

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 8 December 2011  
TRIBUNAL SITTING No. 89 / CASE 1  
CASE REFERENCE: 856050

Information Provider: Wild ACE Marketing Limited, Manchester, UK

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER  
PARAGRAPH 8.7 OF THE CODE (11<sup>th</sup> EDITION, AMENDED APRIL 2008)**

## BACKGROUND

PhonepayPlus received seven complaints relating to unsolicited, free-to-receive and premium rate short text message services (“**PSMS**”) which were sent to consumers on 28 and 31 January 2011 on shortcode 80160. PhonepayPlus received the complaints between 28 January 2011 and 10 February 2011.

### **Sample of the complaints**

One complainant reported the following message in their complaint dated 28 January 2011:

*“FREEMSG U R Subscribed to monthly offers n freebies txtx (sic) each month ur offers are worth lots more than Â£1.50 a month! Stop? txt STOP to 80160 help?08445042583 mobyoffers”*

The complainant stated:

*“On 28th January 2011 i recieved a text stating that i was subscribed to monthly offers n freebies txtx each month. I have not requested this service in anyway. I have not given my details to any website or premium rate numbers. I rang Virgin, my phone provider, and they recommended that i text STOP as directed as they could not do anything unless the problem continues. They advised that my [sic] appears to have been randomly selected for the purpose of scamming people out of their hard earned money. I searched online and found lots of people who had been conned for sometime before becoming aware that this company Mblox had been taking their money from them. I appear not to have been charged anything at this early stage but wish to report this nuisance so that something can be done about it.”*

Another complaint reported a similar message:

*“Ur subscribed to monthly offers n freebies txts each month. Ur offers are worth lots more than Â£1.50 / mth!”*

This complainant stated:

*“I never asked for this. I have never requested any services on my mobile. This is a work phone, I have no idea how they got my number. I got a couple of texts which I thought were random junk until I realised my employer highlighted premium texts on my bill. This is a scam but I don't know how they have got my details.”*

It appeared on the evidence that a large number of free-to-receive messages were sent by the Information Provider on 28 January 2011 via a service provider that was not mBlox Limited.

On 31 January 2011 further free-to-receive messages and then a large number of charged PSMS messages were sent out via mBlox Limited's platform.

### ***The Information Provider's explanation of the service.***

The Information Provider's explanation of the service was illustrated by (i) mobile internet illustrations of the consumer's user flow (located in Appendix A) (referred to here as the “**User Flow**”); (ii) a copy of the service terms and conditions; and (iii) the message logs of some of the complainants. These items were submitted to the Executive by the Information Provider on 25 May 2011 and 1 July 2011.

The Information Provider's User Flow indicated that the service was a one-off pay-for-product service, charging users £1.50 to obtain:

*“amazing high street offers and discounts off fashion, dining, music and much more...”*

It was claimed that in exchange for each payment of £1.50, consumers would receive one discount offer on their mobile phones. The Information Provider claimed that a further offer would only be sent to consumers who then opted to pay another £1.50. The charge was not therefore automatically recurring and, on this basis, the Information Provider claimed that it was not offering a subscription service.

The Information Provider claimed that the service was promoted in December 2010 using banner advertising on the internet and/or mobile WAP site, which redirected users to the Information Provider's website or WAP site.

As illustrated in the User Flow, the Information Provider alleged that users would enter their own mobile number on the web/WAP site and would then receive a free-to-receive PIN message on their mobile phones. The PIN provided would then be entered onto the web/WAP site to complete the process for signing up to the service. No charges were incurred at this time.

The Information Provider also supplied sample terms and conditions for the service which suggested that it was not a subscription service. The terms and conditions were also written to envisage a delay between the date when each consumer signed up to the service, and received the offer.

At paragraph 3 of the terms and conditions it stated:

*“We will send you the MobyOffers SMS alert as soon as possible after your entry, please note that in some circumstances this could be a few weeks after you have signed up to the service. Where this happens we will text you a reminder message prior to the offer and give you the chance to cancel the service without charge.”*

According to message logs supplied by the Information Provider on 1 July 2011, there had allegedly been a delay. One message log indicated that a consumer had apparently received the free-to-receive PIN message on 23 December 2010 but the free-to-receive message terminating (“MT”) containing a discount offer at ASK restaurants was not received until 28 January 2011. The log also showed that the chargeable PSMS message was received almost immediately after the MT. The Information Provider claimed that the delay between the first two free-to-receive messages arose because the banner advertisements that enabled consumers to sign up to the service were active one month before the Service Provider had provided access to its platform. The Information Provider claimed that access to this platform was delayed as a result of service integration issues arising from the Information Provider changing its domain name. If the Information Provider had decided to promote the service to consumers when it had approval to use the Service Provider’s platform, no such delays would have been anticipated or permitted under the PhonepayPlus Code of Practice (11<sup>th</sup> Edition, Amended April 2008) (the “Code”).

The Information Provider further claimed that only one offer was ever sent to consumers as it had decided that the service format was unviable and should be terminated.

