

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 17 December 2009 TRIBUNAL SITTING No. 43 / CASE 3
CASE REFERENCE: 810615/DL

Information provider:	TagContent Limited, Coventry and Glasgow
Service provider:	Wireless Information Network Limited, High Wycombe
Type of service:	Subscription/mobile download service
Service title:	'Best New Tones'
Service number:	85222 and 82344
Cost:	£1.50 or £2.50 per month
Network operator:	All Mobile Network Operators
Number of complainants:	17

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

BACKGROUND

On 19 June 2009, PhonepayPlus received a promotional WAP-push message on one of its monitoring phones. The WAP push message stated "Member Content" and gave no details as to the sender. The Executive accessed the WAP-push message to test the service and established that the service was associated with 'bestnewtones.com/wap'. The service was a mobile download service charged at either £1.50 (shortcode 85222) or £2.50 (shortcode 82344) per month. The monitoring phone subsequently received chargeable messages from the service even though PhonepayPlus had not downloaded anything from the service, and had not accepted the terms and conditions on the WAP site.

PhonepayPlus also received 17 complaints in relation to this service. Complainants said that they had received unsolicited messages from the service and had been subscribed to the service without their knowledge. There was also evidence suggesting that consumers had been misled when accessing the service via WAP-push promotional messages.

(i) The Service

The Information Provider informed the Executive that the service was promoted by banner adverts, including trigger words and two shortcodes – one Wireless Information Network ('WIN') shortcode 85222 (or 82344) and one mBlox shortcode 78889 (or 85015). The consumer would discover these in the public domain and issue the trigger word to one of the advertised shortcodes.

On receipt of the trigger word, the Information Provider stated that it issued a marketing WAP-push message stating "CALVIN AND TOPTONES 85222 Help02476998891" providing a link to the service WAP site called:

bestnewtones.com/wap/<PIN>

The PIN would be unique to the user's mobile number and functioned whilst the user was subscribed to the service.

On 85222, the charge of the service was £1.50 per month, which, the Information Provider said, was made clear in the terms and conditions supplied on the WAP site visited prior to opt-in to the subscription service. According to the Information Provider, those terms and conditions stated:

This is a subscription service. The unlimited download service costs £1.50 per month. You can download all of the content on the site as many times as you want. By clicking the link you have agreed to the terms and conditions. Helpline 0247 699 8891. Service provided by TagContent Text STOP to 85222 to opt out.

By accepting the terms and conditions on this site you accept that we/third parties have the right to send you free marketing messages promoting similar products and services to you and you also accept that our preferred partners may also offer you 3rd party marketing and promotions of products and services we think you may enjoy. By entering this site you also acknowledge that such promotions may be some time in the future from when your initial purchases were made. You may choose not to receive any promotional messages from us or our partners, by replying to the promotional message with the word STOP at any time or clicking the link to be removed at the bottom of the wap-site. By entering the download link you acknowledge that you accept the terms and conditions of this service.

The Executive submitted that the tone and wording of the above terms and conditions were ambiguous. It was unclear whether the point of opt-in was "by clicking the link you have agreed" [referring to link in WAP-push message] or was when the consumer entered "the download link" within the WAP site. The IP stated in the response to the 8.3.3 request dated 5 August 2009:

"I must stress that customer must accept terms and conditions before proceeding. They also have an option to opt out of service. After customer accepts terms and conditions they are taken to download section and click on link to content. From this they are sent a FREE join message (Free Msg: You are subscribed to bestnewtones for cost of £1.50 per month until you send STOP to 85222. 16+ SP:tagcontent Help?0247 699 8891)."

The Executive submitted that the message logs supplied with this response indicated that there were service text messages issued in conjunction with the service, including reminder text messages once a month.

The Executive submitted that, according to complainants, prior to receipt of a chargeable text message each month, the service re-issued the WAP-push link. The Information Provider gave the following as an example WAP-push message linked to the service:

Complainants stated that they received WAP-push messages saying "Member Content". This was also the experience of the Executive when undertaking monitoring work in relation to this investigation, as outlined in further detail below.

The Executive questioned some aspects of the original description of the service in its second request for information under paragraph 8.3.3 of the Code.

The Executive submitted that the Information Provider had first indicated that subscribers would receive a WAP-push message stating "Member Content" and which did not necessarily include other information regarding the service, as previously stated.

