

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 9 July 2009 TRIBUNAL SITTING No. 31 / CASE 2

CASE REFERENCE: 785258/GL

Information provider:	SIA A1: Baltic, Latvia
Service provider:	Ericsson IPX AB, Sweden
Type of service:	Internet contact and dating
Service title:	N/A
Service number:	79067
Cost:	£5.00 per reverse-billed text message
Network operator:	All mobile operators
Number of complainants:	1

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received one complaint regarding a service operating on shortcode 79067. The complainant had made contact with a female user via a contact and dating website called 'flirt.co.ua' and she subsequently asked for the complainant's mobile phone number. The complainant provided his mobile phone number and received a promotional text message which requested that he text a shortcode in order to receive the female's contact phone number. When the complainant sent a text to the shortcode, he was then sent two reverse-billed text messages, neither of which contained the contact details and he was charged a total of £5 for the messages he received.

Complaint Investigation

Standard Procedure

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

The Executive sent a breach letter dated 20 May 2009 to the Service Provider. A formal response was received from the Service Provider on 20 May 2009 requesting that the case be considered as an Information Provider case.

The Executive received the respective undertaking forms from the Service Provider and the Information Provider and reissued the breach letter raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1 and 5.8 of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 ('the Code').

The Information Provider responded to the breach letter via a consultant company in a letter dated 20 May 2009.

The Tribunal made a decision on the breaches raised by the Executive on 9 July 2009 having heard informal representations from the consultant on behalf of the Information Provider.

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 Regulation 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, unless (1) the recipient has specifically consented to receiving such promotions, or (2) the recipient's details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication (this is known as the 'soft opt-in').

The Executive submitted that the promotional message which had been sent to recipients of the service was direct marketing electronic mail for the purposes of the Regulations and that it appeared that the promotional message sent to complainants had been unsolicited since there was no evidence that recipients had consented to the receipt of any promotion for this service either directly or indirectly.

The Executive referred to the complaint it had received. The complainant had stated that he had been using an online chat service via the website 'flirt.com.ua' but had never given his consent to receive a promotion for a premium rate service via his mobile phone. The complainant stated that the woman he had been chatting to online had asked for his mobile phone number, which he had given. He was then sent the promotional text message asking him to text the shortcode in order to receive the woman's phone number, which he had done.

The Executive stated that it had previously requested evidence of how mobile phone numbers were opted into receiving the promotional email in the first instance, and that no evidence had been produced by the Information Provider.

2. During the informal representations, the consultant acting for the Information Provider explained that the Information Provider's service allowed its partner companies/clients to register online, providing basic details such as name, passport number, and bank account details, and then to generate text messages which could be sent to end users over the Information Provider's system. The consultant explained that, in this case, it appeared that one of the Information

Provider's partner companies had registered false details and then deliberately set out to take money from consumers by enticing them to provide their mobile phone numbers through a chat service called 'flirt.com.ua' so that it could then send them a promotion for a premium rate service. The Information Provider stated that in this case the 'rogue' partner appeared to have used the prefix '18 natasha21' to engage with users of the third party's chat service. The Information Provider states that the 'rogue' partner had not followed the Information Provider's rules nor its terms and conditions and that the promotional messages had been sent without the correct opt-in procedures. The Information Provider stated that it had not been provided with any marketing lists and was not aware of any campaigns being run at that time by its partner company.

3. The Tribunal considered the evidence and concluded that the promotional text message sent to the complainant's phone was direct marketing for the purposes of the Regulations. The Tribunal concluded that, on the balance of probabilities, the complainant had not given consent to receive the promotional text message and therefore the promotional text contravened Paragraph 22 of the Regulations. The Tribunal therefore decided to uphold 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 submitted that the complainant had been misled into using the service because he believed that he was going to receive the phone number of the woman he was speaking to online via the website 'flirt.com.ua'. The Executive submitted that he was sent a promotional text message after being asked for his mobile phone number by the woman he was chatting to online, and he was unaware that the intention was to send him a promotion for a premium rate service. The Executive referred to the fact that once the complainant had sent a text message to the shortcode he was charged £5 and sent the following two messages:

Message 1: *'Thank you for your payment of £5. The order is on its way'*

Message 2: *'[FreeMsg] <http://1alt.ru/GEtj9i9COGailo9yE4vm3m>'*

The Executive submitted that on receipt of the two text messages, nothing further happened and no mobile phone number for the woman named 'Natasha' was given.

2. The Information Provider stated that the 'rogue' partner in this instance intended to mislead the user and did so by stating the cost of the text message received by the complainant would be \$0.20 instead of £5 and that once the text messages had been sent to the user, and he or she had been charged, the service was terminated.

3. The Tribunal considered the evidence and concluded that the complainant had been misled into using a premium rate service in the belief that he was going to receive the phone number of the woman with whom he had been speaking via the website 'flirt.co.au'. The Tribunal also concluded that the complainant had been misled into texting the shortcode provided in the promotional text without the knowledge that he would be subsequently receive two service messages and be charged £5 as a result. The Tribunal therefore decided to uphold a breach of 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

PRICING INFORMATION - COST (Paragraph 5.7.1)

'Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge'

1. The Executive submitted that the complainant stated that he had not been informed of the cost of using the premium rate service prior to being charged £5 by reverse billed text message. The Executive further submitted that the promotional message had not contained any pricing information.
2. The Information Provider stated that it was of the opinion that the intention of the 'rogue' partner, in this case '18 natasha21', appeared to have been to defraud the user by both displaying the wrong pricing and then to send out service text messages to the value of £5 with no content at the end of the transaction.
3. The Tribunal considered the evidence and concluded that the promotional message had failed to provide any pricing information in relation to the service and that users had not been informed of the correct costs of using the service prior to incurring a charge. The Tribunal therefore decided to uphold a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

CONTACT INFORMATION (paragraph 5.8)

'For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in Paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user.'

1. The Executive submitted that the promotional text message failed to provide the required contact details under paragraph 5.8 of the Code.
2. The Information Provider stated that under normal operating circumstances any partners that used its shortcodes were obliged to provide the necessary contact information and due to the fraudulent intentions of the 'rogue' partner this had not been the case.

3. The Tribunal considered the evidence and concluded that the promotional text messages sent to the complainant had not contained any contact information as required by the Code. The Tribunal therefore decided to uphold a breach of paragraph 5.8 of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **very serious**.

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

- The service was valueless to the consumer – users had been billed £5 and received nothing further from the service;
- The behaviour of the Information Provider was negligent in relation to the level of due diligence carried out on its partner company, which was the ultimate information provider.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had not played an active part in causing the breaches;
- The Information Provider closed the partner's account and deactivated its use of the shortcode immediately upon being informed of the fraudulent activity by the Service Provider;
- The Information Provider stated that it had tried to offer refunds but had not been able to get through to the mobile phone numbers concerned.

Having taken into account the aggravating factors and the mitigating factors, the Tribunal concluded that bearing in mind the very low revenue generated by the service (which indicated a low level of actual consumer harm) and the lack of active participation of the Information Provider in causing the breaches, the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A £1,000 fine;
- The Tribunal also 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.

The Tribunal expressed concern in relation to the Information Provider's due diligence procedures that had allowed the breaches to occur. The Tribunal commented that it expected the Information Provider to make improvement to its due diligence procedure.

