

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 2 April 2009 TRIBUNAL SITTING No. 24 / CASE 1

CASE REFERENCE: 772061/DL

Service provider & area:	mBlox Limited, London
Information provider & area:	Spread Mobile Services Limited, Oxon
Type of service:	Text Chat
Service title:	M-Contacts Chat Service
Service number:	84566
Cost:	£1.50 per MT message issued
Network operator:	Mobile Operators
Number of complainants:	43

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 43 consumer complaints regarding the receipt of chargeable promotional messages which were said to be unsolicited. These messages related to a chat service which operated on shortcode 84566. The Service Provider was notified of PhonepayPlus’ preliminary investigation on 9 September 2008, at which time it was discovered the service had already been suspended following an audit of services undertaken by the service provider on 1 September 2008. Complainants stated that they did not request or use the chat service and that they had not authorised the premium rate charges.

The Service

The service was a chat service where SMS messages could be exchanged between service operators and users. The service was operated by the information provider and one of its clients using the shortcode 84566.

SMS messages sent from the shortcode to the users were charged at £1.50 per message, as were SMS messages sent to the shortcode from the user. The service was not a subscription service. Chargeable chat messages sent to users included content such as the examples provided below, very often ending with the letters ‘tb’, which meant ‘text back’:

- *I'd love to see u babe x when is best for u?, im free all next week, tb*
- *Hi, how as ur shopping trip yesterday,im missing u babe x*
- *Hey, did you get my text last night? tb*

Complaint Investigation

During the investigation the service provider acknowledged that it was responsible for the service running on this shortcode, but indicated that the content had been provided by the information provider. In support of this, the service provider provided contractual documents relating to the information provider along with revenue statistics indicating payment or payment due to the information provider in relation to revenue made from 84566 during the relevant time period (July to September 2008).

The Executive was provided with some correspondence during October and November 2008 between the information provider and service provider on the issue of responsibility. The Executive subsequently formed the view that the party responsible under the Code of Practice was the service provider.

The Executive issued a request for information under paragraph 8.3.3 of the Code and was subsequently provided with message logs for the relevant time period. The Executive noted that there were some user messages included which did not appear to be live chat messages as these were simply 'STOP' commands following receipt of a charged message, such as the examples given above. The Executive was advised by the service provider that it had suspended the service in early September 2008 due to service irregularities which it had identified during an audit of the service.

Standard Procedure

The Executive made a request for information from the service provider under paragraph 8.3.3 of the Code on 22 October 2008.

Following further correspondence with the information provider and service provider the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.14, and 7.3.2d of the Code in a letter dated 27 January 2008. The service provider responded to the breaches on 3 February 2008. At this time the service provider requested that the Executive should deal directly with the information provider; however no information provider undertaking was provided as required by the Code.

The Tribunal made a decision on the breaches raised by the Executive on 2 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."

Under Regulation 22 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'.

1. The Executive submitted that the messages issued, whilst carrying a charge of £1.50, were still marketing messages, encouraging consumers to participate in a paid-for service. Complainants' comments had indicated that these marketing messages had been issued without any form of subscription to the service and without the recipient's consent. The Executive acknowledged the Customer Care Form supplied by the service provider which indicated that the service related to a website called "mcontacts.com". However, the Executive could find no evidence within the message logs supplied, the complainant comments, or any other documentation which proved that the chat service messages were indeed related to that website, or that the complainants were registered on the web-based service. The Executive submitted that where there was no evidence of consumer consent prior to the sending of these chargeable SMS chat messages, then these had been sent in contravention of the Regulations, section 22(2).
2. The service provider confirmed that the message logs provided for the purposes of the investigation, as part of the response to the request for information under paragraph 8.3.3 of the Code, contained all the relevant consumer and service messages relating to code 84566 which had transited its platform for the period 1 April 2008 to 1 September 2008. The service provider agreed with the assessment of the Executive that the Regulations had been breached by virtue of the evidence presented by the information provider. The service provider stated that it was led to understand that all the unsolicited messages were issued as a result of a technical failure, which was subsequently admitted by the information provider. It was not entirely clear to the service provider whether the failure referred to rested entirely with the information provider, or its clients, or both. The service provider stated that it had no evidence to suggest that the information provider was fabricating their explanation based on a technical fault, and it noted that it was entirely feasible for the information provider to have obtained opt-in via separate codes/aggregators. However, the service provider stated that it recognised that the latter was severely discounted if the information provider chose not to step forward to corroborate that possibility. Wherever the technical failure may have arisen, the service provider wished to stress that the mBlox platform was not involved in producing or aggravating the technical error in any shape or form that could have resulted in the unintentional delivery of unsolicited messages. The service provider stated that it merely carried the messages that the information provider and/or its partners/clients had triggered. As described in its response to the paragraph 8.3.3 request, the service provider noticed that the information provider was sending increasing volumes of billable MT messages without any evidence of opt-in. The service provider stated that the subsequent investigation identified the issues that were subject to this case and allowed it to limit further consumer harm by suspending the shortcode. The service provider stated that it had alerted PhonepayPlus pro-actively with follow-up emails and discussions to assist in understanding the scope of the issue and to help in setting up the initial request for further information.

