

**ADJUDICATION TRIBUNAL MEETING OF PHONEPAYPLUS  
(NO.17)**

**Date of Adjudication - 18<sup>th</sup> December 2008**

**ADJUDICATION**

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY  
ICSTIS)**

**TRIBUNAL DECISION**

**Thursday 18 December 2008 TRIBUNAL SITTING No. 17 / CASE 2**

**CASE REFERENCE: 764194/AM**

Service provider & area:	Dialogue Communications Limited, Sheffield South Yorkshire
Information providers & area:	Consume First Pty Ltd, Alexandria, Australia
Type of service:	Mobile adult video and picture content Free Adult Video
Service number:	69005
Cost:	£1.50 for 4 pictures or 3 videos
Network operator:	All Mobile Networks
Number of complainants:	16

**BACKGROUND**

The PhonepayPlus Executive ("the Executive") received 16 consumer complaints in respect of a pay-per-view mobile adult and video content service, the promotion of which included the following mediums; 'The Sun' newspaper, ZOO magazine, internet pop-ups and use of keyword 'Filth' in an unknown publication. The service operated under the name 'FREE\* ADULT VIDEO FOR EVERY READER'.

The complainants reported to have received unsolicited WAP push messages and to being charged for content they had not accessed. Other complainants who viewed the promotional material for the service, stated that they did either not receive, or could not locate the 'free video' on offer, but incurred a charge nonetheless. Other complaints reported that in their search for the 'free video', they accidentally accessed other chargeable content.

**The Executive's understanding of how the service was supposed to operate**

1) The Sun promotion:

The promotion appeared in the classified section of the newspaper. The service appeared to frequently change its keywords (previous examples being PIE, BARE, NUDE and VID). In order to access the service, the consumer was required to send the relevant keyword to shortcode 69005. The consumer would then receive a WAP push message which when clicked, opened a WAP landing page and allowed access to the service.

## 2. Pop up / banner on third party website:

A pop up/banner promoting the service appeared on a third party website called 'Mywaves'. According to the service provider, the pop-up/banner for this service only went live as a test promotion on the 'Mywaves' website for one day only, being 9 August 2008.

The website offered consumers access to free mobile phone videos with the option to browse and download their favourites onto their mobile phones. The screenshot of this pop up/banner was not made available to the Executive.

In order to access the service, users were required to log on as a member on 'Mywaves' website and then click on the pop-up/banner, which opened the following web page <http://d.dsza.com/universal/start.action?sid=2548>. The webpage promoted 'Erotic Mobile Movies' and offered a free adult video. In order to access the free erotic video, users were presented with two different methods of entry into the service: a) by entering their mobile number or b) texting "MOB" to shortcode 69005.

### 4) Other Means of Entry

The service was also promoted in Zoo magazine and in other unknown publications, which required consumers to send the keyword 'Filth' to shortcode 69005, and resulted in the receipt of a service called 'Filth Town'. The Executive understood that the service for these two promotions worked in the same manner as 'The Sun' promotion.

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

In a letter to the service provider dated 15 August 2008, the Executive requested under paragraph 8.3.3 of the Code, information on the service including all methods of promotion, message logs and opt-in details for 10 complainants. The service provider requested an extension of time in which to respond, which the Executive granted until 28 August 2008.

The Executive issued a second 8.3.3 request dated 27 August 2008, seeking message logs for the two monitoring phones used by the Executive. The deadline of 28 August remained. This new deadline was not adhered to, and the service provider requested a further extension, which was again granted by the Executive until 2 September 2008.

The service provider duly responded to the 8.3.3 request within the deadline, although the message logs and attachments could not be accessed by the Executive. The full response was eventually received on 4 September 2008.

The Executive subsequently requested a missing attachment, which included screenshots which the service provided described to be 'WAP landing pages'. These were actually screenshots of web landing pages with the URL addresses obscured by minimisation of the webpage. The Executive requested the URL address and details of the web page. The URL address provided could not be accessed by the Executive despite numerous attempts. The Executive was put in touch with the information provider, who admitted that they had in fact also promoted their service via third party website called 'Mywaves'.

The Executive issued two further 8.3.3 letters on 8 and 10 September, requesting further information on the web site promotion, message logs for another monitoring phone used by the Executive and for original message logs to be provided in full format.

The service provider responded on 15 September but failed to provide the original message logs in their full format.