It submitted that the Information Provider had appeared to accept the terms and conditions were not complete in the original explanation, and that the monitoring experience was accurate. The additional wording, emboldened in the request letter, was explained by the Information Provider but was not questioned.

This is a subscription service. The unlimited download service costs £1.50 per month. **The first 48 hrs are FREE.** You can download all of the content on the site as many times as you want. By clicking the link you have agreed to the terms and conditions. Helpline 02476998891. Service provided by TagContent Text Stop to 85222 to opt out.

By using this site you accept that we/ third parties have the right to send you free marketing messages promoting similar products and services to you and you also accept that our preferred partners may also offer you 3rd party marketing and promotions of products and services we think you may enjoy. By entering this site you also acknowledge that such promotions may be some time in the future from when your initial purchases were made. You may choose not to receive any promotional messages from us or our partners by reply to the promotional message with the word STOP at anytime or clicking on the link to be removed at the bottom of the wap-site. By entering the download link you acknowledge that you accept the terms and conditions of this service. **Thank you for your order. You must be sixteen years or over to use this service.**

The Executive submitted that the differences were small but potentially significant, as the ambiguity remained but the statements "by using this site" and "thank you for your order" strongly suggested that the subscription started at the point of clicking the link in the WAP-push message, and not at the later point of clicking the link acknowledging the terms and conditions shown above.

Another difference between the first and second explanations was in relation to the banner advertisements. The Information Provider clarified that the banners provided were new and the trigger words had not been placed in the public domain by the Information Provider in relation to shortcode 85222, as previously stated. Instead, the Information Provider introduced a third party marketing affiliate, claiming they had uploaded data to the Information Provider's server.

This party was introduced as an 'affiliate' in one section of the response from the Information Provider; however, in the general explanation given regarding the opt-in process, the IP supplied the following information:

"Tag-Content Ltd is a mobile software company formed on the 5th of March 2009. Tag-Content Ltd offers mobile content applications for other companies to use our services through our platform. Tag-Content takes a percentage of every transaction as a fee for usage. The company then pays out to any affiliates using our platform after a given period of time as agreed on a per territory basis.

...

We can confirm however that the download service operation on short-code 82344 on the tariff of £2.50 is indeed a download service provided by ourselves.

Currently our company offers plug in services that 'affiliates' can use. In both previous examples the affiliate has used our platform to offer the services indicated. As you may see from the initial logs that the function IMPORT DETECT has been used. This means that the affiliate has uploaded the number as a subscriber to a particular genre of content. The affiliate has the option of utilising our Win codes or plugging in there [sic] own individual codes. The affiliate when uploading subscribers or changing codes must accept stringent terms and conditions in order for them to be allowed to proceed. This includes verification that all numbers have sent an MO message which must be uploaded by the affiliate. Again we must reiterate that Tag-Content insures that all messages hard coded comply with the PhonePayPlus code of conduct."

The Executive sought verification of this information, but none was provided prior to the Tribunal hearing, nor was it provided at the Informal Representations. Throughout the investigation, the Executive focussed on the Information Provider, who had signed an undertaking for PhonepayPlus to deal directly with it under section 8.7 of the Code.

(ii) Executive monitoring

Receipt of promotional WAP-push messages

The Executive submitted that a monitoring phone had been used for other monitoring work for other services but had not knowingly engaged with any TagContent Ltd service in the past.

The Executive observed, on 19 June 2009, the receipt of a WAP-push promotional message, which had arrived on the handset sometime previously. The Executive proceeded to monitor the service using the link provided, which stated "Member Content" but provided no identifier for the service. The metadata linked to the WAP-push message provided the WAP site address – bestnewtones.com/wap.

Consumer experience regarding opt-in: video evidence

The Executive submitted that the lack of information provided in the WAP-push message meant the Executive did not have knowledge of the service or its relevance to premium rate services at the outset of the exercise. After accessing the WAP site, it became apparent that it was associated with a subscription service and video evidence was collected to record the Executive's monitoring.

According to the Information Provider, the first WAP-push promotion received by the consumer ought to have read “**CALVIN AND TOPTONES 85222 Help02476998891**”. The Information Provider had previously stated that the use of “**Member Content**” WAP-push links had been issued only after sign up had previously occurred.

The Executive submitted that this was not the experience of the monitoring phone. Message logs were provided by the Information Provider relating to the monitoring phone. These logs did not match the monitoring report information.

