

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 7 January 2009
TRIBUNAL SITTING No. 44/ CASE 4
CASE REFERENCE: 826856/AM

Information provider:	TxtNation Ltd, London
Service provider:	MX Telecom, London
Type of service:	£10 reverse-billed service
Service title:	Unknown
Service numbers:	60999 and 79555 (and other shortcodes)
Cost:	£10 per reverse-billed text message
Network operator:	All Mobile Network Operators
Number of complainants:	12

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

BACKGROUND

PhonepayPlus received a complaint from the operator of the website Gumtree.com, stating that eight of its customers had received an unsolicited email or text message after having posted an advert on Gumtree.com. A further four complaints of a similar nature were received from members of the public.

The complainants mainly noted that both the email and text messages had the appearance of having been sent by Gumtree.com, and required the recipients to verify their posted Gumtree.com advertisement by texting a ten-digit keyword to shortcode 60999 within 24 hours, or else have their advertisement removed. On sending a text message with the keyword, users received a reverse-billed text, written in English or Russian, incurring a £10 charge. The pricing in the promotional email was presented as *"00.1 GBP (incl. VAT)"*. The promotional text message contained no pricing.

(i) The Investigation

The Executive conducted this matter as an Emergency Procedure investigation in accordance with paragraph 8.6 of the Code.

Following the Executive's monitoring, it contacted the Service Provider by email dated 20 November 2009 and requested that the service be switched off. The Executive issued a breach letter to the Service Provider, raising potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1 and 5.8 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Executive accepted a signed undertaking and re-issued the breach letter to the Information Provider on 10 December 2009. A formal response was subsequently received from the Information Provider.

The Tribunal made a decision on the breaches raised by the Executive on 7 January 2009

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’).

It submitted that consumers had received the promotional email or text message after having posted an advert on gumtree.com. The message appeared to have been sent by Gumtree.com, when actually it was promoting a premium rate service. The Executive submitted that it considered that the promotional email and text message received by Gumtree.com customers, after they had posted their advert on the website, as direct marketing electronic mail for the purposes of the Regulations. The Executive submitted that it was of the opinion that the promotional email sent to complainants had been unsolicited since it appeared that recipients had not consented, either directly or indirectly, to the receipt of any promotion for this service.

2. The Information Provider stated that the message had been an unauthorised publication that had misused its shortcode. It stated that it had resold the shortcode to one of its clients, Agregator Ltd, which had, in turn, permitted its use by a number of services over which only Agregator Ltd had direct day-to-day control. The Information Provider stated that it was devastated on a personal and corporate level at the affect on consumers by the non-compliant use of its services by a third party.
3. The Tribunal considered the evidence and concluded that the promotional message received by complainants, either by text message or email, was direct marketing for the purposes of the Regulations. It also found that, the promotional message was unsolicited and, as such, was in contravention of the Regulations, it followed that there had been a breach of the Code. 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 submitted that all of the users that had complained to Gumtree.com had received the promotional email or text message after they had placed their advertisement on its website. The Executive made reference to the promotional email received by Gumtree.com customers and noted that:

- i. The sender details had appeared in the inbox as “From Gumtree (gumtree@gumtree.com)” / “Gumtree security”; recipients were also addressed as “Dear Gumtree Client” and specific reference was made to the recipient’s Gumtree.com advert within the body of the message making it appear as though the message had been sent to the recipients by Gumtree.com in response to their posted advert.
- ii. The purported consequence of not texting the keyword to shortcode 60999, as set out in the message, read as follows: “If you will not confirm it in max 24 h we will remove the ad and contact the authorities about an illegal ad”; this compelled the recipients to act upon the message within a set time limit.
- iii. The pricing information was documented as “The message will cost you 0.01 GBP (incl. VAT)”, inferring that texting the keyword to the shortcode 60999 would incur a nominal charge of 1p.

The offending text message received by Gumtree.com customers began with the words “Gumtree.com...”, making it appear that the text message was sent by Gumtree.com; it also contained no pricing information.

The Executive submitted that the promotional email failed to inform recipients that it was a promotion for a premium rate service and as such those recipients who did respond to this message with the ten digit keyword to shortcode 60999 were misled into doing so as they believed that the message was from Gumtree and that they were required to verify their posted Gumtree advert at a cost of 1p. It submitted that complainants had believed that the penalty for not responding to the message within 24 hours would be removal of their posted advertisement.

