

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 18 March 2010  
TRIBUNAL SITTING No. 49/ CASE 3  
CASE REFERENCE: 823563/JI

Service provider:	BCH Digital Limited, Manchester
Information provider:	SMIS Limited, St Peter Port, Guernsey
Type of service:	Betting Tipster Hotline - Various
Title:	Various
Service numbers	09061221321, 09042510899, 09042510909, 09110312122, 09110312221, 09042510881
Cost:	£1.50 per minute
Network operator:	All Mobile Network Operators
Number of complainants:	5

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

### BACKGROUND

PhonepayPlus received five complaints in relation to services operating on numerous fixed-line numbers. The Information Provider provided various branded services promoting 09 premium rate numbers that were advertised to users via free promotional text messages. The messages sent to users contained various 09 numbers charged at £1.50 per minute promoting the following betting tipster hotline services:

- 09061221321 – ‘Mick Fitzgerald – 12 noon maximum bets hotline’
- 09042510899 – ‘Dale McKeown’
- 09042510909 – ‘Kim Brassey’
- 09110312122 – ‘Mark Winstanley’
- 09110312221 – ‘Speedform’
- 09042510881 – ‘Angus Loughran’

The 09 numbers were also promoted to users who called various 08 numbers, having received separate free promotional text messages. The content of the 08 numbers included an Interactive Voice Recording (IVR), informing users that they could call a 09 number to receive betting tipster advice. For example, a user wishing the ‘Mick Fitzgerald’ service may call 09061221321 at 12 noon daily to receive updated information regarding new horses racing that day.

Following the complaints received and monitoring of the services, PhonepayPlus became concerned about the receipt of unsolicited promotional text messages. PhonepayPlus also identified potential issues with the services’ pricing information, contact information, opt-out mechanic and elements of the service that appeared to be misleading to consumers.

### The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Service Provider dated 22 December 2009. The Executive received a formal response to its breach letter from the Service Provider on 24 January 2010.

The Tribunal made a decision on the breaches raised by the Executive on 18 March 2010.

## **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 the service to be in breach of paragraph 5.2 on the following grounds:

#### **Ground 1**

The Executive submitted that, under Section 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 / WAP-push messages) for direct marketing purposes, either where the recipient has not specifically consented to receiving such unsolicited promotions, or where the recipient's details were not obtained whilst purchasing a similar, or related, product or service to that being promoted.

Additionally, even where such consent (implicit or explicit) has been obtained, the recipient should be given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for direct marketing purposes (an opt-out).

The Executive submitted that it had received five complaints to date, all of which alleged to have been sent unsolicited free promotional text messages, and quoted the following sample of complainant comments:

- i. *“I have a serious complaint about the above service provider. The [sic] are operating a 'racing tips' service which customers are unable to unsubscribe from. The messages are free but they are promoting a premium rate service and the content of the message is in breach of PECR and just about any other CoP/Law etc...It was as a direct result of my investigative calls that I myself started to receive the marketing messages however if these calls were being treated as my 'soft opt in' to receive future marketing messages, you can only 'softly' opt a user into receiving marketing from a service if at the point of original access (my calls to the 0844 number) you have the user the option to 'opt out' of marketing which I can categorically tell you didn't happen! I am afraid I don't know where this service was advertised and I don't know how any of the other customers started to receive the messages however I do know that none of them were able to stop them over quite some period and they were all very upset about this!”*

- ii. One complainant indicated that he received free text messages advertising 09061221321 which he could not stop. He was also unable to locate the number the messages were sent from, even after contacting his mobile network operator.
- iii. *"I have not asked for this service and see it as blatant invasion of my phone and time. It's out of order they don't give you an option to unsubscribe... Spoke to T-Mobile and there is nothing they can do because there is no number the message is sent from."*
- iv. *"I did not asked [sic] to be texted these messages plus unable on my mobile to send text back saying STOP ALL"*
- v. *"No call charges were displayed on this unsolicited text message."*

The Executive made reference to its third request for information (made during the investigation) and submitted that the Service Provider was asked to explain how users had been initially opted into receive the free promotional text messages and to provide evidence of a specific number opting into the service (see complainant (i) above). It submitted that the Service Provider responded as follows:

*"The data that is used to promote to mobiles is collected when the 0844 556 8180 number is dialled. A report is then run which collects the mobile CLI's that have dialled the 0844 number."*

