

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 15 October 2009
TRIBUNAL SITTING No. 38/ CASE 4
CASE REFERENCE: 790296/AC

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| Information provider: | Reach Communications Limited, Isle of Man |
| Service provider: | Tanla Mobile Limited, London |
| Type of service: | SMS points incentive gift claim – subscription service |
| Service title: | 'Pointfactory' |
| Service numbers: | 80405, 81404 and 78181 |
| Cost: | £3 per week |
| Network operator: | All Mobile Network Operators |
| Number of complainants: | 155 |

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received more than 150 complaints between January and March 2009 in relation to a subscription service operating on shortcodes 80415, 81404 and 78181. These complaints related to the receipt of unsolicited or misleading messages from the service. Consumers were opted into a subscription via a premium rate text message, through which they accrued 'points'. Consumers were then able to exchange these points for gift items on the 'Pointfactory' website. Consumers could also play games on the website to accrue extra points. Consumers were reportedly also able to accrue points through inviting their friends to sign up, or through completing online surveys. The service provider switched off the service on 26 March 2009.

During the course of its investigation, the Executive became concerned that consumers had received marketing messages or charged text messages without providing full verifiable opt-in confirmation, and that consumers were not being provided with sufficient details of the service (i.e. how it worked, how much it cost and what was being offered to users). In addition, the Executive was concerned about the identity of the Information Provider as the individuals involved appeared to have historically been involved in non-compliant services.

(i) The Service

This was a service whereby subscribers earned points to their mobiles and were then able to exchange them for various product items via the pinc.tv website.

Upon sign-up, every user received 1,500 points, and 1,500 more points were reported to be awarded every week thereafter. Within the website there were several ways for the users to increase their total points; for example, they could play online games such as 'Hangman', 'Memory' or 'Sudoku'. Users were also awarded points for inviting their friends to join. The site contained a 'Shop' section, where consumers were able to trade their points in for products.

The service operated on shortcodes 80405, 81404, 78181 and 87333. It appeared from the call logs that, at the end of March, Tanla Mobile Limited ('Tanla') subscribers were migrated

onto shortcode 87333 (which belongs to Zamano Limited). This coincided with Tanla discontinuing the service on its shortcodes, following the notice of investigation. The service continues to operate on Zamano shortcode 87333.

(ii) The Investigation

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.7 of the Code.

The Executive sent breach letter dated 29 June 2009 to the Service Provider, raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.2 and 7.12.3a of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided an Information Provider pass-through undertaking on 2 July 2009, which was agreed by the Executive. The Executive sent the same breach letter directly to the Information Provider and received a response on 3 July 2009. The Executive requested further information in accordance with paragraph 8.3.3 of the Code on 11 August 2009, and the Information Provider responded to these further questions on 18 August 2009.

The Tribunal made a decision on the breaches raised by the Executive on 15 October 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 recipients details were not obtained whilst purchasing a similar, or related, product or service to that being promoted.

The Executive submitted that it received a large number of complaints from consumers, a large proportion of which stated that they did not solicit marketing text messages. The Executive made reference to six specific examples of the complaints received, including the following complaint:

'The complainant has been sent unsolicited texts from the shortcode 80022 advising to send a text to the shortcode 80405. The complainant did not respond and was send a further text to which her Husband responded saying "What's this all about?". The complainant call the helpline number after receiving a text on 31 December 2008 and cancelled the service.'

The Executive submitted that these complainants' testimonies, together with a lack of substantive evidence produced to show that consumers had opted into receiving text messages of a promotional nature from the Information Provider, indicated that these marketing text messages have been sent unsolicited.

2. The Information Provider stated that it could demonstrate that every subscriber who joined the service did so by sending a valid user text message and that, in order to gain a full and fair picture, it would have been helpful if the Executive had asked it to comment on all the mobile phone numbers for each complaint. The Information Provider refuted five of the six sample complaints submitted by the Executive. It refuted the above example by commenting that it did not own the shortcode referred to in the complaint.

