

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Thursday 19 August 2010 TRIBUNAL SITTING No. 60 / CASE 2
CASE REFERENCE: 840403**

Information provider:	Guerilla Mobile GmbH, Germany
Service provider:	Netsize UK Limited, London
Type of service:	Subscription download service
Service title:	'Goldgames'
Service number:	85085 and others
Cost:	£2.50 sign-up fee and a further £5 per week
Network operator:	All Mobile Network Operators
Number of complainants:	8

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

BACKGROUND

By 7 July 2010, PhonepayPlus had received eight complaints in relation to the 'Goldgames' service, operating on shortcode 85085 and others. The service was promoted on the websites <http://m.bobmobile.co.uk> and <http://bobmobile.co.uk>.

The PhonepayPlus Executive noted that, of the eight complaints; three stated they were unaware the service charged on a subscription basis, three stated that they experienced difficulty cancelling the service, two stated they did not receive their requested content and one stated that he or she had not requested the service, but was still being charged.

The PhonepayPlus Executive was concerned complainants were unaware that the service was charged on a subscription basis, that several complainants were parents contacting PhonepayPlus on behalf of their children, and that the service did not have Prior Permission. Furthermore, PhonepayPlus was concerned about issues relating to pricing information, subscription initiation and reminder text messages.

The Investigation

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

The Information Provider undertaking forms that were submitted by the Service Provider on the 12 July 2010 were accepted by the Executive. The Information Provider was issued a breach letter on 22 July 2010, to which it responded on 2 August 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 19 August 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE PRIOR PERMISSION (Paragraph 5.1.1)

“PhonepayPlus may require that particular categories of services must not be provided without its prior written permission for any service within that category. PhonepayPlus will give reasonable notice of such a requirement and the category of service to which it applies, and will publish a full list of such service categories from time to time. Prior permission may be granted subject to the imposition of additional conditions. Such permission may be withdrawn or varied upon reasonable grounds and with notice in writing.”

1. The Executive submitted that it was a PhonepayPlus requirement that certain categories of premium rate service obtain prior written permission from PhonepayPlus before commencing operation.

On 22 January 2009, PhonepayPlus issued a statement advising that subscription services that charge in excess of £4.50 in any seven-day period would now be covered by the Prior Permission regime.

On 25 February 2009, a reminder was issued to the industry that Prior Permission was required for subscription services exceeding £4.50 in any seven-day period, and that the deadline for obtaining Prior Permission for existing services remained the 4 March 2009.

In the June 2009 edition of the PhonepayPlus e-newsletter (*NewsPlus*) issued to industry, PhonepayPlus advised that any such services found to be operating, where Prior Permission had not been applied for, would be considered to be in breach of the Code.

The Executive submitted that the Industry Affairs Team, which processes all applications for Prior Permission, had confirmed that Prior Permission had not been obtained by the Service Provider for its client, the Information Provider known as Guerilla Mobile GmbH.

2. The Information Provider stated that it accepted a breach of the Code had occurred and it asked, in mitigation, that the Tribunal accept that it had now changed its service entirely so that it was now priced at £2.50 per week. It stated that it had not been aware of the requirements, not that ignorance was a defence, but it had not been done in an effort to avoid its obligations and responsibilities under the Code of Practice.

It stated that it had now made the changes and, should it charge more than £4.50 per week, it would, of course, make the necessary application for Prior Permission.

3. The Tribunal considered the evidence and concluded that the Information Provider had not had the required Prior Permission to operate a premium rate service that charged in excess of £4.50 in any seven-day period, as required under the Code. The Tribunal upheld a breach of paragraph 5.1.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO PRICING INFORMATION (COST) (Paragraph 5.7.1)

“Service Providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”

1. The Executive considered the service to be in breach of paragraph 5.7.1 on the following grounds:

Ground 1

The Executive submitted that the website 'bobmobile.co.uk' contained no pricing information on the main website pages or within the terms and conditions on the website (Appendix A).

The Executive submitted that it was of the view that consumers visiting the website 'bobmobile.co.uk' would not have been fully informed, clearly and straightforwardly, of the cost of using the service, prior to incurring charges.

