

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 17 December 2009
TRIBUNAL SITTING No. 43/ CASE 1
CASE REFERENCE: 773908/MS

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|-------------------------|---------------------------------------|
| Information provider: | Sonnerier, Paris, France |
| Service provider: | mBlox Limited, London |
| Type of service: | Monthly ringtone subscription service |
| Service title: | Sonnerier |
| Service numbers: | 57782 |
| Cost: | £2 per month |
| Network operator: | All Mobile Network Operators |
| Number of complainants: | 84 |

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

BACKGROUND

PhonepayPlus Executive (the 'Executive') received 84 complaints in relation to the 'Sonnerier' service operating on shortcode 57782. The service was a subscription service whereby subscribed consumers received a text message allowing access to new ringtones for their phones. Typically, once a month a consumer would receive a text message that would charge them £2. According to the Information Provider, consumers would also receive a text message once a month, reminding them that they were part of the subscription service.

(i) Preliminary investigation – opt-in data

Based on the initial information provided by the Information Provider, the Executive assumed that the Information Provider had gathered its own opt-in data directly from consumers who had responded to its promotions by sending a keyword by SMS to a particular shortcode. The Information Provider had stated these promotions took the form of banner ads on the internet. It was not until the Information Provider responded formally to the breach letter that it became clear to the Executive that the opt-in data had been supplied by the third party data supplier known as Fonedata.

(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 9 September 2009, raising potential breaches of paragraphs 5.4.1b and 5.2 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided a signed Information

Provider undertaking form and the breach letter was re-issued to the Information Provider on 21 September 2009. A formal response was received by the Executive on 25 September 2009.

The Tribunal made a decision on the breaches raised by the Executive on 17 December 2009, having heard an Informal Representation from the Information Provider's representative.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS (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, in response to its letters dated 19 March and 22 June 2009, the Information Provider had provided several complainant message logs which purported to show: a) user text messages from consumers (both keyword service initiation messages and 'STOP' text messages, inclusive of the times and dates), and b) all of the free and chargeable text messages that that consumer had received whilst they were subscribed to the service, again inclusive of the times and dates that the text messages were sent.

The Executive submitted that, as the service had already been in operation prior to the Service Provider taking on Information Provider as a client, much of the user text message opt-in information related back to a time when the service was operating on other shortcodes belonging to other service providers.

The Executive submitted that that it had contacted three of the previous service providers - MX Telecom, Oxygen8 Communications and Zamano Limited - which the Information Provider advised that the service had previously operated under, in order to validate the opt-in information (user text message records) that the Information Provider had provided. The Executive submitted the following in relation to those service providers.

Oxygen8 Communications

The Executive submitted that the Information Provider appeared to have suggested, through the complainant message logs and the promotional material it had supplied, that its service had previously operated on the shortcodes 64100, 60973 and 88833, which belonged to Oxygen8 Communications. The Information Provider's message logs appeared to show clear opt-in information for several of the complainants' mobile phone numbers.

The Executive submitted that, upon cross-checking this information with Oxygen8 Communications, the Executive was advised that a) Oxygen8 Communications was not aware of the company 'Sonnerier', and b) the user text message in question was actually sent by the consumer in relation to a completely different service which had no connection to that being provided by the Information Provider.

Oxygen8 Communications advised that the shortcode 64100 was a dedicated shortcode for a company called 'Bauer', and had been used for a one-off radio quiz competition on the radio station 'Kiss 100'.

The Executive also submitted that, in relation to the further two shortcodes which the Information Provider had advised the Executive were managed by Oxygen8 Communications, the Executive was advised by Oxygen8 Communications that the shortcode 60973 also belonged to 'Bauer' as a dedicated shortcode (for the radio station 'Radio Forth'), whilst 88833 was a shared shortcode used by numerous clients (none of whom were Sonnerier).

Oxygen8 Communications was able to provide the Executive with the content of the consumers' user text messages, which were the answers to a one-off radio quiz competition. The contents of those messages did not match the messages shown in the logs provided by the Information Provider, although the shortcodes used, and the date and time of the messages, were the same (allowing for discrepancies between GMT and local French time).

