

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 16 April 2009 TRIBUNAL SITTING No. 25 / CASE 1

CASE REFERENCE: 768905/JI

Service provider & area:	mBlox Limited, London
Information provider & area:	Aquila Worldwide Holdings Limited, Tortola, British Virgin Islands
Type of service:	[Competition Service]
Service title:	Quiz Magic
Service number:	60019
Cost:	£1.50 per MT message issued
Network operator:	Mobile Operators
Number of complainants:	30

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 30 consumer complaints regarding the receipt of unsolicited promotional and/ or chargeable promotional messages. These messages related to a quiz service which operated on shortcode 60019. mBlox Limited (“the Service Provider”) was notified of PhonepayPlus’ preliminary investigation on 11 November 2008. Complainants stated that they did not request or use the quiz service and that they had not authorised the premium rate charges.

The Service

The service was a mobile subscription competition service which, according to the Service Provider, was promoted on the website www.quizmagic.net. Subscribed users could win prizes by answering questions sent by the service via SMS messages for a £4.50 weekly subscription fee. The service was operated by Aquila Worldwide Holdings Limited (“the Information Provider”) on shortcode 60019.

Once subscribed to the service users received three reverse-billed SMS ‘true or false’ type messages per week from the shortcode charged at £1.50 per message. These messages included content such as the example provided below:

Question: Robert Plant and Jimmy Paige both perform in the band Led Zeppelin Reply Y and N. customer care: 08444994762. 1.50 GBP per msg.

At the end of each month a winner was chosen and contacted by a representative. Prizes included the Apple iTouch, Nintendo Wii, Sony T200 digital camera, Sony Ericsson K850 mobile phone and other products.

Complaint Investigation

Standard Procedure

The Executive issued a request for information from the Service Provider under paragraph 8.3.3 of the Code on 11 November 2008. Following further correspondence with the Information Provider and Service Provider, the Executive raised potential breaches of paragraphs 5.4.1b, 5.7.1, 5.8, 7.6.7a, 7.12.3a-c, 7.12.4a-f, 7.12.5, 7.12.6a, and 8.3.3 of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 (“the Code”) in a letter dated 4 February 2009. The Service Provider responded to the breaches on 13 February 2009. At this time, the Executive was provided with a request from the Service Provider that the Information Provider be made the responsible party in this case. The Executive rejected this request due to the lack of an Information provider undertaking and held the view that the party responsible under the Code was the Service Provider.

The Tribunal made a decision on the breaches raised by the Executive on 16 April 2009 having heard informal representations from the service provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS (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 of the 30 complaints received, 29 complainants had received unsolicited reverse-billed text messages for a service which they had not subscribed to. None of the 29 complainants reported to have visited the website www.quizmagic.net which the service provider stated was used to register their mobile number, as part of the opt-in process. The remaining complainant did not make it clear whether the text messages received were unsolicited or not. The Executive further submitted that some complainants who the Service Provider had claimed to have won a prize after subscribing to the service reported that they had not heard of the website. In addition, one complainant explicitly stated that his mobile phone did not have a WAP facility. The Executive further submitted that there had been an omission of key terms and conditions of the service informing users how they could win a prize. The Executive submitted that the complainants were unlikely to have opted-in to a service which entirely failed to explain how winners were chosen.

The Executive submitted that the website www.quizmagic.net had never existed in the public domain and that consumers were not sent a WAP link or a ‘free’ initial text message prior to opt-in. The Executive asserted that consumers’ mobile numbers were used without direct or implied consent, and had been used to charge a fee for a service which consumers never agreed (either directly or indirectly) to receiving. The Executive believed that the service was operated in such a way that consumers were charged without their consent or knowledge

and that the service provider had taken unfair advantage of the circumstance that mobile complainants were unable to prevent the receipt or charging of reverse-billed messages which they had not agreed to receive. The Executive subsequently submitted evidence in support of all of its assertions.

2. The Service Provider stated that it was not unusual to rely entirely on the Information Provider to ensure that the necessary opt-in data to support promotions and/or reverse billed messages had been legitimately obtained and remained valid. The Service Provider added that in the event that the opt-ins originated on third party shortcodes and other channels, there was evidence to show that respectable Information Provider's could have managed this process correctly. The Service Provider stated that it had not been apparent at the time that the Information Provider in this case would infringe the opt-in requirements that had been made clear under the contracts and addenda made between the two parties. The Service Provider stated that in order to combat this issue it now had the ability to identify clients that delivered billable traffic without a corresponding mobile originating SMS message.