Ground2

The Executive submitted that the website 'http://m.bobmobile.co.uk' (Appendix B) contained the following pricing information on the main landing web page:

'2,50GBP per msg. (2 msg./game) and additional sign up'

The Executive submitted that it was of the opinion that consumers visiting the website 'http://m.bobmobile.co.uk' were not fully informed, clearly and straightforwardly, due to the use of 'GBP' and the £2.50 sign-up fee being described as "*and additional sign up*".

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

Ground 1

It stated that there had been some technical issues in relation to the 'bobmobile.co.uk' website (Appendix A) and the presentation of the HTML pages on Microsoft Internet Explorer. It stated that all other browsers had displayed the pricing information next to the products when the page was requested, and that the technical bug in relation to the Microsoft Internet Explorer had not existed for more than two days and had been immediately fixed when noticed by its own technical support and quality control staff during a review of the site.

Ground2

It stated that applying the abbreviation 'GBP' to the prices, as opposed to a '£' symbol, had not been aimed at confusing the customer. It stated that it had changed the currency's declaration from 'GBP' to the '£' symbol, as it had not been fully aware of this requirement. It stated that it would make sure that all prices in relation to its UK services would be displayed accordingly.

The Information Provider stated that there was significant and overwhelming evidence to assume that UK consumers fully understood the meaning of the 'GBP' abbreviation. It stated that it was of the opinion that this was a common denomination used in many areas and it had assumed that the 'GBP' symbol would be understood by UK consumers.

The Information Provider stated that it regretted that it also had a technical issue when displaying the specific £2.50 sign-up fee, that this had been corrected immediately and now read as follows: "*and additional £2.50 sign-up*".

3. The Tribunal considered the evidence and concluded that, in relation to Ground 1, although it noted the Information Provider's comment in relation to the technical bug, there had been incidences where the 'bobmobile.co.uk' website (Appendix A) had not contained pricing information. In relation to Ground 2, the Tribunal found that the

use of the abbreviation 'GBP' contained on the main landing page of the 'http://m.bobmobile.co.uk' website (Appendix B) had not informed consumers, clearly or straightforwardly, of the cost of using the service. The Tribunal upheld a breach of paragraph 5.7.1 of the Code on both grounds.

Decision: UPHELD on both grounds

ALLEGED BREACH THREE CHILDREN'S SERVICES (EXCEEDING £3) (Paragraph 7.5.4a)

"Children's services must not:

a) generally cost more than £3, or in the case of subscription services, more than £3 per month"

1. The Executive made reference to paragraph 7.5.1 of the Code that defines a 'children's service' as the follows:

"Children's services are services which, either wholly or in part, are aimed at or should be expected to be particularly attractive to children, who are defined for the purpose of this Code as people under 16 years of age."

It submitted that the 'bobmobile.co.uk' website (Appendix A) had displayed a game called 'Wizards Phantom', in addition to text below that read: 'send G11 to 85085'. The game graphic contained a picture of a cartoon duck. The Executive submitted that it was of the opinion that this game would have been particularly attractive to children and, as such, the service fell into the definition of a 'Children's service', as defined by the Code, and was subject to the relevant provisions of the Code, including paragraph 7.5.4 of the Code. The Executive made reference to further examples in relation to a pirate game and a racing game on the same webpage.

The Executive also made reference to the 'http://m.bobmobile.co.uk' website (Appendix B), that contained a 'Tamogotchi' game and a winter sports game that used Disney imagery.

The Executive submitted that two complaints received by PhonepayPlus had been from parents regarding their children.

It submitted that the cost of using the service had been a £2.50 sign-up fee and a further £5 per week. The charge was, therefore, £7.50 in the first week and £5 in subsequent weeks. It referred to Paragraph 7.5.4a and submitted that children's subscription services must not generally cost more than £3 per month. In light of the above, the Executive was of the opinion that a breach of paragraph 7.5.4a had occurred.

2. The Information Provider stated that it disputed that this was a children's service. It stated that it had a cartoon image which may be attractive to children, but the site had been a generic site and it argued that the majority of its users had been adults. It stated that it had not actively sought any business from consumers under the age of 18.

It stated that it accepted that a parent had complained about the accessing of the service by his or her child, but this had not been as a result of its marketing of the service. It stated that cartoon images were regularly used for older consumers, as well. It stated that any complainant who claimed to be the parent of a child would automatically be refunded once it had validated the claim.