### ***The Service Provider’s explanation of the service.***

The Service Provider stated that in August 2010, it had approved a radio competition service to be run by the Information Provider on shortcode 80160. It further stated that it had no knowledge of the “offer” service allegedly run by the Information Provider on a one-off payment basis on the same shortcode. It was, however, aware that the Service Provider was proposing to run a subscription “offer” service on that shortcode as the Information Provider had submitted to it a customer care form (“CCF”) for such a service which was dated 25 January 2011. That application was withdrawn by the Information Provider in advance of any internal compliance review by the Service Provider and was therefore never approved.

Authorisation for this separate radio competition service was the result of extensive negotiations with the Service Provider regarding Code compliance issues. These negotiations were evidenced by email correspondence between the Information Provider and Service Provider between 26 July 2010 and 9 August 2010 (the “**Service Negotiation Correspondence**”). The Service Negotiation Correspondence showed that particular regard had been given to the Service Provider’s requirement for the Information Provider to show a full audit trail of consumer opt-ins for the service. In an email to the Information Provider dated 4 August 2010 the Service Provider stated:

*“...For compliance purposes we require all messages to come via mBlox [the Service Provider] as we would need to see proof of the MO’s, only MSISDNs that send MO’s to 80160 should be billed by the mBlox code. To avoid confusion for the end user it would make sense for the MO code to be the same as the billing code...could you please confirm that only users that have engaged with this service will be sent marketing MTs and there is no marketing database?...”*

The Service Provider further confirmed that, following authorization of the service on 9 August 2010 the Information Provider had become entitled to obtain a client profile from the Service Provider. The client profile included provision of password protected access to the Service Provider’s platform which enabled the Information Provider to send messages. Separate profiles were provided to enable the Information Provider to send both free-to-receive and chargeable PSMS messages.

As indicated in the above quote, one of the conditions for authorized use of the Service Provider's platform was for all consumer opt-ins to be obtained exclusively via the Service Provider's own platform.

The Service Provider had no knowledge that messages had in fact been sent to consumers via a third party aggregator until charged PSMS messages were sent to consumers on 31 January 2011. Indeed, the Service Provider had suspended the service of the Information Provider for non payment between 9 December 2010 and 6 January 2011.

On 21 November 2011 the Service Provider provided the Executive with records of its correspondence with the Information Provider on this matter (the "**Service Suspension Correspondence**"). An email chain dated 1 February 2011 showed that the Service Provider had written to the Information Provider expressing its concern that ten thousand MTs had been sent to consumers on 31 January 2011. The Service Provider was concerned as it had not seen any corresponding message originating ("**MO**") messages from these consumers as evidence of their consent to receive the MTs. The Service Provider expressed this concern to the Information Provider in an email dated 1 February 2011. In the same email the Service Provider instructed the Information Provider to suspend the service immediately. The Information Provider sent a reply on the same day to confirm that the service had been suspended.

### ***The investigation***

The investigation was originally allocated as an Informal Procedure on 16 February 2011 but was later transferred to the Standard Procedure on 16 May 2011 in accordance with paragraph 8.5 of the Code. On 16 May 2011 the Executive sent a preliminary request for information to the Service Provider under paragraph 8.3.3 of the Code (the "**First Information Request**"). The First Information Request sought information regarding the launch of the service on shortcode 80160. The Service Provider responded on time on 23 May 2011 and the Information Provider responded on 25 May 2011, following the granting of an extension by the Executive. Among the information provided by the Information Provider, the response contained: (i) a message log from one of the complainants to PhonepayPlus; (ii) the User Flow; and (iii) the service terms and conditions. The Executive noted that the message log did not contain a PIN message for the service despite this being an essential part of the Information Provider's description of the service.

On 21 June 2011 the Executive sent a further request for information under paragraph 8.3.3 of the Code (the "**Second Information Request**"). Following the granting of an extension by the Executive, the Service Provider responded on 29 June 2011 and the Information Provider responded on 1 July 2011. Among the additional information provided by the Service Provider were (i) an amended version of the message log sent on 25 May 2011 which now contained details of a PIN message; (ii) the CCF dated 26 July 2010, together with the terms and conditions for the authorised radio competition service and; (iii) the CCF for a subscription "offer" service dated 25 January 2011, allegedly the service under investigation.

On 18 October the Executive proceeded to take the case to Tribunal, and liaised with both Service Provider and Information Provider representatives prior to drafting the formal investigation letter outlining the potential breaches of the Code. During this period, the Information confirmed that a third party aggregator platform had been used by the Information Provider to send out bulk messages from December 2010.

In an email dated 19 October 2011, the Executive sought clarification of the identity of this third party aggregator. The Information Provider sent a response on 21 October 2011 which was inconclusive and vague. It failed to provide precise details as to the sender of the PIN messages or the free-to-receive messages which were sent on 28 January 2011 and stated:

*“As documented in the original response we had a few challenges integrating and setting up correctly with mblox due to various admin and technical issues so unfortunately one of the SMS message batches could not be sent through them. This meant that another SMS platform was used as a one-off. Unfortunately I cannot find information on the exact provider but we think it was a web based console such as BulkSMS or Clickatel but we cannot be 100% precise as we cannot find any of the account details. As soon as we were able we sent all SMS through our mblox [sic] in January 2011 as requested and agreed.”*

On 3 November 2011 the Executive issued a breach letter to the Service Provider. On the same date the Service Provider forwarded the breach letter to the Information Provider so that it would be able to provide responses. After extensive interim correspondence with the Executive, the Information Provider provided a response on 14 November 2011 which was sent via the Service Provider, together with its separate response and a request for an Information Provider pass through in accordance with paragraph 8.7 of the Code.

