

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Friday 1 October 2010 TRIBUNAL SITTING No. 63 / CASE 1
CASE REFERENCE: 845779

Information provider:	Content Merchant Ltd, Glasgow and Wales
Service provider:	Tanla Solutions UK Ltd
Type of service:	Competition subscription service
Service title:	'Itv2Mobi.com'
Service number:	81404, 82777 and all other shortcodes in relation to this service
Cost:	£2.50 per week
Network operator:	All Mobile Network Operators
Number of complainants:	3

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received three complaints in relation to the subscription download service called 'Itv2Mobi.com' operating on shortcode 81404, 82777 and all other shortcodes in relation to this service. The service was associated with the website 'itv2Mobi.com', which advertised a quiz question every month. The website contained a quiz question and consumers were invited to text back one of two responses to a specific shortcode. The service cost £2.50 per week.

PhonepayPlus observed a promotional text message received on 5 August 2010 on one of its monitoring handsets in relation to shortcode 82777. This prompted the service to be monitored. The Executive was made aware of the service website following interaction with the promotional text message and receiving the initial subscription text message.

The Executive received evidence, including complainant comments, and was concerned that this service had been promoted by way of unsolicited text messages. Furthermore, it was concerned that the text messages were missing important information as to the nature of the service, its cost and contact information. As a result, the Executive considered that consumers had been misled into interacting with the service.

The Service

The service was a monthly competition associated with the 'itv2Mobi.com' website. The website advertised a quiz question each month with a call to action associated with the answer – two possible words were given and consumers were invited to send a text message to the advertised shortcode to enter. The website advertised the cost of the service and provided terms and conditions. The cost of the service was £2.50 per week, and this subscription charge was levied via issuance of one Mobile Terminating (MT) premium short message service (PSMS) message per week. The website address was contained in the initiation subscription text message, although was not received in the promotional text message received by the Executive.

The service, according to the Service Provider's records taken from the Information Provider prior to launching the service on shortcode 82777, was promoted on the

internet, via 'Facebook' and banner advertising campaigns. The Service Provider was not informed of any direct marketing campaigns involving delivery of free-to-receive text messages.

Following receipt of evidence from the complaints received in June 2010 and the receipt of the promotional text message sent directly to the monitoring phone on 5 August 2010, it is understood direct marketing text messages had been used by the Information Provider since the service was first launched.

Some examples of text message transcripts used for direct marketing are as follows:

"FreeMsg:WIN £1000 FREE in WEDNESDAYS BUMPER QUIZ. Question? What would Tom Cruise usually appear in a DVD or in LINGERIE? Text DVD or LINGERIE to 81404"

"FreeMsg:Win £1000 FREE in SATURDAYS BUMPER QUIZ. Question? What would Tom Cruise usually appear in a MOVIE or in LINGERIE? Txt MOVIE or LINGERIE to 81404"

"FreeMsg:WIN £1000 FREE in SUNDAYS BUMPER QUIZ. Question?Complete this film PETER XXX? Is the missing word PAN or CROUCH? Txt PAN or CROUCH to 82777"

"FreeMsg:WIN £1000 FREE in WEDNESDAYS BUMPER QUIZ.Complete this film LADY AND THE XXXXX? Is the missing word TRAMP or ROONEY? Txt TRAMP or ROONEY to 82777"

"FreeMsg:WIN 1000 POUNDS in TODAYS BUMPER QUIZ. Question?Who starred in Top Gun Tom Cruise or Tom Boy Txt CRUISE or BOY to 82777?"

The Investigation

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

The Executive conducted a preliminary investigation into the Information Provider's service on 5 August 2010. Following correspondence between the parties, the Information Provider provided a full response to the Executive's breach letter, dated 31 August 2009, on 30 September 2010, following several prompts from the Executive.

In view of the fact that the Information Provider had provided a late response (on the evening before the Tribunal), it was considered whether the matter should be postponed. The Tribunal members considered whether they had all had adequate time to read the submissions, and it was decided that all Tribunal members were adequately prepared and able to deal with the matter, taking into account the late response. The Executive conceded that it did not require extra time to deal with any of the points raised in the submissions of the Information Provider. The Tribunal concluded that it was fair and reasonable to proceed.

