

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 30 April 2009 TRIBUNAL SITTING No. 26 / CASE 2

CASE REFERENCE: 748801/DL

Service provider & area:	mBlox Limited
Information provider & area:	SMS Digital Future Limited
Type of service:	Subscription Service
Service title:	SMS Auction Club
Service number:	84253
Cost:	£1.50 per MT message issued. £12.00 per auction or £6.00 per week.
Network operator:	Mobile Operators
Number of complainants:	74

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

BACKGROUND

The PhonepayPlus Executive (the “Executive”) received 74 complaints regarding the receipt of promotional messages followed by charged service text 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 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.

Consequently, the sending of these messages appeared to the Executive to have contravened the PhonepayPlus Code of Practice 11th Edition Amended April 2008 (“the Code”).

The Service

The website “for-auction.info” was promoted via an in-flight magazine and could also be found by way of specific searches on the internet. Once the website was accessed consumers could begin the process of opting-in to the service by providing their mobile number in one of three ways:

- a. On the home page of the website, half way down the page.
- b. On the registration page of the website.
- c. By sending an email to the service operator following the instructions given on the registration page of the website.

The "SMS Auction Club" operator would then issue a WAP push message to the consumer's mobile phone. This contained the following message and URL address:

"Auction Web Request <http://209.160.78.80/wapvert/br.asp?t=1687235614>"

According to the Information Provider once this link was accessed the consumer was taken to a WAP landing page with an image of a mobile phone and a message including terms and conditions, and an "ENTER" button which needed to be clicked to proceed to the final stage of opt-in. Pressing "ENTER" would take the consumer to a second WAP landing page, which contained the following message:

"Welcome and thank you for joining the auction subscription service. The first auction is free and you can win a Sony 880i if you have the highest bid. You will be advised before this starts. After the initial free auction is finished, each round is then charged at £1.50, there are a maximum total of 8 rounds and 1-2 auctions per month. Please confirm you wish to play the service by answering the text we send to you. You can stop at any time by sending STOP to 84253. Customer services: 08712222835. This service is run by SMS Digital Future Ltd, PO Box 114, 14 Tottenham Court Road, W1T 1JY."

The third and final stage of opt-in involved the "SMS Auction Club" operator issuing a free SMS message which requested a positive user SMS message from the consumer to confirm and finalise the opt-in. The message read as follows:

"FreeMsg: Important! Please reply "OK" to confirm."

If the consumer responded with a user message they were opted-in to the service and received the following message:

"[FreeMsg] There r mobiles MP3 players waiting 4 u here in SMS Auction Club. Sub service.2 auctions/month.Max 4 msg/wk.£1.50/msg. Help:08712222835. Stop to end."

The consumer was then introduced to the "SMS Auction Club" service by way of a free auction, which he or she could engage in by bidding in accordance with the instructions given within the free SMS messages issued to the user's phone.

"SMS Auction Club" auctions

Subscribers to the service received a free message warning them that a "Charged Auction" was due to start in 30 minutes. They were then sent a chargeable SMS message announcing the start of the auction and giving details of the maximum bid for "Round 1". The auction continued with the sending of further chargeable service messages announcing the current highest bidder and the next maximum bid possible for a given "round". There were a maximum of 8 "rounds". At any stage the consumer could send a bid by way of an SMS to the short-code charged at the standard rate. A valid bid message was made by replying "BID (space)" plus the number of pounds, so long as the number lay between the current highest bid and the maximum bid for the "round".

At the end of the last "round" the consumer received a free SMS message from the relevant short-code announcing the end of the auction, details of the highest bid and an invitation to join in the next auction.

