

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 10 December 2009 TRIBUNAL SITTING No. 42 / CASE 2

CASE REFERENCE: 782317/AC

Information provider:	Nexus Enterprises Limited, Isle of Man
Service provider:	2 Ergo Limited, Manchester
Type of service:	Reward points subscription service
Service title:	SMSX service
Service number:	80039
Cost:	£1.50 per service message received, one text message received per week.
Network operator:	All Mobile Network Operators
Number of complainants:	24

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

BACKGROUND

PhonepayPlus Executive ('the Executive') received 24 complaints in relation to the 'SMSX' service that operated on shortcode 80039. The service reportedly ran from October 2007 to May 2009 and was a subscription-based service that offered the subscriber the opportunity to receive 'rewards' by visiting the associated website 'smservice.net'. The subscription element was charged at £1.50 per week and, to access the rewards, further chargeable text messages were required. The SMSX rewards service was marketed through free promotional text messages.

(i) The Service

Consumers could join the service by sending a keyword, either 'SMX' or 'SMSX' in this instance, to the shortcode 80039. The consumer would then be subscribed to a service through which they are offered 'rewards'. Consumers could claim these 'rewards' by visiting the website 'smservice.net'. By joining the service, the consumer had the opportunity to receive rewards, such as: 5000 free SMS web-to-mobile messages, hotel accommodation or European flights.

(ii) The Investigation

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

The Executive issued a breach letter to the Service Provider on 7 May 2009, raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 7.12.4e and 7.12.5 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided a signed Information Provider undertaking form on 8 June 2009 which was accepted by the Executive. The breach letter was re-issued to the Information Provider on 29 June 2009 and a further

addendum, raising a further potential breach of 7.12.4 followed on the 30 July, to which a formal response was received from the Information Provider on the 17 August 2009.

The Tribunal made a decision on the breaches raised by the Executive on 10 December 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 Section 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, either where the recipient has not specifically consented to receiving such unsolicited promotions, or where the recipient’s details were not obtained whilst purchasing a similar, or related, product or service to that being promoted.

The Executive submitted that it had received a number of complaints from consumers who stated to have received unsolicited marketing text messages. The Executive referred to several examples of complaints that stated as follows:

‘I have never heard of/corresponded with the above mentioned company before, but I received a text message from them at 11:30pm GMT’

‘Unsolicited text trying to con me into replying for something I know nothing about.’

Receiving texts from 80039. Did not subscribe to services. ‘How did they get my number?’

The Executive submitted that it was of the opinion that, where the Information Provider relied on obtaining the opt-in details as a result of the consumer purchasing a similar, or related, product or service to that being promoted (from the Information Provider), it must supply sufficiently compelling evidence to verify this.

2. The Information Provider stated that it had provided documents which evidenced that the purchased numbers were opted into receiving marketing text messages. It made reference to an email which aimed to evidence that it had purchased numbers from a company called ‘Reactiv Media’.

The Information Provider stated that all mobile phone numbers had been properly opted in and, that upon purchasing the database of marketing phone numbers, it had requested confirmation and documentation to verify that users had been appropriately opted in. It stated that it had been given confirmation from ‘Reactiv Media’ and had been sent a document containing a sample of the opt-in procedure.

The IP provided further information in relation to 'Reactiv Media' as its database supplier that sought to demonstrate how users had opted-in:

quotezone.co.uk

Opt-In Statement:

If you provide us with your information through this website, for instance by filling in one of the forms requesting us to compare insurance quotes, we shall use your information as set out in this privacy policy and in the notices we provide when you submit your information. By submitting your personal information, you consent to our use of the information as set out in this privacy policy and such notices.

In particular, we may need to collect your sensitive personal information to allow us to provide you with quotes, for instance information relating to criminal convictions or to your health. You consent to our use of such information for the purposes set out below. If you give us your personal information, we will use it to provide you with the quote comparison information you request. We may also from time to time contact you by mail, telephone, SMS, or email to provide information that may be of interest to you, including our newsletter, special offers and details about the services we offer. We shall give you an opportunity to choose not to receive marketing by email before you submit your personal information. You can tell us to stop sending you marketing information at any time by contacting us at info@quotezone.co.uk.

