

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 5 February 2009 TRIBUNAL SITTING No. 20 / CASE 1

CASE REFERENCE: 778061/AB

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|------------------------------|------------------------------------------------------------------------------------------|
| Information provider & area: | Mobile Messenger EU Limited, Australia |
| Service provider & area: | MX Telecom Limited, London |
| Type of service: | Amazing Facts – Subscription Love Advice & Horoscopes - Subscription |
| Service title: | i) IQ Quiz (The 10 Minute IQ QUIZ) ii) Crush Calculator iii) IQ QUIZ (Brain Power) |
| Service number: | 88870, 66662, 66655 and 66670 |
| Cost: | £6.00 or £9.00 per week |
| Network operator: | All Mobile Operators |
| Number of complainants: | 206 |

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 206 complaints in respect of the following services: 1) IQ Quiz (The 10 Minutes IQ Quiz), 2) Crush Calculator and 3) IQ Quiz (Brain Power). Complainants reported having seen an invitation on the social networking website ‘Facebook’ which requested them to either participate in an IQ test, or find out who had a crush on them. After completing the test, consumers were instructed to enter their mobile phone number online, in order to obtain their results. The majority of complainants reported to being unaware that supplying their mobile number would result in entry to a subscription service, costing either £6.00 or £9.00 per week. Some complainants reported problems with the ‘STOP’ command, stating that they had continued to receive reverse billed SMS messages, after attempting to leave the service.

Nature of complaints – short code 88870

By 10 November 2008, the Executive had received 18 consumer complaints in respect of the above short code.

- 11 complainants said they were on ‘Facebook’ where they saw an invitation requesting them to participate in an IQ test. Upon completing the test, they were required to enter their mobile phone number in order to receive their results. These complainants said they were unaware that by entering their mobile phone number, they would be entered into a subscription service.
- 3 complainants said they had never registered to such a service and the first they heard of it, was when they received chargeable messages.

One complainant reported to have been charged £98.00 for the service. By 11 December 2008, the number of complaints had risen to from 18 to 44.

Nature of complaints – short code 66662

By 12 November 2008, the Executive had received 33 consumer complaints in respect of the above short code.

- 28 complainants said they were on 'Facebook' when they saw an invitation requesting them to participate in an IQ/ Crush Calculator test. After completing the test they were required to enter their mobile phone number, in order to receive their results. These complainants said they were unaware that by entering their mobile phone number, they would be entered into a subscription service.
- 22 complainants said that they sent 'STOP' to the shortcode 66655 but continued to receive chargeable text messages.
- 5 complainants said they had never registered to such a service and the first they had heard of it was when they received chargeable messages.

By 11 December 2008, the number of complaints had risen to from 33 to 116.

Nature of complaints – short code 66655

By 10 November 2008, the Executive had received 18 consumer complaints in respect of the above short code.

- 6 complainants said they were on a website or 'Facebook' when they saw an invitation requesting them to participate in an IQ test. After completing the test they were required to enter their mobile phone number in order to receive their results. These complainants said they were unaware that by entering their number, they would be entered into a subscription service.
- 9 complainants said they had never registered to such a service and the first they heard of it, was when they received chargeable messages.
- 4 complainants said that they sent 'STOP' to the short code 66655 but continued to receive chargeable text messages.

One complainant reported to have been charged £80.00 in respect of the service. By 11 December 2008, the number of complaints had risen to from 18 to 23.

Nature of complaints – short code 66670

By 10 November 2008, the Executive had received 8 consumer complaints in respect of the above short code.

- 6 complainants said they had never registered to such a service and the first they heard of it was when they received chargeable messages.

- 4 complainants said they were on 'Facebook' when they saw an invitation requesting them to participate in an IQ test. After completing the test they were required to enter their mobile phone number in order to receive their results. These complainants said they were unaware that by entering their number, they would be entered into a subscription service.

By 11 December 2008, the number of complaints had risen to from 8 to 23.