3. The Tribunal considered the evidence including the message logs supplied and the admission of the service provider. The Tribunal concluded that there was no evidence presented by either the service or information provider to show that recipients had consented to receiving the promotional texts. The Tribunal also noted the service provider's acceptance that the text messages had been sent to recipients contrary to the Regulations. The Tribunal also found that there was no evidence to support the information provider's assertion that the messages had been sent out as a result of a technical failure. The Tribunal decided to uphold a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (Paragraph 5.4.1a)

"Services and promotional material must not:

a misled, or be likely to mislead in any way..."

1. The Executive made reference to the content of the SMS messages, some of which were transcribed within the body of the breach letter and also referred to an extract from message logs. The Executive submitted that these were of a personal nature and style. It was the opinion of the Executive that, but for the use of a shortcode number rather than a mobile '07' long number, these read as if they were sent by a friend or partner or other known person. The Executive referred to a direct quote from a complainant which stated this same point:

"It was made to look as though it was a personal text message from a friend or partner"

In the Executive's view, this misrepresented the nature of the charged service and the messages themselves. Furthermore, the Executive noted the colloquial use of "tb" in many messages, which was shorthand for "*Text Back*". It was the opinion of the Executive that this was a deliberate inducement for recipients to respond to the SMS message, thus engaging with the premium phone-paid service. Further, whilst the content of the messages looked to be person (recipient) specific, on reviewing the message logs it was clear to the Executive that the same content was often sent to multiple users. The Executive referred to a table of examples of repetition discovered within the body of the message logs supplied by the service provider. The Executive submitted that these promotional (or service) messages were deliberately misleading and thereby in contravention of paragraph 5.4.1a of the Code.

2. The service provider sought clarification from the Tribunal as to whether the messages would have been deemed misleading if they had been generated as the result of a valid opt-in and had not been received unsolicited by virtue of a technical error. Insofar as some of the messages received by consumers were unsolicited they would also be misleading, but there was no intent to mislead in

that the transmission was an error. The service provider therefore considered that this breach arose out of the same inadvertent error as the breach of paragraph 5.2 and therefore it would not be appropriate to impose a further sanction.

3. The Tribunal considered the evidence, including the message logs supplied by the service provider, and concluded that the messages as received by consumers were misleading by appearing to facilitate interaction of a purely social nature, when in fact they were commercially driven. The Tribunal found that some consumers were misled into responding to the messages and into believing that the charge for responding would be the standard rate network charge, not a premium rate charge as was the actual case. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 circumstance which gave rise to the Executive’s concerns in the investigation was the access to, or possession of, technology and user MSISDN data by an information provider who was willing to use both so as to issue unsolicited chargeable SMS messages to individuals without receiving their consent and without giving them any prior opportunity to prevent them incurring the charge. Without being provided such an opportunity the individual consumer was vulnerable to unwanted messages and the cost attached. The Executive submitted that the conduct of sending the unsolicited chargeable SMS messages to those consumers it held data on amounted to the information provider taking advantage of a circumstance which may have made consumers vulnerable.
2. The Executive concluded that the mobile phone numbers of those consumers had been used without their direct or implied consent, in order to charge them a fee for a service they had never agreed to receive. The Executive considered that a service which used consumer details it held to bill them without their consent, knowledge and ability to prevent incurring a charge, took unfair advantage of this circumstance.

The service provider stated that they considered the information provider’s handling of their opt-in data in this situation as amateur and in breach of their obligations to have valid opt-in data to support any promotional or billing messages. The information provider had not explained how it came to obtain and use the MSISDNs that received the offending messages in error, or whether those MSISDNs came from the information provider’s database or from third parties. Any opt-in would have been conducted via the information provider website, which was under the sole control of the information provider. The service provider added that it would not do further business with this information

provider and would share information about all entities associated with the information provider in order to allow the industry to take necessary precautions as they deemed appropriate.