By submitting your personal information, you agree that we may for the purposes set out above disclose your information to our agents and service providers, some of which may be located outside the European Economic Area in countries providing less protection for personal data than the UK.

beatthatquote.com

Opt-In Statement:

We or third parties acting on Our behalf may use Your Personal Information in the following ways:

** to populate online forms with data provided by You which we screen and pass on to suitable providers furnishing such providers with the information necessary for the conclusion of Your application for the financial and insurance products displayed on Our website; and/or*

** to provide You with information, products or services that You request from us and/or*

** to allow You to participate in interactive features of Our service when You choose to do so; and/or*

** to contact You by letter, telephone or e-mail to inform You about other products and services*

which may be of interest to You; and/or

** notify You of Our news, changes to the Website, special events or other services We think may interest You; and/or to administer or develop Our Website.*

providentfinancial.com

Opt-In Statement:

We would like to provide you with information about products which we think you may find interesting. We may send you such information by mail, telephone or fax, unless you have registered with the appropriate Preference Service. When you provide us with information, you will be given the option to let us know that you do not want your information used for direct marketing purposes. If you request this option, we will not send you any direct marketing.

In their respective terms and conditions it is clearly stated that by using their services consumers agree to receive marketing material in the future.

3. The Tribunal considered the evidence and found that the opt-in statements had required individuals to effectively opt-out of receiving marketing communications. The Tribunal did not consider that, on the basis of these statements, the consumers had explicitly given their consented to receiving marketing material ('hard opt in'). The Tribunal also found that the marketing material sent in relation to the reward points subscription service had not been sent as a consequence of the purchase of similar products from the Information Provider ('soft opt in') and therefore the messages had been sent in contravention of the Regulations. The Tribunal 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 marketing text messages that had misled consumers into believing that they had received a text message from their Network Operator and, as a result, consumers erroneously opted into a charged service. The Executive made reference to examples that read as follows:

"FreeMsg:U have 3 unclaimed rewards valued at 350GBP. 2Claim join SMSX SMSX to 80039. smservice.net,1SMS/week,150p/sms,txt STOP 2stop."

"Your Oct account statement shows 3 unclaimed rewards valued at 350GBP. Join SMSX. 2 claim txt SMX to 80039. www.smservice.net 2sms/mth 150p/sms txtSTOP2stop"

The Executive considered there to be a breach of paragraph 5.4.1a of the Code on the following grounds:

Ground1

The Executive submitted that the use of the word 'Reward' had misled consumers as it had been discovered to be associated to most or all Network loyalty bonus schemes.

The Executive submitted that, where consumers had not expected to receive text messages from an alternative source, they were misled into believing that these text messages had been sent by their network, and not from a premium rate service.

The Executive made reference to examples of the use of the word 'Reward' in network marketing campaigns:

T-Mobile

"As a little thank you for topping up, we'll give you free rewards every time. So now you can talk and text even more because every single top-up lasts longer.

If you don't already get these FREE rewards:

Opt in by texting GOODIES to 441

Top up your phone with as much credit as you like

We'll text you with details of your FREE reward"

O2

"To join text REWARD to 50202, free of charge and start earning today. We'll send you a text message that confirms you've joined the programme.

"To claim your O2 Reward, just text CLAIM to 50202 free of charge in the time periods outlined below. We'll send you a message confirming your claim, followed by a message detailing the amount you have earned. This will be added to your phone balance within 48 hours."

Orange

"Collect 3750 points when you purchase through Green Rewards with Orange - Contract.

"We've got great value monthly plans, whether you love to text or talk – just pick the one that's right for you.

"If this shop has a loyalty programme, and as a member they offer you points when you shop online, you will earn Green Rewards points as well.

*"Hi from Orange. Make sure you get your free text **reward** next month. Just top-up by £10 or more before 22/04/09. You've topped-up by £0 so far. From Orange 15:03 17-Apr-09"*

Virgin

"TANTALIZING REWARDS TO HELP YOURSELF TO:

"TIME TO REAP THE REWARDS

With us you have longer to earn the maximum amount of money off - that gives you plenty of time to reap the rewards and earn what you deserve.

"EARN AS YOU SPEND

"All your calls and messages, or bundles, count toward your discount - even the airtime you use abroad.

"See how much you have to spend by visiting Your Account and clicking on Your Rewards, anytime you like."

