

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 5 March 2009 TRIBUNAL SITTING No. 22 / CASE 2

CASE REFERENCE: 760984/DM

Service provider & area:	mBlox Limited, London
Information provider & area:	POD Technologies Limited, Uxbridge
Type of service:	Mobile SMS
Service title:	WhereIsMyDelivery.com
Service number:	60040 and 83833
Cost:	£3.50 per week subscription
Network operator:	Mobile Operators
Number of complainants:	33

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

#### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 33 complaints regarding a service which purported to use a mobile tracking system to ‘track’ the delivery of the date and time of a consumer’s order. It appeared that the service ran as a delivery prediction service estimating delivery times by collecting information from a database of over 43 million delivery dates and times for all postcodes across the UK.

To use the service, the participant was required to text their postcode with the keyword ‘WMD’ to the advertised shortcode (60040). It appeared that each delivery prediction comprised receipt of two texts via two different shortcode numbers; one text from (60040) charged at 50 pence, and another text charged at £3.00 from (83833). On successful registration of the postcode using the keyword, the participant was entered into a weekly subscription fee of £3.50.

The complaints were based on problems with the operation of the STOP command, the receipt of unsolicited reverse-billed SMS messages, as well as the receipt of service messages long after receipt of confirmation that STOP requests had been successfully processed.

#### The Executive’s understanding of how the service operated

A number of complainants stated that the service had been found via a link advertised on a banner of the confirmation page of a mobile phone retail website. The link led to a website at URL <http://www.wherismydelivery.com> which provided various details in relation to the service.

After successfully subscribing to the service by texting a postcode with the keyword ‘WMD’ to the advertised shortcode (60040), consumers were subsequently sent the following automated response charged at 50 pence:

*“Thank you for using the WhereIsMyDelivery.com service, the service is designed to help you better plan your day. Your prediction will follow shortly.”*

In addition to this introductory text, a further and instantaneous text message was sent via a different advertised shortcode (83833), costing £3.00, which took the form of the following example message:

*“Deliveries to your road are normally made between 13:23 and 14:23. Have a nice day and thanks again for using WhereIsMyDelivery.com”*

The delivery time predictions were calculated by taking the average delivery time for all previous deliveries being made to a particular customers' road with a one hour time window being returned to the customer.

The Executive noted that the advertised website did not provide, at any stage, a means by which consumers could input their details so as to subscribe into the service.

### **Standard Procedure**

Following receipt of a number of complaints the Executive monitored the service on 21 July 2008. The Executive requested information under paragraph 8.3.3 of the PhonepayPlus Code of Practice 11<sup>th</sup> Edition (amended April 2008) (“the Code”) in a letter dated 23 July 2008, and granted an extension to the deadline for a response until 1 August 2008.

A formal response was received from the information provider, replying on behalf of the service provider, on 2 August 2008.

In a formal breach letter dated 7 November 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 7.12.3b, 7.12.4, and 7.12.5 of the Code. An extension was granted for the service provider's response in order to allow it to obtain an undertaking from the information provider so that the case could proceed as an information provider case.

As no information provider undertaking was forthcoming, the case was ultimately conducted as a case against the service provider.

The service provider contended that paragraph 8.7.5 of the Code enabled the Tribunal to decide, on receipt of the evidence placed before it for adjudication, whether the case should be treated as a service provider or information provider case. This interpretation was rejected by the Executive who maintained that the correct interpretation was that paragraph 8.7.5 applied to cases which had already commenced as information provider cases, where the Tribunal considered it appropriate for the case to revert to the service provider.

The Tribunal made a decision on the breaches raised by the Executive on 5 March 2009 immediately following informal representations made by the service provider to the Tribunal. As a preliminary point the Tribunal agreed with the interpretation of the Executive in relation to paragraph 8.7.5 of the Code and stated that it did not consider it had any authority to substitute the information provider.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

#### MISLEADING (Paragraph 5.4.1a)

*“Services and promotional material must not:  
a mislead, or be likely to mislead in any way...”*

1. The Executive considered the service to be misleading on the following grounds:

##### Ground 1

The Executive was concerned at the way the service was promoted, particularly by the use of wording on the promotional website ([www.whereismydelivery.com](http://www.whereismydelivery.com)) which appeared to be personalised to the individual, when in fact, all the service was offering was a ‘delivery time assumption’ based on an ‘average’ taken from a database of previous delivery times and postcodes.

The Executive cited the repeated use of the word ‘your’ on the promotional website as an indication of the potential problems this type of terminology may have caused to some consumers, leading them into believing that the service had in some way been personalised to their individual needs. In the Executive’s view even the instructional messages sent to consumers explaining how to operate the service, appeared to give the impression that the service had been designed specifically to the consumer:

*“Simply text WMD (space) and your postcode to 60040”*

*“Within minutes, you will receive a text back detailing the estimated delivery time your delivery will arrive”*

The Executive considered that this may have explained the confusion as to why a number of consumers had been left frustrated about how the service worked, particularly with regard to some of the late delivery texts that had been received.

##### Ground 2

The Executive stated that the advertising banner used on the confirmation page of the mobile phone retail website gave the impression that the service was being personalised to the consumer by providing a time frame and date as to when the item, as purchased by the individual, would be delivered to them.

In addition, the Executive cited a further issue that it had noticed in some of the complainant reports it had received, which was that consumers had been ‘misled’ into believing that the service, *WhereIsMyDelivery.com*, was in some way associated or affiliated with the mobile phone retail website, which in the Executive’s opinion added a level of unnecessary confusion.