The Information Provider stated that, in the course of the preliminary investigation, it had provided the Executive with substantive evidence to show valid opt-ins. It stated that the Executive had only provided it with extracts mentioned in its letter and it was not fair to use these selective extracts as the basis for stating that “these marketing messages have been sent unsolicited”

3. The Tribunal noted that, contrary to the Information Provider's assertion that it had provided valid opt-in evidence, it had actually provided evidence that every user of the service had sent a text message to the service prior to being subscribed to the service, but this was not the same as providing evidence that the recipients of the first promotional text message (which would have been received before any initial text message had been sent by the user) had opted-in to receive it. The Tribunal considered the evidence and, on the basis of the complainants' evidence and, in the absence of any evidence of user opt-in in relation to the first promotional text message, concluded that users had been sent unsolicited text messages for the purposes of direct marketing. As a result of this, there had been a contravention of section 22 of the Regulations and 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 mislead, or be likely to mislead, in any way.’

1. The Executive submitted that the marketing text messages had misled the consumer into opting into the service. The Executive submitted that the marketing text message read as follows:

“FreeMsg: You have 1,500 unredeemed value Points. Txt: VALUE to 80405 and redeem for Products. www.poinc.tv Subscription3gbp/wk Stop?txt stop Support08448714032”

The Executive submitted that the marketing text message was worded in such a way as to mislead the consumer into believing it to have been sent by his/her mobile network.

It submitted that it was of the opinion that, to a consumer without any prior knowledge of the ‘Pointfactory’ service, the wording, “*you have 1,500 unredeemed value points*” may have misled the consumer into believing that the text message had been sent from his/her network operator and, therefore, the consumer would not have been on notice to seek out a charge attached to sending the keyword to the shortcode.

The Executive also submitted that it did not believe that providing the internet website in the text message had been sufficient to inform the consumer of the nature of the service.

The Executive made reference to complainants who stated that they believed the text message had been sent by their network operator. The Executive made reference to a number of sample complainants, such as:

'Consumer thought the text was from O2 and replied back, thinking she will win a prize.'

'Consumer been receiving unsolicited messages been charged £3 toady for above message, received at text thought it was from o2 telling him to "sign up to our completely free news letter'

2. The Information Provider made reference to its response to the Executive's breach letter in which it had stated that it did not agree with the Executive's belief that the "marketing messages mislead the consumer into opting in to the service by sending a user text message to the shortcode provided". It further stated that the use of the expression "you have 1,500 unredeemed value Points" was a basic marketing tool, and in no way dissimilar to other well known expressions or marketing 'hype', which appeared in all media forms.

It stated that a recipient was given a telephone number that he/she can call for further information regarding the nature/purpose of the service, and/or origin, of the message. The purpose of giving a website address was to provide the recipient with an additional way of obtaining information regarding the service.

Furthermore, there was nothing in the body of the text message which suggested that the recipient's network operator had sent it to him/her. The text message was very clear in explaining to the recipient that it was a subscription service which charged £3.

It stated that, after the initial user text message, subscribers received the following welcome text message:

"FreeMsg: Welcome to Point Factory! Goto www.pointfactory.co.uk Login password 12345678 Subscription 3gbp/wk includes 1500 pts to Stop txt stop Help08448714032"

It stated that, from the moment of the original user text message, the subscriber had 1,500 value points credited to his/her website account. Users were at liberty at any time to cancel their subscription. If they did so within seven days of receiving the user text message, they would not have been charged anything. They could, in that seven-day period, redeem the value points and then cancel their subscription.

The Information Provider further submitted that, in the following weeks and for so long as they remain subscribed, users received weekly text messages, such as:

*"£3 Renewal message #1
Dear Point Factory Member, 1500 Points have been added to your account. Login to www.pointfactory.co.uk to see your new balance. Continue to enjoy the service."*

"£3 Renewal message #2"

Dear Point Factory Member, 1500 Points have been added to your account. Login to www.pointfactory.co.uk to see your new balance. Continue to enjoy the service."

It stated that, for so long as users remained subscribed, and as required by the Code, users received a text message at the end of each succeeding month which read (the actual points balance may of course vary between subscribers):

"£ Renewal message week #3

*Dear PointFactory user New Point balance is 250000 www.pointfactory.co.uk
Password 12345678 Subscription3gbp/wk and 1500 points to STOP Txt Stop
Help08448714032"*

The Information Provider stated that, not only was the service compliant in respect to its submission of text messages and the detail set out in such text messages, but any argument that consumers were 'misled', whether by the original marketing text message or subsequently, truly lacked substance or merit.

The Information Provider responded to the sample complaints submitted by the Executive and commented that, in relation to the first and second sample complaint, the service text message users had received made no mention of the network operator and, therefore, users had clearly made an incorrect assumption.