3. The Tribunal considered the evidence and found that a number of complainants had received unsolicited reverse billed messages 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 had the ability to use that data to send unsolicited reverse-billed SMS messages to consumers which they would be unable to prevent. The Tribunal therefore upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

PRICING INFORMATION (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 submitted there was no evidence that the complainants, or any other recipient of chat service messages issued on short code 84566 between 27 August 2008 and 4 September 2008, actually visited the “mcontacts.com” website or saw any other pricing information relating to the service prior to incurring a cost when receiving the first chat SMS message. The Executive made reference to the content of the SMS messages and submitted that these were of a personal nature and style, and that they did not contain any information relating to the cost of using the service.
2. The service provider stated that it had understood, from the mBlox Customer Care Form document, that all opt-ins would have taken place via the website <http://www.mcontacts.com>. Although the service provider noted that it remained feasible for the information provider to have obtained opt-in via separate codes/aggregators, it recognised that this was severely discounted if the information provider did not step forward to corroborate that possibility. The service provider again noted that this breach arose as a result of unsolicited messages which the information provider had said were generated in error, and submitted that there would not have been a breach of paragraph 5.7.1 if the service had operated as it had understood it was to be.
3. The Tribunal considered the evidence, including the message logs supplied by the service provider, and concluded on a balance of probabilities that, as there was no evidence that any of the 43 complainants' had seen the website, they had not seen any pricing information. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

STOP COMMAND (Paragraph 5.14)

“Where a ‘STOP’ command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of ‘STOP’ within any message to be sent by the user. When a ‘STOP’ command has been sent, the service provider must make no further charge to the user for the service.”

1. The Executive made reference to the content of the SMS messages reported by complainants and to an extract from message logs. The Executive submitted that these messages, which were part of a text chat service, did not inform consumers of the ‘STOP’ command as was required by the Code. The Executive further submitted that this increased the misleading element of messages by inducing responses, such as *“Who is this?”*, rather than issuing the relevant “STOP” message.
2. The service provider stated that the Customer Care Form completed for it by the information provider in June 2008 showed that the information provider had indicated that they would use the following message format: *“Hi, my name is xxxx and I would love to chat! Just text xxx to 84566 or txt stop to opt out. CS 0800xxxxxx, SPxxxxx, £1.50/msg 18+”*. The information provider had not indicated why they (or their partners/clients) had deviated from the agreed message format. The service provider stated that the information provider would have been fully aware of its obligations in relation to sections 5.14 and 7.3.2d of the PhonepayPlus Code of Practice, which was the very reason why the intended message format as shown in the Customer Care Form was designed in the way that it was quoted above. The service provider stated it had introduced procedures to monitor whether information providers had adopted non-compliant practices following launch and its revised procedures had led to this service being suspending prior to being contacted by PhonepayPlus about it.
3. The Tribunal considered the evidence and concluded that, according to the message logs supplied by the service provider, complainants’ had not been given any instructions on the use of the ‘STOP’ command at any point before or during the service. The Tribunal upheld a breach of paragraph 5.14 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

VIRTUAL CHAT SERVICES (Paragraph 7.3.2d)

d “In the case of text virtual chat services, the ‘STOP’ command must be available and consumers must be so informed before entering the service.”

1. The Executive made reference to the content of the SMS messages reported by complainants and to an extract from message logs. The Executive submitted that these messages, which were part of a text chat service, did not inform consumers of the ‘STOP’ command as was required by the Code. The Executive further submitted that this increased the misleading element of messages by

inducing responses, such as “*Who is this?*”, rather than issuing the relevant “STOP” message.

2. The service provider stated that the Customer Care Form completed for it by the information provider in June 2008 showed that the information provider had indicated that they would use the following message format: “*Hi, my name is xxxx and I would love to chat! Just text xxx to 84566 or txt stop to opt out. CS 0800xxxxxx, SPxxxxx, £1.50/msg 18+*”. The information provider had not indicated why they (or their partners/clients) had deviated from the agreed message format. The service provider stated that the information provider would have been fully aware of its obligations in relation to sections 5.14 and 7.3.2d of the PhonepayPlus Code of Practice, which was the very reason why the intended message format as shown in the Customer Care Form was designed in the way that it was quoted above. The service provider stated it had introduced procedures to monitor whether information providers had adopted non-compliant practices following launch and its revised procedures had led to this service being suspending prior to being contacted by PhonepayPlus about it.
3. The Tribunal considered the evidence and concluded that, according to the message logs supplied by the service provider, there was no evidence of a ‘STOP’ command having been made available to consumers at any point before the service commenced. The Tribunal upheld a breach of paragraph 7.3.2d of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The service had provided no value to the complainants;
- The behaviour of the information provider was wilful with regards to the wording of the chargeable messages which were sent without consumers’ consent;
- There was material consumer harm on an extensive scale; and
- Non-compliant services which do not inform users of the ‘STOP’ command 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 factors:

- The service provider had carried out some compliance checks on the information provider prior to the launch of the service;

- The service provider had cooperated with the investigation and suspended the service voluntarily after discovering messages were being sent without clear evidence of an MO opt-in; and
- The information provider stated that it had made some refunds prior to it going into liquidation.

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 £35,000 fine in respect of the upheld breaches;
- 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, and to report back to the Executive with refund figures following a 6 month period after publication of the adjudication.