

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 11 November 2010

TRIBUNAL SITTING No. 66/ CASE 1

CASE REFERENCE: 844794

Information provider:	Telephone Entertainment Network Limited, Cambridgeshire
Service provider:	MX Telecom Limited, London
Type of service:	Virtual SMS Chat Service
Title:	'Daily Sport 50+'
Service number:	89990
Cost:	£1.50 per service message received and £3 per picture message received
Network operator:	All Mobile Network Operators
Number of complainants:	0

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

BACKGROUND

The 'Daily Sport 50+' was a Virtual SMS Chat service operating on shortcode 89990 and promoted in the Daily Sport newspaper between 25 July 2010 and 26 July 2010. The service was monitored on two occasions by the PhonepayPlus Research Team on 27 July 2010.

PhonepayPlus was concerned that the promotional material that appeared in the newspaper had not contained pricing information. The Executive had further concerns in relation to age verification and the 'STOP' command.

Monitoring

The Executive noted that PhonepayPlus had specifically brought Virtual SMS Chat services to the attention of Service Providers during the latter part of 2009 and early 2010. This initially happened through the publication of a Helpnote and subsequently when the Investigations Team at PhonepayPlus initiated a monitoring project to ensure compliance was being met.

On 3 March 2010, the Investigations Executive wrote to all service providers notifying that a monitoring project had been undertaken following the publication of the Helpnote. The letter explained that the following areas were being tested for compliance:

- Promotion material
 - Pricing prominence
 - Total cost pricing (for services which do not operate the 'one in, one out' model)
 - Misleading terms used to imply that chat is with other users or that users will be able to meet others by engaging with the service unless that is, in fact, the case,
- Age verification,
- Identity of the Service Provider/Information Provider is displayed within promotions,
- 'STOP' command,

- 'STOP' command sent to further marketing messages after service interaction has finished,
- Service operators clearly misleading users to engage them in further service interaction,
- That the service re-informs consumers as to the costs of the service soon as is reasonably possible after £10 has been spent, and
- That after £10 has been spent, the service is terminated if no further positive response is received from the consumer.

The results of this monitoring project were documented to the Service Provider within the written correspondence and particularly the area of 'Age verification' was highlighted as a concern requiring attention for four of the services monitored. The services monitored were operated by the Information Provider.

The Investigation

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

Following the Executive's monitoring exercise The Executive issued a breach letter to the Service Provider dated 6 October 2010. The Executive received an Information Provider undertaking on 8 October 2010 and a response to the breaches raised in a letter from the Information Provider received 21 October 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 11 November 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

PRICING INFORMATION (Paragraph 5.7.1)

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

1. The Executive submitted that on the 27 July 2010, it monitored a promotion for the 'Daily Sport 50+' service that had appeared in the Daily Sport newspaper on 25 and 26 July 2010 (Appendix A). The promotion for this Virtual SMS Chat service displayed the information 'FILTHY FIFTIES TXT GRA64 TO 89990' and this promotion provided no pricing information.

The Executive submitted that it monitored the service on two occasions and that the monitoring demonstrated that no pricing had been supplied to the user prior to incurring charges.

Text message sent
27.07.2010– 'GRA64' sent to shortcode 89990

Text message received
27.07.2010 – Service text message received charged at a cost of £1.50 to the user.

The Executive stated that this paragraph of the Code required that users were fully informed of the cost of using a service prior to incurring any charge and that the promotional material and the service messages had failed to bring pricing information to the attention of the user prior to charges being incurred.

2. The Information Provider stated that the advertisement in question appeared in the Daily Sport on 25 and 26 July 2010 and its records showed that it in fact did not appear on 27 July 2010, as was first thought to be the case.

It stated that in its response to the preliminary investigation dated 3 September 2010, three separate copies of promotional material were provided to evidence the time period during which the advertisement appeared.

The Information Provider stated that the advertisement was initially designed without the text promotion and as such there had been no need to include any relevant terms and conditions associated with text based services therein. When the final copy was submitted and sent to the publisher, the fact that the standard terms and conditions for text were not included had been overlooked. It stated that the advertisement had appeared incorrectly and without its standard terms and conditions associated with text promotions.

