

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 30 April 2009 TRIBUNAL SITTING No. 26 / CASE 4**

**CASE REFERENCE: 772121/DL**

Service provider & area:	mBlox Limited
Information provider & area:	Wireless International Limited
Type of service:	SMS Auction service
Service title:	SMS Auction Club
Service number:	86500
Cost:	£1.50 per MT message issued. £12.00 per auction or £6.00 per week.
Network operator:	Mobile Operators
Number of complainants:	27

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

### **BACKGROUND**

PhonepayPlus was alerted by the public to the receipt of promotional messages followed by charged service messages which were apparently unsolicited. These messages related to a 'live auction', accessed by way of SMS text message bids made in response to chargeable SMS text auction updates which had been sent to consumers handsets by the Information Provider.

The 'SMS Auction Club' was promoted within an in-flight magazine and on the Internet. The service was related to a website called "wireless-international.co.uk", however past service messages had related to a website called "for-auction.info". The complainants stated that they had not viewed any promotion or engaged with the service prior to receiving messages, promotional or otherwise, on their handsets.

### **The Service**

Wireless International ("the Information Provider") said that the service was run in conjunction with a website – wireless-international.co.uk – which had been advertised in the in-flight magazine for Easy Jet in the period November 2007 through to the present day, albeit not in every monthly edition. The website could also be found by making specific searches on the Internet. According to the Information Provider it was not promoted by way of SMS, WAP, or other electronic means.

### **Complaint Investigation**

#### **Standard Procedure**

The Executive issued the original breach letter to mBlox Limited (the Service Provider) on 2 September 2008 raising breaches of paragraphs 5.2, 5.4.1a, 3.3.3, 5.7.1, 5.7.2, 5.8, 7.12.3a, and 7.12.5 of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition, Amended April

2008) (“the Code”). Following an addendum to the breach letter issued to the Service Provider and an 8.3.3 request for information relating to ‘SMS Auction Club’, the Executive received a letter from SMS Digital Future Limited (another company under investigation by PhonepayPlus) requesting that the case be treated separately. Over the course of the investigation the Executive gathered evidence of a migration of mobile phone numbers from SMS Digital Future Limited, the Information Provider and another company. On the 17 March 2009, the Service Provider requested that PhonepayPlus should deal directly with the Information Provider, however no Information Provider undertaking had been provided by the Information Provider.

The Tribunal made a decision on the breaches raised by the Executive on 30 April 2009, having heard informal representations from the Service Provider.

## **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 considered there to a breach of paragraph 5.2 of the Code on the following Grounds:

#### Ground 1

The Executive submitted that under Paragraph 22(2) 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 referred to the Information Provider’s claim (in response to the Addendum to the breach letter in relation to short-code 86500) that a hard opt-in was necessary prior to any WAP push or SMS promotional text messages being sent to the consumer and that the hard opt-in was by email or by the user entering his or her mobile number into the relevant section of either website. The Executive made reference to the complainant remarks which strongly suggested that the complainants had not given their consent to receive thef ‘SMS Auction Club’ promotional text messages and the later charged service messages. The Executive submitted that there was insufficient evidence to support the Service Provider’s and Information Providers’ claims that all complainants had gone to the website and entered their mobile numbers to opt-in.

The Executive submitted that the 'auction logs' indicated that consumers had no requisite knowledge of the service, were unaware of how the service worked and were unaware of how the service was charged prior to receipt of the 'SMS Auction Club' charged service messages. The Executive further submitted that the auction logs demonstrated 'a distinct negativity' from consumers which was not in-keeping with the Information Provider's suggestion that all users had visited the website and seen the WAP advertisements prior to knowingly and willingly opting-in to the service.

### Ground 2

The Executive noted that paragraph 23 of the Regulations reads as follows:

*23. A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail - a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.*

The Executive repeated its earlier submission that consumers had not consistently undertaken points of entry one (web) or two (WAP push), and that consequently, the first promotional message that was issued on this short-code, (which could be confirmed by the Executive as relating to the service) would have been: 'FreeMsg: Important! Please reply with 'OK' to confirm.' The Executive submitted that this text message had induced a response from the consumer as it implied that the text message was "important" and it deliberately concealed the "identity of the person on whose behalf the communication had been sent".

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

### Ground 1

The Information Provider stated that all users entering the service had initially done so by clicking on "Enter" in the WAP landing page, and that this in itself was an opt-in as required by the Code. The Information Provider stated its view that there was 'effectively nothing wrong with the opt-in process'. The Information Provider further stated that the complainants' comments were inconsistent and incomplete.