The Executive made reference to its second request for information and submitted that the Service Provider was asked to explain how users had been able to opt out of receiving promotional text messages and to provide evidence of opt-out. It submitted that the Service Provider responded as follows:

*"At the point of opting in (calling the 0844 556 8180) the user was not given the opportunity to opt out but it is included in free promotional text" and "The opt out number 0844 556 5878 is promoted by way of FREE text message and also on the official Mick Fitzgerald Website – mickfitz.com where visitors can clearly navigate to opt out instructions in simple fashion. An example FREE text message is below:*

*"SANDMAN KING OF ALL WEATHER HAS GIVEN 6 BETS 6 WINNERS!  
NEXT BET TODAY! + NEWS OF 20/1 PLUNGEHORSE CALL FREEPHONE  
0808 129 0303 – (To stop texts 0844 556 5878)"*

The Executive submitted that, according to the message logs provided by the Service Provider, the stop instruction in the above example message was only sent once to one of the three complainants that message logs were provided for, and only after that user had received 72 previous promotional text messages.

The Executive made reference to its third request for information and submitted that the Service Provider was asked to provide evidence to show that the website mickfitz.com was made available to users. It submitted that the Service Provider responded as follows:

*"The website was not promoted."*

The Executive submitted that the promotional text messages advertising premium rate numbers were considered to be promotional material for direct marketing

purposes as they contained a call to action. It submitted that the Service Provider did not provide any evidence that users were informed that, by dialling an '08' number, they were providing consent to receive promotional text messages, or that users had purchased similar, or related, products before receiving the promotional text messages. The Executive submitted that it was of the opinion that this did not constitute a valid opt-in.

It submitted that this was aggravated by the apparent fact that users were not given a simple means of opting out of receiving further promotional text messages either at the point of opt-in, i.e. during the initial call to the '08' number or after receiving promotional text messages (as no opt-out method was advertised).

It submitted that, based on the above excerpts from complainants and the Service Provider's submissions, it was of the opinion that a contravention of Section 22 of the Regulations had occurred and, consequently, a breach of paragraph 5.2 of the Code.

### **Ground 2**

The Executive submitted that, under Regulation 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, it is an offence to transmit, or 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 received five complaints to date, all of which alleged to have been sent unsolicited free promotional text messages, and quoted the following sample of complainant comments:

- i. One complainant indicated that he received free text messages advertising 09061221321 which he could not stop. He was also unable to locate the number the messages were sent from, even after contacting his mobile network operator.
- ii. *"I have not asked for this service and see it as blatant invasion of my phone and time. It's out of order they don't give you an option to unsubscribe...Spoke to T-Mobile and there is nothing they can do because there is no number the message is sent from."*
- iii. *"I did not asked to be texted these messages plus unable on my mobile to send text back saying STOP ALL"*

The Executive made reference to its first request for information and submitted that the Service Provider was asked to state the shortcode the text messages sent to consumers originated from and whether this had been identifiable to consumers. It submitted that the Service Provider responded as follows:

*"N/A – as a company they do not operate SMS reverse billing services."*

The Executive submitted that, as the text message had concealed the "*identity of the person on whose behalf the communication has been sent*", this appeared to have been, in the Executive's opinion, in direct contravention of Section 23(a) of The Regulations.

It also submitted that the promotional text messages had failed to provide any address by which the recipient could seek to cease future communications being sent, which appeared to contravene section 23(b) of The Regulations.

It submitted that, based on the above excerpts from complainants and the Service Provider's submissions, it was of the opinion that a contravention of Section 23 of the Regulations had occurred and, consequently, a breach of paragraph 5.2 of the Code.

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

**Ground 1**

The Service Provider stated that the Information Provider ('SMIS') had believed that the mobile database to which it was promoting contained users that had already opted into receive free horse racing promotional text messages.

The Service Provider stated that, upon further investigation of the data, it had come to light that the mobile phone numbers in question had, in fact, come from a marketing list that had been provided by a service partner whose brand was under the management of SMIS (the Information Provider). It stated that it appeared that some of the numbers on the list had not opted in.

It stated that SMIS had assured it that it had not had any further dealings with the marketing list in question, or the provider of the marketing list, since this had come to light.

It stated that, on this occasion, SMIS acknowledged that for some reason the opt-out information and helpline number had been missing from some of the broadcast.

As soon as this came to light, SMIS had advised the Service Provider that it had re-structured its text marketing strategy and only broadcast to current members.