The Information Provider stated that the additional standards terms and conditions that should have been incorporated into the advertisement read as follows:

“SMS mgs cost £1.50, pics charged 2x £1.50 from 89990. SMS mgs & standard mobile charges apply. Txt STOP to stop the service. Promo mgs may be sent”

The Information Provider stated that the incident could be considered a “one-off” event and not representative of the other advertisements promoted under this shortcode.

It stated that the advertisement had appeared on 25 July 2010 (Sunday). The error was noticed by its media department on 26 July 2010 and immediately removed. The advertisement did not appear on 27 July 2010 and a completely new advertisement replaced it on 28 July 2010. It stated that it acted as quickly as possible to correct the error.

The Information Provider stated that it acknowledged and accepted, for the reasons set out above, that there was no text pricing information contained in the advertisement due to a genuine error and it had corrected the error prior to the Executive’s enquiry into the matter.

3. The Tribunal considered the evidence, including the Information Provider’s admission of the breach, and concluded that the promotion that appeared in the Daily Sport on the 25 and 26 July 2010 (Appendix A) had contained no pricing information. Furthermore, the Tribunal found that the Executive’s monitoring had demonstrated that on texting the service, consumers were not informed of the cost of using the service prior to incurring a charge (service text message). The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO VIRTUAL CHAT SERVICES (AGE VERIFICATION) (Paragraph 7.3.2a)

'Service providers must take all reasonable steps to ensure that the participant in any virtual chat service is an authorised user and that nobody under the age of 18 uses virtual chat services'.

1. The Executive submitted that it monitored the 'Daily Sport 50+' service on 27 July 2010 and that this was carried out on two occasions using two different mobile phone numbers.

It submitted that a text message containing the keyword 'GRA64' was sent to the shortcode 89990 to initiate the service, as requested by the service promotion. Having completed this step the monitoring mobile phone immediately received a service text message charged at £1.50. The user was immediately entered into the service without any reasonable form of age verification having been attempted.

It also submitted that the service continued to allow the user to use and engage in the virtual chat and at no time attempted to verify the age of the user.

The Executive submitted that the promotion had stated in very small terms and conditions 'Over 18' Only'. However, it was of the opinion that the Information Provider had not taken all reasonable steps to ensure that the participant in the virtual chat service was an authorised user and was not under the age of 18.

2. The Information Provider stated that the service in question had been promoted on an adult shortcode and the advertisement itself had stated that the services were for "Over 18s only". It stated that the advertisement had been published in "The Daily Sport" which was targeted at readers over eighteen years of age.

It also stated that non-age verified 'Vodafone' and '3' users were unable to text adult shortcodes. The text platform had contained an age verification flag to identify to the operators whether a system user was age verified, by way of a Mobile Network Operator look up, or had previously supplied their age or date of birth.

The Information Provider stated that an extensive training and monitoring regime had existed to ensure the quality, integrity and compliance of all text operators. It stated that each new operator had been given a copy of the operator's handbook and then trained off-line by a supervisor paying particular attention to matters of compliance. Operators passing the off-line training received further training and supervision on the on-line system; all operators were regularly monitored by the virtual chat supervisors to ensure all areas of compliance are being met.

The Information Provider further stated that the operator's handbook had been provided to all operators before their training commenced and the supervisor team had checked both verbally with the operators and by expecting the logs of the virtual chat services that all areas of compliance were being met. The handbook had been regularly updated to include any directives issued by PhonepayPlus. It stated that the management team responsible for live content provision had regular meets with the supervisor team to ensure compliance. It stated that operators that interacted with non AVS users were trained to request the user's age or date of birth at the commencement of the service.

The Information Provider made reference to the Executive's monitoring exercise. It stated that in the case of monitoring conducted by the Executive from the first monitoring phone, the chat system had identified the mobile number as adult verified from the '3' network. It stated that as such there had been no need to adopt further age verification. It stated that the chat logs indicated that the operator concerned had requested the customer's name and age in the second text message.

It stated that in the second time the service was monitored by the Executive, the chat system identified the mobile number as originating from the 'Orange' network. It stated that it acknowledged that the chat operator had not followed the proper procedure although the chat logs had indicated that the operator concerned had requested the customer's name and age in conversation.

The Information Provider stated that the Executive had implied that an operator asking a customer's age would be considered reasonable age verification. It stated that it was of the opinion that any participant would state that they were over 18 in any event and so such a request was, on the face of it, rather moot.