### Ground 2

The Information Provider stated that all users would have seen the website, the WAP landing page and the WAP welcome text. The Information Provider also stated that the welcome message provided the identity of the company running the service, all the relevant contact information and informed the user that all auctions that followed the initial free auction would be chargeable.

3. The Tribunal considered the evidence and concluded that in relation to Ground 1 there was an absence of credible opt-in evidence and that, on a balance of probabilities, it accepted the evidence of the complainants that they had not consented to receiving the messages and the messages had therefore been sent

in contravention of paragraph 22(2) of the Regulations. In relation to Ground 2, the Tribunal concluded that since the messages did not contain the identity of the sender, paragraph 23(a) of the Regulations had been contravened. Whilst the Tribunal noted that the messages had been received from a visible short-code, it concluded, that provision of a short-code on its own was insufficient identification for the purposes of paragraph 23(a) of the Regulations. The Tribunal also noted the admission of the information provider with regard to paragraph 23(a). The Tribunal therefore decided to uphold a breach of paragraph 5.2 of the Code on both Grounds.

## **Decision: UPHELD on both Grounds**

### **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 referred to the Information Provider's argument that the promotional text messages which had been sent to users offered an opportunity to engage in a "free auction" and were used to introduce new subscribers to the auction and demonstrate how the service worked. The Executive expressed the opinion that uninformed users who had not subscribed by visiting the website or by activating the WAP text message would have adopted the habit of deleting the promotional messages without reading them in full.

The Executive submitted that the "free auction" text messages had not included any details regarding subscription to any service, or to the cost of the messages received by the user for the service. The text message used to announce the issuance of chargeable messages in 30 minutes contained no details of the subscription or the cost per message:

*'The auction for 8 Apple iPod is starting in 30 mins. To bid send BID 10 (to bid £10) to 86500. Stop to end. Cust Care: 08712222836.'*

The Executive submitted that the users that had adopted the habit of deleting unwanted messages had not realised the "free auction" was only a promotional introduction to a subscription service, users were misled into thinking that they were free to choose whether or not to bid at no cost to themselves if they did not participate. By the time charges had been announced, £3.00 had already been charged to the users.

The Executive submitted that the user was misled into thinking the auction messages were received at no cost, and as a result was not inclined to respond with "STOP", and had deleted the apparently free messages. The Executive was

of the opinion that complainants had not seen any pricing information prior to receiving the service messages from the short-code.

#### Ground 2

The Executive submitted that notwithstanding the Executive's concerns that the website was not the primary piece of promotional material, (the primary promotion being the text message *'Reply with OK to confirm'*) and that the complainants had not registered on the website, the Executive did accept that the SMS Auction Service had run as described on the website and on the WAP landing page. The consumers who accessed the service with the necessary knowledge and understanding, expected to engage in a live SMS auction at a cost of up to 8 service messages at £1.50 per message. In paying £12.00 per auction the consumer expected the opportunity to bid in 'real-time' for items, such as a mobile phone or an iPod music player.

The Executive was of the opinion that users of the service offered by the Information Provider had been misled in relation to the "live" aspect of the auction. The Executive submitted that there had been a significant delay in issuing the service messages in the "SMS Auction Club" service, and that the consumers had been misled into believing they were all part of a "real-time" auction when in fact the technology available to the Information Provider was not sufficient for purpose.

- 2 The Information Provider responded to the Executive's allegations as follows:

#### Ground 1

The Information Provider stated that all users had been informed on the website and WAP landing page that all auctions following the free sample auction would be charged. The free sample auction was solely used to give users an idea of how the service operated, anyone not wishing to participate during or after the free sample auction could be unsubscribed. The Information Provider stated that all the relevant opt-out information had been freely available to all users during the opt-in process and that this point was made evident in light of the many users who unsubscribed during the free sample auction and before the first charged auction commenced.

The Information Provider stated that as all users were fully informed through the website, WAP landing page and welcome message that the service was subscription-based. Every user who received the "auction start" message would already have received subscription details. The Information Provider noted that no user had been charged £3.00 before the charges were announced for a second time in the "auction starting" message. The auction reminder message was free and the "auction start" message was charged £1.50, as such all users would have been charged only £1.50 by the time they had been re-informed of the auction charges.

#### Ground 2

The Information Provider stated that it could not be responsible for the late arrival of certain messages, and that this was due to problems at a network level. The Information Provider stated that the breach raised by the Executive was unjust. The service was "live", meaning that all bids would have been received in the

order in which they were sent, dependant on how the networks were operating on the day.