On 15 November 2011 the Executive notified the Service Provider that the Information Provider pass through application had been successful.

On 18 November 2011 the Information Provider provided an additional response to the breach letter. On 21 November 2011 the Service Provider provided the Executive with both the Service Negotiation Correspondence and the Service Suspension Correspondence. The Information Provider commented on this correspondence on 22 November 2011.

The Tribunal made a decision on the breaches raised by the Executive on 8 December 2011. The Information Provider did not make any informal representations.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE DISCLOSURE OF INFORMATION (Paragraph 3.2.2)**

*“Service Providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code, which may include but is not limited to:*

- a any number ranges (including dialling codes) or other connection arrangements allocated to it by Ofcom or any Network operator,*
- b if the service requires or involves access to any website, the URL of the site,*
- c the name, address, e-mail address, phone and fax number of the person representing the service provider who is nominated to receive all communications in connection with the application of the Code, enabling contact to be made with that person at all necessary times, and, if that person is not a director of the service provider, the name of the director with primary responsibility for premium rate services,*
- d the name and home address of each of the directors and their phone and fax numbers and e-mail addresses.”*

1. During its investigation, the Executive requested information from the Information Provider under paragraph 8.3.3 of the Code to secure compliance with the provisions of the Code. Under paragraph 3.2.2 of the Code providers must provide without delay such information as PhonepayPlus may require. The Executive submitted that it is an implied requirement that such information must be factually accurate and relevant. Therefore any failure to provide factually accurate and relevant information when responding to a request for information under paragraph 8.3.3 of the Code would undermine the efforts of PhonepayPlus to secure the enforcement of its provisions and would certainly amount to a breach of paragraph 3.2.2 of the Code.

The Executive submitted that various items of information supplied to the Executive in response to requests made during the investigation under paragraph 8.3.3 of the Code were inaccurate and misleading. These comprised: (i) the User Flow, (ii) the service terms and conditions of the service in which the Information Provider described the service as a one off pay-for-product; and (iii) the message logs associated with the MSISDN of one of the complainants.

#### The User Flow

The Information Provider accepted that the User Flow was only a mock up of the banner advertisement and the website for the service. In its response to the Second Information Request, the Information Provider stated:

*“As previously documented the site is no longer live as this dates back to December 2010. Because the site is no longer live the only evidence we can provide is the creative design and user flow which is contained in Annex 1...”*[now Annex A]

The Executive further submitted that there was no indication of the exact URL address in correspondence or in relation to the User Flow itself. This was put to the Information Provider in an email from the Executive dated 19 October 2011. The reply from the Information Provider was that the website domain used was the company's own website 'wild-ace.co.uk'. However, the Information Provider stated that the service had been suspended and those web pages had been removed. The Executive found that no further evidence appeared to be available.

The Executive further submitted that the complainants' comments suggested that no User Flow was seen in December 2010 or January 2011. A questionnaire was sent out to all complainants and while only one response was sent back to the Executive, this confirmed that the complainant had never requested to sign up for the service.

The Executive therefore submitted that the User Flow had been mocked up for the purpose of this investigation, and was inaccurate and misleading.

#### The Service Terms and Conditions

The terms and conditions for the service also appeared to have been mocked up for the purpose of this investigation. A number of the terms expressed within the terms and conditions were unusual for this type of service. An example at item 3 of the terms and conditions stated:

*“We will send you the MobyOffers SMS alert as soon as possible after your entry, please note that in some circumstances this could be a few weeks after you have signed up to the service. Where this happens we will text you a reminder prior to the offer and give you the chance to cancel the service without charge”.*

The Executive submitted that the service terms and conditions for the service appeared to be in place to match up to consumer complaints and the alleged service description given by the Information Provider. The service terms and conditions were also not presented in a way that would have been expected in the public domain, with key information missing in relation to customer care contact number and email address, which were expressed simply as “NUMBER” and “EMAIL”.

Further the Executive relied on the CCF details set out by the Information Provider for the Service Provider. The CCF was designed to give an accurate description of the service so that it could be approved by the Service Provider prior to launching it. While it was possible that only one set of charged messages was sent out before the service was suspended, it appeared clear to the Executive that the intention was to operate a subscription-based service. The attempts to suggest otherwise in the terms and conditions seemed contradictory.

The Executive submitted that the service was more accurately described by the details contained in the CCF, and that the terms and conditions supplied by the Information Provider were inaccurate and misleading.

#### Message Logs

The message logs presented by the Information Provider on 25 May 2011 in response to the First Information Request did not contain a PIN message, yet the User Flow suggested that a PIN would have been entered on a website by the consumer to complete the sign-up process. The message logs were in-keeping with the Service Provider’s CCF details although there were no MO messages from the consumer to access the subscription service. These message logs did however appear to match what the consumers described happened in relation to their complaints, whereby no MO message was ever sent and consumers received unsolicited free-to-receive and chargeable PSMS text messages (if they did not use the ‘STOP’ function).