The Service Provider stated that all details relating to prize winners had come from the Information Provider. The Service Provider was not involved in the operation of the service (including allocation of prizes) and had relied entirely on the Information Provider to provide this information. The Service Provider stated that other than relying on the assessments presented by the Executive, the Service Provider had no basis to challenge the Information Provider's rendition of events and could only refer to its Customer Care Form.

The Service Provider stated that it had experienced cases where the Information Provider has gone to great lengths to construct a legitimate façade to an otherwise non-compliant service. The Service Provider stated that it had been presented with a compliant service description (in accordance to the Customer Care Form provided in the 8.3.3. response) that served to mask any rogue activity the Information Provider might have attempted. The Service Provider further stated that such activity was difficult to identify when it was submerged in volumes of legitimate traffic. As a result, the Service Provider stated that it now had an 'in-life' monitoring program to assist in the uncovering of this type of malicious activity.

The Service Provider also stated that the Information Provider had no previous breach history; however it appeared that the Information Provider may have been established to avoid association with breach history elsewhere. The Service Provider stated that had there been timely and reliable information about this possibility then certification checks and audit cycles would have been initiated much sooner and more frequently than normal. The Service Provider stated that it believed that such a mechanism would have provided some degree of additional safety net in this case. The Service Provider stated that it was involved with an Information Provider registration scheme through AIME that is an initiative designed to provide intelligence about Information Providers to combat the scenario of "shell" companies.

The Service Provider stressed that the Information Provider was the defendant in this case and that it was the Information Provider who was entirely responsible

for the operation of the service. The Service Provider stated that was at fault for 'sins of omission' in this case, which it had accepted and explained following the voluntary compliance review conducted in Q4 2008. The Service Provider stated that these 'sins of omission' related to the degree of due diligence and monitoring of the Service Provider's customers. As a result of the voluntary compliance review, the Service Provider now had a number of regulatory governance systems and procedures that it believed would identify an Information Provider's non-compliance much earlier than had previously been the case.

The Service Provider subsequently provided a specific response to each form of evidence submitted by the Executive.

3. The Tribunal considered the evidence and concluded that it was satisfied on the basis of the message logs and the user experience as evidenced by the complaints, that the messages had been sent without the appropriate consent and that the service had thereby taken unfair advantage of circumstances which made those consumers vulnerable. Those circumstances were that the information provider was in possession of the complainants' mobile phone numbers and used its ability to use that information to send unsolicited reverse-billed SMS messages to consumers which they had no opportunity to prevent. The Tribunal therefore upheld a breach of paragraph 5.4.1b.

Decision: UPHELD

ALLEGED BREACH TWO

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 considered the service to be in breach of paragraph 5.7.1 on the following grounds:

Ground 1

The Executive submitted that the Service Provider had stated that the subscription cost of £4.50 per week was mentioned on the website, the WAP advertisement, and the WAP welcome message. The Executive submitted that the reasons for concluding that users had not opted-in to the service by registering their mobile number on the website or accessing the WAP advertisement had been set out in the Executive's submissions in relation to the breach of paragraph 5.4.1b of the Code. The Executive stated that if users claimed to not have subscribed to the service it followed that they would not have visited the website or accessed the WAP advertisement. As a result, it appeared that the first time the Information Provider made contact with users was by sending a text message charged at £1.50. Complainants would only have realised that the service was premium rate and that they had been charged when they received their phone bill or by checking their pay-as-you-go credit. It therefore followed that users would not have been informed of the cost of using the service prior to incurring charges.

Ground 2

The Executive submitted that according to complainants, all chargeable messages followed the format: "*Question: Robert Plant and Jimmy Paige both perform in the band Led Zeppelin Reply Y or N. Customer care: 08444994762. 1.50 GBP per msg*". However, the formats of these chargeable messages as presented in the message logs supplied by the Service Provider were inconsistent. Some messages followed the format: "*True or False:3a George Harrison played the bass guitar in the Beatles Reply T or F:2e 1 pound 50 per msg:2e Customer care:3a 08444994762:2e*" but the Executive noted that the vast majority of the message logs did not contain any reference to pricing information and as such users would not have had any knowledge that they were being charged for receiving those messages.