3. The Tribunal considered the evidence and concluded in relation to Ground 1 that, on the basis of the message logs, users who received the initial 'free auction' message were misled into thinking the service was free and did not realise that the subsequent auctions were charged for until they had already been charged. The Tribunal noted that there was strong complainant evidence demonstrating actual confusion on the part of consumers. In relation to Ground 2, the Tribunal concluded that the service was misleading because the auction was not a 'real' time live auction as it purported to be. The Tribunal expressed doubt that the service as designed could ever be truly 'live'. The Tribunal decided to uphold a breach of paragraph 5.4.1a on both Grounds.

**Decision: UPHELD on both Grounds**

### **ALLEGED BREACH THREE**

#### **ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)**

*'Service Providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality.'*

1. It was the Executive's opinion that the Service Provider had not used all reasonable endeavours to ensure that the platform used to issue the service messages for the SMS Auction Club service was of an adequate technical quality to perform the auction in "real time" as described by the Information Provider. The Executive submitted that there was evidence that subscribers to the SMS Auction Club received delayed service messages, making it impossible to run the auction in "real-time".
2. The Information Provider stated that it had made all reasonable endeavours to ensure that the technology was "adequate" for purpose and that it employed suitably qualified, industry recognised professionals in connection with the promotion. The Information Provider stated that it was of the belief that no matter how well built and well intentioned a service was, there was no escaping the possibility that problems at a network, human or technological level would give rise to a difficulty.

The Information Provider further submitted that it had used considerable funds in developing its service and had done this from its own limited resources. The Information Provider stated that it was constantly testing the service and when problems were identified, it moved to resolve them as quickly as possible. The Information Provider stated that there were events which were wholly outside of its control and that this was clearly explained in its terms and conditions, which were available on the website.

3. The Tribunal considered the evidence and found that there were clear instances of delays in the receipt of messages and instances where messages had been received out of order. The Tribunal therefore concluded that the service was not

'real time' or 'live' for a number of users and that the Service Provider had not ensured that the service was of adequate technical quality. The Tribunal therefore upheld a breach of paragraph 3.3.3 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FOUR**

### **PRICING INFORMATION (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 repeated its earlier submission that users had not registered their details on the website as suggested by the Service Provider and that the WAP PUSH message and the landing page had not appeared to consumers in the way described by the Service Provider. As a result, the first message received by complainants was: *'The FREE auction for the Sony 880i is starting in 30 mins! To bid send AUC 10 (to bid £10) to 86500. Stop to end. Cust Care: 08712222836.'* The Executive submitted that a consumer who had received the above text message, in isolation, would not have been made fully aware of the costs of the service prior to incurring charges, as the promotional message had not contained any details of costs. The Executive made reference to the message logs and submitted that the user had only become aware of the pricing of the service after being charged £3.00 (the cost of two service messages). The Executive later conceded that users would only be charged £1.50 when they received the first "charged auction" message which contained pricing information, but it maintained this was still a breach of 5.7.1 of the Code because users had not been informed of the cost prior to incurring a charge.

The Executive further submitted that the users had to scroll right to the very end of what appeared to be a standard message to see the cost was £1.50 per message.

2. The Information Provider submitted the "auction start" message was not the first message received by the user and that the pricing could be viewed on the terms and conditions page on the website. The Information Provider stated that all users would have had to actively click on the "Please register here" link to enter their mobile number and activate the service. The Information Provider noted that the "Terms & Conditions" link was set out in bold type to stand out from the other links on the same page.

The Information Provider further submitted that all users would have also had to scroll down through the terms on the WAP landing page, which included pricing information, in order to reach the "Enter" link. The Information Provider stated that there was no way of avoiding the information before deciding to enter the service and that users would not be charged £3.00 before becoming aware of the pricing, as such, all users would have been completely aware beforehand.

3. The Tribunal considered the evidence and concluded that users were not informed about the cost of receiving the auction messages until they received the

first “charged auction” message, by which time they had already been charged £1.50 for receipt of that message. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FIVE**