The Tribunal made a decision on the alleged breaches raised by the Executive on 1 October 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 made reference to Section 23 of Privacy and Electronic Communications Regulations (PECR) 2003 (the ‘Regulations’)

“A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail—

- (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or*
- (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.”*

It submitted that it was of the opinion that Section 2 of PECR 2003 defines ‘electronic mail’ widely, specifically stating that it *“means any text, voice, sound or image message sent over a public electronic communications network... and includes messages sent using a short message service (SMS)”*.

The Executive made reference to the Information Commissioner’s Office (ICO) ‘Guidance for marketers on the Privacy and Electronic Communications Regulations 2003’, version 3.1 dated 08.10.07, page 19:

“We...are prepared to allow the use of short codes as a valid address provided the sender makes sure that:

- they clearly identify themselves in the message (for example, ‘PJ Ltd’);*
- using the short code does not incur a premium rate charge; and*
- the short code is valid.”*

The Executive submitted that the text messages sent by the Information Provider had included a ‘call to action’, instructing recipients to enter a competition by texting the correct answer to a given shortcode. It submitted that, in doing so, recipients initiated a subscription service and incurred a charge. It submitted that the Information Provider had elected to transmit a communication for the purposes of direct marketing by means of electronic mail.

The Executive submitted that the text messages had not identified the sender of the text message. It submitted that, although the Information Provider had relied upon a shortcode as a ‘valid address’, it had not complied with the ICO’s guidance in relation to valid addresses.

It submitted that these direct marketing text messages had been in breach of the regulation and it followed that there had been a breach of this paragraph of the Code.

2. The Information Provider stated that there had only been a limited amount of consumers that may have been affected by the incorrect text messages sent by the Information Provider. It stated that the vast majority of text messages had been fully correct and compliant, and that the incorrect text messages had been sent as a result of a limit on the number of characters technically available in the text message, which had resulted in the last third of the text message being cut

off. It stated that this missing third of the text had contained some standard, required information, such as the identity of the Service Provider, a helpline and the opt-out command. The Information Provider stated that it fully accepted responsibility for this error.

3. The Tribunal considered the evidence, including the Information Provider's admission, and found that three consumers had received a text message for the purposes of direct marketing that had not contained the identity of the Service Provider or the Information Provider and had failed to provide the identity of the entity on behalf of which the communication had been sent. The Tribunal found that the text messages sent to the three complainants had been in contravention of the Regulations and it followed that there had been a breach of paragraph 5.2 of the Code. The Tribunal upheld a breach of paragraph 5.2.

Decision: UPHELD

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

“Services and promotional material must not:

a mislead, or be likely to mislead in any way...”

1. The Executive submitted that it was of the opinion that the direct marketing text messages had been sent to lead consumers to enter a competition. It submitted that key information had been omitted from these text messages and, as a result, the true nature of the service was not brought to the consumers' attention. It submitted that the information contained within these text messages and the wording of these text messages had, or was likely to have had, misled consumers into engaging with a charged subscription service by suggesting that it was a free one-off quiz question with a £1,000 prize on offer to the winner.

Text message wording

The Executive submitted that the text messages frequently used the word 'FREE' in relation to the competition and the prize available. It made reference to the transcripts contained in the message logs and submitted that it was of the opinion that the cost of the service had been omitted from the text message.

It submitted that the direct marketing text messages had all referred to the prize being available "TODAY", or as part of a specific day's quiz – e.g. "WEDNESDAY'S BUMPER QUIZ". It submitted that, in reality, the quiz had operated over the course of a month and entrants within that period, regardless of the day on which they responded, were grouped together. It submitted that it was of the opinion that the closing date for the competition had been omitted from the text message.

The Executive submitted that consumers had been misled into believing that this was a free competition and was available to entries received on a specific date, as opposed to the reality of an ongoing monthly quiz.

Complainants

The Executive submitted that it had reviewed the message logs supplied by the Service Provider and observed that they contained a large number of 'negative'

text messages in response to the service, including the use of the 'STOP' command.

The Executive made reference to examples found within the message logs, some of which read as follows:

"My intention was not to sign up to something I know absolutely nothing about so please cancel".

13 July 2010

"Do not want 2 join.stop! U tricked me! Stop".

23 July 2010

"S ry do not wsh 2 join I thought it was a 1of game".