Vodafone

"Collect 5250 points when you purchase through Green Rewards with Vodafone - Small Business.

"For more than 20 years we've been at the forefront of mobile innovation. Now we're entering a stretch of uncharted territory as next generation technology opens up a whole new range of opportunities for customers. It's a new and exciting stage in our journey.

"If this shop has a loyalty programme, and as a member they offer you points when you shop online, you will earn Green Rewards points as well."

Tesco

"Recycle your mobile for recycling rewards

"Our customers have told us that green issues are important to them, and they're just as important to us, which is why we're always looking for ways to make it easier to be a little greener. Did you know you can recycle mobile phones? Most people have old mobiles lying around the house, so why not get rid of the clutter, put them to good use and recycle them.

"With Tesco you can recycle your old working mobile phone online and earn rewards of up to £70! You have the choice of two great rewards – either Tesco Mobile Airtime or Tesco Giftcard. PLUS you will receive 200 Green Clubcard Points, or choose to donate £2 to Tesco's charity of the year, Muscular Dystrophy.

"To see the value of your recycling rewards - just click on one of the links below, to select which rewards you would like, and follow the simple steps."

The Executive also made reference to sample complainant statements, some of which read as follows:

'I find this misleading I understood this to be from 02, I sent text sms and £1.00 was automatically credited from my phone I knew this was not from 02 and thought it to be a scam'

'I thought the texts were coming from 02, I text ok and then realised I was being charged for these messages.'

Ground2

The Executive submitted that it was of the opinion that a 'high value' had been attached to the word 'Reward';

It submitted that the text message stated that the reward had a value of 350GBP and submitted that attaching this value would, in its opinion, further mislead the consumer into responding positively to the marketing text message. The Executive submitted that fulfilling such a promise of a high value reward was impracticable.

Ground3

The Executive submitted that the Information Provider had suggested to the consumer that the reward had been being given as a result of the consumer already being party to a scheme.

It submitted that the text message stated that: '*U have 3 unclaimed rewards*' or '*Your Oct account statement shows 3 unclaimed rewards*'. The Executive submitted that it was of the opinion that this suggested that the consumer had, in the past, become part of an agreement whereby they might foresee the receipt of occasional incentive awards. It submitted that because this text message was received on their mobile phone suggested that this agreement would have been with a network and not, in fact, a premium rate service. The Executive submitted that this element of the text message had misled consumers.

2. The Information Provider stated that the initial promotion text message for the service had contained the following content, varying only in the month read as follows:

"Your Oct account statement shows 3 unclaimed rewards valued at 350GBP. Join SMSX. 2 claim txt SMX to 80039. www.smservice.net 2sms/mth150p/sms txtSTOP2stop"

The Information Provider stated that, in November 2008, it was brought to its attention that, because of its phrasing 'account statement', the text message could be perceived by users as a text message originating from their respective Network Operator, after which it immediately changed the message to read as follows:

"FreeMsg:U have 3 unclaimed rewards valued at 350GBP. 2Claim join SMSX Club now. Txt SMSX to 80039. smservice.net, 1SMS/week, 150p/sms,txt STOP 2stop.08712316594"

The Information Provider stated that it was not aware that the word 'reward' was connected to Network loyalty schemes and, as such, could have lead users into believing that the sender of the promotional text message was a Network Operator.

Furthermore, the Information Provider denied any intention in this regard. It stated that it worked closely with the Service Provider on the wording for this text message in order to comply fully with the regulations. It stated that, in relation to the wording "*U have 3 unclaimed rewards*", the idea of the service was to reward customers for previously using the Information Provider's, or its partners', services and to give them an incentive to do so again (customer retention). It stated that, since users had used a related service before and agreed to receive information material in the future, an agreement had in fact been established.

The Information Provider stated that it refuted the Executive's allegation that the text messages had misled consumers by attaching a high value to the word 'Reward'. It stated that all consumers had been eligible for the three awards previously communicated to the Executive which, in actual fact, totalled on average £770. It stated that clearly promoting the rewards as being valued at £350, when the total value, if taken up, was £770, had been entirely appropriate. It stated that the promotional text messages clearly indicated that it was necessary to join the service in order to be able to claim the rewards (which were not described as free, unlike those offered by T-Mobile and Orange in the examples provided by the Executive). It stated that the value of the rewards on offer was, in fact, in excess of the amount quoted in the marketing text message.