Complaint Investigation

Standard Procedure

The Executive decided to investigate the service using the standard procedure under paragraph 8.5 of the Code. The investigation led to connections being established between two services which appeared to be similar in nature and operated by two information providers using separate short-codes which were both managed by the Service Provider. Originally, the Executive treated both services as one and sent a breach letter to the Service Provider on 2 September 2009 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 (11th Edition, Amended April 2008) (“the Code”). Following the Service Provider’s response to the breach letter the Executive sent an addendum on 15th September 2008 raising a breach of paragraph 8.3.3 of the Code. On 19th September 2008 the Service Provider forwarded a request from the Information Provider requesting that both services be treated separately. The explanation provided was that there were two Information Providers which were separate legal entities. The Executive did not initially agree to this request, but on 21st January 2009 decided to deal with the cases separately and provide the Service Provider with a further opportunity for the cases to proceed directly against the two Information Providers. However, the Service Provider was unable to provide signed undertakings from the Information Providers as required under paragraph 8.7.1 of the Code and this case therefore continued against the Service 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:

Ground1

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 indication given by the Information Provider that users had consented directly to receiving the text messages (hard opt in) after having taken the following steps:

- a. viewed the advert in the Easyjet magazine, and
- b. visited the website www.for-auction.info where they registered their mobile number to try out the SMS auction service; and
- c. received a WAP PUSH message. Users would have clicked on the link within the message which would have directed them to a WAP landing page. The Information Provider indicated that by clicking on the link marked 'Enter' prompted a text message that was sent to the user's phone; and
- d. received the message "*FreeMSG: Important. Please reply with OK to confirm*", and replied with the key word 'OK' to initiate the service.

The Executive made reference to the full message logs provided by the Information Provider which suggested that the first form of electronic communication sent to complainants consisted of a WAP PUSH message (point c, above) - which the Executive could not confirm related to the service - or the text message (point d, above). The Executive expressed concern that the WAP PUSH and text message were, in fact, unsolicited and that the Service Provider and Information Provider were unable to demonstrate evidence of direct consent (hard opt-in) from the users to receive either a WAP PUSH or text message promotion. The Executive submitted that of the 65 complainants, 61 had explicitly raised the issue of unsolicited text messages from the short-code 84253. As regards the remaining 4, the Executive considered that whilst these had not expressly stated that the messages were unsolicited, they had indicated that they wanted the messages to cease and expressed confusion regarding the service.

The Executive made reference to the breach letter dated 2 September 2008 which referred to complainant and message log evidence which undermined the opt-in evidence provided by the Information Provider (as forwarded by the Service Provider). The Executive submitted that in light of the evidence, including the comments made by the complainants, the Executive had reason to believe that the service was in contravention of section 22(2) of the Privacy and Electronic Communications Regulations 2003, and in breach of paragraph 5.2 of the Code.

Ground2

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*
 - b) *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 referred to the reasons it raised in Ground 1 and formed the opinion that as it could not confirm the content of the unsolicited WAP Push message received by consumers, the first promotional message (that it could confirm) related to the service would have been:

'FreeMsg: Important! Please reply with 'OK' to confirm.'

The Executive submitted that this message would be likely to induce a response from the consumer by indicating the message was "*important*" and by deliberately concealing the "*identity of the person on whose behalf the communication has been sent*". The Executive concluded that this was in direct contravention of paragraph 23(a) of the Regulations.

The Executive further submitted that whilst the promotional message gave clear instructions as to how to respond to the message, it failed to provide any address by which the recipient could seek to cease future communications, in contravention of paragraph 23(b) of the Regulations. The Executive submitted that it appeared that the service had been run unlawfully and was thereby in breach of paragraph 5.2 of the Code.

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

Ground 1

The Information Provider stated that the WAP Push and SMS text messages were not unsolicited and that it categorically refuted the allegation that it had been "unable to demonstrate evidence of direct consent".

The Information Provider provided a technical summary that stated that before any charged service message could be sent to the consumer, the consumer would always have to go through the following steps which it claimed were verifiable:

- 1) The consumer would receive a WAP-push which contained a unique URL (unique to that particular customer's mobile number/CLI)
- 2) The consumer would then have a choice to either open that message and click on that URL or discard it (in which case the consumer would not enter the service).
- 3) By clicking on the URL, the WAP page would be displayed on the consumer's mobile. This WAP page contained marketing information and terms and conditions and would again explain what the service was about and offer the consumer the opportunity to click on the button and to enter;
- 4) The consumer at this point had a choice to either click on the button/link displayed on the WAP page and enter the service or simply discard the WAP page and exit. If the consumer decided to discard/exit, the consumer would not enter the service and could not therefore be charged
- 5) If, on the other hand, the consumer clicked on the button displayed on the WAP page, accepting to enter the service, the consumer would receive the WAP

welcome page and receive a free service welcome message which would confirm that the consumer had entered the subscription service and what it would cost

6) Only after step 5 has been completed, and as a result of the consumer's acceptance of the subscription, the consumer would be sent a charged MT at regular intervals, as specified in the terms and conditions and the welcome message.

