

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Thursday 3 MARCH 2011 TRIBUNAL SITTING No. 72/ CASE 1
CASE REFERENCE: 853479**

Service provider:	Ericsson IPX AB, Sweden
Information provider:	Muzicall Limited, London
Type of service:	Charity and donations
Service title:	'BBC Children in Need'
Service number:	88188
Cost:	£2.50 one-off charge
Network Operator:	Orange, Virgin Mobile, Three
Number of complainants:	1

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

BACKGROUND

PhonepayPlus received one complaint in relation to the charity and donation service operating on shortcode 88188. On texting the service, consumers were charged a one-off fee of £2.50 to donate to the charity.

The complainant stated that the first he had heard about the service was on receipt of an unsolicited text message.

Upon investigating the service further, the Executive was concerned that the promotion was unsolicited, that the text message did not contain sufficient contact information and that the promotional material did not make consumers sufficiently aware of how much of the £2.50 cost of the text message was going to the charity.

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 1 February 2011.

The Service Provider provided signed Information Provider undertaking forms, which were received by the Executive on 3 February 2011. The Executive accepted the Information Provider pass-through in an email dated 16 February 2011.

The Tribunal made a decision on the breaches raised by the Executive on 3 March 2011.

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 any-thing 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 PECR 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 submitted that the complainant had stated that the first that he heard of this service had been on the receipt of an unsolicited promotional text message that read as follows:

"Free Msg: Support BBC Children in Need appeal for £2.50 with a message to your callers! Cost will be donated to the appeal. Simply reply CHILD to this message"

The complainant was unsure as to how the Information Provider had obtained his mobile phone number. The Executive made reference to the Information Provider's response to the complaint and quoted as follows:

"...Muzicall intended to send a marketing message promoting our charity campaign for BBC Children in Need, where all proceeds go to the charity as per the terms on the WAP portal and website [sic] ringtagz.co.uk. Unfortunately instead of sending this message to our existing Ringtagz subscribers, the wrong list was selected which meant the message went to consumers that have in the past interacted with Ringtagz but are not currently subscribers. The number of messages sent to the wrong database totals just over 250 000 users. Consumers were not charged for receiving this message and we are capturing all STOP responses to this short code.

"Your MSISDN (mobile no.) was unfortunately in this base, as your number appeared in our records since you have visited the Ringtagz WAP portal 7 times in the past. The last visit was on the 1st of October 2010

"Typically our marketing messages are sent directly from our Operator Partners (Orange, 3 and Virgin) as per their normal base marketing controls, this was the first time we ran a cross operator campaign and therefore sent the message from our own short code 88188

"All future SMS campaigns to existing customers will go through an extra validation process prior to executing the campaign to ensure this does not happen again..."

The Executive submitted that the Information Provider stated that it had promoted the 'BBC Children in Need' campaign to the wrong mailing list and, therefore, the message received by the 250,000 recipients would have been unsolicited.

2. The Information Provider stated that it understood the concerns raised by the Executive and that it wished to reiterate that the primary cause for concern had been due to a genuine technical error which had caused free text messages to have been sent to certain recipients who had not formally opted into receiving promotions in relation to commercial services. It stated that it had not been in its commercial interests to send such a text message as it had incurred costs in doing so.

Furthermore, due to the charitable nature of the campaign, it had had nothing to gain commercially from the text messages that had been sent.

The Information Provider stated that it had admitted the issues at a very early stage to both the Network Operators and PhonepayPlus, and it had sought to resolve this particular issue as quickly as possible.

3. The Tribunal considered the evidence and noted the Information Provider's admittance of the breach. It concluded that there had been no consent, by way of hard or soft opt-in, on the part of the consumer, in contravention of the PECR Regulations. The Tribunal upheld a 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 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 obvious and easily available to the user."

1. The Executive submitted that the complainant stated that he had received the following promotional text message:

"Free Msg: Support BBC Children in Need appeal for £2.50 with a message to your callers! Cost will be donated to the appeal. Simply reply CHILD to this message"

It submitted that the promotional text message had stated 'BBC Children in Need'; however, this had not been the identity of the Service Provider or the Information Provider relating to this service. Furthermore, the promotional text message had failed to contain a customer service phone number, as required by the Code.

2. The Information Provider stated that the promotion had been via a free text message and referred to a well-known charity, with online payment mechanisms that were supported by the Network Operators. It stated that, in light of this, the source of the text messages would have been implicit in the communication.