On 1 July 2011, a second version of the message logs was supplied by the Information Provider in response to the Second Information Request when questions were raised about the above discrepancy. This new version of the message log now showed an earlier PIN message which appeared to have been sent on 23 December 2011, and which the complainant did not report in its complaint. The message stated:

*“To complete your MobyOffers service pls enter the following code at <WEBLINK> your unique code is <CODE> MobyOffers costs £1.50. Help 08445042583”*

The Executive pointed out that the message transcript for the PIN message remained incomplete as the references to “Weblink” and “Code” ought to have contained an actual web address and PIN code. The message appeared to be a model message and not a full transcript including all characters that would be seen by the consumer viewing the handset. Without the website or the PIN number, the consumer could not complete the opt-in process as described by the Information Provider.

The Executive submitted that the logs containing the above PIN message were inaccurate and misleading, and the clear absence of both the actual weblink and the PIN code from the PIN message undermined the credibility of the logs supplied by the Information Provider.

For the above reasons, the Executive submitted that the Information Provider had provided inaccurate and / or misleading information during the investigation of this case in an attempt to hamper the enforcement of the Code in relation to the service and associated complaints made by the public. It appeared that the Information Provider had acted in breach of paragraph 3.2.2 of the Code.

2. The Information Provider disagreed that it was in breach of clause 3.2.2 of the Code. Far from trying to mislead the Executive the Information Provider stated that it had provided open and honest answers and claimed that the Executive was now using these answers against the Information Provider. The Information Provider covered each of the points raised by the Executive as set out below:

#### The User Flow

The Information Provider admitted that the User Flow it had provided was only a creative design because the actual WAP site where consumers signed up in December 2010 was no longer live. Instead of providing the User Flow, the Information Provider stated that it could have built the WAP site again and given the Executive actual access to it on a URL, although this exercise would have made a total mockery of the situation. The Information Provider therefore decided to simply provide all the information that it had available.

The Information Provider commented about the Executive's request for the precise URL address used for the service and noted that this request had been made in October 2011 some 10-months after the service was live. The Information Provider wished that, on hindsight, it had provided this information in earlier correspondence but it was not asked for by the Executive.

Having further looked into the background of this case, the Information Provider said that it was 99% certain that the service operated on a sub domain of its wild-ace.co.uk domain name, such as offers.wild-ace.co.uk. However, rather than lie to the Executive, the Information Provider stated that it was unable to confirm the URL address as there had been a huge time delay between the end of the service in early 2011 and the timing of the Executive's request in October 2011.

The Information Provider disputed the Executive's claim that complainants saw no promotional material in December 2011. It referred to the Executive's questionnaire which was conducted on 7 July 2011, over 7 months after the service was promoted in December 2010. It observed that the questionnaire was unclear and the one consumer who had filled out the questionnaire had simply answered 'no' to all questions. Consequently, it could not be argued that the questionnaire supported the Executive's claims and allegations within the breach letter.

#### Terms and Conditions of the Service

The Information Provider noted that these terms resided within the mobile internet site and were also accessible at the time on the customer care line for the service. The



Executive's allegation that these terms and conditions had been 'mocked up' for the purposes of the investigation was rejected.

The Information Provider noted that the Executive had alleged that the terms and conditions were unusual for a service of this type and had drawn specific attention to item 3. The Information Provider advised that item 3 was a normal term which it provided to consumers when they signed up for the service. Item 3 was important as the Information Provider operated the service post sign up to provide consumers with the best and most researched offer it had available at that time. The Information Provider followed item 3 by sending a reminder free-to-receive SMS message to consumers prior to billing and in order to give consumers the opportunity not to be charged. The Information Provider claimed that other premium rate services operated in this way.

The Information Provider accepted that the terms and conditions provided to the Executive were not those which were in the public domain when the service was live but argued that, by the time of the Executive's First Information Request on 16 May 2011, these terms and conditions were no longer available. The Information Provider had instead provided the master template held on file. Key information that was missing within the terms and conditions were made available when the service was live. While evidence could no longer be provided to the Executive to support the live website the Information Provider could confirm that the contact number and email address on the live website would have been: 0844 504 2583 and help@wild-ace.co.uk respectively.

The Information Provider understood that the Executive had relied on the CCF provided by the Service Provider dated 25 January 2011. It openly acknowledged to the Executive that there had been a number of process and communication issues with the Service Provider in this regard which resulted in confusion over the actual service launch. While a CCF dated 25 January 2011 had been submitted to the Service Provider, this had been for a subscription variant of the service which was never launched.

The Information Provider further acknowledged in its Second Information Response that no CCF had been submitted to the Service Provider for this service but, it had conducted its own internal review and this had been submitted to the Executive with its response to the First Information Request.

The Information Provider referred to the Executive's allegation that the CCF was evidence as to how the Information Provider had intended to operate the service but pointed out that, as could be seen in the message logs, these showed a totally different message flow to those on the CCF. The Information Provider therefore asserted that the intention was not to operate a subscription based service and an administration error on the CCF process supported this.