The Information Provider stated that all the above steps were fully logged and easily verifiable.

The Information Provider further stated that the WAP Push bulk sends were sent via the Service Provider who could verify and provide the log showing that the WAP push message had been sent and at what time in relation to each customer's mobile number in question.

The Information Provider further stated that the WAP page content and provision had been managed by a third party and it was able to provide message logs for all the mobile numbers in question to show that each customer had received the WAP push with the URL link for the WAP page and whether the consumer had actually clicked on the link to enter the service or not. The Information provider stated that all these events could be clearly identified by the log and time and date stamps shown for all the events in question.

The Information Provider further stated that all the above steps could also be easily reconciled with operator/mobile network message logs which would clearly show and confirm that each consumer's mobile number has indeed accessed the WAP Page server's IP address including relevant time and date stamps thus avoiding any doubt that the customer had seen the content of the WAP page and had ultimately decided whether or not to enter the service. The Service Provider stated that this would show that there was absolutely no way for a consumer to be charged unless he or she had actually decided to do so by going through all the steps outlined above.

The Information Provider further stated that the allegation that consumers would have had a lack of understanding of the service did not stand up to scrutiny. The Information Provider stated that copious information had been provided in relation to the manner in which the service worked before any charge was incurred by the consumer. The Information Provider reiterated that by clicking the "Enter" link, consumers had positively affirmed their wish to participate in the service. The Information Provider reiterated that details of what the service comprised and its operation were contained within the WAP page and the fact that consumers had exercised their right to stop participation in the service or to unsubscribe could not be taken as an indication that they had "not been clearly informed about the nature and costs of the service". The Information Provider stated that the logic of the Executive's argument in this respect was confused.

Ground 2

The Information Provider stated that the message; "FreeMsg: Important! Please reply with 'OK' to confirm" was part of the three tier opt-in. The Information

Provider further stated that all users received the message immediately after entering via the WAP page and as such this was not the first promotional message seen by the consumer. The Information Provider stated that its intention had not been to “deliberately” mislead but had been to send the consumer, in response to their WAP opt-in, a message which would have given them a further opportunity to consider whether they wanted to participate in the service. The Information Provider stated that at this point in time, the consumer had not been charged and that the final text message had been part of a 3-tier continuum. The message was sent to the user as soon as they clicked on the “Enter” link within the WAP page. The Information Provider further stated that users would know that the message was part of the process as they were still involved in the process at that time, also, users would also have been able to match the short code originator as it appeared in the WAP page terms and conditions.

The Information Provider stated that it accepted that notwithstanding the sincerity of its stated intent and the truthfulness of its assertion in this respect, this message failed to comply with paragraph 23(a) of the Regulations in that it did not disclose the Information Provider’s identity. The Information Provider stated that this had been a failing on its part and that it apologised for a breach made innocently on its part. The Information Provider stated that with the benefit of hindsight it should have included these details in the message but had not focussed on the need to do so, it had clearly misled itself into the belief that the prior communications and information given to the consumer combined with the reasoning set out above had been more than sufficient.

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 which had been sent to them. In relation to Ground 2, the Tribunal concluded that as no identity information had been provided within the messages, 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 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 a breach of paragraph 5.4.1a of the Code on the following Grounds:

Ground 1

The Executive referred to the reasons it raised in Ground 1 of paragraph 5.2 of the Code and formed the opinion that users had not registered their details on the website and that the WAP PUSH message and landing page had not appeared to consumers in the way described by the Service Provider, and that consequently, the first message received by complainants, that could be confirmed by the Executive as relating to the service, was the message: *“FreeMSG: Important! Please reply with OK to confirm.”* The Executive further submitted that replying ‘OK’ activated the service and the associated charges. The Executive considered that the consumer expectation on receiving the above message in isolation was that there was an important message waiting for them, that this message was not a commercial venture but an alert and that by replying to the message they would receive more information – rather than be entered into the service itself.