### **PRICING INFORMATION (PROMINENCE) (paragraph 5.7.2)**

*‘Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination.’*

1. The Executive noted that notwithstanding its concerns that users had not visited the website to access the service at any time, the Executive accepted that a website was active and in the public domain. The Executive submitted that the pricing for the service offered through [www.wireless-international.co.uk](http://www.wireless-international.co.uk) was not prominent on the website because it did not appear on the first page, nor on the webpage explaining “*How it all works*” and it did not appear on the webpage accessed via the link “*Please register here*” on which the user entered his or her mobile number. The only place the pricing was included on the website was within the “*Terms and Conditions*” page. The Executive submitted that pricing was not prominent on the website and establishing pricing information would require close examination of the “*Terms and Conditions*” on the part of the user.
2. The Information Provider confirmed that the pricing had not appeared on the landing page of the website (although noted that the “*Please register here*” link was also not present on the landing page). In addition it said that the “*Terms and Conditions*” link was in bold type so that it was prominent to the user. The Information Provider did not accept the Executive’s suggestion that a user would not check the pricing first before actively clicking the “Register” link.
3. The Tribunal considered the evidence and concluded that because the pricing information was not on the main page of the website, nor on the page where the user entered his or her mobile number, and could only be found within the terms and conditions (which were on a different page), the pricing information was not sufficiently prominent and it would require close examination of the website terms and conditions page to find it. The Tribunal therefore decided to uphold 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.’*



1. The Executive submitted that paragraph 5.8 required that any promotion must provide the identity and contact details of the Service Provider or Information Provider and that the promotional message "*FreeMSG: Important. Please reply with OK to confirm*" contained no identity or contact details.
2. The Information Provider stated that it had acknowledged and apologised for its failing in respect of the identity and contact information in this text message. The Information Provider stated in mitigation that it had provided contact information on both the website and in the WAP page and that this information had not been disguised and could not be mistaken.
3. The Tribunal considered the evidence and concluded that there were no identification or contact details provided in the text message. The Tribunal also noted the admission of the Information Provider and decided to uphold a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SEVEN**

### **SUBSCRIPTION – PROMOTIONAL MATERIAL/SUBSCRIPTION BASED (paragraph 7.12.3a)**

*'Promotional material must clearly indicate that the service is subscription-based. This should be prominent and plainly visible.'*

1. The Executive repeated its previous submission that users had not registered their details on the website as suggested by the Service Provider and that the WAP PUSH message and the landing page did not appear to consumers in the way described by the Service Provider and as a result, the first message received by complainants was the message:

*'The FREE auction for the Sony 880i is starting in 30 mins! To bid send AUC 10 (to bid £10) to 86500. Stop to end. Cust Care: 08712222836.'*

The Executive submitted that this first message received by the complainants had not made it clear that the service was a subscription based service.

2. The Information Provider stated that the first two lines of the terms on the WAP landing page read as follows;

*"This is a subscription service; it will cost £6.00 per week until you send Stop or Stop All to 86500"*

In Information Provider noted that these two lines were situated above the "Enter" link and as such all users would have had to pass this to enter. The Information Provider stated that it could not be held responsible for users who had not read the terms and conditions, even though the information was put deliberately in a place that would attract the attention of the user.

3. The Tribunal considered the evidence and concluded that the first message sent by the Information Provider and received by the complainants did not indicate that the service was a subscription based service. The Tribunal therefore decided to uphold a breach of paragraph 7.12.3a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH EIGHT**

### **SUBSCRIPTION REMINDERS (paragraph 7.12.5)**

'Once a month or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers.'

1. The Executive referred to the message logs supplied by the Information Provider and submitted that it did not appear that a reminder message had been sent.
2. The Information Provider stated that it was sufficient that all auctions had started with a free message reminding users that the service was going to start. The free message was as follows;  
  
*'The auction for 8 Apple iPod is starting in 30 mins. To bid, send BID 10 (to bid £10) to 86500. Stop to end. Cust Care: 08712222836.'*
3. The Tribunal considered the evidence and concluded that concluded that the "auction reminder" message sent by the Information Provider did not contain all the information required by paragraph 7.12.4. The Tribunal therefore decided to uphold a breach of paragraph 7.12.5 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 and deliberate which was exacerbated by the Service Provider's negligent lack of effective compliance systems. The Tribunal noted that the Service Provider had since undertaken further compliance activity;
- There was material consumer harm being that there were 27 complaints;
- The cost paid by individual consumers was high; some complainants indicated receipt of unsolicited charges of approximately £100.00;
- The service is a concealed subscription service and such services have been singled out for criticism by PhonepayPlus; and

The Tribunal noted the Information Provider's breach history but did not take it into account in this case in view of its current compliance activity.

In mitigation, the Tribunal noted the following factors:

- The Service Provider assisted PhonepayPlus by providing clear evidence of the value-chain and provided further evidence in relation to related cases and related parties.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £150,000 fine. The Tribunal did not impose an additional fine in respect of the Service Provider's breach history, in view of the Service Provider's current compliance activity;
- The Tribunal imposed a bar on this service and any similar service until compliant to the satisfaction of the Executive. However, the Tribunal commented that based on the evidence it had seen it doubted that the design of the service could ever be compliant because in its view the auction could never be truly live.
- The Tribunal also ordered that claims for refunds are to be paid by the Service Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.