The Service Provider made reference to a message log in relation to a specific phone number (complaint (v) of the Executive's submissions above) and made reference to an email advising that this number was part of an existing member base. It stated that, following a more detailed investigation of the message logs, it was discovered that this number had been receiving update text messages for a different tipster.

**Ground 2**

The Service Provider stated that SMIS was a very successful and long-standing tipster management and marketing company with a database of loyal customers and that it had not set out to deliberately conceal or disguise its identity.

It stated that SMIS had accepted that, on this occasion, it had not included the correct contact information and had genuinely not realised the seriousness of this.

It stated that now this had been brought to the attention of SMIS, SMIS had put new systems in place to ensure that this could not happen again.

3. The Tribunal considered the evidence, including the Service Provider's acceptance of the breach and its reference to the Information Provider's marketing list. It concluded that, in relation to Ground 1, the complainant evidence demonstrated that the promotional text messages had been sent for the purpose of direct marketing and had been received by users who had not knowingly, or otherwise, opted into receive

such promotional material and, in some cases, who had not previously purchased similar, or related, products. The Tribunal found that this was in contravention of the Regulations and it followed that there had been a breach of paragraph 5.2 of the Code.

In relation to Ground 2, the Tribunal took into account the Service Provider's acceptance of the breach. It found that the complainant evidence demonstrated that the promotional text message they had received had not contained the identity of the sender and, as such, was in contravention of the Regulations. It followed that there had been a breach of paragraph 5.2 of the Code.

The Tribunal upheld a breach of paragraph 5.2 of the Code on Grounds 1 and 2.

### **Decision: UPHELD on Grounds 1 and 2**

#### **ALLEGED BREACH TWO FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

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

1. The Executive made reference to the message logs supplied by the Service Provider. It submitted that these complainants had received promotional text messages with various headers, such as “URGENT!”, “IMPORTANT!”, “ATTENTION!” (the header being the replacement text for what would normally be a shortcode).

The Executive provided examples of the promotional text messages sent to users as follows:

“MASSIVE TRIPLE MAXIMUM BET ASSAULT TODAY FROM MICK FITZGERALD ON HIS TRACKSIDE LATE MAXIMUM BETS HOTLINE! 20/1 WINNER YESTERDAY! CALL 09061 221 321 URGENTLY! “

“JOB DONE!TODAYS FIRST MICK FITZGERALD LATE MAXIMUM BET HAS LANDED A HUGE GAMBLE AS EXPECTED 3/1-15/8 TWO MORE MAX BET TO RUN HURRY £1.50p CALL 09061 221 321 ASAP“

“MICK FITZGERALD HAS 4 VERY BIG PRICED BETS TODAY FOR YOU ON LATE MAX BETS HOTLINE! 5/1 + 6/1 + 7/1 + 12/1 DONT MISS OUT £1.50p min HURRY CALL 09061 221 321 NOW!”

“\*IMPORTANT\* MASSIVE FRIDAY PAYDAY FOR DALE MCKEOWN CALLERS TODAY! THE EX JOCKEY HAS A HUGE DOUBLE MAXIMUM DARING RAID ON THE BOOKIES! CALL 0904 251 0899 NOW!”

The Executive submitted that it was of the opinion that the overall nature of the wording of the above text messages (and any other examples), including the header, had been presented in a way that created a sense of urgency and was therefore

likely to mislead consumers into calling the '09' number advertised within the text message.

2. The Service Provider stated that all SMIS promotional text messages had been free to receive. It stated that SMIS did not operate a shortcode and, as such, this would not have appeared in the identity box.

It stated that, as the promotional text messages were in relation to horse racing bets with time sensitive information, SMIS wanted to make people alert to the fact that they should call as soon as possible for the information contained on the lines in order to get up-to-date information in time for races.

It stated that SMIS did accept that this regulation had been breached due to the operator not being fully aware that the header was subject to restrictions and guidelines. It stated that this has now been rectified and would not reoccur.

3. The Tribunal considered the evidence, including the Service Provider's acceptance of the breach, and concluded that, in light of the subject matter of the text messages and their clear reference to horse racing, it did not, on the balance of probabilities, find that the promotional text messages in question had misled, or were likely to have misled, users. The Tribunal noted that none of the complainants had stated to have misunderstood the subject matter of the promotional text messages, or claimed that they had been misled by the sense of urgency expressed within them. The Tribunal did not uphold a breach of paragraph 5.4.1a of the Code.