The Executive submitted that it appeared that the promotional message had misled consumers by omission, by failing to make clear that by responding ‘OK’ the user was activating a subscription service for which the consumer was charged £1.50 per message. The Executive submitted that as a result of the Information Provider’s failure to give any detail or any indication that the service was a charged service via the free service message, the consumer was misled into opting into a service and being charged for a service which they did not fully understand.

Ground2

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 Executive submitted that the consumer expectation, if he had indeed accessed the service with the necessary knowledge and understanding, was access to a live SMS auction for the cost of up to 8 user 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 made reference to its analysis of the data within the “auction logs” for two particular auctions. The Executive submitted that the results of that analysis showed that users of the service had been misled in relation to the “live” aspect of the auction because time delays in the sending and receipt of messages by different users meant that it was not truly a “live” service and in some cases the users did not have a genuine opportunity to bid in each round..

2. The Information Provider responded via the Service Provider to the Executive’s allegations as follows:

Ground 1

The Information Provider stated that the Executive reasoning was premised on the Tribunal upholding their contention that *“FreeMSG: Important! Please reply*

with OK to confirm.” was the first message received by complainants. The Information Provider stated that this clearly was the first text message but for the reasons set out above it could not be viewed in isolation from the volume of information given to the consumer prior to opt-in.

The Information Provider further stated that all users had received the service message prompt and welcome message after going through the sign in process via the website and WAP page, also the information on the website and in the WAP advertisement had stated that the initial auction was free of charge and that the following auctions would be charged.

The Information Provider stated that the time between the free and charged auctions had given users ample opportunity to unsubscribe from the service before incurring any charges and that the promotional aspect of the Free Auction was for the sole purpose of giving users a taste of the service. The Information Provider stated that users who took part in the free part of the service, did so in the full knowledge that the following auctions would be charged.

The Information Provider stated that the “negative messages” (including requests to opt-out of the service) sent by users in response to the auction messages had merely indicated that users wanted to opt out soon after they entered the service and that the user’s use of the STOP command served to demonstrate the Information Provider’s compliance with the Code and Network Operator requirements as well as suggesting that users were mindful of the service, pricing and opt-out information that had been previously given to them.

Ground2

The Information Provider stated that it regarded it as nonsensical to suggest that the “primary piece of promotional material” was the text message “Reply with OK to confirm”. The Information Provider stated that it had already explained the manner by which a consumer would have previously opted-in to the service and that it had spent a considerable amount of money in marketing this promotion via the airline magazine and the web-site and regarded it as entirely illogical to believe that having incurred those costs it would use such a message as the “primary piece of promotional material”.

The Information Provider further stated that the auction had run in “realtime” and was “live” and that any delay was not intentional and if such delay had arisen, it was generic to all modes of electronic communication. It stated that all messages had been sent out on time to all handsets contemporaneously with the auction start and following rounds. The Information Provider stated that unfortunately, it had no control over delays at a network level and believed this to be a universal experience with services that rely on premium text messaging.

3. The Tribunal considered the evidence and concluded in relation to Ground 1 that, on the basis of complainants’ evidence that they had not seen the website or received a WAP message, the text message sent to them was the first communication they had received and was therefore misleading because it did not provide sufficient information for users to understand the implications of replying “OK” to that message. The Tribunal noted that there was strong complainant evidence demonstrating actual confusion on the part of the

consumer. 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. The Executive submitted 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 run by the Information Provider in the way in which it was described.

The Executive submitted that the SMS Auction Club service was presented as a "real-time" auction costing users £12.00 per auction (for 8 rounds at £1.50 per message) and giving users an opportunity to engage with the auction by making bids with a chance to purchase an item, such as a mobile phone or iPod music player. To 'win' the item the user had to send the quickest and highest bid to the short-code.

