

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 9 JUNE 2011 TRIBUNAL SITTING No. 78/ CASE 1
CASE REFERENCE: 852607

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| Service provider: | mBlox Limited, London |
| Information provider: | SJA Mobile LLC, USA |
| Type of service: | Subscription download service |
| Service title: | 'BuboMe Premium Videos' |
| Service number: | 60042 and all other shortcodes on which the service is available. |
| Cost: | £4.50 per week |
| Network operator: | All Mobile Network Operators |
| Number of complainants: | 78 |

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

BACKGROUND

The Executive received 78 complaints in relation to a subscription-based video clip service that operated on shortcode 60042 and other premium rate shortcodes called 'BuboMe Premium Videos'. Complainants stated to have first come into contact with the service, though inadvertently, by way of a free battery saver application called 'Battery Booster UK' found in the Android Market.

Complainants stated that, having downloaded the 'Battery Booster UK' application, they were apparently subscribed into the service. It appeared that the application was sending a keyword to the service and that subsequent service text messages were sent; however, several complainants stated not to have received these service text messages.

The Executive conducted its own monitoring exercise and established that the 'Battery Booster UK' application was free to download and contained wording in the terms and conditions that stated that the application would have access to the text messages functions of the mobile handset, including the ability to receive, send and edit text messages. These terms and conditions made no reference to the 'BuboMe Premium Videos' subscription service.

The Service and Monitoring

Information provided by complainants and the Service Provider indicated that certain mobile phone applications available to download onto the Android phone handset contained coding that prompted the handset, without the knowledge or consent of the owner, to send a keyword to shortcode 60042, which initiated the premium rate subscription 'BuboMe Premium Videos' service.

In addition, there appeared to be evidence that consumers who attempted to leave the subscription service by sending the 'STOP' command without first deleting the application from their handset were at risk of being signed up again to the subscription service.

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 11 May 2011. The Service Provider responded to the breaches in a letter dated 18 May 2011, following the Executive's refusal of an Information Provider pass-through request dated 25 May 2011.

The Tribunal made a decision on the breaches raised by the Executive on 9 June 2011, following an informal representation by the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

PROVISION 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. The Executive submitted that service providers and information providers are required to provide PhonepayPlus, without delay, such information as it may require for any purpose relating to this Code.

The Executive submitted that, on 14 February 2011, it had written to the Service Provider requesting information under paragraph 8.3.3 of the Code. It submitted that this request for information had included a request for copies of the contractual negotiations (contracts) between the Service Provider and the Information Provider to be provided to the Executive by a deadline of 21 February 2011. The Executive submitted that, to date, it had not received this information and the Service Provider had failed to supply the requested information by the given deadline.

2. The Service Provider stated that the Executive had worded its request for information as follows: 'Please inform us of the party promoting and operating the service and provide copies of contractual negotiations between you and the information provider'.

The Service Provider referred to clause 3.9 of its Master Service Agreement and stated that its Client service descriptions were contractually binding and had been received in the form of a Customer Care Form ('CCF'). It stated that it had submitted the CCFs and that these represented the copies of contractual negotiations between it and the Information Provider. Furthermore, the initial audit also served as contractual negotiations and had prompted the Service Provider to insist on changes to the service to ensure compliance.

The Service Provider apologised for an omission on its part due when compiling the responses from itself and the Information Provider. It stated that, while it was

correct to say that it had not provided a copy of the contract, it had not failed to supply the information requested. The Service Provider also stated that it had confirmed the identity of the Information Provider when prompted to do so by the Executive. In addition, it stated to have fully co-operated with the Executive throughout the course of this investigation and suspended the service and ensured that the Information Provider initiated a full refund process.

3. The Tribunal considered the evidence and concluded, on the balance of probabilities, that it was satisfied that the Service Provider had supplied the relevant information when requested by the Executive and that any initial failure to provide information had been as a result of a misunderstanding, rather than a deliberate attempt by the Service Provider to frustrate the investigation process. The Tribunal did not uphold a breach of paragraph 3.2.2 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH TWO FAIRNESS (MISLEADING) (Paragraph 5.4.1(a))

'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 all complainants stated to have received unsolicited chargeable text messages to their handset. The Executive alleged that there had been a breach of paragraph 5.4.1(a) of the Code on the following grounds.