The Executive submitted that the video evidence showed that the Executive had scrolled through the terms and conditions supplied on the WAP site www.bestnewtones.com/wap/?c=IA2EEBF. These terms and conditions were transcribed into the monitoring report itself and later used in a request for information letter issued to the Service Provider. The Executive observed that they were written in the past tense, including the phrase “thank you for your order”, which was unusual for a service that had not been accessed before. In the round, the tone and wording used by the terms and conditions suggested the user was already opted-in to the service having used the link in the WAP push message provided.

The Executive submitted that the video showed the provision of two WAP links within the body of the WAP site – one to accept the terms and conditions, apparently to opt-in to the subscription service, and the second to opt-out of promotional material being issued in future. The video shows that neither one of these was selected. Instead the Executive chose the ‘Back’ option on the handset and the video indicated that no previous WAP screens had been accessed. The Executive proceeded to back out of WAP altogether and the video shows the Executive viewed WAP push message as had previously been accessed to start the monitoring work.

The Executive submitted that the video clearly indicated that at no stage did the Executive knowingly opt into the service during the monitoring exercise on 19 June 2009.

Service messages issued during monitoring exercise

The message logs supplied by the Information Provider indicated that the first WAP-push message was delivered and accessed on 29 April 2009. Nowhere on the logs is there a record of the interaction with the service on 19 June 2009.

According to the Executive’s observation of the mobile phone handset, no earlier WAP-push promotion was issued prior to that which was later accessed by the Executive on 19 June 2009. Furthermore, no subscription initiation text message was found on the mobile phone handset at all, either prior to the interaction with the WAP site on 19 June 2009, or afterwards.

The message logs supplied by the Information Provider suggested that six service text messages were issued between 29 April 2009 and 6 July 2009, with five of those being successfully delivered.

According to the monitoring report, only one service text message was issued and received on the handset dated 6 July 2009 and this was after the 19 June 2009 interaction with the WAP site.

(iii) The Investigation

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

The Executive requested information from the Service Provider in a letter dated 24 September 2009. The Service Provider provided a signed Information Provider undertaking form on 25 August 2009, which was accepted by the Executive. The Executive issued a breach letter to the Information Provider raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.8, 7.12.4a-f and 3.2.2 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code').

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 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 made reference to Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 'Regulations'), under which 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 made reference to the evidence supplied by the Information Provider and submitted that it suggested that recipients of WAP-push marketing material had sent user text messages in response to banner advertisements and, thereby, provided positive consent to the receipt of marketing material associated with the service as advertised in the banners.

The Executive submitted that it had obtained evidence that disputed the content of the message logs provided by the Information Provider. This evidence suggested that the user text message opt-in details supplied by the Information Provider were inaccurate, with one mobile phone number not issuing any user text messages in the six-month period relevant to the consent claimed by the Information Provider. Another mobile phone number sent a user text message

that contained a 'STOP' command and could not therefore be taken as a positive text message which provided the user's consent to receive marketing material.

The Executive also submitted that there was no evidence of the banner advertisements ever having been in the public domain. It submitted that the banner advertisements originally submitted by the Information Provider were later described as "new" banner ads, which included its new Service Provider's shortcode for the first time. It submitted that the Information Provider had also indicated that no opt-in had been generated via the WIN platform during the life of the service, implying that all users had been migrated onto the Service Provider's platform. The Executive submitted that the discrepancies in the message logs (two of which it identified above) indicated that this opt-in migration was not premised on valid user consent to receive marketing or service text messages from the Information Provider.

The Executive also relied on the monitoring evidence, which showed that unsolicited messages had been received by the Executive's monitoring phone without the Executive having given any consent for such messages.

The Executive submitted that the absence of valid user consent in the form of user text messages, and the lack of evidence of any other form of consent being obtained by the Information Provider, had led it to the opinion that the marketing material (WAP-push promotional messages) was issued in contravention of section 22 the Regulations and it followed that there had been a breach of paragraph 5.2 of the Code.

2. The Information Provider stated that it denied the alleged breach entirely. It stated that the Tribunal should be aware that, as part of its due diligence, it randomly contacted 100 numbers from the database to validate that consent had been provided and, in every case, it was. It stated that there was little else it could do to validate these consents. The Information Provider stated that, in addition to denying this was against the law, the Tribunal must be aware that:
 - (i) There is nothing in the Code regarding validation of user text messages.
 - (ii) There is nothing in the Code regarding the timescales for a valid user text message.