The Executive considered that, even in cases where the cost was included in the wording of the message, there was no suggestion that users, regardless of whether they had decided to respond or not to the message, had been charged for receiving the message. The Executive considered that on the contrary, the users may have believed that they would only be charged for replying with 'true' or 'false' to the question, particularly as, in the Executive's view, they had not opted-in to the service.

The Executive submitted that as it was not clear or straightforward as to whether the pricing information contained in the message applied to the outbound or inbound messages, it would follow that users were not fully informed, clearly and straightforwardly as to the cost of the service.

2. The service provider responded to the Executive's allegation as follows:

Ground 1

The Service Provider stated that in the event that users had received billable service messages without 1) first providing a legitimate opt-in (by visiting the associated web-site or other promotional channels), 2) receiving and viewing the resultant WAP push landing page and 3) having clicked on the link on the WAP landing page, obtained a subscription invite with the pricing confirmed, then it would agree that it was unlikely that the stated complainants would have been aware of the necessary pricing prior to receiving the first billable service messages. The Service Provider stated that if the Information Provider had operated according to the description provided by the Executive, the Information Provider would not have been following a model that had been agreed in the Customer Care Form, and would be violating the terms of its contract. The Service Provider stated that only close monitoring (and astute end user complaints) would have identified the Information Provider's surreptitious insertion of unsolicited messages of this nature. The Service Provider stated that it would continue to fine tune its monitoring and compliance review processes to help prevent similar issues in the future.

Ground 2

The Service Provider stated that in the event that a service was operating correctly, all messages that did not carry the "FreeMsg" prefix could be deemed chargeable. The Service Provider stated that in the context of the case, if the billable services messages were unsolicited and did not show any pricing

information, then the breach would be aggravated. However, the Service Provider argued that the WAP landing page did show clear pricing information and the Service Provider would have expected the website and any other promotional channels within the Information Provider's control to do the same. The Service Provider made the assumption that if that was the case, then in relation to legitimate opt-ins there was a case to suggest that pricing information had been clear. The only weak point that was acknowledged by the Service Provider was that the Information Provider's subscription invite message did not contain confirmation of the pricing information.

3. The Tribunal considered the evidence and in relation to Ground 1 accepted the complainants' evidence that they had not visited any website or been in receipt of any WAP advertisement containing pricing information relating to the service. The Tribunal therefore concluded that the chargeable SMS messages were the first messages received by the complainants and that accordingly there had been no pricing information provided to them prior to incurring charges. In relation to Ground 2, the Tribunal concluded that even where pricing information was contained within the first message sent to the complainants who had not seen any earlier website or WAP advertisement, this did not satisfy the Code requirement as the first message was charged and therefore the information was not given prior to the charge being incurred. The Tribunal therefore upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD on all grounds

ALLEGED BREACH THREE

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 stated that the information supplied by the Service Provider suggested that the WAP advertisement contained the identity of the Information Provider. However, the Executive noted that in the message logs supplied by the Service Provider, users received chargeable messages predominantly in the following format: *"True or False:3a George Harrison played the bass guitar in the Beatles Reply T or F:2e 1 pound 50 per msg:2e Customer care:3a 08444994762:2e"*. The Executive noted that neither the identity of the Service Provider nor Information Provider were contained within the message. The Executive submitted that if users had not subscribed to the service, they would not have visited the website or accessed the WAP advertisement and therefore would have had no way of identifying the sender of the message. The Executive considered that this was aggravated by the fact that some users were unable to speak to an operator when calling the customer services number contained within the text message. The Executive submitted that as the charged text message also encouraged users to engage with a premium rate service, it was also considered to be a promotion within the meaning of paragraph 11.3.27

of the Code. The Executive submitted that in the absence of the identity of the Service Provider or Information Provider there had been a breach of paragraph 5.8 of the Code.