#### Message Logs Supplied

The Information Provider stated that the Executive was correct to point out that the initial logs provided in the response to the First Information Request did not contain a PIN message. The PIN message was the free message that consumers would have received upon sign up to validate their service. This was admitted as a human error and the issue was resolved within the response to the Second Information Request when the corrected logs were resubmitted to the Executive.

The Information Provider claimed that the message logs submitted in the Second Information Response were not in keeping with the description of the service within the CCF as the service that was launched was not subscription based. The service did not therefore operate using a MO text message, but was instead operated by PIN SMS activation. The message logs were also template messages stored on its system which contained the generic data fields of "WEBLINK" and "CODE". These were automatically updated with the correct information when they were sent to consumers.

The Information Provider further pointed out that, on one of the message logs it was possible to see the PIN code of 345771 which was sent to this particular consumer. The URL for activating the PIN would have been either an IP address URL specific to that user or a sub domain of wild-ace.co.uk such as offers.wild-ace.co.uk.

3. The Tribunal made the following observations:

There had been no PIN message in the message logs sent by the Information Provider in response to the First Information Request. The PIN message within the message logs sent by the Information Provider in response to the Second Information Request was incomplete and could not therefore have been a genuine log entry. This was consistent with the evidence of the complainants, all of whom had reported that they had never seen the User Flow and had never received a PIN message in December 2010. The Tribunal further concluded that, even if the PIN message had been sent to consumers, key information comprising the PIN code itself and the URL address for entering the PIN number, was missing from the text. The absence of this information would have prevented consumers from being able to sign up for the service and provide evidence of opt-in to receive the free-to-receive and PSMS messages that were subsequently sent by the Information Provider on 28 and 31 January 2011. The Tribunal concluded that it was highly unusual for any message log to contain messages that did not contain the exact wording received by consumers. On the balance of probabilities, the Tribunal concluded that the PIN message was not genuine and had been added by the Information Provider for the purposes of this investigation.

The Information Provider was also unable to provide the name of the third party aggregator whose platform was allegedly used to send messages to complainants in December 2010 and on 28 January 2011. The Information Provider further claimed that it could not remember the URL address that had originally contained the User Flow and was unable to provide actual screenshots of the User Flow allegedly used for the service. The Information Provider had also accepted that the User Flow was a mock up. In addition, the service terms and conditions were incomplete as they did not contain the Information Provider's contact number or email address and, when the Executive queried this issue with the Information Provider, the Information Provider was unable to provide a complete set of service terms and conditions. The Tribunal found, on a balance of probabilities that, if the service had genuinely operated as the Information Provider had described, the Information Provider would have been able to provide all of the above.

Having considered the entirety of the evidence, the Tribunal concluded that the Information Provider had deliberately provided false, inaccurate and misleading information to the Executive, and was therefore in breach of paragraph 3.2.2 of the Code.

**Decision: UPHELD**

## ALLEGED BREACH TWO 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 noted 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. This is sometimes called ‘a hard opt in’, 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 sometimes called a ‘soft opt-in’.

The Executive further noted the Information Provider’s assertion that consent was being given by consumers responding to the User Flow. This suggested that consumers had firstly entered a website owned by the Information Provider and then consented to receive such marketing material associated with the service as advertised on that website.

The Executive submitted that the evidence supplied by the Information Provider of consumer opt-in was inconclusive. The Executive stated that essential aspects of the opt-in process had not been made available to the Executive on request and these aspects ought to have been readily available to the Information Provider if the service had operated as described. Furthermore, the complainant evidence contradicted the description of the service as none of the complainants had described any kind of opt-in process.

The Executive stated that there was no evidence of the User Flow having ever being in the public domain and, as the Information Provider had stated that it had removed promotional material following the suspension of the service, the only remaining evidence was the mock-up User Flow that had been submitted to the Executive.

The Executive pointed out that consumers were said to have received a PIN number within a free-to-receive message on 23 December 2010 as part of the sign up process for the service. These PIN numbers appeared to be a six-digit number according to the message logs supplied by the Information Provider. The Executive noted that as the message transcript did not contain either the web link for completion of the sign-up process, or the consumer PIN code, it could not be representative of what consumers received on their handsets. If on the other hand the message was fully representative of the consumer experience, it would have been impossible to complete the opt-in process as the web link and the PIN code were missing. Alternatively, as described by the complainants themselves, these messages were never sent and no such opt-in process was in existence in December 2010.

The Executive also submitted that there was evidence from three complainants, and two of the message logs obtained from Mobile Enterprises UK (one of the complainants’ mobile operators), that they were being charged by another third party premium rate service provider in the months before the Information Provider began sending messages

to their mobile phone numbers. It was submitted that this was evidence in support of the Information Provider obtaining a marketing data list of mobile numbers from another party and, without consent from the consumer, the subscription service was initiated by sending first a free-to-receive message announcing the user had joined the service, and then issuing charged premium rate messages using the Service Provider's platform and shortcode: 80160.

Without there being any evidence of any form of consent being obtained by the Information Provider, it was the opinion of the Executive that the initial messages reported by complainants were issued in contravention of section 22 of the Regulations and the service was apparently in breach of paragraph 5.2 of the Code.

