

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 15 April 2010  
TRIBUNAL SITTING No. 51/ CASE 1  
CASE REFERENCE: 823604/PJ

Service provider:	Wireless Information Network Ltd, High Wycombe
Information provider:	Mobile Software Solutions Limited, Hertfordshire
Type of service:	Subscription Competition
Title:	'The Big Text Quiz'
Service numbers:	89032 and all other shortcodes on which the service is available
Cost:	£1.50 per week
Network operator:	All Mobile Network Operators
Number of complainants:	10

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

### BACKGROUND

The PhonepayPlus Executive (the 'Executive') received ten complaints in relation to the service operating on shortcode 89032 and all other shortcodes on which the service was available. The service was a subscription competition service offering quiz prizes such as £100 cash and was operated by Mobile Software Solutions Limited.

Consumers stated to have first heard of the service on receiving an unsolicited text message charged at £1.50. An example of the text message is as follows:

*"Free msg: Win £100 cash in this weeks big text quiz. Reply with CASH to enter. 1 question and 1 prize/wk £1.50 per week. MMS help 08452260723"*

During the course of its monitoring, the Executive also identified problems with regard to the lack of contact information and established that three consumers had stated that the 'STOP' command had not worked.

According to the Information Provider it had provided a 'white label' unbranded platform to a client. It stated that the client in question was Netcollex Limited, and that it had operated the service on shortcodes 81666 and 89900. The Information Provider had also stated that the specific promotions submitted by the Executive had been sent from Netcollex's system to the consumer and the consumer messages had been forwarded from Netcollex's system to the Information Provider.

### The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.7 of the Code.

The Executive issued a breach letter to the Information Provider dated 24 March 2010. The Information Provider responded to the breach letter on 31 March 2010. The initial responses to the Executive's requests for information were provided by the Service Provider on behalf

of the Information Provider. Following the Executive's approval of the Information Provider undertaking these responses became those of the Information Provider.

The Tribunal made a decision on the breaches raised by the Executive on 15 April 2010, having heard Informal Representations from the Information Provider and 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.”*

1. The Executive submitted that 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, or (2) the recipient's details were obtained whilst purchasing a similar or related product 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 known as “soft opt-in”).

The Executive submitted that it had received ten complaints from members of the public and that all ten complainants had stated to have received an unsolicited text message from shortcode 89032. The Executive made reference to complainant comments and the opt-in details that had initially been provided by the Service Provider on behalf of the Information Provider. The Executive made reference to specific consumer complaints as follows:

#### **Mobile Number \*\*\*\*\*6241**

The Executive submitted that the consumer complaint was as follows: *“Consumer does not use these types of service, she received two messages this morning, one being the above message [You have joined the big text quiz £1.50 per seven days until you send stop to 89032]”*

#### **Opt in details supplied by Service Provider on behalf of the Information Provider**

The Executive submitted that the Service Provider had stated that the *“number rang 08715296009 on 2008-06-06 15:33:31, 2008-06-18 16:32:45 and 2008-07-11 16:15:56. This was a dial through service which captured caller details prior to connecting to the call”*

The Executive submitted that it was of the opinion that using a dial through service should not opt-in a consumer to receiving direct marketing promoting a text message competition service. In addition, it submitted that the time elapsed between the use of the dial through service and the issuing of marketing text messages should not have led to the sending of such messages.

#### **Mobile Number \*\*\*\*\*4626**

The Executive submitted that the consumer complaint was as follows: *"I've never subscribed to them [the text messages] I don't have a clue what it's about I have sent 3 stops to it but I've heard nothing"*

Opt in details supplied by Service Provider on behalf of the Information Provider

The Executive submitted that the Service Provider had stated that the marketing text message – *"This [the marketing message] was sent from our clients systems in error"*. It submitted that no further opt-in information was provided in relation to this mobile phone number. The Executive was of the view that the above statement was confirmation that the text message sent to the consumer had been unsolicited.

**Mobile Number \*\*\*\*\*1645**

The Executive submitted that the consumer complaint was as follows: *"This message [Freemsg win £100 cash in this weeks big text quiz. Text CASH to 89032 to enter] has come through...without him requesting anything."*

Opt in details supplied by Service Provider on behalf of the Information Provider

The Executive submitted that the Service Provider had stated that *"the number was not opted-in. It had stated that an error had occurred and this user was sent a promotional text message by mistake"*. The Executive was of the view that the above statement was confirmation that the text message sent to the consumer had been unsolicited.

