

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 22 January 2009 TRIBUNAL SITTING No. 19 / CASE 3

CASE REFERENCE: 754475/CB

Information provider & area:	Red Circle Technologies Limited, Dublin
Service provider & area:	Zamano Limited, London
Type of service:	Mobile Content Downloads
Service title:	Zing
Service number:	60699, 64440, 81002, 88770
Cost:	Subscription service tariff varies £6 - £9 per week, Non Subscription service tariff varies £1-£6
Network operator:	All Mobile Operators
Number of complainants:	94

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

BACKGROUND

PhonepayPlus received 94 consumer complaints in respect of service messages from the 'Zing' mobile content service. The 'Zing' service was heavily promoted in various media including main stream magazines, newspapers, websites and mobile phone accessible WAP sites. The service operated with both subscription and non-subscription charging arrangements. Messages received were charged at a rate of £1.50 per message. Weekly subscription and non-subscription charges varied, costing a maximum of £9 per week.

The consumer complaints demonstrated a high level of confusion as to the sender of the chargeable SMS messages; consumers also disputed ever having opted-in to the service. It appeared that much of this confusion was a consequence of the 'Zing' service moving aggregators in June 2008, which resulted in the service changing its short codes used for promotional and billing purposes.

The Executive's understanding of how the service operated

The Zing service was branded as 'Zingtones' and 'Txtuk', depending on whether the consumer used the subscription or non-subscription element of the service. Consumers who did not want to enter the subscription service were directed towards the Txtuk.tv web/WAP sites, whereas consumers who wished to make a purchase and enter into a subscription service, were directed towards the Zingtones.tv branded web/WAP sites.

Both of the websites, www.Zingtones.tv and www.Txtuk.tv, had the same initial lay out and offered the same content. The main difference was that the terms and conditions supplied, were specific to the subscription and non-subscription services offered to the consumer. Further brands of the Zing service were identified by the Executive, one being 'Club 84225' which was used in print promotions in The Sunday Sport magazine.

The Zing subscription service charged a joining fee of up to £6 and £3 per week thereafter, which allowed consumers to download five pieces of content every week as part of their package. The non-subscription element of the service charged at rates of up to £6, depending on the content requested. Available content included ringtones, animations, wallpapers, videos and games.

Print Media:

If the print advertisement was subscription based, the consumer subscribed to the service upon the successful sending of a valid mobile originating message ("MO") from their handset. If the advertisement was non-subscription based, their MO was treated as a one off transaction; the consumer would be billed and the content delivered.

WAP Site Purchasing:

The information provider explained that WAP sites were not subscription based and consumers would often purchase content directly from the sites, via their mobile phones.

Websites:

Consumers who visited the websites were directed to input their mobile number, which triggered the sending of a free text message to their handset. The consumer was required to respond with 'OK', if they wished to subscribe to the service. A subscription was only activated by the receipt of an MO from the consumer.

Complaint Investigation

In a letter dated 21 July 2008, the Executive requested information from the service provider in respect of the Zing service and SMS logs for complainant's mobile numbers. The service provider duly responded on 8 August 2008, including a response supplied by the information provider.

In a letter to the service provider dated 22 October 2008, the Executive raised potential breaches of paragraphs 3.3.1, 5.4.2, 7.12.4a-f and 7.12.5 of the Code. On 5 November 2008, the service provider supplied a formal response from the information provider. The service provider also enclosed undertaking forms and requested that the Executive deal with the information provider directly, to which the Executive agreed.

The present investigation ran in parallel with a case reference number 750479, in which the same 'Zing' service ran through a separate service provider, 2 Ergo Limited. The service operated from September 2007 through to June 2008, at which point the information provider moved the 'Zing' service over to its present service provider, Zamano Limited. The Executive received 116 public complaints in respect of case reference 750478, which appeared to indicate that the 'Zing' consumer experience was misleading and had resulted in consumers mistakenly understanding that the SMS messages received were unsolicited. Further to its migration to Zamano short codes, the Executive ran the same checks and considered that the misleading elements of the service such as, consistency in brand name in promotional material, 'STOP' command confusion and pricing inconsistencies, had been resolved.

The Tribunal made a decision on the breaches raised by the Executive on 22 January 2008.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

GENERAL DUTIES OF SERVICE PROVIDERS - DEDICATED PREFIX (Paragraph 3.3.1)

“Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service... those codes or number ranges must not be used in contravention of these restrictions...”

1. The Executive monitored the Zing service as promoted in the October 2008 edition of ‘Loaded’ magazine. The Executive considered that the promotional material which advertised the videos and pictures available via the Zing service, included material which consumers were likely to believe to be adult in nature. The terminology used to describe the videos and pictures included: *Squirt Squirt, Blue Movie, Get into me, Puss, Up the jacksie, Fanny Grabs, Dying for oral* and *Gagging for it*. The pictures accompanying the wording in these advertisements also appeared to be of a sexual nature, using stars to cover exposed breasts and female genitalia.

The Executive noted that paragraph 7.11.1 of the Code stated that a sexual entertainment service is any service for which the associated promotional material ‘*indicates or implies*’ that the service is of a sexual nature. The Executive considered that the Zing promotional material should have been promoted on an adult short code of 69 or 89, not 88770. As the service appeared to be promoting adult content, the Executive considered that the incorrect short code had been used in contravention of Network Operator restrictions.

2. The information provider commented that although the actual content which could be purchased through the service was of a topless nature, it showed nothing beyond that. It stated that the content operated within the IMCB guidelines, was similar to that which was freely available in newspapers such as The Sun and The Star, and was in context with the material included in the magazine. The information provider did not believe that the material warranted provision over an adult short code.

The information provider explained that the use of stars to cover breast and pelvic regions was carried out at the publishers’ request, in order to comply with copy guidelines. It accepted that the terminology outlined in the breach letter could be construed as inappropriate and had removed all similar terminology from subsequent advertisements. The information provider stated that it considered it acceptable to carry an image of a topless girl on a non adult short code, without the use of stars and after removal of the terminology in question.

3. The Tribunal considered the evidence and determined that the promotional material implied that the service was of a sexual nature and therefore the promotion should have been on the appropriate short code. The Tribunal commented that regardless of whether the actual service *content* fell within the adult category, the information provider must make the appropriate changes to the promotion, if it wished to continue to promote the service on a non-adult short code. The Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

DELAY (Paragraph 5.4.2)

“Services must not be unreasonably prolonged or delayed.”

1. The Executive noted that the SMS logs provided by the information provider, appeared to show that one particular mobile number had opted-in to the service by sending an MO to a service

advertised in Star Magazine, on 30 July 2007. The SMS logs showed that the consumer did send an MO to short code 84225 (a 2 Ergo short code for the Zing service) on 30 July 2007, which was then followed by a WAP push promotion from the service on 13 August 2007. At this point the consumer had not been charged for any service material received. No contact was then made by the service to the consumer until 14 May 2008, whereupon the consumer was charged for 3 x £1.50 reverse billed SMS from the service short code 64440.

The Executive considered a delay of nine months to be an unreasonable length of time. The prolonged delay in the service messages reaching the consumers mobile phone led to the consumer mistakenly believing that the messages were unsolicited.

2. The information provider commented that it appeared that the breach had been raised, because of confusion relating to the detail included in its response to the Executive's request for information under paragraph 8.3.3 of the Code. The information provider explained that because the request related to the service provider's short codes, it had supplied the logs detailing all transactions on those short codes only, and where applicable, any MOs on the previous service provider's short codes. Therefore, all other transactions sent via 2 Ergo Limited short codes had been removed, with the exception of the initial MO which was retained in order to demonstrate opt-in. The information provider apologised for the confusion caused, but stated that at the time, did not think it appropriate to discuss one service provider whilst responding in respect of another service provider's short codes.

The information provider supplied a revised description of events relating to the mobile number in question, including transactions on both service providers' short codes. The information provider stated that the logs demonstrated the consumer received billed messages after sending the 'STOP' command, but that the command related to one-off, non subscription based purchases. Additionally, the consumer's transaction history dated back to 28 November 2006 and since then, had downloaded 27 items in total and continually interacted with the information provider's systems, by purchasing content. The information provider denied a breach of paragraph 5.4.2 of the code.

3. The Tribunal considered the evidence and noted the information provider had subsequently supplied full information in respect of the mobile number in question. This additional information demonstrated that the complainant had opted-in to the service and used it on a number of occasions, throughout the period in question. The Tribunal concluded that the additional information supplied, demonstrated that there had not been unreasonable delay in respect of the sending of service messages to that particular consumer. The Tribunal did not uphold a breach of paragraph 5.4.2 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH THREE

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. The Executive noted that the SMS logs provided by the information provider showed that of the 38 logs provided, 20 mobile phone numbers were sent messages as part of a subscription service by the short codes 81002 or 87770. Furthermore, thirteen of the logs showed that no subscription initiation messages had been sent full stop, and seven of the logs showed that chargeable subscription initiation messages had been sent to consumers, costing £1.50 per message received.
2. The information provider responded that 13 consumers had been sent welcome messages. It reiterated that all transactions on its previous service provider's short codes had been removed from the logs, with the exception of the initial MO, which had been included in order to demonstrate opt-in to the service. The information provider apologised for any confusion caused. The information provider stated that the following message had been sent to consumers:

'Welcome to the Zing. Download up to 5 chart tones, games & videos each week for 3 GBP per week until u send stop to 87666. Problems?0871 872 1813'

The information provider explained that the fact that the initial subscription messages were chargeable was a mistake, although there was no implication that the welcome message was free. Upon migration to the current service provider, the information provider realised the error and changed the initial subscription message to a free message on Zamano short codes from mid July. For example:

'FREEMSG: U have joined Zing. Download up to 5 tones, games r videos for 3 per week until u send stop to 88770. Help 08452251808. SP Red Circle'

3. The Tribunal considered the evidence and noted that the information provider had subsequently supplied complete logs, which demonstrated that the appropriate messages had been sent. However, the Tribunal also noted the information provider's admission that it had charged consumers for these messages in error, which was confirmed in the logs. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

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 noted that the SMS logs demonstrated that the subscription element of the service operated on short codes 81002 and 87770. The logs provided also appeared to show that 20 of the 38 complainants were part of the Zing subscription service, operating on the short codes 81002 and 87770. The Executive found that five complainants had not been sent the appropriate reminder message, and three complainants incurred overall charges of £30 and the remaining two complainants, £22.50 and £60 respectively.

Contrary to the evidence in the logs, the Executive noted the service provider's admission in correspondence dated 6 August 2008, that a technical error occurred, whereby the reminder logic in its system was flawed and the reminder text message not delivered at appropriate intervals. It stated that it had since rewritten the logic, resolved the problem and commented that the error was an intermittent problem.

2. The information provider admitted that the reminder message functionality was not working correctly on its systems. When the information provider moved the service to its current service provider, all consumers had received a free message informing them of the short code change and the fact that they were subscribed to the service. The information provider was happy that the reminder messages were operating in conjunction with the Code. For example:

'FREE MESSAGE: As part of Zing U can get 5 Ringtones, Videos, Games & Graphics for £3 per week! Helpline: 08452251808. SP.Red Circle. stop to 81002'

3. The Tribunal considered the evidence and noted that at least five complainants had incurred significant costs in using the service ranging from £22.50 to £60, and had not received the requisite reminder messages as required by paragraph 7.12.5 of the Code. The Tribunal also noted the information provider's admission in this regard. 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 **significant**.

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

- The cost paid by individual consumers was high (£6 per week and one consumer incurred costs of £60);
- The information provider was aware of problems with its service and should have taken more steps to ensure it was compliant, prior to moving to a new service provider; and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factor:

- The information provider cooperated with the Executive when notified of the breaches.

Taking into account the aggravating factors and mitigating factor, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand
- A £50,000 fine.
- The Tribunal ordered the information provider to seek compliance advice in respect this category of service and similar categories of services, within 2 weeks from receipt of the summary decision, such advice to be implemented within 2 weeks of receipt.

Comment

The Tribunal also noted that refunds had been issued to some complainants and commented that it expected the information provider to continue to provide refunds for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.