4 August 2010

It submitted that the examples above provided an insight into the mindset of some of the recipients in regard to the direct marketing text messages. It submitted that the evidence suggested that these consumers were indicating that they had not wished to sign up to a subscription service and had not understood the nature of the service when responding to the direct marketing text message containing the quiz question. The Executive submitted that it was of the opinion that these examples added weight to the view that the wording of the text messages had misled consumers, or was likely to have misled, consumers as to the true nature of the service.

2. The Information Provider stated that the use of the word 'free' in the text messages had only appeared in the first batch, which had affected a very small amount of mobile phone numbers.

It stated that a small bunch of text messages had been sent out with the incorrect content due to the limitation of characters allowed. It stated that the character limit is 160 characters and its original text message had gone beyond this limit. Furthermore, the message logs demonstrated that these oversized text messages had been in the minority and 'these people' had not been charged as a result of the free subscription initiation message sent out via the Service Provider. It submitted that error had been reduced as, at this point, all customers had been informed of the cost prior to being billed.

3. The Tribunal considered the evidence, including the Information Provider's admission, and concluded that the use of the word 'free' in the context of the text messages in question had misled consumers into interacting with the service in the belief that the competition was 'free', when, in fact, this was not the case. It also found that the use of the word 'today' or a specific day of the week had misled consumers into thinking that the quiz was daily, when, in actual fact, it was operated on a monthly basis. The Tribunal also found that consumers had been further misled by the absence of pricing information in the text message. The Tribunal also took into account the Executive's examples of complainant comments and concluded that, on the balance of probabilities, consumers had been misled. The Tribunal upheld a breach of 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

PRICING INFORMATION (PROMINENCE) (Paragraph 5.7.2)

“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 that all direct marketing text messages known to the Executive had not contained pricing information.

The Executive submitted that the direct marketing text messages had not made reference to the service website (itv2Mobi.com) and, as such, it was possible that consumers would not have accessed the website prior to subscribing to the service. The Executive made reference to its monitoring exercise and submitted that this had demonstrated that the direct marketing text messages had been issued to the monitoring handset without any prior interaction with the website or a WAP site and, as such, the Executive submitted that the pricing information had not been prominently displayed or presented in a way that did not require close examination.

It submitted that the subscription initiation text message, which was received once consumers had been subscribed into the service, had advertised the website for the first time to consumers who had opted-in via this route (identical to the way the Executive subscribed into the service during the course of monitoring). The Executive was of the opinion that the website provided the consumer with pricing information after subscribing to the service.

The Executive submitted that the service failed to operate in a way which ensured that written pricing information was prominent and presented in a way that did not require close examination. The pricing information that was present on the website had been provided too late in the sign-up process.

2. The Information Provider stated that the Executive's monitoring phone had received a technically incorrect version of the text message. It stated that the issuing of the subscription initiation text message had informed the consumer of the service, as well as of the website, and this had been prior to any billing. This had allowed the customer to unsubscribe if he or she so wished.
3. The Tribunal considered the evidence and concluded that this provision of the Code related to the displayed pricing information, as opposed to absent pricing information as it was in this case. It found that this breach could not be made out and that the issue had been addressed in the alleged breach of paragraph 7.6.2 of the Code. The Tribunal did not uphold a breach of 5.7.2 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

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 the direct marketing text messages had been sent out to consumers who had not interacted with any website or WAP site (including

'Itv2Mobi.com') prior to receiving the 'call to action' to interact with the service. It submitted that any response to the shortcode advertised, whether it was a correct entry or not, had subscribed the sender into the competition service.

2. The Information Provider stated that the contact information had been missing from the text message as it had exceeded the 160-character limit. It stated that all consumers who were sent a text message had previously visited one of the Information Provider's sites/banners, allowing them to receive further marketing text messages.
3. The Tribunal considered the evidence and concluded that the direct marketing text messages (regarded by the Tribunal as falling within the definition of a 'promotion' under paragraph 11.3.27 of the Code) had not contained the identity of the Service Provider or the Information Provider, nor a customer contact number. The Tribunal accepted the monitoring evidence which demonstrated that the Executive had had no previous interaction with the website or a WAP site, prior to receiving the direct marketing text message. The Tribunal upheld a breach of 5.8 of the Code.