The Information Provider stated that, despite the Executive not being able to find any evidence of its banner advertisements, it did not follow that the breach should be upheld. It stated that its banner adverts, and those of its affiliate partners, were very much in evidence and it could not be held accountable for the failure of the Executive to find any evidence to the contrary.

It stated that, based on the facts of the above, and that the Executive had no evidence to suggest otherwise, the Information Provider strongly refuted this particular breach.

3. The Tribunal considered the evidence and noted the Executive's monitoring evidence and the 17 complainants who all stated that the service text messages had been unsolicited. In relation to the monitoring evidence, the Tribunal accepted that the Executive had not given consent to receive marketing

messages and therefore concluded that unsolicited messages had been received to the Executive's monitoring phone. The Tribunal noted that the complainants' evidence suggested that other consumers had also received unsolicited messages. The Tribunal also took into account the fact that there was no evidence of a valid opt-in from users of the service as the message logs had been shown to be inaccurate and, in fact, showed keywords being sent by users to a different service operated by another provider, which could not amount to consent to receive marketing messages from the Information Provider. The Tribunal further noted there was also no evidence that the advertising banners (through which users had allegedly signed up to the service) had ever been in the public domain. It concluded that, on the balance of probabilities, the service text messages had been unsolicited and in breach of paragraph 22 of the Regulations. The Tribunal 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:

(a) mislead, or be likely to mislead in any way.”

1. The Executive considered there to be a breach of paragraph 5.4.1a of the Code on the following grounds:

Ground 1

The Executive submitted that its monitoring report indicated that the first promotional text message received by consumers was a WAP-push promotion stating “Member Content”. The Executive submitted that the WAP message suggested that the recipient was already a member and that the recipient was entitled to access the WAP site via the link provided.

The Executive submitted that the message logs provided by the Information Provider suggested that this text message had only been sent to subscribers. However, the Executive submitted that its monitoring showed that the first interaction with the service in relation to this monitoring phone had occurred on 19 June 2009. This interaction was caused by the issuance of the WAP-push promotion described above. It submitted that the use of the phrase “Member Content” had not been factually accurate at the time of receipt, and it was misleading to consumers. The impact of engaging with the WAP site using the ‘Go to’ link in the WAP-push message was to opt into the service. Consumers were misled into opting into the service by the receipt of the “Member Content” text message (the message itself had contained no indication of what it related to). The Executive also made reference to consumer comments.

Ground 2

The Executive made reference to complainants' comments which stated that they had not associated the service text messages with a chargeable service, but instead were misled into thinking that they were free-to-receive promotional text

messages. It submitted that, having been misled by the service text messages in this way, some consumers had failed to notice the charges levied until sometime after receiving the first chargeable text message.

The Executive acknowledged the phrase “FreeMsg” was not used, however the offer of new tones alongside the provision of a trigger word and the cost of the service appeared to have misled consumers into believing the text message was promotional in nature and not a chargeable text message. This was exacerbated by the failure of the service to provide subscription initiation text messages at the point of opt-in to the subscription service. The Executive submitted that it was of the opinion that such an initiation text message, as required by the Code, would have put the promotional text messages into some form of context but the apparent failure of the service to provide such a text message meant that the promotional text messages were misleading to consumers.

2. The Information Provider responded to both grounds of the Executive’s allegations as follows:

Ground 1

The Information Provider denied that this was a breach. It stated that the text message stating “Member Content” had only been sent once the consumer became a subscriber, and not for any other reason, and that this had not formed part of the subscription initiation text message. It stated that its affiliate had already had the subscription confirmed. It stated that “Member Content” was given as all of these mobile phone numbers were already subscribed. It stated that it was conducting reviews of this procedure and had stopped this facility in the interim in relation to its affiliates. It stated that it did not feel that it had breached the Code as “Member Content” had been completely separate from billing/join/reminder text messages.

Ground 2

The Information Provider denied that it, or its affiliate marketing partners, had deliberately misled consumers. It stated that the volume of complaints alleged by the Executive formed less than 1% of those consumers who were happy with the service and who had not complained. It stated that, in all instances, the customers were not subscribed via member content and had previously used services provided by its affiliates. The Information Provider stated that its subscription initiation text messages had always been sent by itself and its affiliates as per the message logs it had provided. It stated that “Member Content” was an entirely separate issue where customers were entitled to free content after becoming a subscriber. It stated that this free content was in no way a promotional text message.

