure**

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 24 April 2009 to the Service Provider raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, and 7.12.4a-f of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) (the 'Code'). A formal response was received from the Service Provider on 28 April 2009 with the appropriate undertaking forms.

The Executive re-issued the breach letter to the Information Provider on 30 April 2009, requesting further information to which the Information Provider responded in a letter dated 3 June 2009. Following further correspondence with the Information Provider, the Executive sent an email dated 15 June 2009 to the Information Provider, raising a breach of paragraph 8.3.3 of the Code.

The Tribunal made a decision on the breaches raised by the Executive on 6 August 2009 having heard informal representations from the Information 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').

The Executive submitted that 50 of the complainants stated to have received unsolicited reverse-billed and free text messages for a service that they had not signed-up to. The Executive submitted that the text messages issued (some charged at £1.50) had been unsolicited communications for the purposes of direct marketing.

The Executive submitted that it had been informed by the Information Provider that the complainant mobile phone numbers had been purchased from an opt-in list. However this statement had not been sufficiently supported by evidence to show that the complainants had consented to receive such promotions and that the opt-in list had been legitimate.

The Executive made reference to the message logs supplied by the Information Provider and submitted that there was no evidence in relation to at least 27 of the complainants that a positive user text message was received from them before chargeable text messages were sent to them and, as such, it appeared that complainants had not opted into the service.

The Executive submitted that it was of the opinion that the lack of a positive user text message combined with the complainants' insistence that they had not opted into the service or provided consent to receive such text messages, suggested that consumers' mobile phone numbers had been used without direct or implied consent, and had been used to charge consumers a fee for a service to which those consumers had never agreed, either directly or indirectly, to receive. Furthermore, it submitted that where there was no evidence of consumer consent prior to the issuance of the text messages, the promotional text messages evidenced by the message logs had been sent to consumers in contravention of paragraph 22(2) of the Regulations.

2. The Information Provider did not respond to the alleged breach in writing. During the Informal Representation, the Information Provider stated that it had purchased an 'opt-in' list from a company with whom it had dealt with for the first time. The Information Provider stated that it had not sought to confirm the legitimacy of the opt-in list, and that the company from which it had bought it was no longer in existence.
3. The Tribunal considered the evidence of the complainants and concluded that, on the balance of probabilities, some complainants had received unsolicited promotional text messages in contravention of the Regulations. The Tribunal noted the Information Provider's admission that it had not performed any due diligence in

relation to the legitimacy of the opt-in list or the company from whom it purchased the list prior to sending any messages. In addition, the Tribunal considered that there was no evidence to suggest that complainants had validly opted into the service. The Tribunal therefore upheld 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:  
a mislead, or be likely to mislead in any way’*

1. The Executive made reference to the 27 message logs supplied by the Information Provider and submitted that the first text message received by 21 of those complainants had been a free reminder text message.

The Executive submitted that a subscription reminder text message was usually sent to a consumer who had already subscribed to a service and that the text message in this instance was likely to have misled the complainants who had not subscribed to the service and who had not received any correspondence in relation to the service before the receipt of this text message. The Executive also submitted (by reference to one complainant’s evidence) that, as the complainants had not subscribed to the service, they would not have been inclined to try to stop the service despite the fact that the same complainants had received chargeable text messages subsequent to the free reminder text message.

2. The Information Provider did not respond to the alleged breach.
3. The Tribunal considered the evidence and concluded that complainants who received a subscription reminder message had been misled into believing that they had subscribed to the service which was not, in fact, the case. The Tribunal was of the view that because complainants had not actually taken steps to subscribe to the service, they had not been alerted to stop the subscription service on receipt of the message because they thought that they had received a text message in error, or thought that it was a free promotional text message. The Tribunal therefore upheld a breach of 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
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 considered the service to be in breach of paragraph 5.7.1 of the Code on the following grounds:

Ground 1

The Executive made reference to the message logs supplied by the Information Provider and submitted that six of the 27 complainants received an initial charged text message before any other text messages and submitted that those particular complainants had not been informed of the cost of the service prior to incurring a charge.

## Ground 2

The Executive made reference to the complainants who had received a free text message before a charged text message and submitted that it was of the opinion that the pricing information as presented in the free text message had not been sufficient to ensure that consumers had a full understanding of how much they were being charged and how often.

The Executive made reference to the pricing information contained within the free text messages sent to consumers that read as follows:

*“club@150p/m max4pm”, “club@150p/m max 2pm”, or club@150p/msg max2/mth”*

The Executive submitted that it was of the opinion that the wording “150p/m” could be interpreted as a billing frequency of either ‘per minute’, ‘per message’ or ‘per month’ and was not sufficient clear or straightforward. Furthermore, the Executive submitted that the wording “max4pm”, “max2/mth” and “max2/mth” was also confusing and ambiguous. The Executive submitted that although the Information Provider had stated that the service was a subscription service costing £1.50 per month, the wording as presented in the text message would suggest that, depending on the text message received, consumers would be of the understanding that they were to receive a maximum of two or four text messages per month, which would have implied charges in excess of £1.50 per month.