The Executive's understanding of how the service operated

The information provider contracted with a further two information providers: Flingweb Sàrl ("Flingweb") in respect of short code 88870 and Immobile in respect of short codes 66662, 66655 and 66670. The Executive was aware of the following promotions:

- 1) 'IQ Quiz' (The 10 Minute Quiz): The Executive understood the promotion to be an 'Amazing facts' service, which sent consumers SMS message(s) containing a factual piece of information, charged by weekly subscription at a cost of £6.00 per week.
- 2) 'Crush Calculator': The Executive understood the service to be a Horoscope service, whereby consumers were sent three weekly messages, containing a horoscope reading. Messages cost £3.00 each, with a total weekly cost of £9.00.
- 3) 'IQ QUIZ' (Brain Power): The Executive understood this service to operate in the same way as the Crush Calculator above.

The Executive was unable to locate promotional material for the short codes 66655 and 66670.

Complaint Investigation

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code Practice 11th Edition (amended April 2008) Code. The matter later became an information provider case under paragraph 8.7 of the Code. The Executive monitored the service throughout the period of investigation.

In a letter to the service provider dated 14 November 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 5.7.2, 5.14, 7.12.2, 7.12.3a and 7.12.4a-f of the Code. A formal response was received from the information provider dated 26 November 2008, together a formal undertaking, indicating its intention to accept full responsibility for the service and promotion.

The Executive noted that the information provider also supplied additional undertaking forms; the first signed by Flingweb, accepting dual responsibility for short code 88870, the second signed by Immobile, accepting responsibility for short codes 66662, 66655 and 66670. The information provider requested that that due to the complexity of the case, it should form two separate investigations, separating the complaints regarding shortcode 88870 from the remainder. The Executive did not grant this request and proceeded with this single standard procedure investigation.

The Tribunal made a decision on the breaches raised by the Executive on 5 February 2009. The information provider made informal representations to the Tribunal, by telephone conference call.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

MISLEADING (Paragraph 5.4.1a)

“Services and promotional material must not:

a misled, or be likely to mislead in any way...”

1. The Executive considered the service to be misleading for the following reasons:

Reason 1

The promotion gave consumers the misleading impression that they were simply completing an IQ test online, and failed to clearly differentiate between the test and the subscription element of the service. The Executive noted that in relation to three promotions, consumers were misled into entering a chargeable service which was very different from the one they initially responded to (be it an IQ Test or ‘Crush Calculator’). The Executive considered that the reasonable consumer expectation after inputting a mobile phone number, would either be to i) receive an IQ score or ii) find out who had a crush on them. In all instances, the Executive considered this expectation defeated, as in order to receive any of the above, the consumer had to send a trigger word to the short code, which resulted in their subscription to the service and incurring a charge. The Executive also considered the IQ Quiz (Brain Power) promotion to be misleading, on the basis that consumers began by completing an IQ Test and were subsequently entered into a horoscope subscription service.

Reason 2

The Executive noted when consumers completed the IQ Quiz (The 10 Minute Quiz) promotion, they were given the option to ‘Select which friends to invite!’. The Executive noted that the boxes which required a tick in order to select the friends to be invited were pre-ticked. Therefore by clicking on the ‘CONTINUE’ button, the test would be automatically sent to all of the consumers’ Facebook friends. When those friends subsequently logged onto Facebook, they would find an invitation from their friend, challenging them to an IQ test. The Executive considered it more likely that people would enter a test sent in this manner, having been invited by a friend. Upon completing the test, if the new recipient entered their mobile phone number, they too would discover that they had been entered into a subscription service.

2. The information provider responded to the Executive’s allegations as follows:

Reason 1

The information provider refuted the Executive’s claim that the promotion did not comply with the paragraph 5.4.1a of the Code. It commented that the nature of the service was clearly and conspicuously stated on the first (index) and ‘enter

mobile' pages of the online service. The information provider commented specifically that on both pages, the charge and means of how to unsubscribe were prominently and conspicuously stated as follows:

“Amazing facts subscription sent to your mobile £6 per week. Send STOP to 88870 to end”

The information provider asserted that within the promotional materials, it was made clear to the consumer that by engaging in the IQ quiz and obtaining their results, they were opting to subscribe to the Amazing Facts mobile text service. Furthermore, at the very moment the consumer decided to purchase the Amazing Facts mobile text service, they were informed once again that obtaining their IQ score required them to join the weekly subscription service. The information provider stated that it only initiated subscriptions to consumers, who correctly followed the instructions as per the following subscriber initiation message:

“FREE MSG: Reply with EXAM to reveal your IQ score and receive amazing facts. Helpline 08453553445 sms stop to 88870 to end subscription £6 per wk to ur mobile”

The information provider asserted that it was the very nature of all promotions to interact with potential customers by asking questions or otherwise, in a manner which related to their “need” for a product as much as it described the features of the marketed product itself. The information provider submitted that an IQ Quiz promotion for an Amazing Facts service, was designed to help purchasers feel and appear more intelligent, was merely an example of ordinary modern marketing methodologies. The information provider also asserted that it had received compliance advice from the Executive on 7 October 2008, which made no comment as to any requirement for further clarity about the nature of the subscription. Nor did the advice make any suggestion that an IQ Quiz as a promotional method, was somehow not tied closely enough to the Amazing Facts service.

Immobile also provided a response stating that it agreed with the Executive’s finding and commented that it took full responsibility for the advertising and promotion of the service. However, it wished to make it clear that the specific advertising (as per the screenshots taken by the Executive) was conducted by an online affiliate marketer. As this affiliate marketer changed the landing page to a level which was unacceptable (from a compliance perspective), Immobile had terminated any and all professional relationships it had with them.

Reason 2

The information provider stated that its client Flingweb who promoted the service had stated that although the Facebook add-on was commonly available, that function had not operated in respect of this short code service. Therefore, no consumers had inadvertently promoted the service via the pre-ticked box method. The information provider confirmed that it would remove the add-on immediately and ensure that it was removed from all future promotions.

3. The Tribunal considered the evidence and determined that the service was misleading, on the basis that the promotional material failed to make the subscription nature of the service sufficiently clear and that a reasonable user could be misled into subscribing. The Tribunal observed that the difference between the content of the promotional material and the subscription content was a further indication that the person playing the quiz was not necessarily seeking the subscription service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

PRICING INFORMATION (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 noted that when the promotion for the IQ Test was viewed on computer screen resolution 1024x768, the Executive had to scroll down during all ten stages of the test, in order to view the pricing information. The Executive raised concerns that consumer could complete all ten stages and enter their mobile phone number, without scrolling down. This would result in consumers being unaware of the cost until they received a subscription initiation message. The Executive noted that at the top of the page, small text white writing on a dark blue background stated: *“Amazing facts subscription sent to your mobile £6 per week”* and on the line below, further smaller text stated *“Send STOP to 88870 to end”*.

The Executive was of the opinion that i) consumers would not associate the IQ test with the subscription service which cost £6.00 per week, ii) the wording at the top of the page was not sufficiently prominent; and iii) the wording at the top of the page should have clearly indicated that by completing the IQ test, consumers would be entered into a subscription service at a cost of £6.00 per week. The Executive considered this to be especially important in view of the fact that consumers could complete all ten stages and enter their mobile phone number without ever having scrolled down, and may therefore never view the ‘summary terms’.

2. The information provider responded that (i) for the reasons cited in respect of the previous breach, it refuted the notion that consumers were unable to draw a connection or associate the IQ Test, with the Amazing Facts subscription service. The information provider commented that the Executive had previously approved this, but that it was willing to make improvements in order to add clarity. (ii) The information provider agreed with the Executive’s comment that the wording at the top of the page lacked prominence, (iii) The information provider asserted that even if a subscriber never chose to review the “summary terms” section of the multiple pages of the IQ Quiz, it did not seem possible that they could be unaware of the relevant information, having been informed prominently several

times on the web pages that they were going to be subscribed to the chargeable Amazing Facts service, informed in writing by text message when receiving instructions for subscribing the service, and again when they followed the instructions in order to subscribe.

Immobile confirmed that it would implement updates to all the web pages to ensure that the written pricing information was easily legible, prominent, horizontal and presented in a way that did not require close examination.