3. The Tribunal considered the evidence and concluded that the use of cartoon images (Appendix A and B), including Disney images, had been particularly attractive to children and, as such, the service on both websites fell under the definition of a 'Children's service', as defined under paragraph 7.5.1 of the Code. It followed that the service was subject to all the provisions of the Code relating to Children's services. The Tribunal found that the service had charged more than £3 per month. The Tribunal upheld a breach of paragraph 7.5.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR SUBSCRIPTION SERVICES (PROMOTIONAL MATERIAL) (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. The Executive submitted that the homepage of the 'bobmobile.co.uk' website (Appendix A) had contained promotional material for six mobile games, including the appropriate keyword for each game and shortcode 85085. It submitted that the homepage had made no reference to the subscription terms of the service, apart from a button marked 'Unsubscribe'. It submitted that, on clicking this button, the Executive was presented with a screen with an entry field for a mobile number and a password, but no further details were given in relation to the subscription terms and conditions. It submitted that it was of the view that the absence of this information would not ensure that the terms of use of the subscription service would be clear to consumers.

The Executive also made reference to a button marked 'Terms & Conditions' and submitted that, on clicking this button, it had been presented with the terms and conditions of the service. It made reference to the following extracts of the terms and conditions of the service:

"This subscription period is one week or one month depending on the type of the subscription contract. The subscription contract and the subscription period will be renewed each week or month as applicable and a new subscription fee shall become due for the new subscription period."

"The monthly fees for the Subscription Service are available at COMPANY's web site. The monthly fee shall be charged for every subscription period the contract is in effect."

The Executive submitted that it was of the view that the above references in the terms and conditions had not ensured that the terms of the subscription element of the service had been clear to consumers.

2. The Information Provider stated that it accepted that further detailed subscription information could have been provided. It stated that it had now amended its terms and conditions accordingly, and they now contained a new link entitled "clubs and pricing" on the 'www.bobmobile.co.uk' website (Appendix A).
3. The Tribunal considered the evidence and concluded that the Executive had wrongly brought a breach of paragraph 7.12.3b in relation to its submissions and the evidence it had provided. The Tribunal clarified that 'clarity' under paragraph 7.12.3b

was in relation to the actual visibility of the subscription terms, as opposed to the meaning of the wording. The Tribunal did not uphold a breach of paragraph 7.12.3b of the Code.

Decision: NOT UPHELD

**ALLEGED BREACH FIVE
SUBSCRIPTION SERVICES (SUBSCRIPTION INITIATION) (Paragraph 7.12.4b-f)**

“Subscription initiation

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

- b) confirmation that the service is subscription based,*
- c) what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent,*
- d) the charges for the service and how they will or can arise,*
- e) how to leave the service*
- f) service provider contact details”*

1. The Executive submitted that it had requested call log information for the following mobile telephone numbers:

*****9563
*****5554
*****5220
*****0584
*****5347

The Executive submitted that all of these mobile phone numbers received one of the two messages below, which read as follows:

“Order confirmation! Ur product in GOLDAPPS Club (2,50GBP join + 2pushes @ 2,50GBP/app) comes shortly from BobMobile. No club? Stop GOLDAPPS.”

“Order confirmation! Ur product in GOLDGAMES Club (2,50GBP join + 2pushes @ 2,50GBP/game) comes shortly from BobMobile. No club? Stop GOLDAPPS.”

The Executive submitted that it was of the view that the information required under paragraph 7.12.4b-f had not been provided in relation to the above subscription initiation text messages.

2. The Information Provider stated that it accepted that the information contained in the subscription initiation text messages had not been as exactly required; however, it was of the opinion that there had been sufficient information for consumers to make an informed decision as to whether to continue with its service or not (this had included a ‘STOP’ command reminder). It stated that it had now made further changes to its service so that all subscription text messages were exactly as required under the Cross Network Operator Code. The Information Provider provided copies of the new wording of its initiation subscription text messages.
3. The Tribunal considered the evidence and concluded that the subscription initiation text messages received by the mobile numbers provided in evidence had not contained the subscription information required under paragraph 7.12.4b-f of the Code. The Tribunal upheld a breach of paragraph 7.12.4b-f of the Code.

Decision: UPHELD

ALLEGED BREACH SIX SUBSCRIPTION REMINDER MESSAGE (Paragraph 7.12.5)

“Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers”

1. The Executive made reference to the call log information in relation to two mobile phone numbers and made the following submissions in relation to the subscription reminder text messages received by these two consumers:

*******5554**

After £20 spend the below message was received;

“[FreeMsg] No action required. For your info only: You have passed 20GBP this month for your Club.”