Ground One

The Executive submitted that a number of complainants stated to have downloaded an application onto their mobile handset which had subsequently prompted the handset, without their knowledge, to send a text message with the service keyword to shortcode 60042, initiating the 'BuboMe Premium Video' subscription service. The Executive made reference to several consumer complaints and quoted as follows:

"I downloaded an app named 'Battery Booster UK' by 'TheMobiGear' from the android market via an ad displayed in another application, upon installing, there was a small message stating that there would be a 'promotional service' bundled with the app but with no mention to billing frequency or price and stating that this was an 'optional service', almost immediately, a few subscribe messages were received but were deleted by the application immediately. Also, the app blocked outbound 'stop' messages to the 60042 number so I had to uninstall the app before I could stop the service, by this point, I had already been charged £4.50. I was given no warning of the charges.

"There was an innocent looking application on the official Android Market place cannot remember what app it was which i downloaded (no warnings of what the app actually was) then it automatically sent 2 text messages to this company but i was unsure what was going on as the messages app opened seemed to send the message then deleted all knowledge of it so i thought nothing of it. Have checked my bill today and found they sent 2 text messages charging me £4.50 each time."

"I did not sign up for this service from "bubome Premium services". I installed a Free app from a Banner advertisement called allmovies. There were no terms & conditions stating that I would be charged £4.50."

"I had money taken out of my account last night from what looks like a spam text. I got a text from a different 600 number the day before but I ignored it. The only thing I did download was an app from android market place."

'He [the complainant] was not sure what had triggered the charges but having read a few forums he related with the same experience of downloading a battery saver application on his android phone.'

The Executive submitted that it had conducted monitoring by downloading the application 'Better Battery UK' on an Android smartphone handset. It stated that the application had been marketed with the following information '*Improve your phone's battery life so it lasts hours longer*'. It stated that, when downloading the application, a terms and conditions page appeared which stated that '*This application has access to the following*'. The list was as follows:

"Your messages

receive SMS, read SMS or MMS, edit SMS or MMS

And

Services that cost you money

send SMS messages"

The Executive submitted that the terms and conditions demonstrated that the application had the ability to send text messages from the handset and initiate a premium rate service.

The Executive submitted that a consumer who chose to download an application which purported to extend the life of the handset battery would not expect to be signed up to a premium rate subscription service and, as such, consumers had inadvertently entered the premium rate subscription service and been misled into doing so.

Ground Two

The Executive submitted that several complainants stated to have experienced difficulty in cancelling the subscription service. It made reference to consumer complaints in relation to this issue some of which were as follows:

'On 22 November 2010 the complainant sent STOP to shortcode 60042. A confirmation text message was sent to the handset confirming that the complainant had been unsubscribed. On 30 November a keyword [UKBUBOATP2 a9b5e706] was sent from the handset initiating the premium rate service again. A further premium rate charge was incurred by the complainant after sending the 'STOP' command.'

'On 24 November 2010 the complainant sent STOP to shortcode 60042. A confirmation text message was sent to the handset confirming that the complainant had been unsubscribed. On 25 November 2010 a keyword [UKBUBOATP2 377adc23] was sent from the handset initiating the premium rate service again. A further premium rate charge was incurred by the complainant after sending the 'STOP' command.'

The Executive submitted that these complainant comments and the text message logs demonstrated that complainants had been unable to leave the subscription service by using the 'STOP' command as the application on the handset appeared to have prompted the resending of a keyword that reinitiating the service. The Executive submitted that these consumers had been misled by the omission in the terms and conditions that, in order to fully stop the service, the application had to be deleted from the handset.