3. The Tribunal considered the evidence and concluded that, in relation to Ground 1, the first text message that consumers received had contained the wording “Member Content” and this was misleading as it implied that the recipient was already a member and, as such, was already entitled to access the WAP site when this was not the case and, in fact, by entering the WAP site they were subscribing to the service. In relation to Ground 2, the Tribunal found that it was not clear from either the content of the message, nor the circumstances in which it was received, that the service text message received by complainants was

chargeable. The Tribunal decided to uphold a breach of paragraph 5.4.1a on both grounds.

Decision: UPHELD on both grounds

ALLEGED BREACH THREE

GENERAL PRICING PROVISION (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 monitoring work undertaken in relation to this service showed evidence that consumers had opted into a subscription service by using the ‘Go to’ link on a WAP-push message and subsequently became liable to a charge. It submitted that no information regarding the cost of using the service was provided prior to this action, which had made the consumer liable to, or subject to, a charge and, as such, it was of the opinion that the service was in breach of paragraph 5.7.1 of the Code.

The Executive submitted that the monitoring phone incurred a charge as a result of being subscribed to the ‘Bestnewtones.com/wap’ service on 19 June 2009. Whilst this charge was not levied until 6 July 2009, the action that made the mobile phone liable to that charge appeared to have been the user accessing the WAP site (using the WAP push link under the label “Member Content”). The Executive submitted that, at the purported time of entry, no cost information had been presented to the consumer.

The Executive submitted that, according to the Information Provider, the user had seen a banner advertisement (which contained pricing information) and issued a user text message positively consenting to the receipt of marketing material.

The Executive submitted that it had previously accessed an unrelated service operated by an unrelated Information Provider on the mBlox Limited platform. The Executive had opted out of this previous service by sending a text message with a ‘STOP’ command. It submitted that it was that user text message on which the Information Provider stated to be a positive opt-in following sight of the banner advert.

The Executive submitted that it had, at no time, had sight of the banner advertisements prior to the response to the request for information. The first time the Executive had sight of any pricing information was 19 June 2009 when reading the terms and conditions on the WAP site itself. This was after incurring the charge (becoming liable for, or subject to, the subscription charge).

The Executive submitted that the service operated in such a manner as to make the pricing information unavailable to consumers prior to their incurring a charge.

2. The Information Provider stated that it had not hidden any terms and conditions from the consumer and that these had been displayed in the following:
 - a. The banners
 - b. The WAP site

- c. The promotional message
- d. The join message
- e. The billing message
- f. The reminder messages

It stated that on six occasions, as per PhonepayPlus guidelines, it had given the consumer all the information requested within the guidelines.

The Information Provider stated that it provided a platform which could be used by affiliates to manage subscribers and submit promotional text messages. It stated that was reliant on a third-party company in relation to the user text messages and that the Information Provider had currently withdrawn this privilege to all its affiliates.

The Information Provider stated that it had automated processes to send out the reminders and had followed the guidelines in every detail, working with the PhonepayPlus Compliance team to fine tune its terms and conditions in line with the PhonepayPlus guidelines.

3. The Tribunal considered the evidence and, in particular, the monitoring report provided by the Executive. It concluded that this evidence showed that the terms and conditions, including pricing information, were, in fact, seen by the Executive before the first charge was actually incurred (which happened several weeks later). Since there was no other evidence from complainants to the contrary, the Tribunal decided not to uphold a breach of paragraph 5.7.1 of the Code.

Decision: NOT 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 and easily available to the user.”

1. The Executive made reference to Information Provider’s claim that the initial text message sent to consumers contained the following information:

*Bestnewtones 85222 Help02476998891 SP TagContent
CALVIN AND TOPTONES 85222 Help02476998891*

The Executive submitted, however, that it had observed, during the course its monitoring and in some of the complainants’ comments, that the first message received was a WAP-push promotion that had only stated “Member Content”. It submitted that, according to the Information Provider, these text messages had only been issued to subscribers; however, this text message had been the first message received on the Executive’s monitoring phone.

It submitted that the “Member Content” text message did not include the identity and contact details in the UK of the Service Provider, or the Information Provider, as required under the Code.