The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1 and 5.7.2 of the Code, in a letter to the service provider dated 15 October 2008, which also included a request for opt-in details and message logs for 7 further complainants. The service provider responded to the breach letter on 22 October 2008 but only provided 6 of the 7 message logs requested. The service provider's response to the breach letter also highlighted that two of the complainants, although they received content from the shortcode under investigation (69005), actually entered by another shortcode (69394) operated by another service provider. For the purpose of this investigation, these 2 complaints were disregarded.

The Tribunal made a decision on the breaches raised by the Executive on 18 December 2008.

### **Preliminary Matter**

The Executive requested that the Tribunal consider whether the service under consideration, 'Free adult video for every reader', promoted in The Sun newspaper, was the same service as that promoted by other means and keywords, but with the same shortcode 69005.

The Tribunal noted the various means of entry into the service, which all operated with the same shortcode and offered consumers a 'free adult video'. The Tribunal also noted the involvement of the same service and information provider in each instance. The Tribunal observed that regardless of which promotional route the consumer entered the service, the WAP link URL sent to their mobile phone handset was the same. The Tribunal concluded, taking these factors into account, on a balance of probabilities that the services were one and the same for the purposes of the investigation.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **LEGALITY (Paragraph 5.2)**

*"Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful."*

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. 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'.

1. The Executive noted that of the 16 complainants, 10 had indicated they had not entered the service, and were charged for viewing content they had not accessed. Furthermore, one particular complainant reported to have received approximately 226 messages in the one hour

from shortcode 69005, (charged at a rate of £1.50 per message), which caused the phone to crash.

The Executive noted that the message log supplied for this complainant, demonstrated that opt-in was obtained by the user entering their mobile phone number into the webpage promoted on 'Mywaves' website. The call logs also showed that the complainant had received 242 message (121 downloads in 28 minutes) which cost £378 in total.

The Executive noted that the service provider stated in correspondence that the pop up/ banner promoting the service on 'Mywaves' website was live for one day only on 9 July 2008. In that same letter, the service provider stated that this complainant entered the site on that same day, although the logs supplied showed the complainant had actually entered their mobile number on the website on the 15 July 2008, some six days after the live test promotion.

The Executive considered that in at least one instance, the service provider was unable to evidence direct or indirect consent for the sending of direct marketing material which appears to breach Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

2. The service provide denied that it had breached paragraph 5.2 of the Code, noting the Executive's assertion that of the 16 complainants, 10 had indicated they had not entered the service, but had been charged for content they had not accessed. The service provider stated that this was categorically false and asserted that it had clear factual evidence in the form of the exact user message logs, which demonstrated that in every single case, the user had consented to receiving the promotion.

In relation to the specific complainant above, the service provider commented that the user's message logs clearly showed they had consented to using its service and were accurately billed for each piece of content purchased. The service provider commented that if the messages crashed the phone, the complainant should contact their handset manufacturer, as this was not normal behaviour for a handset.

The service provider accepted that the logs clearly demonstrated that the user entered the site on the 15 July 2008, and confirmed that the Mywaves test campaign had actually run on 15 July not on 9 July 2008. The campaign was initially scheduled to run on that date but was delayed until 15 July. The service provider commented that this has been confirmed in writing by its advertising agency, who managed the booking of the test campaign on its behalf. The service provider apologised for its mistake. The service provider emphasised that in all of the cases provided, it had clearly proven in every single case, that the user consented to receiving the promotion.

3. The Tribunal considered the evidence and concluded on the balance of probabilities, that the message logs supplied by the service provider did demonstrate the appropriate consumer consents. The Tribunal did not uphold a breach of paragraph 5.2 of the Code.

**Decision: NOT UPHELD**

**ALLEGED BREACH TWO**

**MISLEADING (Paragraph 5.4.1a)**

*"Services and promotional material must not:  
a mislead, or be likely to mislead in any way..."*

1. The Executive considered the service misleading for the following reasons:

#### Reason 1

The Executive considered the format in which the 'free adult video' was promoted, using both bold and colourful text and pictures, was primarily in order to entice consumers into using the service. The Executive considered that upon viewing the promotional material, consumers would have a reasonable expectation that the free adult video would be readily available and easily identifiable.

