

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 19 February 2009 TRIBUNAL SITTING No. 21 / CASE 4

CASE REFERENCE: 767638/GL

Information provider & area:	Text Media Limited (now known as Mexel Limited)
Service provider & area:	mBlox Limited, London
Type of service:	Mobile content download service
Service title:	gummybearringtones.com
Service number:	84300
Cost:	£5 per reverse billed SMS
Network operator:	Mobile Operators
Number of complainants:	51

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 51 complaints regarding unsolicited reverse billed SMS charges from shortcode 84300. The majority of complainants reported the receipt of blank messages with no content, or no messages at all but charged £5 per message to their phone bills. However, some complainants reported the receipt of messages stating the following:

Msg cannot be displayed. Sender 84300. Message centre +447785016005

Complainants stated that when they contacted the information provider for the shortcode, they were advised that the messages had been sent in error and that they would be refunded.

The service

The service was operated on shortcode 84300 and called “GummyBearRingtones.com”. It was promoted by two methods: firstly by web promotion on search engine sites using search terms such as ‘bear’ or ‘gummy’; and secondly, by WAP push promotional text including the URL address “<http://gummybear.wapfly.mobi/?h=xxxxxxxxxxxxx>”. According to the information provider the service was a single purchase mobile content ordering service. The promotion directed users to a mobile internet site where there was a mixture of free content and also gummy bear branded content. This content was charged at £5 or £10 depending on whether the user chose a single piece of content or a bundle of content.

The investigation

Following receipt of complaints regarding unsolicited reverse-billed texts and/or charges from short code 84300, the Executive issued a request for information from the service provider under paragraph 8.3.3 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008) (“the Code”) by letter dated 16th September 2008.

The service provider responded including a response from the information provider. In its response dated 26th September 2008 the information provider included a flowchart of the Gummy bear ringtone service, opt-in and message logs for mobile number data supplied by the Executive. On reviewing the information supplied, the Executive requested further information on the promotion and further opt-in details and message logs on 15th October 2008. The service provider responded advising that the Executive would need to get the requested information directly from the information provider, although it was willing to co-operate with requests in as far as it was able.

In a letter dated 20th November 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.7.2 and 5.8 of the Code. The service provider responded on 28th November 2008 requesting that PhonepayPlus should deal directly with the information provider, and subsequently obtained a signed and completed undertaking form from the information provider which it provided to the Executive on 3rd December 2008. Despite the information provider undertaking form having been signed under the former company name Text Media Ltd (instead of WAPFLY Technologies Ltd as the company was called at the time), the Executive accepted the undertaking as it ascertained from Companies House records that the name change was a straightforward one with all its other Companies House registration details remaining unchanged. The Executive re-issued the breach letter to the information provider on 12 December 2008.

The Executive experienced some difficulty in obtaining a response from the information provider and after a series of delays finally received a response to the breach letter on 19 January 2009.

The Tribunal made a decision on the breaches raised by the Executive on 19 February 2009.

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. 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 the WAP push promotional messages which had been sent to recipients of the service were direct marketing electronic mail for the purposes of the Regulations. It appeared that the WAP push promotional message sent to complainants’ mobile numbers was unsolicited and that they had not consented to receive any promotion for this service either directly or indirectly.

The Executive considered that even if details had been obtained following a soft opt in, recipients must be given the opportunity, within each promotion, to opt out (without charge) of using their details for such promotions. The Executive submitted that, according to the transcript of the Wap Push promotional text, recipients had not been given the opportunity within each promotion to opt out (without charge) of using their details for such promotions.

The Executive had requested evidence as to how mobile numbers were opted-in to receive the WAP push promotional text “*http://gummybear.wapfly.mobi/?h=xxxxxxxxxx*” in the first instance. However, despite the request no evidence had been produced by the information provider.