3. The Tribunal considered the evidence and did not accept the Executive's reasoning in relation to Grounds 1 and 2. In relation to Ground 3, the Tribunal found the text message referred to by the Executive had been misleading as it suggested to the user that rewards were forthcoming as a result of already being part of a scheme. Users were misled into joining the subscription service as they believed that they had unclaimed rewards as a result of previous interaction. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code on the basis of ground 3.

Decision: UPHELD on ground 3

ALLEGED BREACH THREE PRICING (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 cost of using this premium rate service was not made clear and straightforward, and that users were not fully informed prior to incurring a charge. The Executive submitted that the text message itself was aimed at obfuscating the true charge of the service. The Executive submitted that text message read as follows:

"1SMS/week, 150p/sms or 2sms/mth 150p/sms"

The Executive also made reference to a complaint that read as follows:

"The txt doesn't make it plain that it is a subscription service you have to page down to see its £1.50 per text and apparently 2 SMS min charge per month but that is only what I'm guessing because its very unclear. Also I don't know these people...never registered with them."

2. The Information Provider made reference to the text message:

"FreeMsg:U have 3 unclaimed rewards valued at 350GBP. 2Claim join SMSX Club now. Txt SMSX to 80039. smservice.net, 1SMS/week, 150p/sms,txt STOP 2stop.08712316594"

It stated that the promotional text messages had clearly stated the costs of the service.

It stated that there had been no intention on its part to obfuscate the charge of the service. It stated that the limited amount of 160 characters made it difficult to fit all the required information into one text message. It stated that the use of abbreviations in this context was inevitable. It stated that the words 'Join' and 'Club' made it clear that the service was subscription-based. Moreover, the promotional text messages had contained the URL of the service website 'smservice.net' and the customer support hotline – which are ways to retrieve further information about the service, should something not be completely clear.

3. The Tribunal considered the evidence and concluded that the text message pricing had not been expressed clearly or straightforwardly, and the multiple and differing abbreviations such as 'sms', or 'SMS', had caused confusion on the part of users as set out by complainants. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

**ALLEGED BREACH FOUR
SUBSCRIPTION - INITIATION MESSAGE (Paragraph 7.12.4)**

“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. **Free Initial text message**

The Executive considered there to be a breach of paragraph 7.12.4 (failure to send a free initial text message) of the Code on the following grounds:

Ground 1

The Executive submitted that it had discovered two occasions where a charged text message had been the first message received, following a user text message sent to the service. The Executive made reference to the text message that read as follows:

“Welcome! The SMSX reward system offers some top rewards for you to claim right now! Send SMS NEXT to check out the current rewards available for you.”

It submitted that this first text message had not been free. as required under the Code.

Ground2

The Executive made reference to the text message that read as follows:

*“FreeSMS: You have subscribed to SMSX Club. U will receive updates on available rewards min value 100GBP every 2 weeks.
www.smservice.net,Min5sms2claim.150p/sms”*

It submitted that that, where the free subscription text message had been received prior to the charged text message, the charged text message had followed so soon (one- or two-second gap) after the free text message as to render the free text message of little, or no, value.

The Executive submitted that, on the occasions referred to by the Executive, the charged text message had been received a matter of seconds following the receipt of the free subscription text message. It submitted that such limited time provision did not allow for any user to make a decision, and to act on that decision, before being charged by the subsequent text message. It submitted that, as a consequence, the information contained in the free subscription text message had been rendered immaterial as though the text message had not been received at all.

7.12.4e Information - how to leave the service

The Executive submitted that, following the initial marketing text message and a subsequent consumer opt-in by text message, the consumer generally received the following three text messages in the following order:

05/12/2008 02:11:39

FreeSMS: You have subscribed to SMSX Club. U will receive updates on available rewards min value 100GBP once a week. www.smservice.net, Min5sms2claim.150p/sms (delivered, Bulk)

05/12/2008 02:11:39

Welcome! The SMSX reward system offers some top rewards for you to claim right now! Send SMSX NEXT to checkout the current rewards available for you.(delivered, RB)

12/12/2008 03:00:10

Reward update: Go with your family or friends to France! To claim send SMSX to 80039. www.smservice.net. 150p/SMS, min7sms2claim, txt SMSX OPTOUT to opt-out. (delivered, RB)

The Executive submitted that the first two text messages did not provide any information on opting out of the service and the second two text messages in the sequence were charged.