The Executive submitted that the platform was not of adequate technical quality and could not therefore ensure that a "real-time" auction could be run on the short-code. The Executive submitted that the significant delay identified in its analysis of the message logs had meant that the auction had started for some users long before others later down the 'list' of mobile numbers. The Executive made reference to one of the auction logs and submitted that, the potential speed at which users could respond to the SMS auction messages suggested that the auction was not run in "real-time" and that only a small number of paying subscribers had any real chance of engaging in the auction. The Executive made reference to a specific message log which appeared to show that the wrong user had been declared the winner. It submitted there was a very real danger of an auction result being wrong due to problems with the technology used by the Information Provider, and that the platform was not set up so as to run a transparent and fair auction, run in "real-time", whereby the quickest and highest bid would be acknowledged as being the winning bid in every auction.

2. The Information Provider stated that all reasonable endeavours had been used in this respect and that it was confident that the technology was "adequate" for its purpose. The Information Provider stated that it employed suitably qualified, industry recognised professionals in connection with its promotion. The Information Provider submitted 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 difficulty.

- The Information Provider submitted that it had spent a great deal of money from its own limited resources in developing its service. The Information Provider submitted that it constantly tested the service and when problems were identified, it moved to resolve them as quickly as possible. The Information Provider further stated that events that were wholly outside of its control could arise and the fact that it did not have absolute control had been 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 and that the WAP PUSH message and landing page had not appeared to consumers in the way described by the Service Provider, and that consequently, the first message received by complainants was the message: *"FreeMSG: Important! Please reply with OK to confirm"*. The Executive submitted that consumers who had received this message in isolation would not have been made fully aware of the costs of the service prior to incurring charges, as the promotional message above did not contain any details of costs. The Executive further submitted that there appeared to be further aggravation by the fact that in the first message that contained pricing information, the pricing was set out in a confusing format that read as follows: *'4 msgswk.£1.50 msg'* - purportedly indicating that the price was £1.50 per message and that there would be 4 messages per week – making a total cost of £6 per week.
2. The Information Provider stated that the website pricing was clearly indicated and that it believed that users would have had prior knowledge of the pricing as it did not believe that anyone would have entered their number without first having familiarised themselves with the full details of the service. The Information Provider submitted that the pricing appeared at the top of the landing page (which is a prime position) and appeared under "How To Take Part" and in the terms and conditions.
3. The Tribunal considered the evidence and concluded that there was not sufficient evidence of confusion amongst consumers for it to conclude that the first message which contained pricing information was not 'clear and straightforward' as required by the Code. However, the Tribunal noted that the format used was not as clear as it could be and could have the potential to cause confusion and it

that it might well have come to a different conclusion if there had been evidence of actual confusion. The Tribunal did not uphold a breach of paragraph 5.7.1 of the Code.

Decision: NOT 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 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 accepted that the website was in the public domain and may have been viewed as an independent promotion. The Executive further submitted that on the website 'for-auction.info' where the service had been promoted, the pricing appeared in two places on the landing page, however the Executive believed that these two methods of promotion had failed to provide written pricing information in a manner required by paragraph 5.7.2 of the Code. For the pricing information which appeared near the top of the landing page, which was in the form of an advert for "the auction club", the Executive's submissions were that:

- *the colours used in this advert made the wording very difficult to read*
- *the quality of the text was bad. The text was faded and blurred and difficult to read*
- *the advert looked like an advert for another service and was not easily recognised as being related to the service it was supposed to advertise. This was especially highlighted by the fact that the two appeared to show different names. The advert was called 'the Auction club' and the service itself was called 'SMS Flash Auction'. In the opinion of the Executive a user would not automatically link the two.*

In respect of the pricing information which appeared further down the page, below the box where the user would enter their mobile number, the Executive submitted that the users needed to scroll right down the page to see this pricing information requiring consumers to 'work' to find the cost information on the landing page of the website.

2. The Information Provider stated that the website pricing was clearly indicated and that it believed that users would have had prior knowledge of the pricing as it did not believe that anyone would have entered their number without first having familiarised themselves with the full details of the service. The Information Provider submitted that the pricing appeared at the top of the landing page (which is a prime position) and appeared under the "How To Take Part" section and in the terms and conditions.