2. The Service Provider stated that in the scenario where the service worked in accordance with the Service Provider's Customer Care Form and the opt-in had been validly obtained, it would argue that users would have been expecting the billable service messages that contained the quiz questions. As such the identity of the Service Provider and/or Information Provider would have been implicit. The Service Provider stated that in the scenario where users had not subscribed legitimately, it would not have expected these users to have encountered the associated website/s and WAP landing page and as such there was no possibility of them seeing any contact information and identity of the Information Provider or the Service Provider in the first place. The Service Provider stated that as a result it did not believe that the issue of invalid opt-ins should have triggered a breach of paragraph 5.8 of the Code when there could never have been an option to comply with this Code provision in this scenario.
3. Having considered the evidence the Tribunal found that there was no evidence to conclude that the complainants had seen any website or WAP advertisement prior to receiving the charged SMS message and therefore concluded that the charged message was itself a promotion, within the meaning of paragraph 11.3.27 of the Code, for the purposes of paragraph 5.8. The Tribunal further concluded that as the complainants did not see any earlier promotion the identity of the Service Provider or Information Provider would not have been obvious and had not been stated in the charged message. The Tribunal therefore upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

COMPETITIONS (Paragraph 7.6.7a)

"Service providers must ensure that:

- a prizes are awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material."*

1. The Executive stated that three consumers were entered into a competition where they were notified that they had won a prize. The Executive stated that all three consumers informed the Executive that they had not received any prize in relation to that competition. The Executive noted that two of these consumers claimed to have never heard of the Quiz Magic service. The Executive submitted that in light of the evidence that no prizes had been awarded to consumers who had been notified that they had won a prize, a breach of paragraph 7.6.7a had occurred.
2. The Service Provider stated that all details relating to prize winners had come from the Information Provider and that it was not involved in the operation of the service (including the allocation of any prizes) and that it had relied entirely on the Information Provider to provide the relevant information. The Service Provider

stated that apart from relying on the assessments presented by the Executive it had no basis on which to challenge the Information Provider's rendition of events other than to refer to the Customer Care Form.

3. The Tribunal considered the evidence and concluded, in the absence of any evidence to the contrary, that prizes had not been awarded to the complainants notified as winners. The Tribunal therefore upheld a breach of paragraph 7.6.7a of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

SUBSCRIPTION – PROMOTIONAL MESSAGE (Paragraph 7.12.3a-c)

“Promotional material must:

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

1. The Executive stated that if users had not subscribed to the service, they would not have visited the website or accessed the WAP advertisement. The Executive submitted that, on the evidence, it appeared that the first time the Information Provider made contact with users was by sending a charged text message in the following format: *“True or False:3a George Harrison played the bass guitar in the Beatles Reply T or F:2e 1 pound 50 per msg:2e Customer care:3a 08444994762:2e”*. As the text message encouraged users to engage with a premium rate service, the Executive considered this to be a promotion within the meaning of paragraph 11.3.27 of the Code. The Executive stated that the charged text message did not make it clear that the service was subscription-based and that it did not advertise the availability of the ‘STOP’ command. The Executive submitted that although the cost of the message had formed part of the wording, it was not clear whether the cost pricing information related to inbound or outbound messages, and as such, the terms of use of the service were not made clear.
2. The Service Provider stated that the billable service message presented as evidence by the Executive had never intended to be a promotional message, a subscription invite message or a subscription confirmation message. The Service Provider stated that the billable service messages were designed to convey the service after the opt-in had been secured and that any promotional message created by the Information Provider prior to the opt-in process would have been in the control of the Information Provider. As such the Service Provider had no information regarding the nature or content of these promotions. The Service Provider stated that the principal issue in relation to the service offered through the Service Provider was the invalid opt-in that had caused the billable service messages to be deemed unsolicited messages. The Service Provider stated that the mischief caused had already been raised as a

breach under paragraph 5.4 of the Code which, if upheld, would make a breach under paragraph 7.12.3 of the Code a duplicate penalty for the same offence.

3. Having considered the evidence the Tribunal found that there was no evidence to conclude that the complainants had seen any website or WAP advertisement prior to receiving the charged SMS message and therefore concluded that the charged message was itself a promotion, within the meaning of paragraph 11.3.27 of the Code, for the purposes of paragraphs 7.12.3a-c. The Tribunal further concluded that none of the information required in paragraphs 7.12.3a-c of the Code had been included in the charged SMS message. The Tribunal did not accept the service provider's submission that upholding breaches of paragraphs 7.12.3 and 5.4.1b amounted to a duplicate penalty for the same offence. The Tribunal considered that the breaches were entirely separate and that the facts supported both breaches. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