2. The Information Provider did not believe that it was in breach of paragraph 5.2 of the Code and argued that the service was operated with a hard opt-in process due to the nature of the PIN validation. The Information Provider described the service as follows:

#### Service Operation

The service was promoted over mobile internet using a PIN code authentication process, which was believed to be common practice in the market. The PIN validation process enabled the Information Provider to ensure that consumers were properly engaged in the service.

#### User flow

- The consumer saw a mobile internet promotion and clicked the ad banner;
- The consumer visited the Information Provider's mobile internet landing page and followed the user flow as indicated in Annex A;
- The consumer was validated through the site through their mobile ID and via an SMS PIN code entry.
- The consumer was then added to the Information Provider's service to receive the service by SMS when sourced.

#### Consumer Validation

The Information Provider claimed that it was committed to providing quality services in the premium rate market place and its systems and processes did comply with Data Protection legislation and procedures. Consumers who received the PIN code validation received the message entered on the log, dated 23 December 2010. This message was a template of the original message whereby <WEBLINK> and <CODE> would have been populated to the consumer on receipt.

The Information Provider disputed the Executive's allegation that its information was 'inconclusive' and that essential aspects of the opt-in process had not been made available. The Information Provider claimed that it had provided the Executive with every piece of information requested and that, had the service not been terminated months prior to the investigation, it would have been able to provide far more information.

The Executive's questioning of whether the User Flow was ever placed into the market was disputed. The Information Provider further stated that the refunded complainants had admitted that they knew the service and had participated.

The Information Provider claimed that the Executive was speculating completely with its allegations under paragraph 5.2 of the Code. It further argued that the Executive had seemingly made allegations that the Information Provider had simply obtained a marketing database to initiate a subscription service. This was categorically rejected.

3. The Tribunal had already observed, in relation to its analysis of the breach of paragraph 3.2.2 of the Code, that the PIN message within the logs submitted in the Information Provider's response to the Second Information Request was incomplete and either (i) could not have been a genuine log entry, or (ii) could not, on account of the missing web link and PIN code, have enabled consumers to sign up for the service and provide evidence of opt-in. The Tribunal did not accept that the message on the logs dated 23 December 2011 had never been sent to consumers.

In the absence of any convincing evidence of genuine opt-in, the Tribunal accepted the evidence of the complainants and concluded that, on the balance of probabilities, the complainants had received unsolicited promotions from the Information Provider. The Information Provider was found to be in breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE FAIRNESS (MISLEADING)**

*“Services and promotional material must not:*

*a Misplead, or be likely to mislead, in any way.”*

1. The Executive raised a breach of paragraph 5.4.1 (a) of the Code for 2 main reasons.

#### **Reason 1: “You are subscribed”**

The Executive noted that the complainants had consistently stated that the messages received in relation to shortcode 80160 were unsolicited. The nature of the complaints was supported by the speed with which complainants had sent 'STOP' to the shortcode, or reported the incident following the charges being received. Message logs from the Service Provider showed that some complainants sent 'STOP' before any charged messages had been issued.

The message stated:

*“FreeMsg U R subscribed to monthly offers n freebies txts each month ur offers are worth lots more than £1.50 a month! Stop? Txt STOP to 80160 help?08445042583 mobyoffers”.*

The Executive alleged that the Information Provider's message logs suggested that the wording was slightly different to the above transcript. However, two complainants had independently referenced the above wording.

The Executive further noted that the Information Provider had suggested that the message made reference to a “recent sign-up”. The Service Provider had indicated that these messages were not sent on their platform and could not support the claim made by the Information Provider. The Executive submitted that a recipient of the above transcript, who had not signed up for this particular subscription service, was likely to be misled by the message. The message did not clearly set out who the sender of the message was and the pricing information was set out in such a way as to imply a cost of £1.50 a month, but lacked certainty. Consumers may also have been misled to believe that this message was linked to their Mobile Network operator in some way, and that the sum stated was a guide as to the value of the offers themselves instead of the subscription service fee.

The Executive submitted that the above message sent to users without consent was likely to mislead recipients, and appeared to be sent in breach of paragraph 5.4.1(a) of the Code.

### **Reason 2: “This month’s freebie!” - the ‘ASK’ offer as a ‘MobyOffer’**

The Executive confirmed that the first and only offer sent out by the Information Provider before the service was suspended related to ‘ASK’ restaurants. The transcript seen in both the Information Provider and the Service Provider’s message logs was as follows:

*“FreeMsg: Get this months freebie! Get 50% off all pizzas,pastas + salads at ASK Restaurant, just go to <http://bit.ly/qLUa08> before 3rd Feb! Enjoy the savings!”*

Almost instantly a charged premium rate service message was also sent to consumers stating the above was a ‘MobyOffers alert’.

The Executive stated that it had found evidence of the ASK restaurant voucher offer available on the internet, showing the same closing date of 3<sup>rd</sup> February 2011. This evidence from the internet indicated that the voucher associated with the above offer was internet based and managed in conjunction with ‘ASK’. It was free to obtain and was discovered with some degree of ease using web search engines. The Executive further commented that, for some people who were registered with ‘ASK’ to receive offers from time to time, the offer may have been sent electronically, direct to consumers by ‘ASK’ restaurants.