The Executive submitted that its monitoring report and the complainants’ comments suggested recipients of the “Member Content” promotion had not gone through the full opt-in process described by the Information Provider. The Executive submitted that, without sight of the banner advertisement or any other promotional material being received, the issuance of the WAP-push message saying “Member Content” was the first contact between the service and the consumer. It stated that, in such instances, it was the opinion of the Executive that the relevant information under paragraph 5.8 of the Code was, firstly, not otherwise obvious and, secondly, that the customer service phone number had not been provided in the first instance.

2. The Information Provider stated that the banner advertisement, the initial WAP-push promotion and WAP site terms and conditions prior to opt-in, had all contained the relevant information, thereby satisfying the requirements of paragraph 5.8 of the Code and it, therefore, denied this alleged breach of the Code. It stated that the Executive had admitted that all contact details were given on the promotional text message:

*“Bestnewtones 85222 Help02476998891 SP TagContent
CALVIN AND TOPTONES 85222 Help02476998891”*

It stated that “Member Content” had not been a promotional text message and simply acted as an access point for subscribers to receive their entitled content.

3. The Tribunal considered the evidence and concluded that the “Member Content” text message was a promotion by virtue of the fact that it had been an unsolicited message which acted as a call to action to the recipient to click on the link to access the service. The Tribunal found that this promotional text message had not contained the identity of the Service Provider, or the Information Provider, as required under the Code. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE SUBSCRIPTION - PROMOTION (Paragraph 7.12.3)

“Promotional material must:

- a. *clearly indicate that the service is subscription based. This information should be prominent and plainly visible and/or audible to consumers,*
- b. *ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible, advertise the availability of the ‘STOP’ command.”*

1. The Executive made reference to the submissions made in relation to the alleged breach of paragraph 5.4.1a, Ground 1.

The Executive submitted that the service was capable of misleading consumers as it was promoted in such a way so as to deliberately conceal the information required under this provision of the Code.

The Executive submitted that it raised this alleged breach as the monitoring report indicated that the point of opt-in for the service had been the action of the consumer clicking the 'Go to' link in the WAP-push promotional message. According to the Information Provider, the point of opt-in had been at a later time when the consumer had visibility of the WAP site and the full terms and conditions. The Executive submitted that its monitoring report indicated that this was not the case.

The Executive submitted that that Information Provider had also stated that the Executive had seen a banner advertisement and positively requested the WAP-push promotion by issuing a user text message to shortcode 78889 and using the advertised trigger word. The Executive submitted that its report indicated that the user text message sent had not been a trigger word for the service, but had been a 'STOP' command for a separate, unrelated service operated by a third-party information provider.

The Executive submitted that the banner advertisements had not been seen by consumers.

It submitted that, in the instances where the first text message received by the consumer was the WAP-push promotion "Member Content", and the point of opt-in was by clicking on the 'Go to' link within the promotion, the consumer had not had sight of the relevant terms and conditions or any other information required under paragraph 7.12.3 of the Code.

2. The Information Provider stated all details were contained on the banners, WAP site and in the promotional text message and was worded as follows:

*"Bestnewtones 85222 Help02476998891 SP TagContent
CALVIN AND TOPTONES 85222 Help02476998891"*

It stated this was as per PhonepayPlus Guidelines. It stated that the Executive had again misunderstood the member content facility and that, as consumers were already subscribed, this was not a promotional text message.

The Information Provider stated that the Executive's response regarding the fact that the consumers did not see the banners was factually incorrect. It stated that, as indicated before, it had had very few complaints and this was down to the fact that consumers were very aware of where and how they had signed up to the service.

It reiterated that all 'join' text messages and 'reminder' text messages had either been sent directly by the Information Provider itself or previously by affiliates.

3. The Tribunal considered the evidence and concluded that the "Member Content" WAP message was promotional by virtue of the fact that it had been unsolicited

and was, therefore, a call to action to recipients. The Tribunal found that this promotional message had not contained any of the information required under this paragraph of the Code. The Tribunal noted that, even if the first message received by users had been as claimed by the Information Provider, it would still have failed to satisfy the requirements of paragraph 7.12.3a-c of the Code as it did not contain the relevant information about subscription costs or how to stop the service. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

SUBSCRIPTION - INITIAL MESSAGE (Paragraph 7.12.4)

“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 (e.g. per day, per week or per month) 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 message logs supplied by the Information Provider purported to show that the requisite subscription initiation text message was issued by the service at the appropriate time, on the date of subscription.