SUBSCRIPTION – INITIAL MESSAGE (Paragraph 7.12.4a-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 made reference to message logs provided by the Service Provider which indicated that some users received the following free initial subscription message: *"(FreeMsg) There r mobiles:2c MP3 players cameras waiting 4 u here in the Quiz Club! Sub service:2eMax 3 msgswweek:2e?1:2e50 per msg:2e Help:3a 08444994762:2eStop to end:2e"*. The Executive submitted that this message did not appear in the message logs relating to 10 of the complainants and that in any event it did not believe that the complainants had opted into the service via a website or WAP advertisement. Consequently, it appeared to the Executive that the first time the Information Provider made contact with users was by sending the charged text message in the format *"True or False:3a George Harrison played the bass guitar in the Beatles Reply T or F:2e 1 pound 50 per msg:2e Customer care:3a 08444994762:2e"*. The Executive submitted that as several users had not received a free initial subscription message containing the relevant information there had been a breach of paragraph 7.12.4a-f of the Code.
2. The Service Provider stated that the billable service messages were never intended or designed to act as subscription promotion, invite or confirmation messages. The Service Provider further stated that in the event that users had

not received the correct subscription confirmation message, there were two possible explanations: The first was that the missing confirmation message was the result of an invalid opt-in problem, and as such the correct subscription mechanic would not have been used in the first place; and the second was that the Information Provider had simply neglected to send the initial messages or had sent them via alternative Service Providers.

3. The Tribunal considered the evidence including the message logs supplied by the service provider and found that there were several complainants who had not received a free initial subscription message as required by paragraph 7.12.4a-f. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

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 Service Provider and submitted that one complainant was subscribed to the service for over one month and never received a free subscription reminder message. The Executive stated that an additional three complainants had incurred charges of over £20 before receiving a free subscription reminder message. The Executive expressed concern that this alleged breach may have affected other users of the service who had either been subscribed into the service for over one month or who had incurred charges in excess of £20.
2. The Service Provider stated that had the Information Provider followed the terms of the Customer Care Form and provided a compliant subscription service with valid opt-ins, they would have been expected to have issued the necessary spend notifications. The Service Provider stated that responsibility for constructing a system to trigger these messages lay solely with the Information Provider.
3. The Tribunal considered the evidence including the message logs supplied by the Service Provider and concluded that at least one user had not received a free subscription reminder message after having been subscribed to the service for over one month and at least another three users had been charged in excess of £20 before receiving a free subscription reminder. The Tribunal therefore upheld a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT

STOP COMMAND (Paragraph 7.12.6a)

"a After a user has sent a 'STOP' command to a service, the service provider must make no further charge for messages."

1. The Executive submitted that four complainants claimed to have received further text messages after attempting to stop the service. The Executive made reference to the evidence of one complainant who claimed to have sent the keyword 'STOP' to the shortcode and subsequently received a chargeable message, which was supported by message logs supplied by the service provider. The Executive also submitted evidence in relation to a further three complainants who had attempted to stop the service by unsubscribing via the IVR customer services number. The Executive stated that each of these three complainants had received a confirmation message verifying that they had unsubscribed, but continued to receive chargeable text messages. The Executive considered that, apart from the fact that complainants were unable to successfully opt-out of the service by sending the keyword 'STOP' to the shortcode used to operate the service, the alternative opt-out route of calling the customer services number to unsubscribe could also not ensure that users could successfully opt-out. As complainants had received chargeable messages after they had sent 'STOP' to the service the Executive considered that there had been a breach of paragraph 7.12.6a of the Code.
2. The Service Provider stated that had the Information Provider followed the terms of the Customer Care Form the Service Provider would have expected the Information Provider to have acknowledged all STOP commands and ceased all billing and promotion following the unsubscribe confirmation message. The Service Provider stated that failed STOP commands was an area that was potentially suitable for 'data mining' of the message logs with a view to identifying problems as a means of preventing such in the future.
2. The Tribunal considered the evidence contained in the message logs and found that chargeable messages had been sent after STOP commands had been sent by complainants to the shortcode used to operate the service. The Tribunal also took into account the instances where complainants had attempted to unsubscribe using the customer services number and further chargeable messages were sent. The Tribunal upheld a breach of paragraph 7.12.6a 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. This may include, for example, information concerning:

- *call volumes, patterns and revenues,*
- *details of the numbers allocated to a service provider,*
- *details of services operating on particular premium rate numbers,*