Zamano Limited

The Executive submitted that the Information Provider appeared to have suggested, through the complainant message logs and promotional material it had supplied, that its service had previously operated on the shortcode 68866 which belonged to the Service Provider called 'Zamano'.

The Executive submitted that the message logs supplied by the Information Provider appeared to show opt-in messages sent by several of the complainants.

The Executive submitted that, upon checking this information with Zamano, it was advised that IMS Ltd (International Mobile Solutions Ltd), formerly known as 'UnImpeachable Ltd', was the company contracted with them for use of shortcode 68866, and that the keywords 'Girls', 'Kylie' and 'Mariah' (shown in the message logs and promotional material supplied by the Information Provider) had never been used in connection with the shortcode as far as it was aware.

The Executive submitted that, as with Oxygen8 Communications, Zamano had provided message logs that partially matched those provided by the Information Provider. Zamano's logs showed that a user text message had been sent by the user mobile numbers shown in the Information Provider's message logs; however, the logs showed that the user text message had not been sent in connection with the 'Sonnerier' service. The Zamano logs also showed one user sending a 'STOP' command, which was not shown in the Information Provider's logs.

MX Telecom

The Executive submitted that the Information Provider appeared to have suggested, through the complainant message logs and promotional material it had supplied, that its service had previously operated on the shortcode 89366 which belonged to the Service Provider called 'MX Telecom'.

The Executive submitted that, upon checking this information with MX Telecom, it was advised that 'The Lux Project' was the company MX Telecom had contracted with for use of the shortcode 89366, and that the keyword 'xmas' (which appeared in the Information Provider's logs in relation to this shortcode) did not appear to have been used in connection with the shortcode.

The Executive submitted that, as with Oxygen8 Communications and Zamano, MX Telecom did have a message log that matched a message log originally provided by the Information Provider. However, it submitted that the message log supplied by MX Telecom indicated that the user text message had not been sent in connection to the 'Sonnerier' service. Instead, it seemed that the user text message was the initiation into a text chat service which appeared to have no relation to the Sonnerier subscription service.

Unfair advantage

The Executive submitted that it was of the opinion that the text messages sent by the complainants and shown in the message logs were responses to separate, unrelated third-party services, and that the apparent sharing of such user text message data (including mobile phone numbers) with the Information Provider had created circumstances which had rendered complainants vulnerable to the receipt of unsolicited, chargeable subscription text messages from the Service Provider and the Information Provider via shortcode 57782.

The Executive was of the opinion that each consumer who had received text messages from this service had innocently used a premium rate service which appeared to bear absolutely no relation to the 'Sonnerier' subscription service. As a result of this interaction elsewhere, these complainants had been entered into this service leading them to receive reverse-billed text messages on a monthly basis without their consent (and often without their knowledge), resulting in financial loss and, in many instances, deceit. It submitted that some consumers had been receiving these chargeable text messages for a period of over two years.

The Executive made reference to some complainant comments that read as follows:

"I have NEVER given my consent to be billed and would NEVER knowingly consent to this service. I have only discovered what was happening when I notice an unrecognised amount on my Mobile Phone bill for March 2009. I then kept a log of all calls and texts received and sent, for the whole of April's bill. When I noticed the £2 deduction from my bill I checked it against the log of text received and deduced I had been charged for that. I have texted back STOP to stop the service and rung 0845 869 3452 (as per the website address, with no answer to try to stop this service). I want this service STOPPED. I DO NOT want to have to change my mobile number as it is used by my very ill father's doctors and nurses to contact me when my father is ill."

"The above mentioned sent a text to my phone and has charged me £2.00. I have never subscribed to this and am totally bewildered as to why they can text me and steal money from me. What exactly is it I have been charged Â£2.00 for? I haven't received any goods from this company and haven't even heard of them - this is fraud. How did they even get my number? How do I claim this back? How do I stop this happening again?"

"I did not ask to receive this text message advertising ringtones and I certainly did not ask for them to charge me to receive their advertisement. The amount billed is Â£1.702 as shown on 02's website (I can check my recent charges) but I think this is minus VAT which will be added on at the end of the month."

