

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 16 April 2009 TRIBUNAL SITTING No. 25 / CASE 3
CASE REFERENCE: 764291/AC

Information provider & area:	Shetland Worldwide Holdings Limited
Service provider & area:	Sybase 365 Limited
Type of service:	SMS Quiz service
Service title:	The Quiz Club
Service number:	84648
Cost:	£1.50 per MT message, up to £19.50 per month.
Network operator:	Mobile Operators
Number of complainants:	72

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

BACKGROUND

The PhonepayPlus Executive ("the Executive") received more than 70 complaints from consumers regarding this service. The vast majority of the complaints related to the receipt of an unsolicited promotional SMS message which stated "*Free MSG> Important. Please respond with OK to confirm*", and the subsequent receipt of chargeable SMS messages relating to a quiz subscription service. The service required consumers to answer questions in order to win prizes; winners were chosen at the end of each month from a pool of people who had answered the most questions correctly. The service was charged at £4.50 per week.

The Promotion

The Information Provider initially supplied responses to the Executive stating that the service '**Mobiles for you Quiz!!**' was promoted via a 3 stage opt-in; the consumer would see an advertisement in the EasyJet magazine, they would then visit the **mobilesforyou.net** website and enter their phone number, subsequent to which they would receive a WAP message which the consumer would have to respond to positively to continue. The consumer then received a text message asking them to confirm the opt-in process. This text message read: "*FreeMSG> Important. Please reply with OK to confirm*". Following further investigation the Information Provider acknowledged that it had also bought numbers from a 3rd party data supplier and had used these numbers to promote the service.

The Service

The terms of the service were as follows:

'We will send you 3 true or false questions per week. When answering please send either T for true or F for false to the short code. 3 winners will be randomly drawn at the end of each month from top 50 participants with the highest number of correctly answered

questions. Prizes include iPod's, mobile phones and cameras. This service is a reverse billed SMS subscription service and messages are sent and received from a short code.'

Quizzes were run on a monthly basis and winners were drawn on the 5th of each month; each winner was given a choice of prizes.

The Executive did not investigate the legitimacy of potential winners.

Complaint Investigation

Standard Procedure

The Investigation was initiated by the Executive by sending an 8.3.3 Request for Information to the Service Provider on the 29 October 2008. The Service Provider responded on the 4 November 2008 and requested that an Information Provider undertaking be considered. The Executive subsequently explained that a request for an Information Provider pass through could be made on receipt of a formal breach letter.

The Executive raised breaches of paragraphs 8.3.3, 5.2, 5.4.1a, 5.4.1b, 5.7.1 and 5.8 of the Code in a letter dated 20 November 2008 which was sent to the Service Provider. A response was received on the 5 December 2008 accompanied with a signed undertaking by the Information Provider and Service Provider. Following the Executive's acceptance of the undertakings a breach letter was issued to the Information Provider on 23 February 2009 to which a response was received on 13 March 2009. This response confirmed that WAP messages had been sent through a different aggregator and that marketing messages had been sent to numbers purchased from a third party data provider.

The Tribunal made a decision on the breaches raised by the Executive on 16 April 2009.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS - MISLEADING (Paragraph 5.4.1a)

'Services and promotional material must not mislead or be likely to mislead in any way'

1. The Executive considered that the promotion and service were misleading on the following grounds:

Ground 1

The Executive submitted that consumers had been misled into sending a keyword to a shortcode by receiving the following message:

'FreeMSG> Important. Please reply with OK to confirm'

The Executive considered that the message above made no attempt to inform the consumer of the consequences of sending the keyword to the shortcode. Complaints indicated that consumers may have considered that the message was a service message from their Network and subsequently followed the instruction with no idea of the associated premium rate charges.

Ground 2

The Executive submitted that the WAP message sent by the Information Provider to the consumers (as provided via the third party aggregator) misled them into believing they had won a prize and that to claim that prize all they needed to do was click 'collect' and then enter 'OK' to the subsequently received text message. The Executive noted that this was not in line with the quiz service model provided by Information Provider in which winners were chosen each month. The Executive considered that a breach of the paragraph 5.4.1a of the Code had occurred.