**Mobile Number \*\*\*\*\*8204**

The Executive submitted that the consumer complaint was as follows: *"Service Description: unsolicited weekly text quiz. I responded by texting STOP but they have continued to hound me saying I have joined. Their helpline is an answerphone service and is not only useless but also I presume premium rate. I have responded by texting STOP and then a further STOP ALL to 89032. I don't know if I have been charged or will be charged in the future but I am extremely annoyed to be being mugged by these crooks."*

Opt in details supplied by Service Provider on behalf of the Information Provider

The Executive submitted that the Service Provider had stated that the following in relation to the marketing text message sent to this mobile phone number – *"This [the marketing message] was sent from our clients systems in error"*. In addition, the service provider stated the *"Number rang 0844 441 5915 on 11/08/2009 09:17"* and that this was *"an advertising line offering information about products and services"*. The Executive was of the view that the above statement was confirmation that the text message sent to the consumer had been unsolicited.

2. The Information Provider (using the same information that was originally provided by the Service Provider prior to it becoming the subject of the case) responded to the Executive's submissions as follows:

**Mobile Number \*\*\*\*\*6241**

The Information Provider stated that this promotion was sent from its client's (Netcollex Limited) system in error. The promotion was not sent from shortcode 89032 although the service was advertised as having been run on shortcode 89032. It stated that the mistake was noticed very quickly and PhonepayPlus were contacted straight away by the Information Provider and by the Service Provider before any users complained. It stated that all promotions were then terminated. It stated to have tried to contact this user by telephone on three separate occasions to explain the error.

**Mobile Number \*\*\*\*\*4626, \*\*\*\*\*1645 and \*\*\*\*\*8204**

The Information Provider stated that this promotion was sent from its client's (Netcollex Limited) system in error. The promotion was not sent from shortcode 89032 although the service was advertised as having been run on shortcode 89032. It stated that there had been an error that had caused the 'STOP' command message that was sent to its system from its client's system to be incorrect (The word 'CASH' was in front of the word 'STOP'). This prompted the free text message to be sent to the user and entry into the quiz. It stated that when the user eventually sent in 'STOP' to its system on shortcode 89032, the user no longer received the service. It stated that the mistake was noticed very quickly and PhonepayPlus were contacted straight away by the Information Provider and by the Service Provider before any users complained. It stated that all promotions were then terminated.

It stated that it had done everything it could to let users know an error had occurred and that this would be sorted out as quickly as possible. The users were sent an additional text message that read: "FreeMsg. We sent U a QUIZ message earlier in error. We apologize for any upset caused and someone will contact you shortly. MSS 08452260723". Furthermore these users were called and given an apology for the inconvenience caused and an explanation of the error that had occurred. It stated that it had also explained that the user's numbers had been removed from the database and they would receive no further text messages.

The Information Provider stated that the users in relation to mobile phone numbers ending '4626' and '1645' had called another one of its clients services in the past and that during those calls it had been explained to them that they may receive free promotional material in relation to special offers and other services.

3. The Tribunal considered the evidence, including complainant comments and the Information Provider's confirmation of a system error that had caused direct marketing text messages to be sent to individuals that had been trying to stop the service. The Tribunal found that the Information Provider's confirmation of the system error corroborated the complainant's comments about their experience and was satisfied that the text messages had been unsolicited and as such were in contravention of the Regulations.

The Tribunal also found that the opt-in details provided by the Information Provider had been in relation to a dial through service (a non premium rate adult service) and not a competition service and as such the marketing text messages had not been in relation to a similar product or service. The Tribunal found that the unsolicited nature of the marketing text messages was exacerbated by the significant time lapse between the user's inaction with the dial through service and the sending of the marketing text messages. The Tribunal upheld the breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH TWO  
CONTACT INFORMATION (Paragraph 5.8)**

*"For any promotion, the identity and contact details in the UK of either the service 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 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 it had monitored the service by sending the key word 'CASH' to shortcode 89032. It submitted to have then received a text message that stated as follows:

*"FreeMsg: U have joined The Big Text Quiz for £1.50 per 7 days until you send STOP to 89032. Helpline 08452260723. MSS MK9 2RG"*

The Executive submitted that it was of the opinion that the use of the company initials, in this case 'MSS', had not clearly stated the identity of either WIN (the Service Provider), or Mobile Software Solutions Limited (the Information Provider).

2. The Information Provider stated that the actual wording used was clearly stated as "MSS" which was an abbreviation of "Mobile Software Solutions Limited". It stated that the postcode was also clearly visible along with a working support telephone number. It stated that it had genuinely tried to stay within the guidelines set out in the Code and felt that this was adequate information should a user have tried to contact the company.
3. The Tribunal considered the evidence and concluded that the use of the abbreviation of Mobile Software Solutions to 'MSS' and a postcode with no other information was not sufficiently clear to establish the identity of the Information Provider. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **SUBSCRIPTION SERVICE (STOP COMMAND) (Paragraph 7.12.2)**

*"It must always be possible for a user to leave a subscription service by using the 'STOP' command."*

1. The Executive submitted that on 28 September 2009 it received an email from the Information Provider advising that a technical problem had occurred and *"unfortunately a Promotional message went out over the weekend advertising a quiz service on 89032 and the server it was sent on became corrupt. This means that some users who sent in STOP command were not stopped and received a billed message"*. The Executive submitted that it would appear from this correspondence that sending 'STOP' in response to the marketing text message had in fact initiated the service.

The Executive submitted that several complainants had asserted that sending the 'STOP' command had not stopped the service from starting. The Executive made reference to the complainant's comments as follows:

#### **Mobile Number \*\*\*\*\*8204**

*Service description: unsolicited weekly text quiz. I responded by texting STOP but they continued to hound me saying I have joined. I have responded by texting STOP and then a further text of STOP ALL to 89032.*

**Mobile Number \*\*\*\*\*3464**

[the complainant received the text message] *“free message win £100 cash in this weeks big text quiz, reply with cash to enter, 1 question and 1 prize/wk £1.50 per week mss help 08452260703. Reply stop to end” to which he claims to have sent stop, but got subscribed anyway*

**Mobile Number \*\*\*\*\*9606**

*Service description: I keep getting Quiz texts from them, then weekly ones telling me who has won the weekly Quiz. Them some are to enter it. I have texted STOP many times, I have emailed the company too. I have never asked to do this Quiz or deliberately enter it. Some messages from them are free others are not. I don't [want] any from them. Summary of complaint: I have never asked or entered this service. I do not know how they got my number. I have emailed company and texted STOP. It seems to be a weekly Quiz question, first with the question, then others about who has won. I don't want anything to do with it.*

2. The Information Provider responded to the Executive's submissions and made reference to the complainant's comments as follows:

**Mobile Number \*\*\*\*\*8204 and Mobile Number \*\*\*\*\*3464**

The Information Provider stated that this promotion was sent from its client's (Netcollex Limited) system in error. The promotion was not sent from shortcode 89032 although the service was advertised as having been run on shortcode 89032. It stated that there had been an error that caused the 'STOP' command message that was sent to its system from its client's system to be incorrect (The word CASH was in front of the word 'STOP'). This had prompted the free text message to be sent to the user and subsequent entry into the quiz. It stated that when the user sent in 'STOP' to its own system on shortcode 89032, the service was ceased. It stated that the mistake was noticed very quickly and PhonepayPlus was contacted straight away by the Information Provider and by the Service Provider before any users complained. It stated that all promotions were then terminated by Netcollex Limited.

It stated that it had done everything it could to let users know that an error had occurred and that it would be sorted out as quickly as possible. The users were sent an additional text message that read: *“FreeMsg. We sent U a QUIZ message earlier in error. We apologize for any upset caused and someone will contact you shortly. MSS 08452260723”*. Furthermore these users were called and given an apology for the inconvenience caused and an explanation of the error that had occurred. It stated that it had also explained that the user's number had been removed from the database and he would receive no further text messages.

**Mobile Number \*\*\*\*\*9606**

It stated that this 'STOP' command had come from its client's systems and this promotion was not sent from shortcode 89032 although the quiz was advertised as being run on 89032. It stated that it had received the text message *“CASH%OA”* from the user's handset and this had prompted the free marketing text message to be sent to the user and for that user to be entered into the quiz. It stated that when the user eventually sent in 'STOP' to its system on shortcode 89032, the service was stopped.

3. The Tribunal considered the evidence, including the Information Provider's acceptance that it was responsible under the Code, and concluded that, in relation to the complainant's referred to by the Executive, the 'STOP' command had not functioned correctly and as a result it was not possible for those users to leave the subscription service. The Tribunal upheld a breach of paragraph 7.12.2 of the Code.

## Decision: UPHELD

### SANCTIONS

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

There were no aggravating factors in this case for the Tribunal to consider.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had tried to comply with the rules by taking steps in advance to identify and mitigate risk as its system had been sufficiently robust to detect errors.
- The breaches were inadvertent in nature and caused by a third party in circumstances beyond the control of the Information Provider.
- The Information Provider co-operated with PhonepayPlus. The Information Provider contacted the Executive to advise that a technical error had occurred.
- The Information Provider asserted that it had made refunds to complainants.

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

Having taken the mitigating factors into account, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant** in view of the failure of the 'STOP' command.

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 £5,000;