The Information Provider stated that it was of the opinion that the use of the appropriate adult shortcode in an advertisement, the statement of "Over 18s only" in the terms and conditions and the nature of the publication itself, could all be factors that were considered reasonable for an operator to assume that a participant was over 18 years of age and an authorised user.

It stated that whilst in this instance it acknowledged that the intended correct procedures had not been followed, however it was of the opinion that reasonable steps had been in place to ensure that users were over 18 years of age and authorised. It did not agree that a breach of paragraph 7.3.2a of the Code had occurred.

3. The Tribunal considered the evidence and concluded that the Executive's monitoring exercise demonstrated that the user's age had not been verified by the operator at the first opportunity and as such all reasonable steps had not been taken to ensure that the participant was an authorised user and over 18 years of age. The Tribunal upheld a breach of paragraph 7.3.2a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE VIRTUAL CHAT SERVICES (AGE VERIFICATION) (Paragraph 7.3.2d)

'In the case of text virtual chat services, the 'STOP' command must be available and consumers must be so informed before entering the service'.

1. The Executive submitted that on the 27 July 2010, it monitored a promotion for the 'Daily Sport 50+' service that had appeared in the Daily Sport newspaper on 25 and 26 July 2010 (Appendix A). The promotion for this Virtual SMS Chat service displayed the information 'FILTHY FIFTIES TXT GRA64 TO 89990' and this promotion had not informed nor made available any information regarding the 'STOP' command.

It submitted that it had monitored the service on two separate occasions and the service had not informed nor made available any information regarding the 'STOP' command.

The Executive stated that this paragraph of the Code required that the 'STOP' command be available and consumers be so informed before entering the service. It stated that the promotional material and the monitoring demonstrated that the service had failed to inform consumers of the 'STOP' command before service interaction commenced.

2. The Information Provider stated that the advertisement in question appeared in the Daily Sport on 25 and 26 July 2010 and its records showed that it had not appeared on 27 July 2010, as was first thought.

It stated that the advertisement had initially been designed without the text being included and as such there had been no need to include any relevant terms and conditions associated with text based services therein.

The Information Provider stated that when the final copy was submitted and sent to the publisher, it overlooked the fact that the standard terms and conditions for text had been omitted. It stated that this advertisement appeared incorrectly and without its standard terms and conditions associated with text promotions.

It stated that it considered that this incident had been a "one-off" event and not representative of the other advertisements promoting this shortcode.

The Information Provider stated that the advertisement had appeared on 25 July 2010 (Sunday). The error was noticed by its media department on 26 July 2010 and immediately removed. The advertisement did not appear on 27 July 2010 and a completely new advertisement replaced it on 28 July 2010. It stated that it acted as quickly as possible to correct the error.

The Information Provider stated that it acknowledged and accepted, for the reasons set out above, that there had been no 'STOP' command information contained in the advertisement due to a genuine error, but this had been corrected prior to the Executive's enquiry into this matter.

3. The Tribunal considered the evidence, including the Information Provider's admission of the breach, and concluded that the Executive's monitoring exercise demonstrated that neither the service or its promotion had informed consumers of the 'STOP' command before entering the service. The Tribunal upheld a breach of paragraph 7.3.2d of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The Information Provider's behaviour had been reckless with regard to its promotional material approval procedures.
- Non-compliant Virtual SMS Chat services have been singled out for criticism by PhonepayPlus following extensive notes to industry.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with PhonepayPlus.
- The Information Provider had offered refunds to users.
- The advert ran for a very short time and there had been no consumer complaints.

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

The Tribunal commented that although there had been extensive notes to industry in relation to Virtual SMS Chat services, the breaches had been relatively minor in nature and it accepted that on this occasion there had been an oversight on the part of the Information Provider.

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

The Tribunal commented that it was not minded to impose a fine and stated that in coming to this conclusion it had considered the following factors:

- The absence of consumer complaints
- The short time the promotion had appeared in the public domain
- The immediate steps taken by the Information Provider to address the breach and the measures put in place to prevent a similar problem in the future.

The Tribunal commented that any similar further breach would be considered seriously.

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;
- The Tribunal ordered the Information Provider to remedy the breach by seeking compliance advice in relation to this service and its promotion within two weeks from the date of publication of this adjudication, such advice to be implemented to the satisfaction of the Executive within two weeks of receipt.

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