- *customer care records,*
- *arrangements between networks and service providers,*
- *arrangements between service providers and information providers.”*

1. The Executive considered the service to be in breach of the Request for Information rule on the following grounds:

Ground 1

The Executive submitted that an 8.3.3 request for further information was sent to the service provider on 11 November 2008. The Service Provider supplied a partial response on 27 November 2008 and a second response on 15 December 2008. The Executive stated that the Service Provider did not provide a response to Question 2, Table 1, 2, iii which read: *‘If the service was promoted by any other means, supply a copy of the promotional material along with details of ALL publications / websites/ other media in which the promotion appeared. Please also provide details of the registrants of all websites specified above, including, but not limited to, contact names and addresses.’*

Ground 2

The Executive submitted that an 8.3.3 request for further information was sent to the Service Provider on 11 November 2008. The Service Provider supplied a partial response on 27 November 2008 and a second response on 15 December 2008. The Service Provider failed to answer the following questions sufficiently:

(i) Question 1 – Please provide a summary of the way in which the service works, including full details of any terms and conditions.

(ii) Question 2, Table 2, 4 – Where the opt-in was obtained by means other than MO text, please provide any and all evidence / verification of service opt-in with any additional explanatory details of the context of the opt-in (IVR, website, WAP site).

(iii) Question 2, Table 2, 5 – Provide message logs showing all MO and MT messages sent to and from this mobile number in the format below. This table can be provided in Excel format if you wish.

(iv) Question 12 - Please supply copies of the promotional and marketing materials used to advertise the service.

2. The service provider responded to the Executive’s allegations as follows:

Ground 1

The service provider did not provide a response to ground 1.

Ground 2

The Service Provider stated that the information that it had provided in the 8.3.3 response was based on a description of the service supplied by the Information Provider. The Service Provider stated that it had no grounds to question or dispute the Information Provider’s explanation of the service and that the Service Provider relied entirely on the Information Provider’s support in this matter. As far as the Service Provider was aware, the service described by the Information

Provider was the same service that had been in operation during the period of the Executive's investigation.

The Service Provider stated that it had complied with the Executive's request for information by providing all the message log data that was feasibly available. The Service Provider stated that the Information Provider had adopted an un-cooperative stance in refusing to provide information and that it was the Information Provider that had the power to provide the information being sought by the Executive. The Information Provider should have had access to the data providing it had fulfilled its obligations to the Service Provider and PhonepayPlus. The Service Provider stated that it was concerned by the Information Provider's difficulty in responding to these points raised. The Service Provider stated that it had done all it could to comply with the Executive's request for Information by providing the message log data.

The Service Provider stated that it was able to assist an investigation process by keeping accurate records and "switching off" rogue services, but it stated that the Service Provider was not directly responsible for content. The Service Provider described itself as a conduit that acted as the conveyor of an electronic communications network service in its capacity as an aggregator and distributor. The Service Provider stated that it was not able to render the content of these messages as requested and that it had made a reasonable effort to provide a reliable, useful and succinct response to the Executive's investigation. The Service Provider stated that it was prevented from providing clarification to the 8.3.3 response through errors or omissions of the Information Provider which should not subject the Service Provider to a breach of paragraph 8.3.3.

3. The Tribunal considered the evidence and found that in relation to both Ground 1 and Ground 2 the Service Provider had provided all the information it could 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 partial responses 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 **very serious**.

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

- The service had provided no value to the complainants and any prizes purported to have been 'won' were not received;
- The behaviour of the Information Provider was wilful and deliberate which was exacerbated by the Service Provider's lack of effective compliance systems;

- There was material consumer harm; there were 30 specific complaints and over 124,000 messages sent by the Information Provider;
- The cost paid by individual consumers was high; £4.50 per week with one complainant incurring charges in excess of £70.00; and
- The service was a concealed subscription service and such services have been singled out for criticism by PhonepayPlus;

The Tribunal noted the service provider 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 factor:

- The service provider had co-operated with the investigation and suspended the service voluntarily in August 2008 after discovering that the service was not compliant.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £125,000 fine. In setting the level of the fine the Tribunal took into account the gross revenue generated by the service.
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 noted that if future cases were brought to PhonepayPlus involving services which demonstrated a failure in the new compliance structure, it would be open to the Executive to inform the Tribunal that no additional fine was imposed for breach history in this case; and
- 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.