3. The Tribunal considered the evidence and noted the need to scroll down in order to view the pricing information, and that the information required closer examination upon scrolling. The Tribunal did not consider that the information, nor the need to scroll down, had been made clear elsewhere on the webpage and consequently, could result in consumers participating in the quiz whilst being unaware of the chargeable subscription element of the service. The Tribunal found that the pricing information was not easily legible, prominent or presented in a way that did not require close examination and upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 noted that 22 of the 33 complainants reported to have sent ‘STOP’ to short code 66662, and 4 of the 18 complainants to short code 66655, on several occasions, but continued to receive chargeable text messages. The Executive also noted that several of the complainants had stated that once they realised they still were receiving chargeable messages after sending ‘STOP’, they contacted the service provider and the information provider. The complainants alleged that they had left several messages requesting a call back, which were not returned. The Executive considered this failure to return complainants’ calls to be an aggravating factor; complainants having no other means of preventing the receipt of further unwanted chargeable messages.
2. The information provider responded that it was simultaneously made aware of potential problems with the ‘STOP’ command by both the service provider and its own customer care department (as a result of consumer complaints). The information provider stated that it had immediately given the service provider its full support to investigate and resolve the potential issue. The information provider took immediate action to see that all of the 525 affected consumers were unsubscribed and received refunds as soon as possible, and did so before completing its own analysis of the problem. The information provider provided a figure which it stated was the total refund it had made for short code 88870.

The information provider confirmed that the failures resulted from technical bugs in its systems, and were in no way intentional. The problems included consumers having re-subscribed to a service and legitimately receiving chargeable messages after sending 'STOP', timing conflicts including the situation whereby messages were processed out of order, the 'STOP' command being sent so soon that the subscription process had not completed, and where consumers had sent something other than 'STOP'. Having taken full remedial action, the information provider was confident that its STOP handler was now fully functional. It had also initiated a full review of its STOP handler computer systems by its own experts and outside experts, which it shortly expected to complete. The information provider also commented that it was deploying a global STOP handler, which would ensure that any service running through either hosted applications or a straight gateway connection, would always honour the 'STOP' command. This would be done via a "white-listing" of the mobile number after a 'STOP' command was received, until an opt-in was re-attempted from that same number. The additional protective system would further prevent any messages being sent to the number after the 'STOP' command was received, other than those related to an opt-in request. The information provider also commented that it continued to strive to improve the total customer experience; which included regular changes to the way in which its customer care department serviced callers.

Immobile commented that it would ensure that where a 'STOP' command was 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 consumer.

3. The Tribunal considered the evidence and accepted that complainants had continued to receive chargeable messages after activating the 'STOP' command. The Tribunal also noted both the information provider and its client's admissions in this regard. The Tribunal upheld a breach of paragraph 5.14 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION SERVICES (Paragraph 7.12.2)

"It must always be possible for a user to leave a subscription service by using the 'STOP' command."

1. The Executive noted that 22 of the 33 complainants reported to have sent 'STOP' to short code 66662, and 4 of the 18 complainants to short code 66655, on several occasions, but continued to receive chargeable text messages. Therefore, it was the opinion of the Executive that some consumers, despite activating the command 'STOP', were unable to leave the subscription service they had entered.
2. The information provider referred to its detailed response in respect of the alleged breach of paragraph 5.14 of the Code. Immobile stated that it had experienced a corrupt hard drive within its server infrastructure, which affected

- the activation and deactivation of subscriptions. Although the 'STOP' command was received, it was not effected. This went undetected for some time due to the failed hard disk being part of a redundant array and as such, did not raise an alarm. It proceeded to have the hard drive repaired by the hosting company and then manually unsubscribed users and issued refunds. Immobile emphasised that there were no malicious acts which caused this major problem and regretted not having had better safeguards in place.
3. The Tribunal considered the evidence and noted that complainants had continued to receive chargeable messages, after activating the 'STOP' command and were therefore unable to leave the subscription service when they wished. The Tribunal noted both the information provider and its client's admissions in this regard. The Tribunal upheld a breach of paragraph 7.12.2 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

SUBSCRIPTION SERVICES (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,*

1. The Executive noted that once consumer had accepted the Facebook invitation to take the IQ Test from Facebook, a screen appeared which stated at the very top of the page in small white text on a dark blue background:

"Amazing facts subscription sent to your mobile £6 per week" and on the line below, further smaller text states "Send STOP to 88870 to end".

