

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 3 September 2009 TRIBUNAL SITTING No. 35 / CASE 2  
CASE REFERENCE: 803034/AB

Service provider:	WIN Plc, High Wycombe
Information provider:	24x Limited, West Sussex / FTC Media, Bristol
Type of service:	Subscription / Joke service
Service title:	textfunuk.co.uk (operated by FTC Media, Bristol)
Service number:	88222
Cost:	£1.50 per month
Network operator:	All Mobile Network Operators
Number of complainants:	20

### THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

#### BACKGROUND

PhonepayPlus received 20 complaints in relation to a service operated on shortcode 88222. These complaints related to a joke-telling subscription service which sent jokes by way of a reverse-billed text message at a cost of £1.50 per month.

Complainants stated that their first knowledge of the existence of the service was when they received an unsolicited text message which contained a joke but for which they were charged £1.50.

#### (i) The Service

The service was a joke-telling subscription service which sent jokes by way of a reverse-billed text message at a cost of £1.50 per month. The Service Provider contracted with 24x Limited (the 'Information Provider') who had in turn contracted with FTC Media (also known as Daniel Layton Limited) (the 'Service Promoter'). It was the Service Promoter that had day to day operational management of the service known as textfunuk.co.uk.

#### (ii) The Investigation

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

The Executive sent a breach letter dated 24 July 2009 to the Service Provider raising potential breaches of paragraphs 5.4.1b and 7.12.4a-f of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code'). A formal response was received from the Service Provider on 31 July 2009.

The Tribunal made a decision on the breaches raised by the Executive on 3 September 2009 having heard informal representations from the Service Provider and the Information Provider.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

#### MISLEADING (FAIRNESS) (Paragraph 5.4.1b)

*“Services and promotional material must not:*

*b) take unfair advantage of any characteristics or circumstances which may make consumers vulnerable”*

1. The Executive submitted that all complainants asserted that a £1.50 charge had been reverse-billed from their mobile phone, without their prior consent. The Executive submitted that the complainants' mobile numbers had been used without their direct or implied consent, and had been used to charge a fee for a service which they had never requested either directly or indirectly. Consequently, the Executive submitted that that the circumstance which had made consumers vulnerable was the fact that their details were held by the Service Promoter (who was contracted by the Information Provider and had operational management of the service) who had the facility to charge those consumers at will using reverse-billed messages and that the Service Promoter had taken unfair advantage of this circumstance.
2. The Service Provider stated that the Service Promoter had given a written undertaking to the Information Provider guaranteeing the validity of the opt-in data before the service went live. The Service Provider stated that, as a result of complaints received by both it and the Information Provider, the service was suspended by the Information Provider on the 20 April 2009. The Service Provider stated that it then checked a sample of the purported service text message opt-in data with a mobile operator. It stated that the data supplied did not match the operator records and the Service Promoter's account was suspended. The Service Provider and Information Provider accepted the breach.
3. The Tribunal considered the evidence and the admissions of the Service Provider and Information Provider. It concluded that complainants had been sent unsolicited reverse-billed texts and upheld a breach of paragraph 5.4.1b of the Code.

**Decision: UPHELD**

### ALLEGED BREACH FIVE

#### SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)

*“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 submitted that the complainants stated that the first they had heard of this service was when they received one of the following chargeable text messages:

*“Q where do you find a 1 legged dog? A. Where you left it. t&c apply  
www.textfun.co.uk £1.50 pm c/s 448709619222 to stop reply STOP”*

*“Question whats brown and sticky? A stick. 08709619222 t&c apply  
www.textfun.co.uk £1.50 pm c/s 448709619222 to stop reply STOP”*

The Executive made reference the Service Promoter’s correspondence that stated as follows:

*“After a full internal investigation in relation to the PhonePayPlus request for information, we have found some errors in our processing system with regards to the user subscribed database. It has come to my attention that several mobile phone numbers[sic] have received a billed service text [sic] message from our system as opposed to a free marketing message.”*

The Executive made further reference to the Service Promoter’s correspondence that stated as follows:

*“I can confirm that since we have established this technical error we paused this service awaiting confirmation from our technical department that we are fully complaint and these issues are resolved.”*

The Executive noted that, although the two examples of the text messages included the name of the service, included the cost, billing period, how to leave the service and contact details, this message was not free to receive as required by the Code.

2. The Service Provider stated that the Service Promoter had not made it or the Information Provider aware of any technical issues in relation to the service while it was live. The Service Provider also stated that it and the Information Provider had not had any issues with its platforms during the period. The Service Provider and Information Provider accepted the breach.
3. The Tribunal considered the evidence and the admissions of the Service Provider and Information Provider. It found that the initial subscription text messages that had been sent to the complainants had not been free and there had therefore been a breach of the Code. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

**Decision: UPHELD**

## **SANCTIONS**

The Tribunal’s initial assessment was that, overall, the breaches taken together were **significant**.

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

- The behaviour of the Service Promoter was wilful and deliberate. However, the Tribunal noted the efforts of the Service Provider and Information Provider in relation to their due diligence of the Service Promoter.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Service Provider’s breach history.

In mitigation, the Tribunal noted the following factors:

- The Service Provider had tried to comply with the Code by taking steps in advance to identify and mitigate risk. The Tribunal noted the efforts of the Service Provider and Information Provider in relation to their due diligence of the Service Promoter.
- The Service Provider did co-operate with PhonepayPlus when notified of the breaches. The Service Provider had contacted the Information Provider before the investigation and the Information Provider supplied all of the requested information.
- The Service Provider and Service Promoter provided refunds to users.

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

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;
- A confiscatory fine of £10,000;
- A bar on the service and related promotional material until the Service Provider has sought and implemented compliance advice to the satisfaction of the Executive.