2. The Information Provider responded to the Executive's allegation as follows:

Ground 1

The Information Provider stated in its response to the Executive's request for information that all users who entered their number into the website received WAP advertisements with the pricing information and terms. The Information Provider stated that the website already contained this information and that the WAP advertisements provided users with an opportunity to view the information again in order that they may make an informed decision on whether they would want to join. The Information Provider made reference to previously opted in information via the WAP push that served to get a double opt in from customers. The Information Provider further stated that only the customers that had opted in via the link with the WAP Push message received the chargeable SMS message.

Ground 2

The Information Provider did not respond to this breach.

3. The Tribunal considered the evidence and concluded that, in relation to Ground 1 the message was misleading as the consequence of replying 'OK' to the message, and the associated charges, had not been made clear. In relation to Ground 2, the Tribunal concluded that the WAP message had misled recipients into believing that they had won a prize which could be claimed by clicking 'collect' and responding with 'OK' to the subsequent text message received. The Tribunal therefore upheld a breach of paragraph 5.4.1a of the Code on all grounds.

UPHELD on all grounds

ALLEGED BREACH TWO

REQUEST FOR INFORMATION (Paragraph 8.3.3)

'During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:

- *call volumes, patterns and revenues,*
- *details of the numbers allocated to a service provider,*
- *details of services operating on particular premium rate numbers,*
- *customer care records,*
- *arrangements between networks and service providers,*
- *arrangements between service providers and information providers.'*

1. The Executive considered there to a breach of the Code in relation to its request for information, on the following grounds

Ground 1

The Executive submitted that it had requested details in the 8.3.3 request in October 2008 regarding call logs relating to a number of complainants. The Information Provider responded by providing a number of complainant logs by email via the Service Provider on the 4th November 2008. The Executive submitted that WAP push messages were included on the logs. These messages purportedly originated from a number of different short-codes including; 75234, 63228, 63244, 80812, 63433, 64336, 63994, 48645, 48544, 43225 and 22110000. A number of these were reported by the Information Provider to have been used on the O2MUK network. The Executive submitted that O2 had subsequently confirmed that none of these numbers were or had been activated on the O2 Network and as a result the Executive considered that the accuracy of the information was rendered uncertain as a result.

Ground 2

The Executive submitted that the following information was requested in an 8.3.3 letter dated 29 October 2008:

1. All promotional material for this service (if consumers received a promotional marketing message from a 3rd party please provide a transcript of the message and the name of the supplier of the promotional message)

The response stated *'See wap message 'Quiz' attached'*

2. All the methods used to promote this service.

The response stated *'The service was promoted in Easy Jet and the website'*

In the breach letter issued to the Service Provider (before an Information Provider undertaking had been requested and agreed) the Executive had stated:

1. Provide details of any sources where numbers are collected in order to market the service via text message.

The response stated *'The website was the only source where numbers were collected for the service'*

2. Have you ever bought and used number[s] for promotional marketing of this service from a 3rd party supplier?

The response stated *'No'*

The Executive submitted that contrary to this information provided, in the response dated 13th March 2009 to the breach letter sent to the Information Provider dated 3rd February 2009, the Information Provider had stated:

'Unfortunately our investigation unveils that in addition to the Easy Jet in flight magazine we also bought opt in numbers from a reputable "data broker".'

The Executive submitted that this information confirmed that third party marketing numbers were purchased and used by Shetland Worldwide Ltd and that this fact was denied to the Executive on 2 occasions by Shetland Worldwide

Ground 3

The Executive submitted that in the breach letter sent on the 20th November 2009 the Service Provider was asked to provide details of the aggregator through whom the WAP data was processed. The response stated merely that:

'The WAP data is processed through us'.

However, in the response dated 13th March 2009 to the 2nd breach letter dated the 23rd February 2009 in which the WAP MT shortcodes were questioned by the Executive, the Information Provider had responded by stating that:

"WAP information processing and utilisation, in other words being sure that only consumers wanting to participated was opted into the service were solely handled by WIN Interactive, which were a paid technology supplier to Shetland Worldwide Ltd".

