

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 21 January 2010  
TRIBUNAL SITTING No. 45/ CASE 3  
CASE REFERENCE: 811356/AB

Service provider:	Zamano Limited, London
Information provider:	Enicson Limited, Germany
Type of service:	Subscription/Mobile games club
Title:	gstore.tv, veage.com and playminal.com
Service numbers:	88788
Cost:	£3 per week
Network operator:	All Mobile Network Operators
Number of complainants:	8

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

### BACKGROUND

The Executive received eight complaints from members of the public in relation to this subscription mobile content service operating under the shortcode 88788. All eight complainants stated that the first they had heard of this service was upon receipt of unsolicited text message(s) and, in some cases, had been charged £3 per week for a service to which they had not subscribed. The services were stopped by the Service Provider prior to the Executive raising the alleged breaches on 6 November 2010.

### 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 on 6 November 2009, raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.7.2, 7.12.2, 7.12.5 and 7.12.6a of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code'). The Executive received a formal response from the Service Provider, having been informed that the Information Provider had failed to sign the Information Provider undertaking form.

The Tribunal made a decision on the breaches raised by the Executive on 21 January 2009, having heard Informal Representations 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 or service to that now being promoted 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 the 'soft opt-in').

The Executive made reference to consumer complaints and submitted that all eight of the complainants had stated that the text message(s) received had been unsolicited, and that the first they had heard of this service was by receipt of a text message from shortcode 88788. The Executive submitted that it was possible for a user of these websites to enter any mobile phone number and, therefore, considered that, if another user's mobile phone number was entered into the website, the alternative recipient would first be made aware of this service via promotional text message. The Executive submitted that, in this scenario, the text message received by these complainants would have been unsolicited.

2. The Service Provider stated that all the websites had contained full disclaimers, and links to the terms and conditions of the services. In this regard, the Information Provider had followed popular business practice, and the Service Provider considered that it had been operating within the law and the Code. It acknowledged that there might have been problems, as stated by the Executive, but submitted that there had been no intention for the promotion to result in unsolicited text messages. The Information Provider considered the complaints may have been made by users who were dissatisfied with a product and who had then denied ever having requested it.
3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the seven active complainants in relation to this shortcode had each received a promotional text message that had not been solicited. The first that they had heard of the service was via the 'Claim' promotional text message. The Tribunal noted that the Information Provider had supplied artwork of its alleged website, through which the complainants were alleged to have subscribed, but had not supplied relevant screenshots, which was considered as evidence against there having been such a method of web-entry. The Tribunal upheld a breach of paragraph 5.2 of the Code.

## **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 noted that the initial free promotional text message received by the complainants stated as follows:

*"FreeMsg: 500 Top-Up Store Credits were issued to you. Text: CLAIM to 88788. MobileGames www.gstore.tv Subscription3gbp/week stop?Txt stop CS08445564810 WapApply"*

The Executive noted the complainants' message logs supplied by the Service Provider/Information Provider and submitted that, even though two of the complainants had not responded to the text message with the trigger word 'CLAIM', they had been entered into the subscription service whereby they received chargeable text messages. The Executive submitted that those complainants who did respond to the free text message with the trigger word 'CLAIM' were misled into doing so because they believed the message was from their network operator offering them free texts. It argued that this was evidenced by comments, such as:

*"The complainant has been charged £10 on his PAYG mobile and £5 from his Contract mobile for receiving texts from the shortcode 88788 which they do not believe they have requested. The complainant recalls receiving texts which he thought was from O2 offering Free texts so the complainant responded".*

The Executive submitted that these complainants had not understood the nature of the service.