The Information Provider stated that the recipient made an erroneous assumption as to the origin and nature of the text message, or related service, and this did not mean that the service text message was misleading. It simply meant that the user had made a mistake.

The Information Provider that the overwhelming majority of consumers had no difficulty whatsoever in understanding who it was that they were dealing with and how the service operated.

The Information Provider stated that it focussed on client care and it was its policy to operate on the basis of a 100% customer satisfaction guarantee. This operated in any circumstance and, in particular, where it was evident that the consumer was impaired in any way (e.g. poor reading ability, or language skills). Furthermore, it was the experience of its clients that many consumers mistakenly left the service, only then to seek to rejoin. If that happened, the Information Provider reinstated the 'points' the user had accrued at the time they signed off from the service. This was a policy driven by the desire to have happy customers.

3. The Tribunal considered the evidence and noted that some users had assumed that the promotional text message was from their network operator. The Tribunal concluded that, whilst there was no evidence of a deliberate intention to mislead consumers into believing the message was from their network operator, the promotional text message did not make it sufficiently clear that it was from a commercial service for which payment was required, and this lack of clarity was therefore likely to mislead consumers. The Tribunal also considered that the use of the wording 'unredeemed points' found in certain text messages implied a previous relationship between the user and the service that was also likely to mislead, and had probably contributed to some users believing the message was from their network operator. Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 referred to the subscription element in the promotional text messages which stated as follows:

"...Subscription3gbp/wk..."

The Executive submitted that the pricing information was written in such a way, without sufficient spacing and with abbreviated words, which together acted to make its meaning confused and hard to decipher without close examination. It therefore alleged that a breach of 5.7.2 had occurred.

2. The Information Provider stated that it felt that the plain meaning of the wording, and the combination of words, was clear on its face. Whilst it was written without spacing, the first letter of the word 'subscription' was capitalised, as opposed to the word being written in 'ALL CAPS', which was less clear. Furthermore, the number '3' was clearly prominent in relation to the letters which surrounded it.
3. The Tribunal considered the evidence and concluded that the wording "*Subscription3gbp/wk*", read in the context of the entire text message, required close examination on the part of the user in order to decipher its meaning. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION PROMOTIONAL MATERIAL (Paragraph 7.12.3a)

'Promotional material must clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers.'

1. The Executive referred to the subscription element of the promotional text message which stated as follows; :

"...Subscription3gbp/wk..."

The Executive submitted that the subscription information was not clear or plainly visible. It submitted that the subscription information was written in such a way, without sufficient spacing and with abbreviated words, which together acted to make its meaning unclear that it was a subscription-based service.

It submitted that the lack of spacing and the abbreviation of the surrounding words acted to conceal the word 'subscription' and bury its prominence in the middle of the indecipherable writing.

2. The Information Provider stated that the word 'subscription' was very clear and was the first word to be used. It stated that the presence of '3gbp/wk' immediately after the full spelling of the word 'subscription' clearly informed the consumer that this was a subscription service which cost three Pounds Sterling per week. The Information Provider stated, therefore, that it disagreed that the prominence of the word had been buried "in the middle of indecipherable writing".

3. The Tribunal considered the evidence and concluded that the wording “*Subscription3gbp/wk*”, when read in the context of the entire text message, did not clearly indicate to the recipient that the service was subscription-based. The Tribunal noted that insufficient steps had been taken to bring the subscription element to the attention of the recipient, particularly given the overall context of the message which suggested an existing relationship with the sender through the reference to ‘unredeemed points’. This meant that it was likely that the recipient would not have expected that replying to the message would initiate a subscription service. The Tribunal upheld a breach of paragraph 7.12.3a 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 Information Provider’s behavior was deliberate in relation to the misleading nature of the text messages and the lack of opt-in evidence.
- There was material consumer harm – there were 155 complaints over a four month period.
- The cost paid by individual consumers was high – some complainants were charged over £20 for subscription to the service.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider informed the Executive that refunds had been made and that there was a good customer service procedure in place for dealing with complaints.

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

Having regard to all the circumstances of the case, including the large number of complaints, the significant scale of the consumer harm and the level of revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A fine of £160,000;
- The Tribunal imposed a bar on all subscription services and related promotional material for a period of 12 months starting from the date of notification;
- The Tribunal 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.