The Executive submitted that the above Ground 3 indicated that the Information Provider had not been forthcoming in providing accurate information to the Tribunal.

Ground 4

The Executive submitted that in the breach letter dated 23rd February 2009 the Executive had requested 3 sets of data in regard to consumers who had received WAP content, consumers who had received free promotional messages and consumers who had received charged messages. The Information Provider responded by stating that:

'Unfortunately Shetland Worldwide Ltd has not been able to fulfil our payment obligation to our technical provider because of the withholding of all the revenue. As a result our technical provider has denied us access to our IT system including logs etc. Therefore we do not have any access to this information until our outstanding revenue has been released.'

The Executive submitted that unfulfilled contracts between the Information Provider and 3rd parties did not obviate the requirement to provide the information to PhonepayPlus.

Ground5

The Executive submitted that it was supplied with call logs by the Service Provider which appeared to show that WAP advertisements had been sent to consumers on the 9 September 2008. The Executive had since discovered through investigation that all four consumers whose content had been

checked with the aggregator responsible for sending the WAP messages, had corresponding logs which appeared to be inaccurate.

Ground 6

The Executive submitted that it had requested, in the 8.3.3 letter dated 29 October 2008, copies of promotional material used by the Information Provider. As a result the Information Provider sent a copy of a WAP message which they stated was received by the consumers post Web entry and prior to text entry. The Executive were, much later in the investigation, furnished with a copy of the WAP advertisement by the aggregator. The Executive noted that second WAP advertisement was manifestly different from that originally supplied by the Information Provider.

2. The Service Provider and the Information Provider responded to the Executive's allegations as follows:

Ground 1

The Service Provider stated that the logs provided during the Executive's initial request for information were provided to the Service Provider by the Information Provider. The Service Provider stated that not all messages relating to this service were sent by the Information Provider through it and as such the Service Provider did not have complete records of all interactions between the Information Provider and a given mobile number/consumer. The Service Provider stated that it would review its records to see if any of the initial WAP messages had passed through the Service Provider and if the Executive did try to ascertain the shortcode or number that was provided in the message header.

The Information Provider stated that the WAP information processing and utilisation, i.e. being sure that only consumers wanting to participate were opted into the service, were solely handled by the WAP promotion aggregator, who was a paid technology supplier to the Information Provider. The Information Provider stated that it was its understanding that the WAP promotion aggregator had been serving more than 100 individual Information Providers and as a result any WAP handling or sending identification does not always correlate to the short code in question, ie: 84648. The Information Provider stated that it had done everything possible to address the issue and that it was in the process of having resolved the issue by taking over the technical operation part of the business but that the remedy for the issue had been overtaken by events.

Ground 2

The Information Provider stated that it was a business entity that operated in a commercial business space that required flexibility and creativity in order to get business ideas to work commercially. As a result several avenues of marketing might be exploited at any given time. The Information Provider stated that it could not see that the Executive's statement and Ground 2 had much commercial bearing, and that it did not understand the Executive's point. The Information Provider stated that in its opinion there had been no breach of the Code.

The Service Provider stated that the Information Provider had acknowledged that this information should have been supplied in its earlier responses. The

Information Provider had further informed the Service Provider that there had been a change of personnel and all responses prior to the response given on 23 March 2009 were provided by an individual who was no longer employed by the Information Provider.

Ground 3

The Information Provider stated that an agreement on technical support and hosting of own equipment was ongoing with the WAP promotion aggregator and as such the actual physical processing of WAP Push messages was executed by more than one entity.

The Service Provider stated that it had been informed of the hosting and support agreement with the WAP promotion aggregator and as such all WAP messages sent were sent via a server managed by the WAP promotion aggregator.

Ground 4

The Information Provider stated that in the real world, when revenue perishes in an instant, the Executive could not expect a company to be able to honour requests as if there were no change in underlying capability. The Information Provider stated that it was its understanding that this had nothing to do with a lack of conformity to the Code.

Ground 5

The Information Provider stated that it found it hard to believe that there should be inconsistencies in any of the provided message logs. However, in dealing with a large number of logs, a small number of variations could always be expected. This was partly due to differences in technical equipment, network standard, internet connections, roaming abroad and other related issues.