2. The Information Provider did not respond to the alleged breach.
3. The Tribunal considered the evidence comprising of the call logs and concluded that, in relation to Ground 1, some complainants had not received pricing information before receiving an initial chargeable text message and therefore these complainants had not been fully informed of the cost of using the service prior to incurring charges. In relation to Ground 2, the Tribunal found that some complainants had been sent a free text message with some pricing information however the wording of this message was confusing and ambiguous and therefore not clear and straightforward as required under the Code. The Tribunal therefore upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH FOUR SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)**

*‘Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:*

- a name of service,*
- b confirmation that the service is subscription-based,*
- c what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent,*
- d the charges for the service and how they will or can arise,*
- e how to leave the service,*
- f service provider contact details.’*

1. The Executive made reference to the 27 message logs supplied by the Information Provider and submitted that none of the 27 complainants appeared to have received an initial subscription text message.

The Executive submitted that six complainants who received a charged text message as a first text message received had not received a free initial subscription text message as required by the Code.

The Executive submitted that it was of the opinion that, in the case of the 21 complainants who received an initial free reminder message as a first text message, that text message had contained the requisite information as specified by the Code; however, the text message was not marketed as a subscription initiation text message. The Executive also submitted that as these complainants appeared not to have subscribed to the service (as submitted above under paragraph 5.2 of the Code), the fact that they had received a text message which was not marketed as a subscription initiation text message, would not necessarily inform them that their mobile phone number had been subscribed into that service, and therefore these complainants had no inclination to try to stop the service.

2. The Information Provider did not respond to the breach.
3. The Tribunal considered the evidence including the message logs and concluded that six complainants had not received a subscription initiation text message. The Tribunal also found that the 21 complainants referred to by the Executive who had received initial subscription information had done so by way of a text message which was promoted as an initial reminder text message. The Tribunal therefore upheld a breach of paragraph 7.12.4a-f of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FIVE REQUEST FOR INFORMATION (Paragraph 8.3.3)**

*'During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents.'*

1. The Executive submitted that a breach letter containing a request for information under paragraph 8.3.3 was sent to the Information Provider on 30 April 2009. The Information Provider supplied a formal response on 15 May 2009. The Executive sent an email to the Information Provider on 21 May 2009 seeking clarification of its response, and the Information Provider subsequently responded on 3 June 2009. A further request for information was sent by the Executive on the same date and a response was supplied by the Information Provider on 8 June 2009.

The Executive submitted that the Information Provider had failed to answer the following questions sufficiently:

- (i) Question 3 – You have explained that all winners received a follow up telephone call. Do you have any evidence to support this assertion?
- (ii) Question 5 – Thank you for your answer to this question. However, we have been unable to trace this company. Therefore please could you provide any other contact details you have for this company [*omitted*] (i.e. email address, telephone number) and proof that they were in correspondence with Inc Media (i.e. copies of letters, contracts, emails etc).

(iii) Question 6 – The spreadsheet supplied does not prove that revenue was paid into the – [omitted] bank account you supplied details for. We would require a copy of an invoice or remittance stating the amount paid over which would include date, sender, and recipient bank details. This information will be kept confidential and is for verification purposes only. With regards to the November statement you have supplied, please explain why the success rate of messages delivered was 76.69% in comparison to the October statement. Please also confirm the revenue generated by Inc Media for the period it was operating between July and November 2008.

2. The Information Provider stated the following in correspondence with the Executive:

*“I will respond accordingly, but I am a tad confused with number 1 below. I asked on a number of occasions if you would like confirmation from the winners of the confirmation by way of letter from each winner but there was no response to my question.*

*I will get back to you with the information you require.”*

3. The Tribunal considered the evidence and concluded that the Information Provider had failed to provide sufficient information to the Executive, including adequate and appropriate information regarding the revenue generated by the service, and adequate evidence of the contractual arrangements and the contracting parties. The Tribunal took into account the Informal Representation made by the Information Provider who asserted that the information was in the hands of third parties but considered the information to have been too important not to have been retained and provided by the Information Provider when requested by the Executive. The Tribunal therefore upheld a breach of paragraph 8.3.3 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

The Tribunal’s initial assessment was that, overall, the breaches taken together were **serious**.

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

- The behaviour of the Information Provider was reckless and demonstrated an high level of ignorance of the Code, as was admitted by the Information Provider during the Informal Representation it made.
- There was material consumer harm when taking into account the volume of complaints and the number of service messages sent to consumers.
- Subscription services and web opt-in services are examples of services which are of particular concern to PhonepayPlus.

There were no mitigating circumstances for the Tribunal to consider. The Tribunal did take into account the Informal Representation made by the Information Provider; however, it considered the Information Provider’s failure to properly ensure and monitor regulatory compliance, and its clear ignorance of the Code, extremely serious and therefore the Informal Representations did not produce any real mitigation.

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

The Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A £60,000 fine – the Tribunal considered that no more than £3,000 of the revenue generated was genuine and thereby applied £40,000 of the fine as confiscatory and £20,000 as punitive;
- The Tribunal imposed a bar on all subscription services operated and promoted by the Information Provider for a period of six months or until the Information Provider seeks and implements compliance advice to the satisfaction of the Executive, whichever is the longer; and
- 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.