

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 1 April 2010
TRIBUNAL SITTING No. 50/ CASE 2
CASE REFERENCE: 825293/AM/AB

Service provider:	Wireless Information Network Limited, High Wycombe
Information provider:	Blueprint Management Limited, London
Type of service:	WAP-based subscription service
Title:	wap.funafone.com
Service numbers:	81499 and 86069
Cost:	£1.50 per month
Network operator:	All Mobile Network Operators
Number of complainants:	15

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

BACKGROUND

PhonepayPlus Executive (the 'Executive') received 15 in relation to the services operating on shortcodes 81499 and 86069. The service was a WAP-based subscription service offering mobile phone content and was operated by Blueprint Management Limited (the Information Provider).

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:

"To download go to <http://wap.funafone.com/download?pin37508776> help: call 07971250030 or email info@blueprintmgt.com"

The Executive also identified issues in relation to the fairness of the service, pricing information, competition information and subscription initiation.

Promotion of the service

According to the Information Provider, Blueprint Management Limited ('Blueprint'), who responded to the Executive's investigation via the Service Provider, the service was promoted in the following ways:

Radio advertisement

There were two radio advertisements that both promoted a 'Beyonce' competition to win tickets to see her live in concert at the O2. Both radio advertisements were identical, except one required the listener to text their answer (a, b or c) to shortcode 81499 and the second one required the listener to text their answer to shortcode 86099. The radio advert transcript was as follows:

“Hey all the single ladies, all the single guys and even if you ain’t single do you want to win tickets to see beyonce live in concert at the O2 and hang out with the stars then all you have to do is answer the following questions. Who is Beyonce’s husband? a. P Diddy, b. Lil Wayne or c. Jay Zee. Text in your answer by texting 86069 [as stated in radio advert #1] 84199 [as stated in radio advert #2] a, b or c. Texts cost £1.50 to subscribe to this service text stop at any time to cancel your service for more info on terms and conditions visit www.blueprintmgt.com or call 08006446041 that 08006446041 or info@blueprintmgt.com.”

Flyers

There were two similar flyers. The first flyer was a competition-only flyer and was promoted by handing it out to attendees at concerts/live events. The competition promoted a prize of either £1000 cash or a holiday to Atlanta, which consumers could enter by answering a multiple choice question by texting a, b or c to 84199. The second flyer was similar to the first but had a tear-off strip at the bottom for the recipient’s contact details. Blueprint agents set up kiosks at live events and, in exchange for the recipient’s contact details, gave out various free samples such as CDs/drinks on behalf of companies promoting their products, such as ‘Rockstar’ (an energy drink). Consumers who wished to receive a free sample were required to provide their name and mobile number and consent to *“receive information about future promotions events and concerts”*. The Blueprint agent filled in the consumer’s details onto the tear-off slip and retained it. The remainder of the flyer promoted the same competition as the first flyer (the one without the tear-off slip). Examples of the competition flyers are at Appendix A.

Website

It appeared to the Executive that consumers could also enter the subscription service by entering their mobile number onto the website entitled ‘blueprintmgt.com’. The Executive was not aware of why a consumer would enter via this method, noting that the website did not make specific reference to a competition, but only stated ‘subscribe’ next to the mobile phone number entry field. The Information Provider had not provided detail of what text message would be received after entering a mobile phone number into the website.

The Service

Opt-In

The Information Provider stated that consumers who entered the competition promoted via the radio advertisement or flyer would initiate the service by texting a keyword to a specific shortcode. They would then receive a text message that confirmed something along the lines of their ‘subscription to blueprint services at £1.50 per month’. The remainder of the message would state information similar to ‘to unsubscribe from this service text STOP at any time. If you wish to take up this service please reply “OK”’. The Executive was not provided with the precise text of this message.

Consumers who entered the service by providing their name and mobile number to a Blueprint agent on the tear-off slip, when they obtained their free sample at the live venue, received the following text message: *“Do you want to win free flights to LA, nights in hotel and cash to spend? Please answer some simple questions and you could be on your way. Free “OK”*.”

Message logs

The Information Provider stated that consumers received the chargeable WAP messages costing £1.50 after texting ‘OK’. However, the message logs indicated that the first text message complainants received was the chargeable WAP message stating as follows:

“To download go to <http://wap.funtafone.com/download?pin37508776> help: call 07971250030 or email info@blueprintmgt.com”

The Executive noted that the message logs supplied demonstrated that the complainants did not send the required trigger word ‘OK’, but still received chargeable text messages.

Terms and Conditions

The Executive noted that the flyers and radio advertisement referred the user to the terms and conditions on the website ‘blueprintmgt.com’. However, the Executive stated that, having viewed the terms and conditions, there appeared to be no reference to the competitions and the pricing regarding the subscription service was vague, with no specific pricing information provided.

The Investigation

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

The Executive issued a breach letter to the Service Provider dated 19 January 2010. The Executive noted that undertaking forms had been signed by both the Service Provider and the Information Provider. However, the Service Provider subsequently requested that the case should be heard against it, as opposed to the Information Provider. However, the formal response to the Executive’s breach letter was from the Information Provider.