The Executive made reference to a number of Gumtree.com consumers who responded to the promotional message and lodged a complaint with Gumtree.com and PhonepayPlus. They included the following comments:

- *“I posted an ad on Gumtree and immediately got a text message asking me to confirm my account. I honestly thought the message was from Gumtree confirming my account as i had just posted an advert with them and thought it was probably to prevent crooks placing ads. I responded to confirm the 10 digit number. I contacted Gumtree and they said it wasn’t from them and found i had been charged £10. I feel like a mug for falling for it”*
 - *“The email this message came from was gumtree@gumtree.co.uk after i sent the text i got a message back completely unrelated sent back to me saying... & quote thank you for your purchase.....hence why i am worried please get back to me asap regarding this”*
 - *“I have received a text message to text 60999. I Did then realised it could be a scam. You [gumtree] really need to rethink your security plans”*
2. The Information Provider stated that at no stage was it complicit in facilitating the £10 reverse-billed service. It stated that it had had no knowledge of the use being made of the shortcode after its allocation to Agregator Ltd and thanked PhonepayPlus for bringing this matter to its attention (via the Service Provider). It stated that it may not otherwise have discovered the activity given the discreet, subversive, and low-key manner of the breach.

3. The Tribunal considered the evidence and concluded that consumers had been misled as to the origins of the promotional messages (whether by text message or email) that gave the misleading appearance of having been sent by Gumtree.com. Consumers were also misled as to the consequences of responding to the promotional message, thinking that they were fulfilling a requirement stipulated by Gumtree.com when, in fact, they were engaging with a shortcode that would result in them incurring a charge. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE GENERAL PRICING PROVISION (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 the pricing in the promotional email received by the recipients read as follows *“The message will cost you 0.01 GBP (incl. VAT)”*, and that the promotional text consumers received had contained no pricing information.

The Executive submitted that it was of the opinion that those consumers who had received the email or text message were not fully informed, clearly and straightforwardly, of the cost of using the service prior to incurring any charge (in this case, a charge of £10).

2. The Information Provider stated that the texts and emails were sent without its consent. It stated that all the services that were launched through its platform should have gone through the service approval channels with its support team in the first instance. It stated that, from initial set up via its Client Setup Request Form (CSRF), to ongoing support from dedicated account managers and its experienced support team, the consumers of premium services in the United Kingdom were appropriately served and protected. It stated that it had had no visibility on the activation, nor on the ongoing behaviour of this service, including the lack of pricing information.
3. The Tribunal considered the evidence and concluded that the pricing information in the email had not been clear or straightforward, and had indicated the incorrect charge of 1p. The Tribunal also found that the text message had contained no pricing information. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR CONTACT INFORMATION (Paragraph 5.8)

“For any promotion, the identity and contact details in the UK of either the Service Provider 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 previously been taken to bring it to the attention of the user or it is otherwise and easily available to the user.”

1. The Executive submitted that the promotional email and text message received by Gumtree.com customers had not contained the identity of the Information Provider or

Service Provider, or the customer service phone number, as required under paragraph 3.3.5 of the Code; this was aggravated by the fact that both the promotional email and text messages had been given the appearance of being sent by Gumtree.com.

The Executive also submitted that the £10 chargeable service text message that consumers received had not contained the identity and contact details of the Service Provider or the Information Provider.

2. The Information Provider stated that all its clients were handled, from initial inquiry through to sale and ongoing support, by a dedicated account manager, and were made aware of its terms and the existence of the PhonepayPlus Code of Practice (where a service is provided in, or from, the UK). It stated that clients must ensure that adherence to its terms and the Code cascade down to assignees or other parties, and must have each service approved for public use by the Information Provider's support team.
3. The Tribunal considered the evidence and concluded that consumers who had received the promotional text message or email had not received the identity of the Service Provider or the Information Provider. The Tribunal also found that the chargeable service text message had not contained any identity or contact details. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The service was valueless to consumers – consumers received nothing of value in return for the £10 charge.
- The behaviour of the Information Provider was grossly negligent in its failure to systematically monitor its client in the months preceding the breaches.
- There was material consumer harm in that the service undermines public confidence in premium rate services.
- The cost paid by individuals was high in the context of a £10 charge for an error message of no value.

In mitigation, the Tribunal noted the following factors:

- The Tribunal noted that, although the breaches had been caused by a third party, the Information Provider had a high duty of care, having regard to a previous incident that year involving Agregator Ltd and its knowledge of a '£10 error message'.
- The Information Provider asserted that it had made refunds.

The revenue in relation to this service was in the lower 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 **very 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 Information Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.