In the Executive’s view the way the service had been promoted, coupled with the context of where it had been promoted, i.e. on the confirmation page of the

mobile phone retail website created a misleading impression that the service was in some way 'personalised' and that it contained an accurate assessment of when the particular product was to be delivered, rather than the delivery times being a best estimate and 'assumption' based on the delivery records and times collected from a database.

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

Ground 1

The service provider stated that it had asked the information provider to comment on the points raised by the Executive but had not received a contribution by the response deadline. The service provider stated that in future cases of this nature, it would seek to clarify any perceived ambiguity before allowing the service to launch. As a result of this case, the service provider claimed that it would now require the information provider to automatically seek PhonepayPlus compliance advice for any new / revised services / campaigns.

Ground 2

The service provider did not provide a response to the second reason.

3. The Tribunal considered the evidence and in relation to ground 1 found that the way in which the service had been promoted was misleading and that this was supported by evidence from complainants who had complained that they had been misled. With regard to ground 2 the Tribunal concluded that the service was misleading as a result of the manner in which it had been promoted on the third party's mobile phone retail website which led to consumers believing it was associated with their particular delivery of a mobile phone. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWO**

### **SUBSCRIPTION SERVICES (Paragraph 7.12.3b)**

*"Promotional material must:*

- 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"*

1. As part of the promotional material used in this instance, the Executive noted that (owing to the fact that the service itself was a weekly subscription service), the promotional website ([www.whereismydelivery.com](http://www.whereismydelivery.com)) failed to specify, in exact detail, the total costs incurred (i.e. £3.50 p/week) by the consumer at the point of, and following, registration.

The Executive stated that the pricing information had the appearance of being detailed but consumers were required to scroll to the bottom of the page where the pricing information was split into two parts i.e. "One text from 60040 charged at £0.50p and one text from 83833 charged at £3.00".

In the Executive's opinion a better way to provide a clearer indication at the outset of the costs for using the service was by stipulating the weekly costs in their 'totality' and thereby explaining to the consumer the total amount they would be likely to incur. This was especially so when (as highlighted in relation to paragraph 7.12.4) no free subscription message appeared to have been sent to consumers in the first instance and once the service had been activated.

2. The service provider stated that the breakdown of the subscription mechanic was regrettable and it would seek to capture future instances of problems like these through a process of thorough service certification prior to launch, and using targeted and random auditing to identify services where the subscription mechanic is not operating as it should. The service provider added that it would suspend the information provider's access to the associated shortcodes and/or keywords and work with the information provider to implement the correct subscription mechanic and review the overall service for compliance, in line with the result of the adjudication.

In its informal representations, the service provider claimed that the failure of the subscription mechanic was the main issue and that it would have been resolved if certification auditing had been carried out as has now been implemented in its current compliance program.

3. The Tribunal considered the evidence and concluded that the terms of the subscription had not been made clearly visible as a result of the need for users to scroll down in order to view pricing information and the fact that the pricing information itself had been displayed as a split cost and not whole cost pricing as required by the Code. The Tribunal also noted the evidence from complainants showing their confusion over the pricing information given on the website. The Tribunal upheld a breach of paragraph 7.12.3b of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

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

*"Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:*

- a name of service,*
- b confirmation that the service is subscription-based,*
- c what the billing period is ... 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 noticed from the formal response it had received coupled with the call log entries that had been provided, that consumers failed to receive a 'free' initial subscription message in the first instance, and as part of the series of instantaneous and chargeable MT messages that were sent after consumers had entered the appropriate 'keyword' together with their postcode.

What appeared to be happening, in practice, was that consumers were being charged an introductory message of 50 pence (via short code 60040) which read as follows:

*“Thank you for using the WherelsMyDelivery.com service, the service is designed to help you better plan your day. Your prediction will follow shortly.”*

A further instantaneous text message sent (via short code 83833) read as follows:

*“Deliveries to your road are normally made between [ ] and [ ]. Have a nice day and thanks again for using WherelsMyDelivery.com. “*

The Executive pointed out that no ‘free’ introductory message had been included but rather consumers were instantaneously charged following registration. In the apparent absence of any ‘initial’ or ‘free’ introductory text message being sent, the Executive raised a potential breach of paragraph 7.12.4a-f of the Code.

2. The service provider did not provide a specific response to the breach raised.
3. The Tribunal considered the evidence including the call logs supplied by the service provider and concluded that the free subscription message required by paragraph 7.12.4 of the Code had not been sent to consumers upon subscribing to the service. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FOUR**

### **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 stated that the call log entries did not show that any reminder message(s) were being sent to consumers at any point and as part of consumers having subscribed into the service. As supporting evidence, the Executive highlighted the full admission made by the information provider in response to a question within the Code paragraph 8.3.3 request for further information letter sent by the Executive:

*“No monthly reminders are sent as we did not know that this was a requirement of our service.”*

In the absence of any proof being provided in the call logs of an automated reminder message being sent, coupled with the full admission being made in the information provider’s letter of response, the Executive raised a breach of

paragraph 7.12.5 of the Code.

2. The service provider did not provide a specific response to the breach raised.
3. The Tribunal considered the evidence including the admission of the service provider and the call logs supplied by the service provider, and concluded that free subscription reminders had not been sent to consumers. The Tribunal upheld 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 **serious**.

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

- The Tribunal was not persuaded that the service provided any value for the majority of consumers;
- The cost paid by individual consumers was high with some consumers reporting to have been charged over £40; and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The service provider supplied PhonepayPlus with all the information that was requested of them throughout the investigation and carried out voluntary changes to the service, in response to the Executive's preliminary investigation, as part of its compliance audit; and
- There was evidence that refunds had already been issued to some consumers.

Taking into account the mitigating and 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 £50,000 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 stated 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 recommend that future Tribunals take into account the fact that there was no additional fine 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.