The Executive submitted that there had been a breach of paragraph 5.4.1b of the Code as the opt-in information provided by Information Provider appeared not to be genuine in relation to shortcode 57782.

2. The Information Provider stated that there had been a misunderstanding by the Executive in relation to the message logs. It stated that the opt-in information given to the Executive referred to the right to market to the consumers which, by its understanding of the guidelines, was necessary before any marketing text messages could be sent to the individual consumer. It stated that the Executive had submitted that it had run traffic on these codes; however, it stated that it had not done so. It stated that the logs showed that it had run traffic on shortcode 81303, and had then switched to using Wireless Information Network and mBlox as its service providers.

The Information Provider stated that the investigation had clarified that consumers had used services previously and had given the right to be sent further promotions, as per the guidelines before PhonepayPlus' Mobile Review. It stated that it had confidence that the data supplied was genuine and that no breach had occurred.

The Information Provider apologised if its message logs had not been as self-explanatory as the Executive had expected, but it had been of the understanding the word 'opt-in' was the right to market, hence an 'opted in' number. It stated that the Executive had, however, confirmed that this data had indeed been genuine.

The Information Provider stated that consumers had received the marketing text messages via its relationship with 'Fonedata' and, as proved by the Executive, the opt-in information was genuine and, as such, the text messages it had sent to these users were not unsolicited. It stated that, in order to subscribe to the service via the free marketing message, the customer always agreed to its strict terms and conditions and was supplied with the relevant free reminder text messages.

The Information Provider stated that the complainants quoted had denied using any services but, when the Executive checked the user text messages, it found them all to be genuine. It stated that this showed that complainants were familiar with mobile devices and had purchased products before. It stated that this negated what complainants had previously stated. It stated that the small amount of complaints that had reached the Executive over three years indicated that its customer service was contactable and actively sought a satisfactory conclusion. It stated that all customers that it had billed had used its services and, in regard to some of the complaints, there may be more than one charge in one month, if the consumer had failed to previously pay (a rebilling message). It stated that billing would only occur each month in conjunction with a reminder text message, informing the customer that he or she had been subscribed (as per PhonepayPlus guidelines). The Information Provider stated that, if any customer had any complaints, it was more than happy to refund for the total amount billed.

The Information Provider made reference to the Executive's examples in relation to the service provider, Oxygen8 Communications. It stated that the Executive's investigation had shown that the message logs that the Information Provider had provided were genuine. The Information Provider stated that the Executive had confirmed that the user text messages given to it by 'Fonedata' had been genuine. It stated that the Executive had confirmed that Oxygen8 Communications was not aware of 'Sonnerier', which was

also true. It stated that Oxygen8 Communications had the shortcode 64100, and that the Information Provider had stated that billing had only taken place on shortcodes 81303, 82344 and 57782. The Information Provider stated that it did not have any relationship with Oxygen8 Communications and that the message logs simply demonstrated that there had been opt-in, and that the Information Provider had had the right to market to these consumers. It stated that, in 2007, 'Sonnerier' had been considered to be a similar service. It stated that, within the contract between itself and Fonedata, Fonedata had confirmed that it had the right to pass on this information.

It stated that it did not believe that a breach of the Code had occurred.