**Decision: NOT UPHELD**

### **ALLEGED BREACH THREE 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 one user had received seven promotional text messages containing a premium rate number with either unclear or no pricing information between 17 March and 16 September 2009. It submitted samples of the promotional text messages sent to the user as follows:

"\*IMPORTANT\* MASSIVE FRIDAY PAYDAY FOR DALE MCKEOWN CALLERS TODAY! THE EX JOCKEY HAS A HUGE DOUBLE MAXIMUM DARING RAID ON THE BOOKIES! CALL 0904 251 0899 NOW!" (received on 20 March 2009)

"SPEEDFORM" ARE IN AMAZING FORM 18 WINNERS LAST 16 DAYS! ON LIGHTNING FAST HOTLINE! MASSIVE BETS TODAY! ALL BETS GIVE UNDER 59SECONDS! CALL 09110 31 22 21 NOW!" (received on 15 April 2009)

"MARK WINSTANLEY HAS 10/1 DOUBLE MAXIMUM BET BLITZ TO KICK START YOUR WEEK TODAY UNDER 59SECONDS! 11 OUT LAST 15 BETS HAVE WON 73% CALL 09110 31 21 22 FROM 9AM" (received 27 July 2009)

The Executive also made reference to, and provided examples of, messages in relation to a user who received eight promotional text messages containing a premium rate number with either unclear or no pricing information between 10 June and 16 September 2009.

The Executive submitted that the referenced text message transcripts indicated that users were not clearly informed of the cost of using the service prior to incurring any charge.

## **Ground 2**

The Executive submitted that one user received six promotional text messages containing a premium rate number with unclear pricing information between 7 and 12 October 2009. It submitted a sample of the promotional text messages sent to the user as follows:

“MICK FITZGERALD BIGGEST BETTING DAYS OF ALL TIME ON 12NOON  
MAXIMUM BETS HOTLINE ITS UNMISSABLE! 7 WINNERS ALREADY THIS WEEK  
£1.50p min CALL 09061 221 321 NOW!” (received 7 October 2009)

The Executive also made reference and provided examples of text messages in relation to users who received several promotional text messages containing a premium rate number with either unclear or no pricing information. It provided the following examples text messages received by users:

“D MCKEOWN IS BASHING THE BOOKIES!LAST 4 BETS HAVE WON! INC HIS  
BET OF YEAR OVER £2000 PROFIT LAST 4 DAYS!CALL 0904 251 0899 MAX BET  
TODAY UNDER 59secs £1.50call” (received 7 April 2009)

“KIM BRASSEY 59SECONDS QUICK FIRE TRAINER FORM DAILY HOTLINE ALL  
BETS IN UNDER 59seconds! just £1.50p DOUBLE MAXIMUM BET TODAY FROM  
KIM IS ON 0904 251 0909 NOW!” (received on 28 June 2009)

“MARK WINSTANLEY-THE COUCH! IS HERE FOR YOU IN UNDER 59SECONDS  
WITH HIS 2 BEST BETS OF THE DAY! NO FRILLS NO FUSS-IN UNDER  
59SECONDS!£1.50CALL 09110 312 122 NOW” (received on 17 July 2009)

“MARK WINSTANLEY IS ONLINE PERSNALLY AT 9AM DAILY WITH HIS  
MAXMUM BEST BETS OF DAY IN UNDER 59SECONDS! just 1.50p 100%  
WINNERS YESTDAY SIMPLY CALL 09110 31 21 22” (received on 18 July 2009)

The Executive submitted that, as these text messages were sent to users' mobile numbers, users would be likely to call the premium rate number from the mobile handset that received the text message. It submitted that the pricing as stated in the text message had only indicated the cost from a standard BT landline and not from a mobile phone (where users would be charged considerably more). The Executive quoted a complainant comment in relation to this point as follows:

*“I would however question if the actual charge for accessing the service via an 090 number was indeed £1.50 per minute if I used my mobile phone to make the call so I would probably say that this is unclear pricing information in relation to the use of the actual service.”*



The Executive also submitted that the use of '£1.50p' did not make it clear whether a user was charged at £1.50 per minute or £1.50 per call, and '1.50p' does not provide sufficient clarity of the pricing due to the lack of reference to a '£' symbol.

The Executive made reference to the PhonepayPlus Help Note on pricing information published on November 2006, and stated that it was of the opinion that users had not been fully informed, clearly or straightforwardly, of the cost of using the service prior to incurring any charge.

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

#### **Ground 1**

The Service Provider stated that, as the promotional text messages contained the pricing information and the caller would have seen that information within the text, it was not included in the premium rate line's text messages.