2. The information provider stated the mobile numbers used in the promotion of this service had previously used a number of services operated by their client. It went on to state that it could provide evidence to back this up and had not previously been asked to provide specific details. However, it did not supply such evidence. The information provider also stated that these users were given the option on the mobile site to opt out of receiving any further information.
3. The Tribunal considered the evidence and concluded that the WAP push messages were direct marketing messages for the purposes of the Regulations. The Tribunal found that the information provider had failed to provide evidence that recipients of the WAP push promotional messages had opted in to receiving such messages as is required by regulation 22(2) of the Regulations, despite its assertion that it could provide such evidence. The Tribunal also found that the information provider could not seek to rely on the soft opt-in exemption provided by regulation 22(3) of the Regulations, as there had been no opportunity given within the WAP push messages for recipients to opt out of further communications. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

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 the promotion to be misleading on the basis that consumers were under the impression that they could obtain a ringtone for free when the service was actually a charged mobile content download service. The Executive monitored the service and noted that the homepage on the website for the service -

“www.gummybearingtones.com” – stated:

“Using this website you can get one of my great ringtones for free. Just click on the ringtone link and find a great track for you (sic) mobile.”

On the ‘ringtone’ webpage - accessed using the link provided - the terms stated: “Only one ringtone per customer.” The Executive noted at the foot of the ‘ringtone’ webpage it stated: “Join Gummy Bear from £5.00/week. First item only £10.”

In the view of the Executive consumers were misled via an ambiguous promotion as to whether the service was free or chargeable.

2. The information provider stated that the website was owned and operated by a client and that it had no access to the content on the website or the operation of such. The information provider stated that its clients, when contracting with them, are bound to operate under the codes of conduct and practice in place by the network operators and PhonepayPlus. It explained that when its internal compliance department was made aware of the website it immediately suspended its client’s service and users were not able to initiate the service. The information provider stated that it was fully aware of the rules regarding the use of the word FREE in promotional messages where the end user has to incur a charge in order to claim the FREE item. It admitted that the service should not have used the word free. It stated that when checking the short codes used to initiate this service it revealed that two users who had sent in a mobile originating message to start the service were charged but were not subscribed to a subscription service because it had not yet setup the subscription element on the client’s account. The information provider also stated that the website had not actually been promoted by the client due to the fact that the service was not ready and had indeed not been signed off by it.
3. The Tribunal considered the evidence and found that the website was ambiguous in relation to the cost of the service and was therefore likely to mislead consumers as to whether the service itself was free or not. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

UNFAIR ADVANTAGE (Paragraph 5.4.1b)

“Services and promotional material must not:

b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”

1. The Executive submitted that complainants had stated that the reverse billed SMS messages they received for this service were unsolicited. It appeared to the Executive that consumers’ mobile phone numbers had been used without their direct or implied consent and had been used to charge the consumer a fee for a service that the consumer had never agreed, either directly or indirectly, to receiving.

The Executive believed that the circumstance which made these consumers

vulnerable was that the information provider held their personal data in the form of their mobile numbers AND that same information provider had the facility or ability to use that data to charge those consumers by reverse-billed SMS at any time they chose to do so. The Executive submitted that the information provider had taken unfair advantage of that circumstance by using the data in their possession to charge that group of consumers without having first obtained evidence of their consent to being charged.

2. The information provider stated that Internal investigations had revealed that its client had various technical problems when operating the service resulting in a section of users being charged for a service in error having been sent a chargeable promotional message in the first instance and not a free to receive message. The information provider explained that this had only affected a small percentage of the users who received the promotional message. As a result of its monitoring processes it became aware of this and took the steps to disconnect the client's service to limit the effect of this. The information provider stated that it immediately put a procedure in place to refund users who had been affected and pro-actively called customers to make them aware of such. The information provider stated that it had refunded users who had incurred charges and had withheld revenue that was due to be paid to the client.
3. The Tribunal considered the evidence and found that whilst a number of users had received unsolicited chargeable messages, the detriment to consumers was more appropriately dealt with under paragraph 5.2 of the Code, in respect of which the Tribunal had already upheld the breach. The Tribunal therefore did not uphold a breach of paragraph 5.4.1b of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