The Information Provider had confirmed that it had no relationship with ‘ASK’ restaurants but had merely promoted the offer as its offer for the month for January 2011.

The Executive submitted that the messages sent out by the Information Provider were likely to mislead consumers as to the nature of the offer in association with the premium rate service. A consumer may have been misled into thinking that the offer was organised by the Information Provider independently of any other promotion or offer extended in relation to ‘ASK’ restaurants.

While the Information Provider had suggested in correspondence that it was accurate to state the, “*offers are worth lots more than £1.50*”, the Executive considered that the service added no value to the free to obtain voucher in relation to the ‘ASK’ restaurants promotion available via other means. The Information Provider did not provide any alternative method for obtaining the voucher either, with consumers instructed to go to a website just as was necessary if using internet search engines.

The Executive further stated that the consumer was likely to be misled by the words, “*get this months freebie*”, as this suggested that there was no cost to the consumer to obtain the voucher but the service nevertheless cost of £1.50 per month.

This Executive submitted that this appeared to be a breach of paragraph 5.4.1(a) of the Code.

## 2. **The Information Provider’s response to Reason 1: “You are subscribed”**

The Information Provider stated that it did not feel that it was in breach of clause 5.4.1(a) of the Code. While many consumers sent STOP to the service from 28 January 2011, this was exactly what the Information Provider had wanted to happen for those consumers who did not want to be billed for the service. This was a proactive measure carried out by the Information Provider to prevent any consumer harm or annoyance following a delay arising from service integration issues with the Service Provider.

The Information Provider stated that the Executive had again seemed to rely on the inaccurate and inconsistent complainant logs which the Information Provider claimed actually contradicted each other in many places. It had been emphasised throughout the investigation that the service operated was not subscription based and the Information Provider gave an explanation for the message which seemed to state otherwise, ‘*U r subscribed to get a MobyOffers alert from your recent sign-up*’. The Information Provider claimed that this message was correct but was nothing more than the terminology used to say that the customer had requested a previous alert and consented to receiving it in the future. The definition of “a subscription” did not therefore mean that it was of an ongoing nature.

The Information Provider noted that the Executive had claimed that the service was made to look like it had come from the consumers’ Mobile Network operator but claimed that this was simply not the case, nor had the Executive provided any evidence to support this. Instead, the evidence provided by the Executive and all other parties showed that the service was not a subscription service and consumers were only ever billed once. The Information Provider claimed that, if it was a subscription service, then in accordance with how the Executive claimed the service was operating, consumers would have been billed five times in the five months it took the Executive to request information.

The Information Provider acknowledged that regrettably a small number of consumers did complain about the service but steps had been taken to handle these complaints and refund as many consumers as possible. One consumer had however declined to provide the Information Provider with contact details with the result that the refund could not be issued.

The Information Provider claimed that, having reviewed all seven of the complainants’ records, it disputed that any complaints had related to unsolicited promotions. The Information Provider presented evidence to support its view that only four complainants appeared to have ever been billed by the service, and three of these had been refunded in full by the Information Provider via its customer care procedure, and well before commencement of the investigation by the Executive.

The Information Provider claimed that the evidence presented by the Executive showed that many of the complainants were regular and active participants in many premium rate services as they had accessed services on many SMS shortcodes.

Whilst it did not feel any level of complaint on its services was acceptable, the Information Provider further stated that there needed to be a level of 'normal acceptance' and seven complaints out of 4,892 participants in the service represented a small fraction of users (0.14%). The Information Provider confirmed that it would consider this normal on any premium rate service. In total the service had generated approximately £4,000 revenue.

**The Information Provider's response to Reason 2: "This months freebie!" - the 'ASK' offer as a 'MobyOffer'**

The Information Provider claimed that the service was not suspended as the Executive claimed, and it was only ever a one off service and the service was therefore in a controlled state on the Service Provider's SMS platform.

The Information Provider refuted the Executive's claim that the message content was likely to mislead consumers. The Information Provider considered that it was well documented within the User Flow that each consumer had gone through a very clear opt-in process with complete awareness of the service and offers they wanted to receive.

The Information Provider noted that the Executive had reviewed the offer issued to consumers which was a 50% discount at ASK restaurants. It disputed the Executive's approach that the offer was easy to find and stated that this was only the opinion of the Executive and was not representative of other users of the service. The Information Provider further stated that not a single complainant supplied by the Executive had referenced any concern of confusion with the service being associated with ASK restaurants.

The Information Provider refuted the Executive's claim that the service was not worth £1.50, and was of no value to customers. It considered that the Executive's view that this service was of no value was very worrying and damaging to the premium rate industry as a whole. The Information Provider conceded that the Executive was indeed correct that the content of the service was available on the internet and was free to obtain by consumers if they had received or discovered this offer themselves. The service terms and conditions did state this fact to its customers but this was the whole point of the service, which like many others in the premium rate industry, provided consumers with content which was sent directly to them, thereby providing a level of value. The value of such content would vary by consumer but the Information Provider was of the view that the convenience of receiving such content sent directly to their phones by SMS was what consumers were happy to pay for.