3. The Tribunal considered the evidence and concluded that even if the pricing information at the top of the landing page was not sufficiently clear, the pricing information was clearly presented again at the point where users would enter their phone number and as such the user could see the pricing information without close examination before entering in his or her mobile phone number. The Tribunal therefore decided not to uphold a breach of paragraph 5.7.2.

Decision: NOT 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 Executive's submissions. 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 and that the WAP PUSH message and landing page had not appeared to consumers in the way described by the Service Provider, and that consequently, the first message received by complainants was the message: "*FreeMSG: Important! Please reply with OK to confirm*". The Executive further submitted that replying 'OK' activated the service and the associated charges. The Executive considered that the consumer expectation on receiving the above message in isolation was that there was an important message waiting for them, that this message was not a commercial venture but

an alert and that by replying to the service they would receive more information – rather than be entered into the service itself. The Executive submitted that the first message that complainants received did not make it clear that the service provided on the relevant short-code was subscription based.

2. The Information Provider stated that the Executive's case was premised on its assertion that the free service message was the first message received by complainants. The Information Provider stated that the website and WAP landing page had both stated that the service was subscription based before a user chose to enter the service. The Information Provider further stated that if complainants did enter by clicking on Enter, they would have seen a WAP based message confirming that it was a subscription service. Furthermore the complainants had received a welcome message that included the term "Sub Service", which coupled with the information on the website and WAP page, reminded them of the subscription element.
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 considered that this was particularly important as replying with 'OK' to the message activated the 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 made reference to the message logs supplied by the Information Provider and submitted that it did not appear that a reminder message had been sent as required by paragraph 7.12.5 of the Code.
2. The Information Provider stated that all users had received a free message before every auction that read as follows;

'The auction for 8 Apple iPod is starting in 30 mins. To bid,send BID 10 (to bid £10) to 84253. Stop to end. Cust Care: 08444994518'

The Information Provider stated that this message reminded the consumer that they were engaged in a service and that on average they had received this message twice a month, the first one being before they had spent £20. The Information Provider also stated that the message contained Stop information and a customer care number.

3. The Tribunal considered the evidence, including the message logs, and concluded that the "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

ALLEGED BREACH NINE

REQUEST FOR INFORMATION (paragraph 8.3.3)

'During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents.'

1. The Executive submitted that the Information Provider supplied had the Service Provider with information relating to the service so as to enable the Service Provider to respond to 8.3.3 requests made by the Executive during the course of the investigation. The Executive submitted that requests were made relating to users' opt-in to marketing material on the following dates; 26th June 2008, 24th July 2008 and 2nd September 2008.

The Executive submitted that the information that had been provided relating to consumer opt-in to the service did not fully disclose the reality of the service, whereby it appeared that users had been issued unsolicited marketing messages rather than formally opting-in to the service by way of registering on the website. The Executive further submitted that the lists of web opt-ins that been supplied for all users in relation to the above requests was also found to be inaccurate, as demonstrated by a small number of instances where the issuance of WAP push messages appeared to be months prior to the date on which the web opt-in data records suggested that the relevant users had registered on the website.

2. The Service Provider stated that the Information Provider was not available for comment in relation to the information requested by the Executive. The Service Provider stated that the Service Provider did not have control of the service and could only rely on the information supplied by the Information Provider.
3. The Tribunal considered the evidence and concluded that, the Service Provider had provided all the information available to it in response to the questions and information requested by the Executive. The Tribunal considered that the fact that the Service Provider was only able to provide a limited response did not amount to a failure to provide information but rather a failure of effective due diligence in relation to the Information Provider. The Tribunal therefore decided not to uphold a breach of paragraph 8.3.3.

Decision: NOT UPHELD

SANCTIONS

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

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

- The behaviour of the Information Provider was wilful and deliberate which was exacerbated by the Service Provider's lack of effective compliance systems. The Tribunal noted that the Service Provider's failure related to breaches which occurred prior to its current compliance activity;
- There was material consumer harm being that there were 74 complaints and significant inconvenience and annoyance to a significant number of people;
- 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.

The Tribunal noted the service 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 provided full co-operation to the Executive during the investigation
- The Information Provider appeared to have provided refunds; some complainants stated that they had received refunds from the Information Provider.

Having taken into account the aggravating 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 £100,000 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.