2. The Service Provider responded to the Executive's grounds for an alleged breach of the Code as follows:

Ground One

In relation to Ground One, the Service Provider stated that the mechanic, as outlined by the Executive and evidenced by comments from complainants, had not been an agreed version of the service as submitted to it by the Information Provider. It stated that, for this reason, no review of this mechanic was ever carried out.

It stated that, as soon as it became aware of what had occurred, the service was suspended, revenue was withheld and the Information Provider began a voluntary proactive programme of consumer refunds to ensure that no actual permanent consumer harm occurred. It stated that its view (and that of the Information Provider) was that the Information Provider itself had been the victim of an unscrupulous third party who undertook actions without consent or knowledge of the Information Provider. It stated that end users had not positively consented to enter into a subscription agreement and, as a result, the Information Provider had voluntarily carried out a refund programme. It stated that all of the remaining alleged breaches flowed as direct consequence of the same act, rather than being individual breaches brought about by separate complicit acts with intent to breach the Code. It stated that, as per the CCF and various audit documents, it was clear that the alleged breaches would not have occurred under the agreed and documented service flow.

It stated that, based on its understanding of what occurred, it disagreed that, as a result of the terms and conditions mentioning the ability to send text messages, a service was initiated in the traditional sense. It stated that there had been no promotional material for the experience described above as there was at no time intent to engage with end users in this way by itself or the Information Provider.

It stated that, for this reason, the Information Provider sent out a free text message to all user mobile phone numbers believed to have been affected by this in order to initiate a full refund, as in their view there had been no consent to join the subscription service.

Ground Two

In relation to Ground Two, the Service Provider stated that the fact that the application resent the keyword a number of days after a 'STOP' command had been sent by the consumer should be seen as a second instance of the same issue. It stated that, contrary to some of the comments above, the 'STOP' command had not been blocked, as message logs showed it was delivered and responded to.

3. In relation to Ground One, the Tribunal considered the evidence and noted the apparent programming of the application, taking into account the complainants' comments and the monitoring undertaken by the Executive. The Tribunal was satisfied that complainants had been misled into subscribing to the subscription service by downloading the 'Battery Booster UK' application that was designed and promoted for the unrelated activity of improving the battery life of the handset. The Tribunal found that complainants were misled as to the other capabilities of the application and the coding within it that caused them to be inadvertently subscribed into the 'BuboMe Premium Video' premium rate service.

In relation to Ground Two, the Tribunal found that, on this occasion, paragraph 5.4.1(a) was not appropriate to address the consumer harm caused by the service's 'STOP' command.

The Tribunal upheld a breach of paragraph 5.4.1(a) on Ground One of the Code only.

Decision: UPHELD on Ground One only

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 made reference to its monitoring exercise and submitted that it had downloaded the application 'Better Battery UK' onto an Android smartphone handset. The application was marketed with the following information 'Improve your phone's battery life so it lasts hours longer'. It submitted that, when downloading the application, a terms and conditions page was presented that stated as follows:

'This application has access to the following...

'Your messages

receive SMS, read SMS or MMS, edit SMS or MMS'

And

'Services that cost you money

send SMS messages'

The Executive also made reference to the complainant comments, some of which were as follows:

"I downloaded an app named 'Battery Booster UK' by 'TheMobiGear' from the android market via an ad displayed in another application, upon installing, there was a small message stating that there would be a 'promotional service' bundled with the app but no mention to billing frequency or price and stating that this was an 'optional service', almost immediately, a few subscribe messages were received but were deleted by the application immediately. Also, the app blocked outbound 'stop' messages to the 60042 number so I had to uninstall the app before I could stop the service, by this point I had already been charged £4.50. I was given no warning of the charges."

"I did not sign up for this service from "bubome Premium services". I installed a Free app from a Banner advertisement called allmovies. There were no terms & conditions stating that I would be charged £4.50"

"There was an innocent looking application on the official Android Market place cannot remember what app it was which i downloaded (no warnings of what the app actually was) then it automatically sent 2 text messages to this company but i was unsure what was going on as the messages app opened seemed to send the message then deleted all knowledge of it so i thought nothing of it. Have checked my bill today and found they sent 2 text messages charging me £4.50 each time."