The Executive submitted that its monitoring evidence indicated that the only text messages received to the handset relating to this service were the two WAP-push promotional messages and one billed PSMS message on 6 July 2009. It submitted that no free-to-receive subscription initiation text message was received on the monitoring phone before or after 19 June 2009 (when the monitoring report indicates the service was first accessed).

The Executive submitted that the complainants' comments provided further evidence that consumers had not put the premium text message into the context of a subscription-based service. It submitted that, whilst some complainants provided the transcript of the premium text message, which was worded in such a manner as to suggest to some complainants it was merely a promotional text message, rather than a service text message levying a charge, no complainants had provided a transcript for either the subscription initiation text message, or the reminder text message required once per month.

The Executive submitted that the text message was not issued to all users at the point of opt-in and that it appeared that the service was operated in breach of paragraph 7.12.4 of the Code.

2. The Information Provider stated that the message logs clearly showed that all 'join' text messages and 'reminder' text messages had been sent to the consumer by the Information Provider itself, or previously by its affiliates. It stated that it did

not receive status reports on whether or not the 'join' text messages had landed and, therefore, was not able to validate if the Executive had received the 'join' text messages. It stated that it used an extremely professional route to ensure delivery of all free-to-consumer text messages. It rejected and disputed that it had breached this part of the Code.

3. The Tribunal considered the evidence and concluded that, although the message logs provided by the Information Provider purported to show that the free initial subscription text message had been sent, the monitoring phone had received no initial subscription text messages and none of the complainants had referred to receiving it. It found that, on the balance of probabilities, the initial subscription text message was not sent. The Tribunal decided to uphold a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

**ALLEGED BREACH SEVEN
PROVISION OF INFORMATION (IN CONJUNCTION WITH PARAGRAPH 8.3.3)
(Paragraph 3.2.2)**

“Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code which may include but is not limited to:

- a. any number ranges (including dialling codes) or other connection arrangements allocated to it by Ofcom or any network operator,
 - b. if the service requires or involves access to any website, the URL of the site,
 - c. the name, address, e-mail address, phone and fax number of the person representing the service provider who is nominated to receive all communications in connection with the application of the Code, enabling contact to be made with that person at all necessary times, and, if that person is not a director of the service provider, the name of the director with primary responsibility for premium rate services, the name and home address of each of the directors and their phone and fax numbers and e-mail addresses.”
1. The Executive submitted it used paragraph 8.3.3 of the Code to request information relevant to an investigation or adjudication process. It submitted that it was of the opinion that the information requested under paragraph 8.3.3 had been required for a relevant purpose relating to the Code (specifically its powers to investigate and adjudicate under paragraph 11.1.1g-h). Furthermore, the Executive submitted that it was of the view that a request for information made under that paragraph carried with it an implied requirement for the information to be factually accurate and relevant. It submitted, therefore, that any failure to provide factually accurate and relevant information when responding to a request for information under paragraph 8.3.3 of the Code amounted to a breach of paragraph 3.2.2 of the Code.

The Executive noted that the consequences of giving factually inaccurate or irrelevant information during an investigation and adjudication of any complaints may significantly impact upon the procurement of compliance with the Code and

undermine the efforts of PhonepayPlus to secure the enforcement of its provisions.

The Executive submitted that it had requested various pieces of information in conjunction with the preliminary investigation undertaken into the 'Bestnewtones.com/wap' service on 27 July 2009. It submitted that it was of the opinion that some of the relevant information had not been disclosed to the Executive.

The Executive submitted that it had sought a copy of the full terms and conditions for this service, as available to consumers interacting with the service. It submitted that the Information Provider supplied terms and conditions that were inaccurate and had failed to disclose those that were available to consumers interacting with the service. The Executive submitted that it considered the removal of the phrase "thanks for your order", and the change in wording from "by using this site" to the disclosed version that stated "by accepting the terms and conditions of this site", to be have been deliberate attempts by the Information Provider to conceal information from the Executive.

The Executive submitted that it had sought an explanation of the opt-in process, including specific details regarding the promotional activity associated with two mobile phone numbers. It submitted that the Information Provider supplied information in the body of an email and within message logs. This information suggested that both users holding these mobile phones had viewed banner advertisements and issued user text messages. The Executive submitted that the disclosure of information regarding the user text message data was inaccurate and relevant information had not been disclosed to the Executive regarding the audit trail for this data (the Executive also made reference to its monitoring exercise).