Decision: UPHELD

**ALLEGED BREACH FIVE
COMPETITIONS (PROMOTION OF COST) (Paragraph 7.6.2)**

"Promotional material for competition services which generally cost more than £1 must clearly display:

- a the cost per minute and likely playing time, or the full cost of participation*
- b details of how the competition operates and an indication of any tie-breakers."*

1. The Executive submitted that the service had originally been advertised and understood by the Service Provider as costing £2.50 per month. However, it submitted that the service soon operated at the cost of £2.50 per week (as indicated by advertising on the website and subscription initiation text messages).

It submitted that the monitoring evidence in relation to the direct marketing text messages demonstrated that that these text messages had been received without any prior interaction with a website (including the itv2Mobi.com website) or WAP site directly relating to the service.

It submitted that the direct marketing text messages contained the competition prize on offer and a 'call to action' in the form of a quiz question. The full cost of participation was not made available or clearly displayed within the direct marketing text messages.

2. The Information Provider referred to its previous response and stated that the text message had been cut short, resulting in some information being cut off.
3. The Tribunal considered the evidence, including the Information Provider's admission, and concluded that the direct marketing text messages (regarded by the Tribunal as falling within the definition of a 'promotion' under paragraph 11.3.27 of the Code) had not clearly displayed the full cost of participating in the competition service. The Tribunal accepted the monitoring evidence, which demonstrated that the Executive had had no previous interaction with the website or a WAP site, prior to receiving the direct marketing text message and, as such,

had not been aware of the cost. The Tribunal upheld a breach of 7.6.2 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

COMPETITIONS (PROMOTION OF KEY TERMS) (Paragraph 7.6.3)

“Promotional material must clearly state any information which is likely to affect a decision to participate, in particular:

a any key terms and conditions, including any restrictions on the number of entries or prizes which may be won

b an adequate description of prizes and the other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restrictions on their availability or use

c where a prize consists wholly or in part of vouchers, the promotional material must specifically and prominently state the value of a single voucher as well as any total value.”

1. The Executive submitted the competition service under investigation had a number of key attributes. It submitted that it was a subscription service charged at £2.50 per week to entrants and that all entrants in a given month had been included within one draw for one prize, usually £1,000 cash.

The Executive submitted that it was of the opinion that the following key information was likely to have affected a consumer decision to participate in the ‘Itv2Mobi.com’ quiz:

- Length of period in which to enter – one month, as opposed to one day;
- Cost of entry - £2.50 a week, as opposed to a free service;
- Subscription element and any restrictions on entries being added to the monthly draw – do you have to be subscribed on the draw date to be entered into the draw? If so, an entry might cost £10 if subscription starts at beginning of a month and issuance of a ‘STOP’ command may result in non-entry to the draw.

The Executive submitted it was of the opinion that the direct marketing text message had not clearly stated key information that was likely to have affected a consumer’s decision to participate in the competition.

It submitted that a number of the text messages had included the word ‘FREE’, and there had been no reference to the cost of the service, or the subscription element associated with the cost, in any of the direct marketing text messages.

It submitted that all the direct marketing text messages had suggested that the quiz related to a specific day, as opposed to the month-long competition that was actually on offer. It submitted that it was of the opinion that consumers were likely to have assumed that fewer entries would have been made in a one day competition than during the course of a month-long competition. It made reference to the message logs supplied by the Service Provider and submitted that they demonstrated the number of entries on a specific day had been significantly lower than the number received across the course of a month.

The Executive submitted that the direct marketing text messages had not provided accurate or clearly stated information necessary under paragraph 7.6.3 of the Code.

2. The Information Provider stated that the 160-character limit had meant that it was impossible for it to put this information into one text message. It stated that this information had been included on its website and WAP site, in addition to the service terms and conditions. The Information Provider went on to quote the terms and conditions in full.
3. The Tribunal considered the evidence and concluded that the direct marketing text messages (regarded by the Tribunal as falling within the definition of a 'promotion' under paragraph 11.3.27 of the Code) had not contained the information required in relation to the competition, as required by paragraph 7.6.3 of the Code. It found that the direct marketing text message had not clearly stated several key terms and conditions, including the entry period of the competition, the cost of entry and the subscription element. The Tribunal upheld a breach of 7.6.3 of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN COMPETITIONS (CLOSING TERMS) (Paragraph 7.6.5)

“Except where there are only instant prize-winners, promotional material for competition services must state when the competition closes. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes.”

1. The Executive submitted that this service had not involved any instant prize-winners and had constituted a draw every month for a one-off prize.