The Executive submitted that these terms and conditions listed on the handset when downloading the application had not fully informed users, clearly and straightforwardly, of the premium rate charges that would be incurred upon installing the application.

2. The Service Provider stated that the service, as described in the CCF and subsequently audited, had ensured that end users would be fully informed of the

cost of the service, both on the website and in the form of the subscription initiation message flow that required a free text message to be sent to end users in advance of any charges occurring. It stated that the message logs showed that these text messages were sent to affected end users.

It stated that the monitoring by the Executive had not shown whether these free text messages were received on the test handset, or whether or not they had been deleted before the recipient had a chance to see them and become aware of the costs.

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the complainant evidence demonstrated that the first text message that consumers saw, which contained any pricing information, had been after they had incurred a charge. It also found that the complainant message logs supported the conclusion that the text messages prior to subscription did not appear to have been seen by users. 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 obvious and easily available to the user.'

1. The Executive made reference to its monitoring exercise and submitted that it had downloaded the application 'Better Battery UK' on an Android smartphone handset. It submitted that the application had been marketed to 'Improve your phone's battery life so it lasts hours longer'. It made reference to the terms and conditions that had stated as follows:

'Beneath this was listed various handset functions the application will have access to;

Your messages

receive SMS, read SMS or MMS, edit SMS or MMS

And

Services that cost you money

send SMS messages'

It submitted that, during the process of downloading the application onto the handset, the identity of the Service Provider or Information Provider was not provided. Furthermore, the customer service phone number, as required under paragraph 3.3.5 of the Code, was also absent.

2. The Service Provider stated that the service, as described in the CCF and subsequently audited, had ensured that the end users were fully informed of the identity of the content provider as well as the contact details for contacting them (via a freephone number or email) on the website.

It stated that it did not view the monitored service flow as a promotion for a service offered, as agreed with the Information Provider. It stated that the customer service number was sent as part of the billing text message to end users and could also be easily found by entering the word 'Bubome' (present in all messages) into a web search engine.

3. The Tribunal considered the evidence and found that the application fell within the definition of a 'promotion' as defined under paragraph 11.3.27 of the Code as it had the indirect effect of encouraging the use of a premium rate service and had subscribed users into the service. It found that there had been no contact information present in the terms and conditions of the application and, on the balance of probabilities, users had not seen the service text messages. It followed that users had not been provided with the contact details required under the Code. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

SUBSCRIPTION SERVICES – '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 complainant comments some of whom stated to have experienced difficulty in stopping the service. These comments read as follows:

"I downloaded an app named 'Battery Booster UK' by 'TheMobiGear' from the android market via an ad displayed in another application, upon installing, there was a small message stating that there would be a 'promotional service' bundled with the app but no mention to billing frequency or price and stating that this was an 'optional service', almost immediately, a few subscribe messages were received but were deleted by the application immediately. Also, the app blocked outbound 'stop' messages to the 60042 number so I had to uninstall the app before I could stop the service, by this point I had already been charged £4.50. I was given no warning of the charges."

'Consumer sent 2 new text messages asking them to STOP but to no avail'

"Didn't request this service and every time we have sent STOP it still doesn't end the service and we still get charged."

"Was sent a text message for subscription to BuboMe Premium video site on 26th Nov for which i didn't request! I quickly text back stop as requested and was sent a text saying i was no longer subscribed. Then 2 days later i received another text saying the same as the first, again i text back stop and heard no more. Today i received my online phone bill from T Mobile and have found i have been charged £4.50 twice and numerous 10p for other texts!"

The Executive also made reference to the text message logs that demonstrated that consumers were opted back into the premium rate subscription service after having sent the 'STOP' command (the keyword was sent again).

'On 22 November 2010 the complainant sent STOP to shortcode 60042. A confirmation text message was sent to the handset confirming that the complainant had been unsubscribed. On 30 November a keyword [UKBUBOATP2 a9b5e706] was sent from the handset initiating the premium rate service again. A further premium rate charge was incurred by the complainant after sending the 'STOP' command.'