It stated that the pricing had been erroneously missed off some of the text messages.

It stated that SMIS had genuinely believed that the people to whom they were broadcasting the free promotional text messages had already registered to the service, as members and were fully aware of the cost involved.

It stated that, since this enquiry had arisen, SMIS had undertaken a new company policy of not operating any further premium rate services.

The Service Provider stated that SMIS accepted that this paragraph of the Code had been breached.

#### **Ground 2**

The Service Provider stated that SMIS accepted that this paragraph of the Code had been breached.

It stated that SMIS had advised that, in relation to the first time that the hotline was promoted, the charges had been clearly displayed. It stated that SMIS had also advised that subsequent text messages may have been abbreviated to enable other text to be composed. It stated that SMIS now realised that this was not the right way to do this and genuinely didn't realise that it had done anything wrong.

3. The Tribunal considered the evidence, including the Service Provider's acceptance of the breach, and concluded that, in relation to Ground 1, the promotional text messages submitted by the Executive had not contained any pricing information so as to ensure that the recipients were fully informed, clearly and straightforwardly, of the cost of using the service.

In relation to Ground 2, the Tribunal found that, had users responded to the promotional text messages, they were likely to have done so by way of a call from their mobile phone; as such, the Tribunal found that the promotional text messages had been unclear in only showing the cost of a call from a standard BT landline and not a mobile phone. Furthermore, the Tribunal found that the use of '1.50p' had not been clear as to whether the cost was per minute or per call, and also the use of '1.50p' did not provide sufficient clarity due to the lack of the '£' symbol.

The Tribunal upheld a breach of paragraph 5.7.1 of the Code on Grounds 1 and 2.

## Decision: UPHELD on Grounds 1 and 2

### ALLEGED BREACH FOUR

#### PRICING INFORMATION (MESSAGE AT THE START OF SERVICE) (Paragraph 5.7.3)

*“In cases where it is unlikely that a consumer will have seen or heard any promotional material containing pricing information, the service provider must place a short, distinct pricing message at the beginning of the service.”*

1. The Executive submitted that it had monitored the number 09061221321 on 27 October 2009. It submitted that the call, which related to the ‘Mick Fitzgerald’ service, lasted two minutes 58 seconds and, at no point during the recording, was the cost of the call stated.

The Executive submitted that it was of the opinion that users were unlikely to have seen any promotional material containing clear pricing information for the reasons submitted in relation to paragraph 5.7.1 of the Code, and that no pricing message was given at the beginning of the IVR service.

2. The Service Provider stated that SMIS accepted that this paragraph of the Code may have been breached and had believed that the only people that would have been calling the number were already registered members and, as such, they would have been aware of the cost of the call. It stated that SMIS had now put a system in place to ensure that this would not happen again.
3. The Tribunal considered the evidence, including the Service Provider’s acceptance of the breach, and concluded that, in light of the Executive’s previous submissions in relation to paragraph 5.7.1 of the Code, the circumstances in which the promotional text messages were sent and the content of the messages made it unlikely that users had seen or heard any promotional material containing pricing information. It found that there had been no message at the beginning of the service informing the user of the cost and upheld a breach of paragraph 5.7.3 of the Code.

## Decision: UPHELD

### ALLEGED BREACH FIVE

#### 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 submitted that, according to the message logs supplied by the Service Provider, none of the promotional text messages advertising a premium rate number had contained the identity of the Service Provider or Information Provider, or made available a non-premium rate customer service phone number.
2. The Service Provider stated that, having examined the message logs, some of the free promotional text messages advertising the non-premium rate customer service number had failed to identify the Information Provider or the Service Provider clearly.

It stated that SMIS accepted that this paragraph of the Code had been breached.

3. The Tribunal considered the evidence, including the Service Provider's acceptance of the breach, and concluded that none of the promotional text messages received by complainants had contained the identity of the Service Provider or the Information Provider, and had not contained a customer care number. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

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

- The Information Provider was reckless in its use of the marketing list
- The breach history of the Service Provider

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive's investigation
- The Tribunal took into account the Service Provider's admissions to the breaches raised

The revenue in relation to this service was in the lower range of Band 3 (£100,000 - 250,000).

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

The Tribunal expressed disappointment that the Service Provider was unfamiliar with the Code and suggested that the Service Provider re-familiarise itself with the parts of the Code that refer to its services and its business.

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Fine of £15,000.