3. The Tribunal noted there were conflicting submissions as to the facts surrounding opt-in by the users of the service. The Tribunal considered the evidence, including the message logs provided by both the Information Provider and the other service providers, Oxygen8 Communications, Zamano Limited and MX Telecom (the "Service Providers"), and made the following findings of fact:
 - (i) In relation to the banner advertisements submitted by the Information Provider (AppA_773908), the Tribunal found that the advertisements contained many discrepancies which suggested they were not genuine adverts, particularly in relation to the adverts for shortcode 64100, namely: (a) one of the adverts stated 'text Robbie' when the picture was of a female music artist; (b) the price claimed in the promotion was inconsistent with what had been (and what could have been) charged on the shortcode 64100; (c) this shortcode was operated by the service provider 'Oxygen8 Communications' which claimed to have had no business dealings with the Information Provider, yet, despite this, the adverts for this shortcode stated "Sonnerier.com" at the bottom. The Tribunal also noted that the Information Provider had provided no evidence of actual use of the advertisements, when requested by the Executive.
 - (ii) In relation to the Information Provider's claim that the users' text messages had been sent in response to the banner advertisements provided to the Tribunal and that it had provided message logs to support this submission, the Tribunal found as follows: (a) the Tribunal accepted the Service Providers' claims that they were unaware of the Information Provider known as 'Sonnerier', and that the Service Providers' message logs showed that different keywords had been sent by those users to the keywords shown in the Information Provider's logs; and (b) the Tribunal accepted that the shortcodes contained in the message logs provided by the Information Provider were for services that were run by a separate party and services that used different keywords.
 - (iii) In relation to the Information Provider's subsequent claim that the opt-in data had been provided by a third party called Fonedata, the Tribunal found that (a) despite the Information Provider's claims to have performed due diligence on the opt-in data to verify that users had consented to receive marketing, there was no evidence of this; and (b) there was no evidence that that users represented in the opt-in list provided by Fonedata had provided valid consent to receive marketing material from a third party. The Tribunal noted that it had not been assisted by the lack of clarity in the agreement between the Information Provider and Fonedata as to the nature of the service it had provided to the Information Provider.

In relation to (i), in light of the above findings of fact, the Tribunal considered it had no alternative but to conclude, on the balance of probabilities, that the banner advertisement evidence had been fabricated and that the adverts had not appeared on the internet, nor anywhere else.

In relation to (ii) and (iii), in light of the above findings of fact, the Tribunal noted that the Information Provider had provided no evidence of valid user consent to received marketing messages. Taking into account the lack of evidence of consent, and the complainants' evidence which stated the messages had been unsolicited, the Tribunal found, on the balance of probabilities, that the text messages received by users from the Information Provider had been unsolicited.

The Tribunal noted that the Information Provider had claimed it was entitled to market to users of the services operated by the Service Providers because this service was 'similar' for marketing purposes to its own service (or had been considered similar in 2007). The Tribunal considered this to be an indication that the Information Provider was relying on a 'soft opt-in' consent under the Privacy and Electronic Communications (EC Directive) Regulations 2003, but it noted this argument was irrelevant because the Information Provider had admitted it had obtained the opt-in data from a third party and therefore only a 'hard opt-in' could apply.

Having concluded that the text messages had been unsolicited because there had been no user consent to receive them, the Tribunal then considered whether the sending of those messages meant that the Information Provider had taken unfair advantage of circumstances which made consumers vulnerable, contrary to paragraph 5.4.1b of the Code. The Tribunal concluded that consumers had been made vulnerable by the fact that the Information Provider possessed their mobile phone numbers without their knowledge or consent, enabling it to send chargeable subscription text messages to them at will. The Tribunal found that the sending of chargeable, unsolicited messages to users amounted to taking unfair advantage of those circumstances. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

ALLEGED BREACH TWO 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 (this is sometimes called 'a hard opt in'), 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 sometimes called a 'soft opt-in').

The Executive submitted that it was of the opinion that the chargeable text messages which had been sent to complainants in relation to this service had been direct marketing electronic mail for the purposes of the Regulations, in so much as the actual format of the text messages provided the recipient with a call to action to engage with a premium rate service by prompting them to respond to the advertised 'new tone' or 'tone' that was available by texting back a keyword.

The Executive made reference to complainants' comments which indicated that the text messages received on their mobile phones from these numbers had been unsolicited, and that they had no idea how, or where, their mobile number had been acquired.

The Executive made reference to some examples of chargeable text messages that had been sent to consumers:

"Get these Michael Jackson Hit tones now – TEXT Fresh to get your tones. Service by www.sonnerier.com help 08458693452, 200p/month, STOP to stop"

2. The Information Provider stated that it had explained that no text messages had been sent unsolicited, and that no chargeable text messages would ever be sent by it without the user accepting the terms and conditions on the WAP site beforehand (which, at that point, was all that was required). It stated that it now understood that it needed a fresh user text message confirmation as per PhonepayPlus' Mobile Review.