2. The Information Provider responded to both grounds of the Executive's allegations in relation to the free initiation text message as follows:

The Information Provider stated that it should be noted that the times included in the message logs represented a time when the system had recorded the text message as having been sent, after the text message had been passed to the relevant Network Operator. It stated that, for the avoidance of doubt, its text messages were sent in bundles so that the free text message should be sent to the user by the network first. It stated that text message delivery was not always instantaneous and this impacted on the way that the message logs were recorded.

The Information Provider noted that paragraph 7.12.4 of the Code did not state that a time gap should exist between the initial subscription text message and the first billable

text message, and, indeed, the instant gratification nature of purchases by mobile phones was recognised by PhonepayPlus themselves in the 'Mobile phone-paid services and their marketing' consultation published in early 2009. It stated that, even if a significant delay was included in the sending of the text messages, this would not guarantee that their delivery would be with the same delay, or in the correct order. It stated that it was of the opinion that a breach of paragraph 7.12.4 of the Code had not occurred.

The Information Provider responded the Executive's allegation in relation to a how to leave the service (7.12.4e of the Code) as follows:

The Information Provider stated that, in relation to the alleged breach of 7.12.4e, the message logs quoted by the Executive were now over eight months old. It stated that, prior to its suspension by the Service Provider, the subscription procedure had been working properly as described below.

1. User sends 'SMSX'
2. User then receives
 - i) a free initial subscription message ...
"FreeMsg: U have subscribed 2 SMSXClub. U will receive updates on available rewards min value 100GBP once/week. smservice.net, Min5sms2claim. 150p/sms, STOP 2stop"
 - ... and
 - ii) the first billed service message:
"Welcome! The SMSX reward system offers some top rewards for you to claim right now! SendSMSX NEXT to check out the current rewards available for you."

The Information Provider stated that it agreed that paragraph 7.12.4e of the Code had been breached; however, the risk to consumers had been very minor as, in all cases within two weeks of the initial billing, consumers received a text message which did include the required opt-out information. It stated that it continued to be happy to provide refunds to all consumers who made valid complaints. It also reiterated that this issue only happened for a limited period of about two weeks.

3. The Tribunal considered the evidence and concluded that users had not been sent a free initial subscription text message before receiving the premium rate charged text message. The Tribunal noted that the text message sent had not included information on how to leave the service. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE 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 made reference to a complainant message log and submitted that it showed that, although some attempt to inform the complainant had occurred in the

event that he or she had spent £19.50, this did not appear to have been consistent and had not occurred once a month.

2. The Information Provider stated that it agreed that paragraph 7.12.5 of the Code had been breached. It stated that it appeared that it had misread the paragraph and concluded that users had to be informed EITHER once a month, OR every time they spent £20. The Information Provider stated that it had chosen the latter and consistently informed users every time they reached a £19.50 spend. It stated that this, however, was consistent, contrary to the Executive's comment.

It stated that, following this issue initially being raised, it had been addressed and reminder text messages were now sent either monthly, or when the £19.50 limit was reached, whichever was earlier. It stated that this change to the service had been implemented at the beginning of June 2009, and it believed that any consumer harm as a result of this unintentional breach would have been small as the weekly service text messages clearly indicated the cost of the service and how to unsubscribe.

3. The Tribunal considered the evidence and concluded that, on the basis of the complainant message logs, a subscription reminder text message was not sent to complainants within a month of their opt-in to the subscription service, as required under the Code. 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 service was of limited value to consumers.
- There was material consumer harm as consumers had not consented to receive such promotion material.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider did take some steps to comply with the Code, but the Tribunal noted that these had fallen far short of what was required.
- The Information Provider did co-operate with PhonepayPlus.
- The Information Provider has provided refunds to affected users.

The revenue in relation to this service was Band 5 (£5,000-£50,000).

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:

- Information Provider to remedy the breaches in relation to this service;
- A Formal Reprimand;
- An £25,000 fine;
- 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.