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 stated that complainants had reported that they had never initiated the service, and due to that lack of initiation on the part of the recipients they had therefore received the reverse billed SMS unaware that the messages were chargeable, until after having received it. The fact that complainants had reported that the text was unsolicited implied that no notice of the cost was given to the recipients. It therefore appeared that complainants were not fully informed, clearly and straightforwardly of the cost prior to incurring the charges.
2. The information provider stated that internal investigations had revealed that its client had various technical problems when operating the service which resulted in a section of users being charged for a service in error, having been sent a chargeable promotional message in the first instance and not a free to receive message. The information provider explained that this had only affected a small percentage of the users who had received the promotional message. As a result of its monitoring processes it became aware of this and took steps to disconnect the client's service to limit the effect of this. The information provider stated that it immediately put a

procedure in place to refund users who had been affected and had pro-actively called customers to make them aware of such. The information provider stated that it had refunded users who had incurred charges and had withheld revenue that was due to be paid to the client.

3. The Tribunal considered all the evidence and accepted the evidence of the complainants, and the admission of the information provider, that some complainants had received chargeable messages without having seen any promotion and/or initiated the service. The Tribunal found that these complainants would therefore have not seen any pricing information at all prior to being charged. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

PRICING INFORMATION (Paragraph 5.7.2)

“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.”

1. The Executive considered the pricing on the ‘ringtone’ webpage of website *GummyBearRingtones.com* which stated:

”Join Gummy Bear from £5.00/week. First item only £10”

In the opinion of the Executive, the colour combination used for the presentation of the price appeared to adversely affect the clarity of the wording *‘Join Gummy Bear from £5.00/week’* which was displayed in small grey text, and the wording *‘First item only £10’* which was displayed in small black text on a blue background at the bottom of the web page. The Executive stated that the pricing information displayed was not easily legible or prominent.

2. The information provider stated that the website was owned and operated by a client and that it had no access to the content on the website or the operation of such. The information provider stated that its clients, when contracting with them, are bound to operate under the codes of conduct and practice in place by the network operators and PhonepayPlus. It explained that when its internal compliance department was made aware of the website it immediately suspended its client’s service and users were not able to initiate the service. The information provider stated that it was fully aware of the rules regarding the use of the word FREE in promotional messages where the end user has to incur a charge in order to claim the FREE item. It admitted that the service should not have used the word free. It stated that when checking the short codes used to initiate this service it revealed that two users who had sent in a mobile originating message to start the service were charged but were not subscribed to a subscription service because it had not yet setup the subscription element on the client’s account. The information provider also stated that the website had not actually been promoted by the client due to the fact that the service was not

ready and had indeed not been signed off by it.

3. The Tribunal considered the evidence and concluded that the pricing information was not easily legible and required close examination in order to read. The Tribunal found that the use of the particular colour combinations for text and background had made the pricing barely legible. The Tribunal upheld a breach of paragraph 5.7.2 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 information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user.”

1. The Executive noted that the WAP push promotional message failed to provide the required contact information details as the contact details of either the service provider or information provider were not supplied in the promotional message as is required under paragraph 5.8 of the Code.
2. The information provider stated that the only active promotion of the service was the mobile site promotion. The mobile site contained adequate information to allow the users to unsubscribe from any further information. The mobile site contained both a “click to call” customer service number and its operating customer service address.
3. The Tribunal considered the evidence and in particular the WAP push promotional message, and concluded that the message did not contain the details of either the service provider or information provider as required by the Code. The Tribunal also noted that the promotional message did not contain the customer service phone number required by the Code. The Tribunal noted that this information was required for any promotion and considered this to mean each and every item of promotional material unless such information was obvious. The Tribunal 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 was wilful in respect of its failure to ensure that it held valid opt ins and/or to include valid opt out information in the promotional messages; and reckless with regard to the pricing information given on the website and use of the word FREE;
- The cost paid by individual consumers was high (£5.00 per message with some users receiving charges of up to £50); and
- The Executive found the information provider to be uncooperative and difficult in providing a response to the breaches raised.

In mitigation, the Tribunal noted the following factors:

- The information provider stated that it had stopped the service before complaints were received at PhonepayPlus and investigated, and
- The information provider stated that it had issued refunds to complainants.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £50,000 fine;
- The Tribunal also ordered that claims for refunds are to be paid by the information provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.