It stated that the objective had been to send text messages to parties who had opted in via the 'Ringtagz' service that was normally associated with shortcode 88188 and such recipients would associate the fact that they had received the text message with their opt-in to receiving the Information Provider's text messages. It stated that this had not been what happened, due to the error in database handling that it had acknowledged.

3. The Tribunal considered the evidence, including the Information Provider's acknowledgement of the database error. It concluded that the promotional text message had not contained the contact details of the Service Provider or the Information Provider and that such information was not otherwise obvious. It also found that the promotion had not contained a customer service contact number. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

FUNDRAISING AND CHARITABLE PROMOTIONS (BENEFICIARY) (Paragraph 7.9(a))

“Service providers should be aware that the scope of such services is limited by legislation relating to charities.

The promotional material for fundraising (whether or not for charitable purposes) and charitable promotions must make clear:

a. either the total sum per call or the amount per minute which will be paid to the beneficiary,”

1. The Executive made reference to the free promotional text message sent from shortcode 88188 that had read as follows:

“Free Msg: Support BBC Children in Need appeal for £2.50 with a message to your callers! Cost will be donated to the appeal. Simply reply CHILD to this message”

It submitted that the instructions within the text message suggested that, if recipients wanted to donate to the charity, they were required to send the keyword ‘CHILD’ to the 88188 shortcode. The Executive made reference to the Mobile Data Association (‘MDA’) announcement regarding VAT being waived on charity text message donations operating on specific shortcodes (dated 27 July 2009). It quoted as follows:

“...The move means charitable donations sent to a dedicated short code will have the VAT waived for registered charities... Central to the new framework is an allocation of a dedicated range of numeric Short Codes to be used for charity donations only. Any five-digit SMS Text Message Short Code beginning with the number 7 (seven) is now automatically considered a charity code which can be allocated to charities eligible under the rules of Her Majesty’s Revenue and Customs...”

The Executive submitted that the Information Provider’s service had been promoted on a shortcode with the prefix ‘8’, as opposed to the required ‘7’, and, therefore, of the £2.50 donated by consumers to the charity, approximately 43 pence of VAT would have been deducted. In light of this, the Executive submitted that a user who received the text message and made a donation would not have been informed of the total sum that would actually have been paid to the beneficiary (in this case the charity), as the promotional text message had not made this information clear, as required by paragraph 7.9(a) of the Code

2. The Information Provider stated that the 88188 shortcode had not been the mechanism used for billing, but had been used as the address of the free text message promoting the service and as an enabler for users to confirm (i.e. text the keyword ‘CHILD’). It submitted that users who texted back on shortcode 88188 were then sent a subsequent text message redirecting them to a WAP link supported by a Network Operator. It stated that it was via that link that users would have been charged for the charity donation (£2.50 or £3, depending on the Network Operator).

The Information Provider stated that few from this database texted back as they did not recognise the source of the promotion. It stated that the 88188 shortcode had simply been a ‘send’ address and, as such, had been configured as a ‘zero-rated’ shortcode for the purposes of sending a free promotional text message only and as a non-premium rate ‘return mechanism’. It stated that such consumers received the promotion for free, could respond and were not charged with a premium rate text charge when replying with the keyword ‘CHILD’. It stated that any billing had been via a subsequent re-direction to a Network Operator enabled billing system.

The Information Provider stated that the reason it had not included VAT detail in the donation had been due to the lack of reconciliation confirmation with Network Operators – the Network Operators had not been able to put the necessary systems in place quickly enough for the campaign (although they were generally supportive of the charity and campaign). The Information Provider stated that it had made this clear on other promotional text messages and pages.

It stated that billing would have been processed via direct Network Operator billing (online billing) and not via normal shortcode billing as described above. It stated that while the Network Operators had been supportive of this charity, normal shortcode VAT handling had not applied since billing was not via the shortcode 88188.

3. The Tribunal considered the evidence and found that the promotional text message, on an '8' prefixed shortcode, had not informed the consumer that VAT would be deducted from the amount donated, before payment of the remainder to the beneficiary. The Tribunal upheld a breach of paragraph 7.9(a) of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The Information Provider's behaviour was negligent in allowing an incorrect database of former customers to be sent promotional text messages.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with PhonepayPlus.
- The Information Provider stood to make no financial gain from the breaches and raised a modest sum of money for charity.

The revenue in relation to this service was in the mid 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 **moderate**.

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 that the Information Provider seek compliance advice for any future, similar, fundraising/charitable services for a period of 12 months, starting from the date of publication of this decision.