The Executive noted that if users scrolled down the screen, the first line within the 'Summary terms' stated *"This is a subscription service. The cost of calculating your IQ and one amazing fact is charged at £6. These charges are billed upon initial subscription, the subscription is then charged at £6 per week until you send STOP to 88870."*

The Executive considered that a) users would not associate the IQ test with the subscription service; b) the wording at the top of the page was not sufficiently prominent, and c) the wording at the top of the page should have clearly indicated that to obtain the result of their IQ test, consumers would be entered into a subscription service costing £6.00 per week.

2. The information provider requested that in response to the Executive's points a) and c), reference should be made to its previous response to the paragraph 5.4.1a of the Code. In respect of point b), the information provider confirmed that it was willing to comply with any recommendation with regard to making the wording at the top of the page sufficiently prominent. Immobile responded that it

would ensure that the promotional material clearly indicated that the service was subscription based, and that this information would be prominent and plainly visible.

3. The Tribunal considered the evidence and noted that although the statement at the top landing page did state that the service was subscription based, this information was neither prominent nor plainly visible, due to the small size and colour of the font/background. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

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 ... 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. During the Executive's monitoring of the service, it entered a mobile phone number onto the website www.bestiquiz.com and received the following text message:

“FREE MSG: Reply with EXAM to reveal your IQ score and receive amazing facts. Helpline 08453553445 sms stop to 88870 to end subscription £6 per wk to ur mobile”

At this point, the user was not subscribed. The Executive then sent the trigger word 'EXAM' to 88870 and instantly received the following messages at a cost of £6:

Message 1

Based on your answers, your IQ is 84. Challenge ur friends and see if you are smarter than them. For FREE, more in depth test available at www.funeducation.com

Message 2

Life Savers got their shape by a malfunctioning machine, which mistakenly punched a hole in the center of each candy.

A couple of minutes later, the Executive received a further message:

Message 3

FREE MSG: IQ Quiz Amazing Facts! Helpline 08453553445 sms stop to 88870 to end subscription £6 pwk to ur mobile

- The Executive considered that subscription was initiated when the Executive received message one, and therefore this message should have contained the relevant subscription initiation information, as required by paragraph 7.12.4a-f of the Code. The Executive noted that this information did appear in message three, however by which point, costs of £6.00 had already been incurred.
2. The information provider stated that without the provision of the number in question it was difficult to investigate the allegation. The information provider was able to confirm that the standard system protocol for its services was for a "Welcome" message (similar to message three) to be sent to the consumer upon subscription initiation and prior to billed messages. It explained that the UK message flow after MO opt-in, was to send the following three messages within a short interval: 1) welcome message: as per the content of the above message three, 2) initial billed content: as per the content of the above message one, 3) secondary billed content: as per the content of the above message two. The information provider commented that as the three messages were sent closely together, as stated in the summary terms, "You will be billed twice upon subscription", there was the possibility that they somehow got out of order in the transmission process between its application, gateway, the service provider's gateway and the consumers in question.
 3. The Tribunal considered the evidence and noted that charged messages were received before the message which contained the relevant information. It noted that the Code does not impose a requirement regarding the order in which the relevant messages are sent but the order in which they are received. It is the duty of the information provider to so arrange its systems as to comply with this requirement. The Tribunal upheld a breach of paragraph 7.12.4a-f 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 service was valueless to consumers who did not seek to subscribe;
- The information provider was reckless in its operation and promotion of the service;
- There was material consumer harm (206 complaints);
- The cost paid by individual consumers was high (£6.00 or £9.00 per week, with complainant reports of monthly charges of £98 and £80); and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

- The breach history of the information provider.

In mitigation, the Tribunal noted the following factor:

- The information provider cooperated with the Executive when notified of the breaches and the information provider made changes to the service.

Taking into account the aggravating factors and mitigating factor, 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 £250,000 fine;
- The Tribunal ordered a bar on these services and any related promotional material, for one month or until the information provider seeks and implements compliance advice, whichever is the longer.
- The Tribunal also ordered that claims for refunds are to be paid by the information provider for the full amount spent by complainants, and users affected by the failure of the 'STOP' command, except where there is good cause to believe that such claims are not valid.