2. The Service Provider stated that it had operated under the impression that any text message being sent to the shortcode would qualify as a valid opt-in, as long as it didn't state otherwise and was related to the service. It stated that it expected text messages to be either positive initiation requests, or 'STOP' commands. In the given example, however, the sign ups occurred in error and it had agreed to refund these users without hesitation once the error became known. It stated that the Information Provider had been a new company at the time and, although it had designed its technical architecture with great care, teething problems were always to be expected with new applications. It stated that it was of the opinion that the best a company could do was to keep monitoring, and react to customer complaints fast and without hesitation. It stated that it believed the Information Provider had done both.
3. The Tribunal considered the evidence, and concluded that consumers had been confused and misled into using the service by the wording of the text message. The use of the word 'credits' had misled consumers into thinking that the text message was from their network operator, and complainants had not associated the text message with a premium rate service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE 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 noted that the initial first free promotional text message received by the complainants stated the following:

*"FreeMsg: 500 Top-Up Store Credits were issued to you. Text: CLAIM to 88788. MobileGames gstore.tv Subscription3gbp/week stop?Txt stop CS08445564810 WapApply"*

The Executive noted that the above text message stated that the cost of the service was £3 per week. It referred to several message logs that demonstrated that these complainants had received two chargeable text messages in one week and,

therefore, had incurred a cost of £6 in one week, as opposed to £3. The Executive noted that pricing within the text message was worded as “...Subscription3gbp/week...”. The Executive submitted that, in addition to the inconsistency in the cost incurred by some users and the charge stated in the text message, the pricing information was not clear or straightforward.

2. The Service Provider stated that all customers would have visited one of the Information Provider’s service websites and that each website included the pricing information at various locations, all easily visible and not obscured.

It stated that it felt that the text messages had to be seen in this context. The Information Provider had been aware of the requirements of pricing information within the text message and had thought that the above text message was compliant. It stated that there had been no attempt to conceal the price, and the format was chosen due to technical limitations and text message length requirements.

It stated that it should be noted that the word ‘subscription’ was not abbreviated, and the term ‘GBP’ was a widely used and accepted format for ‘£’ sterling.

It also stated that, as all users had previously entered their mobile phone number on one of its websites, the consumer would have been aware of the price. The Service Provider asked the Tribunal to note that the time in between the mobile number being entered into the website and the sending of the text message was very short.

The Service Provider stated that the service had been designed not to penalise people for failing to pay their membership fees - such as blocking or deducting points from the account. The service did, however, attempt to repeat a billing event one time after a failure. Assuming a user signed up on any given Thursday, the Service Provider stated that they would be billed in time periods starting and ending on a Thursday.

It stated that the user might receive his next regular billed text message on the Thursday of the week after and that the period in between charges might possibly not equal seven days, although effectively consumers were still billed once a week.

3. The Tribunal considered the evidence and concluded that, in relation to the complainants who had received unsolicited promotions, the use of ‘GBP’ in the context of the text message did not inform consumers clearly or straightforwardly of the cost of using the service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR  
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 one complainant’s clear account of receiving the free text message, an extract of which reads as follows:

*“...The cost and subscription based service is included but at the back end of the message requiring the recipient on this handset to have to scroll down to see pricing.”*

The Executive submitted that it was of the opinion that this particular user had needed to scroll down in the text message in order to view the pricing information. The Executive stated that, if this text message was unsolicited, it was of the opinion that the pricing information was not prominent within the first free promotional text message received.

2. The Service Provider stated that all users had visited one of its websites and had entered their number and, as such, they would have been aware of the pricing information, which was easily accessible on the websites. It stated that the Information Provider did not agree that the price was concealed within the text message and on most modern phones the pricing would have been visible without scrolling, and this had been the case in its tests. It stated that there had been no attempt to add line breaks or further spaces, and it asked the Tribunal to note that the pricing was not at the end of the text message, rather within the last third. It believed that close inspection was not required as all customers were already aware of the nature of the service at the time they received the text message.
3. The Tribunal considered the evidence and noted that it had already found that the text messages in relation to the complainants had been unsolicited. In relation to the alleged breach, the Tribunal accepted that the complainant in question had had to scroll down in order to view the pricing information. It followed that to see this information had required close examination on the part of the complainant. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FIVE**