Furthermore, the Executive submitted that, according to the Information Provider in its response dated 21 August 2009, the user text message data was uploaded by its affiliate. It submitted that this information had not been verified and was information that was relevant to the audit trail sought in the original request, and relevant to the technical processes involved in the opt-in procedure. It submitted that this was not disclosed to the Executive when originally requested.

The Executive submitted that it considered the provision of the user text message data relating to a 'STOP' command message (that had come from an monitoring phone) as being used to evidence a positive opt-in for a new service had been a deliberate attempt by the Information Provider to conceal information from the Executive.

The Executive submitted that it had sought details regarding how this service was promoted, and specifically in relation to two mobile phone numbers.

It submitted that two banner advertisements were held out by the Information Provider to be relevant to these specific mobile phone numbers and generally available to the public. Those banners included two shortcodes on each – one showing 85015 (mBlox) and 85222 (the Service Provider), and the other showed 78889 (mBlox) and 85222.

The Executive submitted that it had sought clarity regarding these banner advertisements and requested user text message logs for all consumers who had opted into the Service Provider's shortcode. The Information Provider subsequently informed the Executive, on 25 August 2009, that no user text messages had been issued to the Service Provider's shortcode to opt into the service. It also stated that the trigger words had not been used on the Service Provider's platform and the banner advertisements were new because the banner advertisements it had supplied on 5 August 2009 were not relevant to the requests made by the Executive.

The Executive submitted that it considered the provision of these banner advertisements to have been a deliberate attempt by the Information Provider to conceal information from the Executive. The Information Provider failed to disclose relevant information relating to the promotional material for this service.

The Executive submitted that it was of the opinion that the Service Provider, who had received the request and forwarded the responses from Information Provider, should have known which trigger words were being used on the service and should have ensured the banner advertisements supplied by the Information Provider were relevant and accurate.

2. The Information Provider stated that this alleged breach showed a complete and utter lack of understanding of basic logs. It stated that all the message logs given were part of the audit trail given in conjunction with not only the Information Provider itself but in liaising with its affiliates. It stated that it had given all the information with 100% honesty and refuted the Executive submissions that this was not the case. It submitted that it was evident that the Executive had already passed judgement regarding this matter despite its full co-operation. It stated that it was also evident that its internal departments did not speak to one another. It stated that the Executive had submitted that the WAP site had changed and that this change had come about when the Information Provider had first realised there was an issue and had contacted the PhonepayPlus Compliance team to update its terms and conditions. It submitted that, had the Executive bothered to check this, they would have found this to be the case, rather than prejudging that it had altered these terms in an under-hand manner. It stated that it had taken this breach very seriously and immediately contacted PhonepayPlus in response not only to this, but to check its sites and general compliance at the same time.

It stated that it had asked that it not be bracketed like other non-compliant companies within the industry who exercised dubious practices in order to wilfully mislead consumers. It stated that, as soon as it had been made aware of this issue, it had suspended all of its services and had subsequently stopped its income. It stated that this was an indication of how seriously it treated the matter and it firmly refuted all suggestions of non-compliance. It stated that the Information Provider was a system provider for affiliates to market their products to existing consumers and that it had to rely on information passed to it by affiliates.

3. The Tribunal considered the evidence and concluded that there had been a failure to provide accurate information. It found that the Information Provider had

not supplied an accurate version of the terms and conditions seen by users of the service; the message logs provided by the Information Provider contradicted those supplied by the Service Provider (and the Executive's monitoring report); the banner advertisements provided had not been relevant to the Executive requests (and no evidence was provided of them ever being used). The Tribunal found that there was a failure to explain discrepancies which had been put to the Information Provider by the Executive. The Tribunal took into account the Executive's monitoring experience of the service and the fact that this showed that the Information Provider had provided incorrect information about the service. The Tribunal therefore upheld a breach of paragraph 3.3.2 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 was reckless in relation to the opt-in data it had relied upon and in relation to the business model it was operating (allowing affiliates to operate this kind of service).
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- A failure to provide factually accurate and relevant information in response to 8.3.3 requests (which led to an upheld breach of paragraph 3.2.2 of the Code) and supplying misleading information to the Executive.

In mitigation, the Tribunal noted the following factors:

- The Information Provider claimed to have provided refunds affected users.

The revenue in relation to this service was in the upper range of Band 5 (£5,000-£50,000).

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 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 £45,000;
- 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 six months, commencing from the date of notification of this decision; and

- 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.