It stated that it did not believe that a breach of the Code had occurred.

3. The Tribunal considered the evidence and referred to the Tribunal's finding of fact in relation to the breach of 5.4.1(b) that the text messages received by users of the service had been unsolicited. The Tribunal noted the Information Provider's claim that all users had accepted terms and conditions on a WAP site before being sent marketing messages, but, since that there was no evidence that users had accepted terms and conditions on any WAP site, it remained of the view that the messages had been unsolicited. The Tribunal upheld a breach of paragraph 5.2 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 behaviour of the Information Provider was wilful in relation to its operation of the service.
- There was material consumer harm – there were 84 consumer complainants.

- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- There had been deliberate falsification of evidence in relation to: (i) the message logs provided by the Information Provider (which were contradicted by those provided by the Service Providers) during the course of the Executive's investigation; (ii) the banner advertisements which the Tribunal concluded had never been used; (iii) the Tribunal's additional finding that the Information Provider had provided deliberately misleading information to the Executive in relation to the total number of service text messages sent by this service and the revenue generated for this service.
- The Information Provider had changed its explanation as to how the opt-in data was obtained only when it was challenged by the Executive and presented with evidence provided by the Service Providers which showed the initial explanation to be false.

The Tribunal noted that the Information Provider had a breach history of one previous case but, taking into account that this involved breaches of a different nature, it decided not to treat this as an aggravating factor.

With regard to mitigation, the Tribunal noted that, whether or not the breaches had been caused by a third party (Fonedata), as alleged by the Information Provider, this party was not outside the control of the Information Provider and, therefore, this would not be considered a mitigating factor by the Tribunal.

The revenue in relation to this service was Band 2 (£250,000-£500,000).

Having taken into account the aggravating 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 revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Taking into account the financial impact of the other sanctions imposed (see below), a fine of £175,000;
- The Tribunal imposed a prohibition on the Information Provider from involvement in, or contracting for, the provision of any premium rate services for a period of 12 months, commencing from the date of notification of this decision;
- 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.

Appendix A

Banner advertisements submitted by the Information Provider

SONNERIER.COM
Chart Hits, New Games,
Cool Wallpapers, Ringtones
Real Tones & more...

All Content
£2
per month*



**this is a
subscription service*

To receive your
Shontelle - T-Shirt
ringtone

Text FRESH
to 57782

Helpline
0845 8693452
SONNERIER.COM

SONNERIER.COM
Chart Hits, New Games,
Cool Wallpapers, Ringtones
Real Tones & more...

All Content
£1.50
per month*



**this is a
subscription service*

To receive your
MARIAH CAREY
ringtone

Text MARIAH
to 68866

Helpline
0845 8693452
SONNERIER.COM

SONNERIER.COM
Chart Hits, New Games,
Cool Wallpapers, Ringtones
Real Tones & more...

All Content
£1.50
per month*



**this is a
subscription service*

To receive your
KATE PERRY
ringtone

Text FIFTY
to 65511

Helpline
0845 8693452
SONNERIER.COM

Appendix A continued

Banner advertisements submitted by the Information Provider

sonnerier.com
Get min. 4 tones sent per month.




Text LEONA to 64100
ONLY £2 per month
This is a subscription service
Text Stop to Stop to 64100

HELPLINES
UK: 0845 869 3452
EIRE: 1800 550 268

www.sonnerier.com

sonnerier.com
Get min. 4 tones sent per month.




Text robbie to 64100
ONLY £2 per month
This is a subscription service
Text Stop to Stop to 64100

HELPLINES
UK: 0845 869 3452
EIRE: 1800 550 268

www.sonnerier.com

sonnerier.com
Get min. 4 tones sent per month.



Text RIHANNA to 64100
ONLY £2 per month
This is a subscription service
Text Stop to Stop to 64100

HELPLINES
UK: 0845 869 3452
EIRE: 1800 550 268

www.sonnerier.com