Ground 6

The Information Provider did not respond to this Ground for breach.

3. The Tribunal considered the evidence and concluded that in relation to Ground 1, the evidence provided by the Executive was insufficient to show that the information contained in the message logs was inaccurate. However, the Tribunal accepted the evidence of the Executive in relation to Grounds 2 to 6, in the absence of any evidence to the contrary. The Tribunal therefore decided to uphold a breach of paragraph 8.3.3 on Grounds 2, 3, 4, 5 and 6 for the reasons submitted by the Executive.

Decision: UPHELD in relation to grounds 2, 3, 4, 5 and 6

ALLEGED BREACH THREE

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.'

Paragraph 22 of the Privacy and Electronic Communications Regs 2003, deals with the sending of unsolicited promotional texts.

Under Paragraph 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").

1. The Executive submitted that there was no indication that opt-in details had been collected through a "soft opt-in". The Information Provider had stated that it had not purchased numbers from any 3rd party provider. The Executive made reference to over 25 examples of complainants receiving charged unsolicited messages to their phones.

The Executive submitted that the Information Provider had supplied the Executive with a document listing ISP addresses and dates and times on which consumers had reportedly entered their mobile number into the website. However, the Executive had no means of checking the legitimacy of this information. The Executive noted that in past adjudications the provision of ISP addresses was not conclusive evidence of web opt in. The Executive submitted that it had not been supplied with adequate evidence to show that WAP messages had been sent to the consumers handsets as stated by the Information Provider and without any substantive evidence to the contrary the Executive considered that no positive consent had been provided to receive marketing messages or service messages. As a result the Executive considered that a breach of paragraph 5.2 of the Code had occurred.

2. The Information Provider submitted that all customers had opted in correctly. Unfortunately, the Information Provider's investigation had unveiled that in addition to the Easy Jet in flight magazine it had also bought opt-in numbers from a reputable "data broker". Therefore customers had either opted into receiving the initial WAP Push message via the website detailed in the Easy Jet in flight magazine or had been included in the purchased database from a 3rd party supplier of opted-in numbers. The database was purchased through a named and approved data-broker in London. Participation took place as a result of people responding to WAP marketing with the exact artwork that had been provided to the Executive. The Information Provider stated that this database had been used to a very limited degree and that it was sorry that this information had not been provided in its first response to the request for information. The Information Provider stated that the WAP message had been sent to all users and that they had to activate to opt-in to the service. The Information Provider stated that it had originally said that it had sent out the WAP Push messages. However it had actually used a technical provider to send out the WAP Push messages to all users on its behalf.
3. The Tribunal considered the evidence including the Executive's further investigations into the data-broker and data owner referred to, and used by, the information provider. The Tribunal found that subsequent to the

Executive's further investigation in this particular case there was no evidence before it to suggest that the hard opt-in data list provided by the specified data owner was invalid or inaccurate. The Tribunal therefore decided that on the balance of probabilities that all the complainants had in this case validly opted-in via the data list and had thereby consented to receiving the text communications, it would not uphold a breach of paragraph 5.2 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

UNFAIR ADVANTAGE (paragraph 5.4.1b)

'Services and promotional material must not take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.'

1. The Executive submitted that the circumstance which made these consumers vulnerable was that the Service Provider had held their personal data in the form of their mobile number and that the Service Provider had the facility or ability to use that data to charge those consumers by reverse-billed SMS at any time they choose to do so. The Executive further submitted that the Service Provider had taken unfair advantage of that circumstance by using the data in its possession in a way which appeared to charge that group of consumers via a method called flash messaging. This is a method used to send texts to consumers where the messages are not stored in the consumers' inbox following receipt and provides the sender with the opportunity to send multiple charged SMS messages which cannot be stored for evidence of receipt. The Executive made reference to several consumer complaints. The Executive thereby considered that there had been a breach of paragraph 5.4.1b has occurred.
2. The Information Provider stated that it had never used a flash message and there was no evidence for this. The Information Provider state that Flash message technology was unknown to the company, and had never been used in the service what so ever.
3. The Tribunal considered the evidence and concluded that it was satisfied on the basis of the message logs and the user experience as evidenced by the complaints, that the *chargeable* messages had been sent unsolicited and that the service had thereby taken unfair advantage of circumstances which made those consumers vulnerable. Those circumstances were that the information provider was in possession of the complainants' mobile phone numbers and had the ability to use that data to send unsolicited chargeable messages to consumers which they had no opportunity to prevent. The Tribunal therefore upheld a breach of paragraph 5.4.1b.