The Executive made reference to its monitoring exercise and submitted that the closing date for the August 2010 competition (running at the time of the investigation) had not been present anywhere on the website and had not been included in the direct marketing text messages.

It submitted that the homepage of the website, which set out the current prize and possible future prizes, had indicated that the next competition started in September, but had not provided a precise date for closure of the current competition.

It submitted that the direct marketing text message had presented the quiz as being on a specific day, or had referred to it as “TODAY’S BUMPER QUIZ”, and that it was of the opinion that the closing date for the current competition had not been accurately or clearly stated. Furthermore, the subscription initiation text message (that followed a response to the promotional material from the consumer) had stated that “winners will be announced at the end of the month” and the Executive was of the opinion that this also had not accurately or clearly stated the closing date of the competition.

2. The Information Provider stated that its website had clearly stated that the competition closed at the end of the month and that it was of the opinion that consumers would have understood this to mean a closing date of the last day of each month.

The Information Provider stated that the winners had been announced on the last day of the month, which had been highlighted in its 'winners' section on the 'itv2Mobi.com' website. In addition, the terms and conditions had set out all the relevant information regarding contacting the winners. It also referred to its previous explanation in relation to the limited number of consumers that had been affected by its technical error.

3. The Tribunal considered the evidence and concluded that the direct marketing text messages (regarded by the Tribunal as falling within the definition of a 'promotion' under paragraph 11.3.27 of the Code), had not stated to consumers the date on which the competition would close. It found that this had been compounded by the lack of precision in the terms and conditions on the website that had also not provided a specific date. The Tribunal upheld a breach of 7.6.5 of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT SUBSCRIPTION SERVICES (PROMOTIONS) (Paragraph 7.12.3a-c)

[For subscription services] "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 submitted that the service came within the definition of a subscription service under paragraph 7.12.1 of the Code.

It submitted that, as was the case with its monitoring of the service, the direct marketing text message that had been received without sight of the website had contained no indication of the subscription element of the service. Furthermore, the subscription initiation text message had not contained any key terms relating to the subscription service or the 'STOP' command.

The Executive submitted that the direct marketing text messages had advertised the prize on offer, suggesting a specific day of the quiz, or labelling it "TODAY'S BUMPER QUIZ", and had also provided the quiz question (a call to action) and a shortcode.

2. The Information Provider stated that the information had been contained in the correct text message which had been sent out; however, it had not been contained in the incorrect text message that had been sent to a small number of consumers. It admitted to a small technical error that had affected the layout of its initial text messages. It stated that all the relevant information had been clearly displayed within its website, banners and subscription initiation text messages.
3. The Tribunal considered the evidence, including the Information Provider's admission, and concluded that the subscription initiation text messages had not contained information in relation to the subscription element of the service, the terms of use of the subscription service or the 'STOP' command. The Tribunal upheld a breach of 7.12.3a-c 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:

- In relation to the Information Provider's behaviour, the Tribunal considered that the Information Provider's response was inadequate and unsupported by any evidence which demonstrated that only a small number of consumers had been affected by the purported technical error. The Tribunal considered the evidence put forward by the Executive in relation to the marketing of this service and concluded that the service had been marketed primarily by non-compliant text messages. The Tribunal did not accept that the text message had been 'cut off' as a result of exceeding the 160-character limit for the following reasons: the amount of characters in the text messages contained within the Service Provider's message logs (those text messages supplied had not appeared to be incomplete); and there being no evidence of consumers having replied to the service with the specific keyword as the answer to the question, as promoted on the website (itv2Mobi.com). Taking those factors into account, the Tribunal was satisfied that the Information Provider had deliberately promoted the service with a non-compliant text message.
- This was a concealed subscription service, which have previously been singled out for criticism by PhonepayPlus.
- The Tribunal considered that the Information Provider had failed to co-operate with PhonepayPlus as it had failed to supply information within the timescale, although it had had adequate opportunity to do so.
- The breach history of the Information Provider.

There were no mitigating factors for the Tribunal to consider.

The revenue in relation to this service fell within the upper range of Band 6 (£1-£5,000).

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

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;
- A fine of £10,000;
- The Tribunal ordered that the Information Provider submit all categories of its services and all its promotional material, both current and future, for prior permission for a period of 12 months;
- The Tribunal ordered refunds to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.