The Information Provider claimed that the Executive should not have been making decisions based on what it deemed to contain no value as this was merely an opinion based on the Executive's ability to use the internet to source and find offers and content which was not the same for the vast majority of consumers. In order to support this point as a wider issue which the Information Provider felt was damaging to the entire premium rate industry, it noted the following examples of service types which could also be classed as valueless based on the argument of the Executive:



- Lottery results;
- Sports alerts (such as football, cricket etc);
- Horoscopes;
- Betting tips and results; and
- Infotainment alerts (Jokes etc).

The Information Provider stated that all of the above service types listed above were arguably available by searching for information on the internet and the Information Provider urged the adjudication panel to overrule this claim of 'no value'. The Information Provider asserted that the offer provided to consumers was worth significantly more than the cost of the service and it provided the following analysis to evidence this:

- The offer provided to consumers was a 50% discount when eating any Pizza, Pasta or Salad at the ASK restaurant chain.
- The cheapest Pizza on the menu at ASK was the Margherita Pizza which cost £6.55, a 50% discount was a saving of £3.27 which was worth £1.77 more than the cost of the service.
- The cheapest Pasta on the menu at ASK was the Spaghetti al Pomodoro (v) which cost £7.15, a 50% discount was a saving of £3.57 which was worth £2.07 more than the cost of the service.
- The cheapest Salad on the menu at ASK was the Insalata Tricolore (v) which cost £8.45, a 50% discount was a saving of £4.22 which was worth £2.72 more than the cost of the service.

The Information Provider asserted that the Executive could validate the above by reviewing the menu at the following link <http://www.askrestaurants.com/menu.htm>

The Information Provider further stated that its terms and conditions clearly stated that its offers were often available on the open market, that consumers would often need the internet to access the offers, and that the Information Provider was not associated in any way with the offers it provided.

The Information Provider also noted the Executive's allegation that the use of the word 'freebie' might mislead consumers into thinking the service was free. The Information Provider rejected this claim as it stated that consumers had already signed up to the service and had seen the pricing information of the service on no less than six occasions prior to being billed. In addition, not a single complainant put forward as evidence by the Executive advised that he or she thought the service was free.

#### Pricing Transparency

The Information Provider stated that, during the promotion and operation of the service the cost was clearly communicated to the consumer as follows:-

- Within the User Flow;

- On the home page of the mobile site prior to the navigation button which asked the user to confirm their intention by pressing YES;
- Within the free SMS message sent prior to PIN code validation;
- Repeated again on the PIN code validation screen prior to the user pressing ENTER;
- Confirmed again on the final mobile site confirmation page which also gave the consumer the chance to text STOP if they wished to do so prior to being billed; and
- Communicated three days prior to any charges being made via SMS message as evidenced in the logs already provided.

The Information Provider therefore rejected any breach of clause 5.4.1(a) of the Code.

### 3. **Decision; Reason 1: “You are subscribed”**

The Tribunal concluded on the balance of probabilities that the Information Provider was intending to operate the service in question on a subscription basis, notwithstanding the Information Provider’s arguments to the contrary. The free-to-receive text message sent to consumers on 28 January 2011 expressly informed consumers that they were “*subscribed to monthly offers*” and the cost was clearly described as “...£1.50 a month...”. The Tribunal further considered that, as there was no evidence of genuine consumer opt-in to the service the free-to-receive message was misleading as it was an unsolicited text that falsely informed consumers that they had subscribed to a service, when in fact, they had not.

On the basis of the evidence, the Tribunal concluded that the Information Provider was in breach of paragraph 5.4.1(a) of the Code with respect to Reason 1.

#### **Decision on Reason 1: UPHELD**

#### **Reason 2: “This month’s freebie!” - the ‘ASK’ offer as a ‘MobyOffer’**

The Tribunal considered the content of the text message containing the offer, together with the other promotional material that consumers had actually seen. The Tribunal observed that the Information Provider had at no point held out that it was offering exclusive discounts. The Tribunal concluded that the service offered value by directly notifying consumers of offers that they might not have otherwise discovered for themselves.

On the basis of the evidence, the Tribunal concluded that there was no breach of paragraph 5.4.1(a) of the Code with respect to Reason 2.

#### **Decision on Reason 2: NOT UPHELD**

## **SANCTIONS**

The Tribunal’s initial assessment was that the breaches, when taken together, were **serious**.

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

- The Information Provider deliberately sent free-to-receive and charged PSMS messages to consumers without their prior consent.
- The Information Provider had deliberately provided false, inaccurate and misleading information to the Executive.
- Subscription services which are not compliant with the Code have been singled out for criticism by PhonepayPlus.

The Tribunal took into account the following mitigating factor:

- The Information Provider said it had made refunds to complainants.

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

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

Having regard to the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A fine of £9,000; and
- A prohibition on the Information Provider from involvement in, or contracting for, the provision of premium rate services for a period of six months (starting from the date of publication of this decision).

The Tribunal commented that the prompt action of the Service Provider in this case had been exemplary.

## Appendix A – The Alleged User Flow

### 1. Creative Design of the Mobile Internet Promotion for the User Flow:



### 2. Creative Design of the Mobile Internet Site User Flow:

