

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday, 3 September 2009

TRIBUNAL SITTING No. 35 / CASE 1

CASE REFERENCE: 775639/JI

Service provider:	MX Telecom Limited, London
Information provider:	Webmatch Limited, Israel
Type of service:	Subscription – Contact and Dating
Service title:	'iSingles'
Service numbers:	85080 and 82772
Cost:	85080 (old shortcode) - £5 per text message, sent every two weeks 82772 (new shortcode) - £3 per text message, sent once a week
Network operator:	All Mobile Network Operators
Number of complainants:	22

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 22 complaints in relation to a contact and dating subscription service called 'iSingles' which operated on shortcode 85080 prior to March 2009, and subsequently on 82772. The service was promoted and operated on the website iSingles.co.uk and allowed users to communicate with other online website members. Full use of the service was available for a subscription fee of £5 every two weeks prior to March 2009, and subsequently for a subscription fee of £3 per week. Following the completion of a registration form on the website, users were asked to send the keyword 'LOVE' to the appropriate shortcode to activate their membership. The user was then subscribed and immediately sent a reverse-billed text message containing an activation code which was to be entered on the website. By selecting 'activate', the user would then have full access to the service via the website.

Complaints were received regarding the receipt of unsolicited reverse-billed text messages. Complainants did not realise they had been entered into a subscription service. PhonepayPlus also noted during the course of its investigation that the pricing information for the service did not appear to be sufficiently prominent, the customer service number was not clearly prominent, the pre-activation text message received from the service and the website did not appear to clearly indicate that the service was subscription-based, and that complainants had not received a free initial subscription text message or a free reminder text message.

(i) The Service

The service was operated by Webmatch Limited (the 'Information Provider'), previously known as Netsoft Internet Solutions, under the service name 'iSingles'.

According to the message logs supplied by the Service Provider and the Executive's monitoring, users joined the service by way of the following sign-up process:

- i) The user completed a ten-screen registration process on the website isingles.co.uk to create a profile. After registration was completed, a screen appeared which invited the user to activate his or her membership by sending the keyword 'LOVE' to shortcode 82772 (or 85080 prior to March 2009).
- ii) The user then received the following text message from the shortcode: "*Your iSingles activation code: [code]*". This message was charged at £3 (£5 prior to March 2009). Subscription was initiated at this point.
- iii) Once users entered the activation code into the website, they were given full access the website to communicate with other members. They became 'Gold Members'.
- iv) If users did not 'activate' their membership, they still had partial access to the website and were known as 'Standard Members'. This did not incur a charge.

(ii) The Investigation

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

The Executive sent a breach letter dated 17 March 2009 to the Service Provider raising potential breaches of paragraphs 5.7.1, 5.7.2, 5.8, 7.12.3a-c, 7.12.4a-f and 7.12.5 of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 ('the Code'). A formal response was received from the Service Provider on 3 April 2009 providing opt-in records for the 14 mobile phone numbers highlighted by the Executive.

The Executive issued a breach letter to the Service Provider dated 21 May 2009 containing a request for further information. In anticipation of an Information Provider 'pass through', the Information Provider provided a response to the breach letter dated 5 June 2009. Subsequently, the Information Provider's refused to complete a pass through undertaking form and the case proceeded against the Service Provider. The Executive gave the Service Provider an extension of time to submit a formal response, which it did on 12 June 2009.

The Tribunal made a decision on the breaches raised by the Executive on 3 September 2009 having heard informal representations from the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE 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 there to be a breach of paragraph 5.7.1 of the Code on the following grounds:

Ground 1

The Executive submitted that the promotional website indicated that membership was activated by following a three-stage process which included sending the keyword 'LOVE' to a shortcode, receiving an activation code by SMS, inputting that code into the website and selecting the 'Activate' button to start dating. The Executive made reference to a screenshot of the relevant webpage that it had gathered as a result of its own monitoring exercise (see Appendix A below – 775639_5-7-1_5-7-2_7-12-3a-c_App A).

The Executive submitted that it considered the manner in which the promotional website had been presented to consumers had not made it explicitly clear that the service would be activated and subscription charges would be incurred after stage one of the process.

The Executive submitted that this lack of clarity was exacerbated by the text message that users received after sending the keyword, which did not contain any pricing information. Furthermore, the wording of the text message suggested that users would have to enter the activation code into the website before activation could take place, yet at that point they had already been charged for the text message itself. The Executive submitted that, if users had not completed the final stage by entering the activation code into the website, they were likely to believe that they had not yet activated the service. The Executive submitted that the website promotion was not explicitly clear in relation to the consequences of sending the keyword to the shortcode, and that users were charged to receive a text message before completing the last stage of the 'activation' process. The Executive submitted that users had not been fully informed, clearly or straightforwardly, of the cost of using the service prior to incurring any charge.

Ground 2

The Executive submitted that the pricing within the small print terms and conditions appeared to be directly associated with 'Gold Membership' and it was not explicitly clear that the 'Gold Membership' subscription was the same as activation of the service as promoted on the website. The Executive submitted that it was of the opinion that users who had read the small print terms and conditions were likely to have associated the cost presented as being in relation to the 'Gold Membership' and would not have understood that this cost was incurred by merely activating membership.

2. The Service Provider responded to both grounds of the Executive's allegations as follows:

The Service Provider made reference to a screen shot that had been supplied to it by the Information Provider that showed a different subscription page. This stated the cost as being £3 a week and was therefore not the page used prior to March 2009 (see Appendix B below – 775639_5-7-1_App B). The Service Provider stated that the wording in the text message had been changed to include the following sentence:

"Subscribe to iSingles for only 3 pounds per week and receive the Gold Membership seal of approval, ..." (the Service Provider stated that until March 2009 the pricing was different and had read *"5 pounds per two weeks"*).

The Service Provider submitted that this text appeared in the main area of the page without having to scroll down in order to view it. The Service Provider stated that in

relation to the “clearly and straightforwardly” pricing requirements of the Code, the wording of the pricing is as clear and straightforward as can be expected, and matches the regulation requirements. The Service Provider stated that the terms and conditions were not in ‘small’ print, but normal text font sizing.

It stated that the cost of the service was clearly mentioned in the subscription page, users had the choice of upgrading their membership in the site by using a credit card (online via the website) or by using their mobile handset (by text). It also stated that the Information Provider had assumed that the user would have understood that there was a cost associated with an ‘upgrade’. The Service Provider stated that prior to completing the registration to iSingles, users were provided with a link to the terms and conditions, which they confirmed to having read by ticking a checkbox. The terms and conditions included the following clause:

*"By joining the site and activating your Gold Membership via SMS ("opting-in"), you agree that iSingles sends you content SMS messages ("SMS content") - Including, but not limited to, matches, activation codes, member profiles. You agree that such SMS content will be sent to you throughout the period in which you are an active iSingles member, and until you deactivate your account ("opting-out") by sending the opting-out code via SMS (opting-out codes are STOP or NOLOVE), or from the "Update Profile" section of the site under "Membership Status". SMS content fees apply according to content type (subscription fee is £3 per one week). **Click here to view subscription terms.**"*

The Service Provider stated that upon clicking on the ‘Click here’ link at the end of the clause, the full ‘Subscription Terms’ page was displayed, including Gold Membership subscription benefits, cost, refund policy, cancellation instructions and contact information. The Service Provider also stated that the FAQ page (accessible from the website’s homepage) had also included clear instructions in relation to cancelling the subscription:

"How do I cancel my mobile subscription?"

This can be done by doing either one of the following (no need to do both):

- 1. Log into your account, go to the "Update Profile" page, click on the "Membership Status" link and cancel the subscription.*
- 2. Text the word STOP"*

The Service Provider stated that, in relation to Ground 1, the purpose of entering the activation code in the website was merely intended to create the linkage between the subscription and a specific user account (i.e. the unique code is entered in the site in order for the system to know which online profile was linked to the specific number that had subscribed).

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, Appendix B, as presented by the Service Provider, did not represent the webpage screen that had been seen by complainants. The screenshot in Appendix B was not dated, there was no additional evidence as to the authenticity of the evidence and the Information Provider had not supplied a similar page in relation to the period prior to March 2009 during which the service had cost £5 per two weeks. The Tribunal concluded that, on a balance of probabilities, Appendix A, as presented by the Executive as result of its monitoring, was the screen that had been seen by complainants. The Tribunal further found that even if consumers had found and read the webpage’s terms and conditions prior to sending the keyword ‘LOVE’ to the shortcode, they would not have been fully informed of the cost of the service. Those who activated the service immediately after completing the registration stage were

not clearly and straightforwardly informed of the cost consequences of so doing. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
PRICING (PROMINENCE) (Paragraph 5.7.2)**

"Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible."

1. The Executive submitted that written pricing information was not easily legible due to the wording used and a lack of prominence in terms of the placement of the pricing information. The Executive submitted that the pricing information expressed as "3 pounds per week" contained no pound symbol and, coupled with its placing in the middle of the small print terms and conditions, had not made it explicitly clear that pricing information was contained within that text. The Executive also submitted that it was of the view that, as the pricing information was not placed in close proximity to the instructions on the website informing users how to activate the service, users had not been able to make an informed decision about the service.
2. The Service Provider stated that the pricing text was written in the same font type and size as the text in the other pages of the website, had not been written in 'small print' and had not required any close examination or scrolling. The Service Provider also stated that the pound sign and the word 'pounds' were used interchangeably. It asked the Tribunal to note that numeral '3' had been used, rather than the word 'three', which contradicted any submission of intent to reduce the prominence of the pricing information.
3. The Tribunal considered the evidence and concluded that, on the basis of its finding that the activation screen was the one produced by the Executive during the course of monitoring the service (Appendix A), the pricing information was not sufficiently prominent or presented in a way that did not require close examination. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
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 this provision of the Code stipulated that contact information must be clearly stated in any promotion. The Executive submitted that, in order to view the name of the Information Provider or Service Provider and a customer service telephone number, users first had to create a personal profile on the promotional website. The Executive submitted that, if a user chose to subscribe into the service at that point, they were not able to access any contact information. It submitted that if a user visited the website at a later point and chose to update his or her membership by selecting one of the plans, a payment page was displayed

containing a link to the 'Terms of Purchase'. It was only after selecting this link and scrolling down to the bottom that any contact information was made available. It noted that this link was no longer made available during monitoring on 20 May 2009.

The Executive submitted that the breach was exacerbated by the first text message that users received upon activation of the service, which the Executive considered to be promotional material within the meaning of paragraph 11.3.27 of the Code, and which did not contain any contact information or details of the identity of the sender. Additionally, the 'Contact Us' link on the website also failed to mention any contact information other than an email address expressed as "*info *AT* iSingles.co.uk*".

2. The Service Provider stated that the contact information displayed in the 'Contact Us' page related to general enquiries (i.e. not necessarily related to mobile enquiries). It stated that, given that user interaction was undertaken by online means (save for billing contact where the user has opted for SMS billing), these were conducted by email, and had an average response time of less than 24 hours. It stated that the 24/7 customer care phone number had been allocated for mobile subscribers only and, as such, it was not displayed in the general 'Contact Us' page (as it would otherwise have been flooded with general technical enquiries regarding matters that were not mobile-related). The helpline number was therefore displayed in the site only to active mobile subscribers via the 'Membership Status' page. It stated that new users had not been allowed to opt into the service since April, and the system had therefore automatically removed the relevant 'terms and conditions' link. The Service Provider stated that going forward the customer contact details would be clearly laid out on the website without the need for clicking through to different pages depending on the user's membership type.
3. The Tribunal considered the evidence and concluded that neither the registration screens nor the activation screen contained the requisite contact information (including a lack of a customer contact number) and that this information was not otherwise obvious. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR SUBSCRIPTION SERVICES (PROMOTIONAL MATERIAL) (Paragraph 7.12.3a-c)

"Promotional material must:

- a clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers,*
- b ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,*
- c advertise the availability of the 'STOP' command."*

1. The Executive submitted that the first text message users received after sending a keyword to the shortcode, whilst carrying a charge, was a promotional text message within the meaning of paragraph 11.3.27 of the Code, as it required users to enter an activation code into the website to complete the registration process. The message did not indicate that the service was subscription-based, contain the terms of use of the service, nor advertise the availability of the 'STOP' command. Although users who received this text message would have viewed the website, the Executive maintained that the website did not clearly indicate that the service was subscription-based.

2. The Service Provider stated that the activation webpage was the one it had been provided by the Information Provider and read as follows: "*Subscribe to iSingles for only 3 pounds per week...*" and "*When you choose to deactivate the subscription text stop to 82772, or via the 'Update Profile' section.*". It stated the word 'Subscribe' had been used both in relation to the subscription, as well as the cancellation. The Service Provider stated that both the costs, as well as the opt-out instructions, were specified in the webpage. It also stated that the 'STOP' command had been specified in the page (as well as an additional alternative option of cancelling via the site). The Service Provider stated that it would provide assistance so that the service was made clearer in terms of pricing and promotional material.
3. The Tribunal considered the evidence and concluded, on the balance of probabilities, that the screen on which complainants had subscribed was not the screen relied upon by the Service Provider, but that observed by the Executive during the monitoring process (Appendix A). On the basis of this finding, the Tribunal held that the promotional material did not clearly indicate that the service was subscription-based. The information was not prominent (para 7.12.3a) and, that in the context of the promotion, the terms of use were not clearly visible (para 7.12.3b). The Tribunal did not uphold part 7.12.3c as the 'STOP' command was advertised. The Tribunal upheld a breach of paragraph 7.12.3a and b of the Code.

Decision: UPHELD in relation to paragraphs 7.12.3a and 7.12.3b

**ALLEGED BREACH FIVE
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 submitted that, according to the message logs supplied by the Service Provider, none of the complainants had received an initial subscription text message. It submitted that none of the text messages received by the complainants throughout their subscription period contained any of the requisite information as specified in this provision of the Code. The Executive submitted that its monitoring experience mirrored that of the complainants and users had not received a free initial subscription text message containing the information required under paragraph 7.12.4a-f.
2. The Service Provider stated that, prior to activating the subscription, an iSingles user went through an entire registration process to the website, which included reading and accepting the terms and conditions (including all the required subscription information).

The Service Provider stated that the Information Provider had not understood that a free initial subscription text message needed to be sent in addition to the web-based terms and, as a result, these text messages had not been sent. The Service Provider stated that in future a free of charge text message would be sent to users once a month, or when £20 has been spent, in line with the Code.

The Service Provider stated that in June 2008 a mobile network operator had requested that additional information be added to the first text message sent to their users. The Information Provider immediately complied with their request and the relevant information was added. As such, the Service Provider believed that the Information Provider had been confused regarding which elements of the Code applied.

3. The Tribunal considered the evidence and concluded that, although the Service Provider had been given assurances by the Information Provider that the regulatory text messages were being sent, in reality they had not. The Tribunal noted that the Service Provider accepted the breach. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

Decision: UPHELD

ALLEGED BREACH SIX 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 submitted that, according to the message logs supplied, nine complainants were subscribed to the service for over one month and/or incurred charges of over £20, and at no point during the service did any of these complainants receive a free monthly subscription reminder.
2. The Service Provider stated that the Information Provider had informed it that users had received online reminders and notifications in relation to the service. It stated that in future such messages would be sent without fail to all subscribers.
3. The Tribunal considered the evidence and concluded that although the Service Provider had been given assurances by the Information Provider that the regulatory text messages were being sent, in reality they had not. The Tribunal noted that the Service Provider had accepted the breach. The Tribunal 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 **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 wilful. It had deliberately led consumers into subscribing to the service when they had thought they were merely activating their registration of membership.
- The cost paid by individuals was high as some complainants had incurred charges of over £50.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive. Upon issuance of the breach letter, the Service Provider informed the Executive that the Information Provider had voluntarily suspended the service on 27 May 2009.

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

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A £75,000 fine;
- A bar on the service and related promotional material until the Service Provider has sought and implemented compliance advice to the satisfaction of the Executive; and
- Claims for refunds are to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.