

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

**Thursday 25 September 2008 TRIBUNAL SITTING No. 11 / CASE 1  
CASE REFERENCE: 745148/CB**

Information provider & area:	VisionSMS Ltd
Service provider & area:	Tanla Mobile Ltd
Type of service:	WAP video download
Service title:	Vis-Videos
Service number:	81404/81303
Cost:	£9.00 per week (6x £1.50 reverse billed SMS)
Network operator:	All Mobile Networks
Number of complainants:	45 (4 of which in relation to shortcode 81303)

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

#### **BACKGROUND**

The PhonepayPlus Executive (“the Executive”) received 45 consumer complaints in respect of the receipt of unsolicited chargeable text messages, which cost £1.50 each and were received in batches of six.

Examples of such messages are as follows:

‘Thank you for your order of babe videos’ or

‘New content will be available shortly’.

All 45 complainants reported that they had neither used the service, nor consented to being charged to receive it.

#### **The Executive’s understanding of how the service should have operated**

The information provider stated that the service was called ‘Vis-Videos’ and offered users the opportunity to download as many videos of ‘glamour-type’ content as were available for £9 per week. It explained that the service was promoted using WAP push messages, which were sent to people whose details had been purchased from a 3<sup>rd</sup> party data supplier. The WAP push messages contained WAP links, which directed the consumer to download content, an example of which is as follows:

<http://vis-videos.com/wap?c=B8B9A9>.

According to the information provider, if the recipient of the WAP push clicked on the WAP link, they were taken to a WAP landing page. The information provider claimed that users were required to click on the link 'Download your Babe Videos Now' which initiated the service and directed the user to the following page, whereupon the user could download videos.

The information provider emphasised that only users who 1) opened the link in the WAP push, 2) went to the WAP landing page and 3) clicked on the 'Download your Babe Videos Now!' link, would be subscribed to the service and then charged via the 81303, 81404 shortcodes.

The information provider stated that users were entitled to the first week free and that subscription charges began 1 week later, costing £9.00 per week (broken down by the receipt of 6 x £1.50 reverse billed messages).

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the 11<sup>th</sup> Edition (amended April 2008) PhonepayPlus Code of Practice.

In a letter to the service provider dated 21 April 2008, the Executive made a preliminary request for information under paragraph 8.1.3 of the Code, to which the service provider responded on 1 May 2008. The Executive made a further request in a letter dated 9 May 2008, to which the service provider responded on 20 May 2008.

Upon receipt of the appropriate undertaking forms the Executive raised potential breaches of paragraphs 3.3.1, 5.2, 5.8, 5.12, 7.12.4 and 7.12.5 of the Code, in a letter to the information provider dated 9 July 2008. The information provider responded on 15 August 2008.

The Tribunal heard informal representations from the information provider on 25 September 2008. The Tribunal made a decision on the breaches raised by the Executive on 25 September 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **GENERAL DUTIES - DEDICATED PREFIX (Paragraph 3.3.1)**

*"Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service... those codes or number ranges must not be used in contravention of these restrictions..."*

1. The Executive noted that the Mobile Network Operator Code of Practice for Service Delivery on Common Mobile Shortcodes, stated that Adult and Sexual Entertainment Services should only be made available on codes behind the 69XXX and 89XXX ranges. During the Executive's monitoring of the videos provided by the information provider, it noted that one entitled 'maria 3gp' displayed adult content. This led the Executive to determine that the Vis-Videos service/promotion was being operated on the incorrect non-adult shortcode.

2. The information provider stated that it had now reviewed the matter and accepted that maria3.gp should not have been included as part of the service. On reflection, it understood why the Executive or others might consider the content to be adult in nature. The information provider commented that its technical department should have included maria33.gp as the appropriate piece of content and acknowledged that an error had been made. The information provider emphasised that all of its other content satisfied a 'non adult' classification.
3. The Tribunal considered the evidence and noted the information provider's arguments. The Tribunal concluded that the content was adult in nature and therefore inappropriate content to be marketed on a non-adult shortcode. The Tribunal upheld a breach of paragraph 3.3.1 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."*

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, 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").

1. The Executive noted that the information provider had initially stated that all recipients of the promotional WAP push had previously opted into similar services, which the Executive took to be the information provider's reliance on the soft opt-in. The Executive understood that such implicit consent must be provided in the course of a previous sale or negotiation, for the same product or service (of the information provider in question). In this case, the Executive noted that the consumers' details were purchased from a 3<sup>rd</sup> party, which prevented reliance upon the soft opt-in.

The Executive also noted that the information provider subsequently stated that that "explicit consent" had been obtained from users. The Executive took this to indicate that the information provider was seeking to rely on the hard opt-in. The only evidence provided in respect of such 'explicit consent', was a list of websites which users had allegedly visited, together with information provider addresses. Upon the Executive's monitoring of the websites, it did not appear that consumers were provided with a specific opportunity to opt-in, nor were they informed that their access the site constituted an opt-in. The Executive

contacted a sample of complainants, who all stated that they had not accessed any of the sites in question.

2. The information provider did not consider that its service was in breach of paragraph 5.2 of the code. It commented that all terms and conditions were explicit, clear and provided information in respect of the “STOP” command (after opening the link) and that recipients therefore had the opportunity to opt out of further promotions. The information provider commented that the Executive would be aware that it was technically impossible to send a STOP command to WAP push message, which is why the terms and conditions stated that the opt out must be addressed to the short code 81404. The information provider commented that data provider had supplied its original terms and conditions and the relevant consumer contents.
3. The Tribunal considered the evidence and commented that the information provider’s purchase of a data list was not wrong per se. However, the Tribunal concluded that the information provider had not demonstrated the appropriate consents in respect of any purported “hard opt-ins”. The information provider in this case could not rely on the list as a “soft opt-in”, as the consents would only have been relevant in respect of its own previously purchased goods or services, to which the list did not relate. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE**

**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 obvious and easily available to the user.”*

1. The Executive requested logs to be provided by the service provider in respect of certain mobile numbers contacted by the service Vis-Videos on 81404. The logs demonstrated that the initial free promotional messages sent to consumers, failed to provide the customer service number. The messages which stated <http://vis-videos.com/wap?c=>, related to a WAP site and failed to provide the user with any contact information.
2. The information provider responded that no doubt the Executive would be aware that the information could not be included in the promotional message for a WAP service. It referred the Executive to the screenshots provided, which confirmed that the relevant contact information (including service provider identity and contact number) was available once the consumer clicked on the WAP link (at no charge).
3. The Tribunal considered the evidence and noted that the requisite contact information was missing from the WAP push message (which only contained the

WAP link). The Tribunal rejected the information provider's argument that it was impossible to include the additional contact information in the message, and commented that this was not a defence to the breach at hand. The Tribunal noted that paragraph 5.8 required contact details to be contained in each and every promotion, and stated that if the information provider wished to use the WAP push as a method of promotion, then these details must be included in the message. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR**

**INAPPROPRIATE PROMOTION (Paragraph 5.12)**

*“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”*

1. The Executive considered the service to have been inappropriately promoted, for the following reasons:

Reason 1

The Executive received 3 complaints from parents of minors and in one case, the parent of an 11 year old who had received 4 videos from the service. Although the service offered mainly glamour videos, one adult content video called maria3gp was supplied to the Executive by the service provider. The Executive considered that the adult content could easily have been sent to children and was likely to be regarded by the childrens' parents and children themselves, as being offensive and harmful.

Reason 2

The Executive considered that the information provider was relying on consent which appeared to have been obtained some time prior to the promotion in question. For example, the information provided by the information provider demonstrated that recipients had received messages after 8 and 9 months from the purported date of opt-in. Given the public complaints in respect of the service, the Executive considered that the sending of promotional material after such a long delay, constituted inappropriate promotion.

2. The information provider responded to the Executive's assertions as follows:

Reason 1

The information provider stated that it had acted in good faith in response to the data provided by the data provider and its assurances that all numbers supplied, belonged to consumers who had provided explicit consent to receive marketing messages from the information provider. The information provider stated that it

was not its intention nor had it ever marketed any unwanted or inappropriate services to consumers, including those under the age of 16.

## Reason 2

The information provider stated that it accepted the Executive's comments, but respectfully wished to point out that there was nothing in the current edition of the Code of Practice which stated a timescale in this regard. Had the Code specifically stated that all promotions must take place within a set timescale from original opt in, it would have complied. The information provider also commented that PECR 2003 did not provide defined timescales either, and guidelines received from the Information Commissioners Office suggested that a timescale of up to 12 months was not unreasonable.

3. The Tribunal considered the evidence and concluded that the information provider had not used all reasonable endeavours, to check the validity of the 3<sup>rd</sup> party opt-in list. The information provider had taken no positive steps to satisfy itself as to the accuracy of the data contained within the list. The Tribunal concluded that the content was likely to be considered offensive or harmful by some recipients, particularly children and their parents, and that the service had been inappropriately promoted to persons who had never provided consent. The Tribunal upheld a breach of paragraph 5.12 of the Code.

## **Decision: UPHELD**

### **ALLEGED BREACH FIVE**

#### **SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)**

*"Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:*

- a name of service,*
- b confirmation that the service is subscription-based,*
- c what the billing period is ... or, if there is no applicable billing period, the frequency of messages being sent*
- d the charges for the service and how they will or can arise,*
- e how to leave the service,*
- f service provider contact details."*

1. The Executive considered that consumers were not sent the requisite subscription initiation messages for the service, and that the evidence relied on by the information provider to establish that it had done so (SMS logs supplied by the information provider), were unreliable.
2. The information provider explained that the outbound part of the service was not operated by the service provider, therefore it would be a technical and practical impossibility for any subscription reminder messages to be highlighted on any message logs. The information provider emphasised that call logs from the service provider would not show any subscription reminder texts as it did not use them for this part of the service. The information provider stated that for commercial reasons, it used a 3<sup>rd</sup> party technology partner, who had been responsible for sending the subscription reminder messages.

3. The Tribunal considered the evidence supplied by the information provider, which failed to demonstrate that the subscription initiation messages were sent prior to recipients receiving the premium rate service. The Tribunal noted that the Code provision required the message to be sent before the premium rate service is received and was satisfied upon examining the message logs that a breach of this provision had occurred. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SIX**

### **SUBSCRIPTION REMINDERS (Paragraph 7.12.5)**

*“Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers.”*

1. The Executive considered that consumers were not sent the requisite subscription reminder messages for the service, and that the evidence relied on by the information provider to assert that it had done so, was unreliable. In the event that the Tribunal did accept that information provider’s evidence that reminder messages were sent, the Executive considered that the evidence demonstrated that the messages had not been sent at the appropriate points. The subscription reminder messages appeared to either have been sent too late which meant that consumers incurred additional costs before being given a chance to opt-out, or not sent at all.
2. The information provider reiterated that the call logs from the service provider would not show any subscription reminder texts, as it had not used them for this part of the service. The information provider stated that for commercial reasons, it used a 3<sup>rd</sup> party technology partner, who had been responsible for sending the subscription reminder messages.
3. The Tribunal considered the evidence and noted that the logs relied upon by the information provider, demonstrated that the subscription reminder messages were not sent each time users had spent £20 (in less than a month). The Tribunal upheld a breach of paragraph 7.12.5 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

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

- The information provider was reckless in its lack of due diligence in respect of the 3<sup>rd</sup> party data list;

- The service caused consumer harm, resulting in 45 complaints;
- The cost paid by individual users was high, £9.00 per week (complainants reported charges of between £6.00-£40.00 per week);
- The concealed subscription service is one which has been singled out for criticism by PhonepayPlus;
- The service was harmful to children; it was promoted to minors as young as 10 and 11; and
- The information provider did not assist the Executive by providing all the information when requested.

There were no mitigating factors for the Tribunal to consider.

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

The Tribunal therefore decided to impose the following sanctions against the information provider:

- A formal reprimand;
- A fine of £2,000;
- The Tribunal ordered the information provider to seek compliance advice from PhonepayPlus within two weeks from publication of the full decision. Such advice must then be implemented within two weeks of receipt.
- The Tribunal also ordered that claims for refunds are to be paid by the information provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.