The Executive submitted that the complainant comments and the text message logs both demonstrated that complainants had been unable to leave the

subscription service by using the 'STOP' command as the application on the handset appeared to resend a keyword that reinitiated the service.

2. The Service Provider stated that the service, as described in the CCF and subsequently audited, had ensured that the end users were able to leave the service by sending the 'STOP' command. It stated that the mechanism described by the Executive had not been a legitimate entry into a subscription service as there was no informed consumer consent.

It stated that the fact that the application resent the keyword a number of days after a 'STOP' command had been sent should be seen as a second instance of the same issue and, therefore, viewed in the same light as the fact it was sent without informed consumer consent in the first place. It stated that, contrary to some of the comments above, the 'STOP' command was not blocked, as message logs show it was delivered and responded to.

3. The Tribunal considered the evidence and concluded that the 'STOP' command did not work as intended. It found that, when users sent the 'STOP' command, they were subsequently re-subscribed into the subscription service by the programming within the application, thereby frustrating the users' requests to leave. The Tribunal were satisfied that, although the message log appeared to support the contention that the 'STOP' command was working effectively, the complainant evidence was preferred and, in reality, the 'STOP' command did not terminate the service. The Tribunal upheld a breach of paragraph 7.12.2 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX SUBSCRIPTION SERVICES – PROMOTION (Paragraph 7.12.3(a-c))

'Promotional material must:

a clearly that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers,

b ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,

c advertise the availability of the 'STOP' command.'

1. The Executive made reference to its monitoring exercise and submitted that it had downloaded the application 'Better Battery UK' on an Android smartphone handset. The application was marketed with the following information 'Improve your phone's battery life so it lasts hours longer'. It submitted that, when downloading the application, a terms and conditions page was presented that stated as follows:

'This application has access to the following...

'Your messages

receive SMS, read SMS or MMS, edit SMS or MMS'

And

'Services that cost you money

send SMS messages'

It submitted that these terms and conditions listed on the handset when downloading the application did not inform the consumer that the service was subscription-based, the terms of use of the subscription service and failed to advertise the availability of the 'STOP' command. It made reference to consumer complaints in relation to this matter.

2. The Service Provider stated that the service, as described in the CCF and subsequently audited, had ensured that the end users were fully informed of the nature of the service as well as all of the pertinent details, including the price, the fact it was a subscription service and how to exit from the service.

It stated that it did not view the monitored service flow as a promotion for a service offered, as agreed with the Information Provider.

3. The Tribunal considered the evidence and found that the application fell within the definition of a 'promotion', as defined under paragraph 11.3.27 of the Code, as it had the indirect effect of encouraging the use of a premium rate service and had subscribed users into the service. It found that none of the information in relation to the subscription service had been present in the terms and conditions of the application itself and, on the balance of probabilities, users had not seen the service text messages. It followed that the promotional material had not provided the information required under the Code. The Tribunal upheld a breach of paragraph 7.12.3(a-c) 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 for those consumers who did not request it.
- The nature of the application's programming caused material consumer harm.
- The cost of the service to individuals was high for those for whom the service had no value and was not requested.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

The Tribunal took into account the following mitigating factors:

- The Service Provider did co-operate with the PhonepayPlus.
- The Service Provider assisted in the provision of refunds to affected users.
- The mechanism of the smartphone application was a new form of consumer harm and was allegedly caused by an affiliate of the Information Provider.

The revenue in relation to this service was in the range of Band 3 (£100,000-£250,000). The Tribunal commented that, although the Service Provider had carried out an initial due diligence exercise, the information it had received in relation to the consumer complaints and the call revenue was not sufficiently interrogated to identify the problem at an earlier stage.

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the materiality and the consumer harm outweighed the culpability of the Service Provider and the seriousness of the case should be regarded overall as **very serious**.

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

- A Formal Reprimand;

- A fine of £135,000.
- The Tribunal commented that it expected claims for refunds to continue to be paid by the Service Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.