##### **‘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 made reference to the message logs provided by the Service Provider/Information Provider, representing all the complainants who had given disclosure permission. It submitted that the message logs demonstrated that some complainants had sent the command ‘STOP’ to shortcode 88788, but were unable to leave the subscription service:
2. The Service Provider stated that there was a technical difference between sending a text message and the same text message being delivered to the customer handset. It stated that the sending of a message was an action in its hands, but that message delivery was in the hands of the customer’s network operator. It argued that, after a message is sent, it lost any power to control the delivery. It stated that, in the above cases, all the text messages received by the customers were sent prior to them sending the ‘STOP’ command. It also stated that the information about "delivery" of the text messages had been provided voluntarily. It stated that it had not attempted to bill the customer after they sent in the ‘STOP’ command.

The Service Provider stated that it was unable to cancel text messages that were pending to be delivered, where customers on a pay-as-you-go contract might run out of credit and then text in to ‘STOP’ the service; when they top up their phones, they

are sent any text messages that the networks had queued. It stated that, as far as it was aware, no network operator had suggested to its clients that they could ask for message cancellation and, for these reasons, it did not believe a breach of the Code had occurred.

3. The Tribunal considered the evidence and concluded that, on the wording of the Code, it had been possible for users on the occasions cited by the Executive to leave the service by using the 'STOP' command. The Tribunal did not uphold a breach of paragraph 7.12.2 of the Code.

**Decision: NOT UPHELD**

**ALLEGED BREACH SIX  
SUBSCRIPTION REMINDERS (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 noted the message logs provided by the Service Provider/Information Provider, relating to each of the complainants who had given disclosure permission. It submitted that one message log demonstrated that a complainant had received eight text messages between 11 May and 30 June 2009 at a cost of £3 per text message – a total cost of £24. It submitted that, during this period, the complainant did not receive a free reminder text message, as required by the Code.
2. The Service Provider stated that the service was set up to send out reminders once a month. These reminders were billed text messages that replaced regular billed text messages and, therefore, came with no additional cost to the user. It stated that, for this reason, it did not believe a breach of the Code had occurred.
3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the complainant in question did not receive the subscription reminder text message after one month of subscribing to the service. The Tribunal upheld a breach of paragraph 7.12.5 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH SEVEN  
SUBSCRIPTION TERMINATION (Paragraph 7.12.6a)**

*"a After a user has sent a 'STOP' command to a service, the service provider must make no further charge for messages."*

1. The Executive noted the message logs provided by the Service Provider/Information Provider, relating to each of the complainants who had given disclosure permission. It submitted that the message logs demonstrated that some complainants had sent the command 'STOP' to shortcode 88788, but continued to receive further chargeable text messages.
2. The Service Provider referred to its response in relation to alleged breach of paragraph 7.12.2 of the Code. It stated that, in the cases cited by the Executive, it did not make any further charges after the users had sent in the 'STOP' command; however, billed text messages that had already been issued to the network operators were delivered after the 'STOP' command had been sent.

3. The Tribunal considered the evidence and concluded that the message logs showed that the complainants in question had received chargeable text messages after sending the 'STOP' command to the service shortcode. The Tribunal upheld a breach of paragraph 7.12.6a 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 wilful in relation to the use of text messages that were of an unsolicited, and generally misleading, nature and with an unclear pricing rhetoric.
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

The Tribunal noted the Service Provider's breach history and noted that it had much improved since 2008.

In mitigation, the Tribunal noted the following factors:

- The Service Provider did carry out a due diligence exercise on the Information Provider; however it had failed to correctly assess the risk.
- The Service Provider co-operated with the Executive's investigation.
- The Service Provider asserted that it had made refunds.

The revenue in relation to this service was in the mid range of Band 5 (£5,000-£50,000). 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;
- A £15,000 fine;
- 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.