Decision: UPHELD

ALLEGED BREACH FIVE

PRICING INFORMATION (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 first free promotional message had not supplied any pricing details. The first message read:

'FreeMSG> Important. Please reply with OK to confirm.'

The following free message was apparently received following a user opt-in:

'[FreeMsg] There r mobiles, MP3 players & cameras waiting 4 u here in the Quiz Club! Sub service.Max 3 msgs/week.A£1.50 per msg. Help:08444994559. Stop to end.'

The Executive submitted that this message was received to the user's handset around 1 minute before the first charged message was received. The Executive submitted that this short time period did not provide sufficient time for the user to respond and stop the service. The Executive asserted that the message was received so close to the charged message so as to be deemed ineffectual in fully informing the consumer of the pricing information prior to the consumer being charged. The Executive considered that a breach of paragraph 5.7.1 of the Code had occurred.

2. The Information Provider stated that the user had the ability to view all the pricing information on the web site and in the WAP page before entering the service. The Information Provider stated that it felt that if the [second] message was sent earlier the user might forget how to unsubscribe when they get charged and therefore it was in the customer's interest to send this information close to the charge message.
3. The Tribunal considered the evidence and concluded that on the facts there had been no previous interaction between the service and the consumers and therefore it was unreasonable to expect all recipients to have seen and understood the content of the message and respond within the one minute window. The Tribunal also concluded that for complainants who had only received the chargeable SMS text questions no pricing information would have been seen at all prior to them being charged. The Tribunal therefore decided to uphold a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

CONTACT INFORMATION (paragraph 5.8)

'For any promotion, the identity and contact details in the UK of either the service provider or the information provider, where not otherwise obvious, must be clearly stated.'

1. The Executive submitted that the consumer would not have seen the website or received a WAP message before receiving the marketing text and as a result the user would not have had sight of the identity details in the WAP push promotional message. The Executive noted that the contact telephone number was available on the free service messages but no identity details were available on any service messages. However, the contact telephone number was only provided following an opt-in message sent by the user. The first free service message reads:

'FreeMSG> Important. Please reply with OK to confirm.'

The following free message is received following a user text opt in:

'[FreeMsg] There r mobiles, MP3 players & cameras waiting 4 u here in the Quiz Club! Sub service. Max3 msgs/week. A£1.50 per msg. Help:08444994559. Stop to end.'

The Executive submitted that it considered that a breach of paragraph 5.8 of the Code of Practice had occurred.

2. The Information Provider stated that all customers had received, opened and activated the link in the WAP Push message and that all required and relevant information was provided in the WAP Push message.
3. The Tribunal considered the evidence and concluded that the identity of the Service Provider or Information Provider were not present in the WAP promotional message and did not appear in any messages detailed in the message logs provided by the Information Provider. The Tribunal therefore upheld 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 behaviour of the Information Provider demonstrated a wilful disregard for compliance with the Code;
- There was material consumer harm; there were over 72 complaints;
- The cost paid by individual consumers was high; the service attracted charges of up to £19.50 a month;
- The service is a concealed subscription service and such services have been singled out for criticism by PhonepayPlus; and
- The Executive experienced difficulty in making direct contact with the Information Provider subsequent to accepting the Information Provider's undertaking to deal directly with PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider appeared to have provided refunds, some complainants stated that they had received a refund from another company whom the Executive believes to be associated with the Information Provider.

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**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £200,000 fine;
- The Tribunal imposed a bar on all the Information Provider's subscription-based services and related promotional material for a period of two years; and
- 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.