After £40 spend the below message was received;

“[FreeMsg] No action required. For your info only: You have passed 40GBP this month for your Club.”

The Executive submitted that it was of the opinion that the above text messages had not contained the information required under paragraph 7.12.4 of the Code and, as such, there had been a breach of paragraph 7.12.5 of the Code.

*******5347**

The Executive submitted that between 4 April 2010 and 1 June 2010 the above mobile phone number was charged £50; however, no free-to-receive subscription reminder text messages were issued to this mobile phone number in this time period.

2. The Information Provider stated that, whilst it did accept that the text messages sent had not conformed exactly to what was required under the Cross Network Operators Code, the information contained had been sufficient for consumers to understand how much they had spent in relation to the service. The Information Provider provided copies of the new wording of its subscription reminder text messages.
3. The Tribunal considered the evidence and concluded that, in relation to the first mobile phone number submitted by the Executive, the subscription reminder text message had not contained the information required under paragraph 7.12.4 of the Code, and it followed that there had been a breach of paragraph 7.12.5 of the Code. The Tribunal found that, in relation to the second mobile phone number submitted by the Executive and ending ‘5347’, the user did not receive a subscription reminder text message after spending a further £20 as required by the Code. 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 behaviour of the Information Provider was negligent in relation to the operation of this service in the regulated UK market.
- The cost paid by consumers was high – one complainant was charged £50.
- This was a concealed subscription service, which have previously been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Tribunal was satisfied that the Information Provider had not deliberately set out to breach the Code.
- The Information Provider did co-operate with PhonepayPlus and made early and appropriate admissions about the breaches.
- The Information Provider had provided refunds to users.

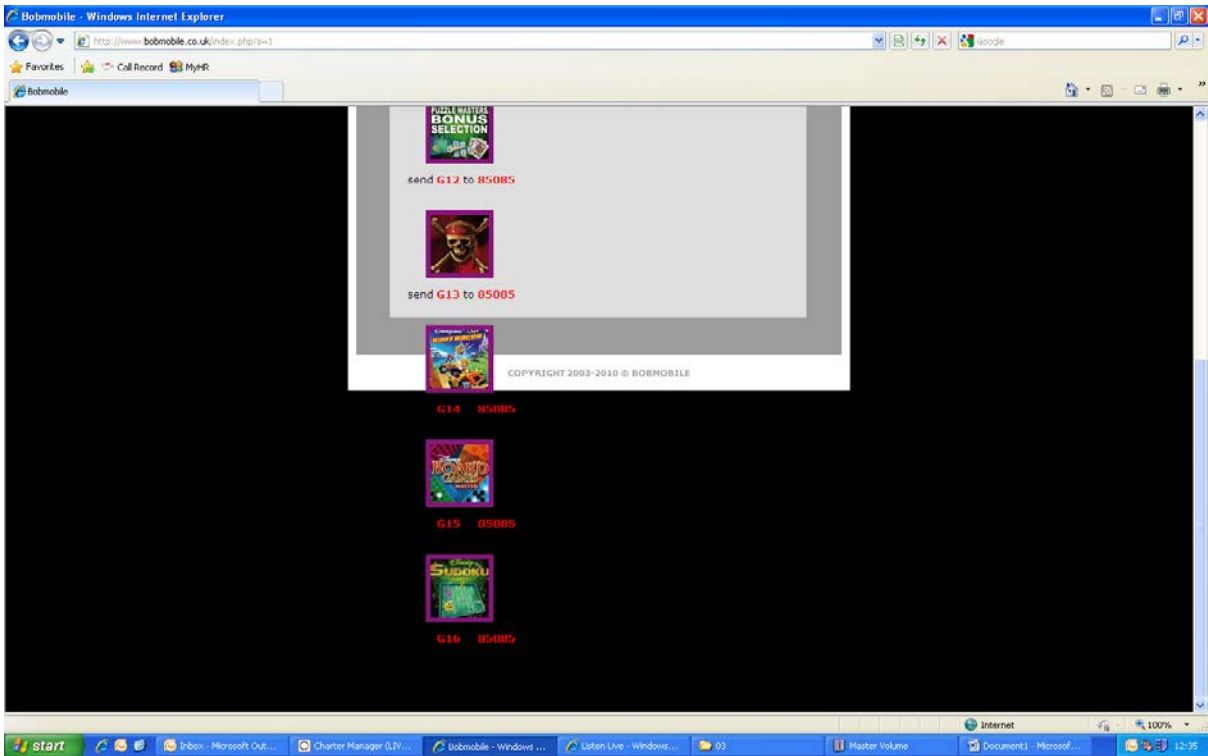
The revenue in relation to this service fell within the upper range of Band 5 (£5,000-£50,000).