The Tribunal made a decision on the breaches raised by the Executive on 1 April 2010, having heard a joint Informal Representation from the Service Provider and the Information 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 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the ‘Regulations’), it is an offence to transmit, or instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or (b) where a valid address to which the recipient of the communication may send a request that such communications cease, has not been provided.

The Executive submitted that the Information Provider had stated that users were entered into the service in the following ways:

- i. The service was promoted by text message whereby users received a text message stating: *“Do you want to win free flights to LA, nights in hotel and cash to spend. Please answer some simple questions and you could be on your way. Press “OK”.*
- ii. Flyers were distributed at live music and concert events and the names and mobile phone numbers of customers were taken at these events, asking customers for their consent to send marketing and promotional material for future events.
- iii. Customers opted in by texting shortcode 81499 or 86099. Customers then received a text message confirming subscription to ‘blueprint services at £1.50 per month’. The text further stated that to unsubscribe from this service text “STOP” at any time. If you wish to take up this service please reply “OK”.

The Executive submitted that all 15 complainants stated that the text message(s) they received were unsolicited and that the first they had heard of this service was by receipt of a chargeable text message containing a WAP-link from shortcode 84199 costing £1.50. The Executive submitted that none of the message logs indicated; that the complainants had received the promotional text message (as set out in point (i) of the Executive’s submissions), that complainants had texted in a code with keyword 81499 or 86099, that complainants had received the subscription message or that complainants had entered “OK”. The Executive submitted that it was of the opinion that the message logs did not substantiate that these complainants had opted into the service via the website and, therefore, the first they would have heard of the service would have been via receipt of this free WAP-push promotional text message.

2. The Information Provider stated that all customers’ details, including mobile phone numbers, were manually entered into its systems and it believed that errors during the inputting of the mobile phone numbers had occurred. It stated that customers had been fully aware that they were opting into a service that was a subscription competition service that provided music downloads.
3. The Tribunal considered the evidence and accepted the complainants’ evidence that they had received unsolicited reverse-billed text messages in circumstances that contravened paragraph 23 of the Regulations. It followed that there had been a breach of paragraph 5.2 of the Code. The Tribunal therefore upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
FAIRNESS (UNFAIR ADVANTAGE) (Paragraph 5.4.1b)**

*“Services and promotional material must not:
b take unfair advantage of any characteristics or circumstances which may make consumers vulnerable.”*

1. The Executive submitted that all complainants asserted that a £1.50 charge had been reverse-billed from their mobile phone, without their prior consent.

The Executive submitted that some consumers' mobile phone numbers were used without their direct or implied consent, and had been used to charge a fee for a service that they had never agreed, either directly or indirectly, to receive. Consequently, the Executive submitted that consumers were made vulnerable by virtue of the fact that their details were held by the Service Provider or Information Provider that had the facility to charge them at will using reverse-billed text messages.

2. The Information Provider stated that the terms and conditions were clear, and had been present on the website during the months of August, September and October 2009. It stated that the promotional flyers that were given out during campaigns had stated pricing and web information in relation to the terms and conditions. It stated that customers had signed up to service by filling in their information onto the flyer (receiving their free product) and it was at this point that all cost and charges were made clear to them.
3. The Tribunal considered the evidence and found that the Information Provider had taken unfair advantage of its ability to bill consumers who had not previously interacted with the service or subscribed. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
PRICING INFORMATION (PROMINENCE) (Paragraph 5.7.2)**

“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible”

1. The Executive made reference to the flyers at Appendix A and noted that the pricing on Flyer 1 had been clearly presented. In relation to Flyer 2, the Executive submitted that the tear-off slip had taken the space where the pricing was displayed in Flyer 1 and the pricing information was not sufficiently legible.

The Executive submitted that the tear-off strip in relation to Flyer 2 had rendered the pricing information no longer prominent and had required close examination.

2. The Information Provider stated that it felt that the Executive's submissions were subjective and personal as it had not received any complaints indicating that consumers could not read the pricing information on the flyers. It stated that its terms and conditions had been very clear and had not misled anyone.
3. The Tribunal considered the evidence, including the examples of the flyers at Appendix A. It noted that the pricing information of Flyer 2 was in a smaller font to the adjacent text and concluded that it was not easily legible or prominent. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH FOUR
COMPETITIONS (PROMOTIONAL MATERIAL) (Paragraph 7.6.3a-b)**

“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 restriction on the number of entries or prizes which may be won,*
- b. an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restriction on their availability or use.”*

1. The Executive submitted that the flyers had offered users the chance to win a holiday to Atlanta and £1000 cash prize by answering one question. The Executive submitted that prizes such as holidays and cash prizes would have certain terms and conditions, including restrictions that were likely to affect a user's decision to participate. The Executive noted that the promotional material provided a brief description of the prizes on offer *“£1000 cash Prize! Holiday to Atlanta. Enter our competition for your chance to win a £1000 cash prize or a holiday to Atlanta”* but contained no key and terms conditions or adequate description of the prizes. Furthermore, although the flyer referred the user to the Information Provider's website for *“more info, cash prizes and music content”*, the Executive submitted that it had found that the terms and conditions did not mention any detail about the competition or prizes. The Executive submitted that, due to the lack of information on the prizes, it had contacted the Information Provider to provide further details about the prizes. It submitted that the Information Provider confirmed the following information:

For the holiday to Atlanta:

- i. The deadline for entry was 31st October 2009;
- ii. Was for two persons only;
- iii. Entrants must be aged 18 or over;
- iv. The holiday included flights, accommodation and airport taxes;
- v. The holiday was an all-inclusive package, which excluded charges such as the mini bar;
- vi. Spending money was not included.

For the cash prize:

- i. Deadline for entry to this competition is November 2009.

The Executive submitted that it was of the opinion that the above detail in relation to the prizes on offer was key information that was likely to have affected a consumer's decision to enter the competition. It submitted that the prizes had terms and conditions, including restrictions, that would have been factors likely to affect a consumer's decision to enter either of the competitions.

2. The Information Provider stated that, once again, it felt that it was unreasonable to expect the inclusion of all the information submitted by the Executive as its promotional flyers had been small and it would not have been able to fit this

information. It stated that it had now had significant additional marketing and compliance support and would be using different means to get this information across to consumers.

3. The Tribunal considered the evidence, including the examples of the flyers at Appendix A. It concluded that the promotional material had not clearly stated all the information that was likely to affect a consumer's decision to participate in the competition. It considered that the deadline for entry, the number of people who could attend holiday and the age restriction would all have affected a consumer's decision to participate, and these details were not included on the flyers. The Tribunal found that the lack of information related both to key terms and conditions and an adequate description of the prizes. The Tribunal upheld a breach of paragraph 7.6.3 (a-b).

Decision: UPHELD

ALLEGED BREACH FIVE SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)

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

- a. name of 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 the message logs demonstrated that the first text message received by complainants was a WAP-push message that read as follows:

"To download go to <http://wap.funtafone.com/download?pin37508776> help: call 07971250030 or email info@blueprintmgt.com"; or:

"To download go to <http://wap.funtafone.com/download?pin37508776> help: call 08006446041 or email info@blueprintmgt.com"

The Executive submitted that the fact that these messages were charged at £1.50 and were both subscription text messages demonstrated that complainants did not receive a free initial subscription text message containing the details, as required by the Code.

2. The Information Provider stated that the free initiation text messages had been sent, but that the manual entry of mobile phone numbers into its system had caused the wrong numbers to be sent service text messages and not the numbers that had received the initial promotional text message.

3. The Tribunal considered the evidence and concluded that, in respect of those

consumers who had received an unsolicited text message, there had been no initial subscription text message, as required by the Code. The Tribunal upheld a breach of paragraph 7.12.4 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 Information Provider was reckless in its operation of the service;
- Concealed subscription services have been singled out for criticism by PhonepayPlus;
- The breach history of the Service Provider.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive's investigation;
- The Information Provider offered refunds to five of the complainants.

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

Having taken into account the aggravating and 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;
- Fine of £3,500
- The Tribunal imposed a bar on the Service Provider providing any services to this Information Provider without having taken and implemented compliance advice to the satisfaction of the Executive.
- The Tribunal also ordered that claims for refunds are to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

Appendix A – Examples of the flyer promotion

Flyer 1

**£1000 Cash Prize!
Holiday to Atlanta!**

Enter our competition for your chance to win a £1000 Cash Prize or a holiday to Atlanta, in association with I LUV LIVE Promotions!

Answer the following question to enter our competition and you will also receive a free wallpaper, ring tone or screen saver for your phone!

What is the name of Beyonce's husband?

a. P Diddy
b. Jay Z
c. Lil Wayne

Please TXT your answer to 84199
Costs £1.50 per month to subscribe to this service, you can unsubscribe at any time by texting STOP to 84199

Blueprint Management
Tel: 0800 644 6041
Fax: 0800 644 6041
Mobile Marketing Solutions
for more info, cash prizes and music content please visit
www.blueprintmgt.com for files

Flyer 2

Join us at NOTTINGHILL
CARNIVAL BANK HOLIDAY
Monday 2009 @RINSE FM
stage 100.4 FM all day

£1000 Cash Prize! Holiday to Atlanta!

Enter our competition for your chance to win
a £1000 Cash Prize or a holiday to Atlanta, in
association with I LUV LIVE Promotions!

Answer the following question to
enter our competition and you will also
receive a free wallpaper, ring tone
or screen saver for your phone!

What is the name of Beyonce's husband?

- a. P Diddy
- b. Jay Z
- c. Lil Wayne

Please TXT your answer to 84199
Costs £1.50 per month to subscribe to this service, you can
unsubscribe at any time by sending STOP to 84199

blueprint mgt txt / marketing and promotions services

name _____

mobile _____

If you wish to receive information about
future promotions, events and concerts
tick this box.

Blueprint Management

Tel: 0800 644 6041

Fax: 0800 644 6041

Mobile Marketing Solutions

for more info / cash prizes and music
content please visit

www.blueprintmgt.com for files