Having taken into account the aggravating factors and the mitigating factors, including the level of consumer harm and the negligent, rather than reckless, nature of the breaches, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

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 £25,000;
- The Tribunal ordered that the Information Provider remedy the breaches by seeking compliance advice in relation to this service within two weeks of the publication of this decision. Compliance advice is to be implemented to the satisfaction of the Executive within two weeks of receipt;
- The Tribunal commented that it expected claims for refunds to continue 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.

Appendix A – Screenshots of the ‘bobmobile.co.uk’ website.



Bobmobile - Windows Internet Explorer

http://www.bobmobile.co.uk/

Bobmobile UK: Terms & Conditions - Windows I...

http://www.bobmobile.co.uk/cgi/index.html

welcome to Bobmobile

WELCOME TO GUERRILLA MOBILE ("COMPANY")! BEFORE YOU USE OUR SERVICE, YOU MUST READ THESE TERMS AND CONDITIONS ("TERMS") CAREFULLY. BY USING OUR SERVICE, YOU AGREE TO THESE TERMS AND CONDITIONS, IF YOU DO NOT AGREE, DO NOT USE THE SERVICE.

1. Description of Services
COMPANY provides downloadable mobile entertainment content, such as ringtones, games, graphics, news and other information data through its on-line (World Wide Web) and SMS (Short Message Service) services to certain compatible mobile devices (the "Service"). The Service may also include access to products and services of independent third parties. After proper registration and payment, you will be permitted to download certain Products through the Service to compatible mobile phones and other compatible devices.

2. Registration and Access to the Service

Games+ware
BOB MOBILE

Terms&Conditions Unsubscribe

send G11 to 85085

Puzzle Masters Bonus Selection

send G12 to 85085

start

Inbox - Microsoft ...

Charter Manager ...

Bobmobile - Wind...

Listen Live - Wind...

Bobmobile UK: Te...

03

Master Volume

document1 - Mo...

Internet

100%

12:36

Appendix B – Screenshots of the bobmobile flyer.

MOBILE FUN!!!

TOP GAMES SMS TO 85085

<div style="writing-mode: vertical-rl; transform: rotate(180deg); background-color: yellow; padding: 5px; font-weight: bold;">+++ PIRATES 3 +++</div>  <p>send G1 to 85085</p>	<div style="writing-mode: vertical-rl; background-color: yellow; padding: 5px; font-weight: bold;">+ WIZARDS PHANTOM +</div>  <p>send G2 to 85085</p>
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U get 2 Top Games per week in Goldgames Club. Get it all for only 2.50GBP per msg. (2 msg./game) and an additional sign up fee of 2.50GBP. To cancel your club, send STOP GOLDGAMES to 85085. Help? Call 08082343605.

CASINO GAMES SMS TO 85085

<p>Roulette 3</p>  <p>send G3 to 85085</p>	<p>Texas Hold'em</p>  <p>send G4 to 85085</p>	<p>Black Jack</p>  <p>send G5 to 85085</p>	<p>Video Pocker</p>  <p>send G6 to 85085</p>
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U get 2 Top Games per week in Goldgames Club. Get it all for only 2.50GBP per msg. (2 msg./game) and an additional sign up fee of 2.50GBP. To cancel your club, send STOP GOLDGAMES to 85085. Help? Call 08082343605.

FUN GAMES SMS TO 85085

<p>Tamagotchi</p>  <p>send G7 to 85085</p>	<p>Xsmas Sudoku</p>  <p>send G8 to 85085</p>	<p>Winter Games</p>  <p>send G9 to 85085</p>	<p>Xmas Slot Machine</p>  <p>send G10 to 85085</p>
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U get 2 Top Games per week in Goldgames Club. Get it all for only 2.50GBP per msg. (2 msg./game) and an additional sign up fee of 2.50GBP. To cancel your club, send STOP GOLDGAMES to 85085. Help? Call 08082343605.