The Executive considered that the consumer expectation was defeated by the by the fact that a) users were required to scroll past 10 promotions of chargeable videos and pictures, b) the service on offer changed from picture and video downloads to chat and text and meet services and c) the '*included items link*' appeared directly above (with no gap to suggest a different item) the first pictorial icon promoting a chat service with two further services on offer below and, d) the 'included items link' was presented to the user as a plural rather singular, which suggested more than one item, whereas the promotion offered only *one* free adult video.

The Executive noted that six complainants explicitly stated they entered the service but could not locate the free content, and that two of those complainants stated they accessed other links on the WAP page in search of the free video.

The service was monitored by two members of the Executive, using different mobile phone networks, and both were unable to locate the free video. In that search, one of the Executives clicked a link titled "*The good stuff*" in the belief that it contained the free video, but it did not. The fact that the Executive had accessed another link to find the video was an indication that a user could be misled into doing the same, and unknowingly incur a charge as a consequence.

The Executive considered that the service provider appeared to have accepted that the location of the free adult video was not readily available or easily identifiable to users, having proposed various amendments to their WAP page:

#### Reason 2:

The Executive had concerns that the promotion and service was likely to mislead consumers, because the terms and conditions in 'The Sun' newspaper stated: '*Further premium quality video and picture sets available, priced at 3 pounds for each 3 video pack, or 4 picture pack*'. At least one complainant who accessed the service after viewing a promotion, stated that in their search of the free video, they downloaded other videos and unknowingly incurred a charge. The complainant also stated that when downloading those videos, they only received picture content.

The Executive's monitoring highlighted that users only received three still pictures regardless of whether they requested a video or picture pack. The Executive considered this further aggravated by the following three factors: 1) The Sun promotion clearly stated the quantity available in each video/picture pack, however the pricing information on the WAP landing page did not provide this information, 2) users who accessed the service via the pop up/banner on the 'Mywaves' website, would only have had viewed the pricing information on the WAP landing page (it was not available on the website). The user would therefore they would be

unaware of the quantity of videos and pictures contained in each pack, 3) the pricing information on the WAP landing page received by users of the 3 network clearly stated “*Video and pics just £3.00 per pack*”. However, the WAP landing page received by users of all other mobile networks stated “*3 Video Packs just £3.00 ONLY*” The Executive believed this was less clear, and could quite legitimately be construed as meaning 3 video packs for £3.00, whereas only one pack (consisting of three videos) was available at the advertised price.

As a further aggravating factor, the Executive considered the actual content provided different considerably from that promoted. A reasonable consumers’ expectation upon downloading that content, would be to receive content close or similar to the image/description, and this was not the case.

2. The service provider responded to the Executive’s allegations as follows:

#### Reason 1

The service provider commented that although the content of the service was updated on a regular basis in order to keep the service fresh and improve the customer experience, the service had always contained a free video, located via a dedicated link on the main menu that read ‘Included Items’. The service provider stated that there was no charge to download this content other than the users’ standard network data charges. The service provider emphasised that it is always was the case that a free video was available.

It commented that the definition of ‘Included Items’ meant that any reasonable person would not expect to receive a charge in respect of those items available. Furthermore, the ‘Included Items’ link was located with the video packs above the cross sell links for other services. As the user scrolled down, the ‘Included Item’ link became highlighted and was very obvious. The service provider commented that there were very few things the user could click on the site, and essentially only had four options and it would be impossible not to notice the ‘Included Items’ link.

At the top of the site the most prominent information that all users must read before scrolling down, was the pricing information for additional content. This was deliberately placed at the top of the site to ensure that all users were aware that the site also contained content that they must pay to download. The service provider disagreed that also having billable content on the site, defeated the expectation that the site would contain a free video under ‘Included Items’.

In view of the Executive’s difficulty in finding the free content, the service provider had amended the terms and conditions at the top of the page to state: ‘*Included items are at no charge. Additional 3 Video Packs just £ 3.00 ONLY plus network data charges*’. The dedicated link to the included content now read: ‘*Included Items – Free Video*’. It emphasised that this was not an acceptance that the location of the free adult video was neither readily available, nor easily identifiable.

The service provider requested details of the complainant referred to by the Executive, and respectfully suggested that if this was not possible, the Tribunal either disregard the evidence or allow it an opportunity to respond.

In relation to the pricing available to the Mywaves website, the service provider asserted that it was not a subscription service and that users were not billed for visiting the site, as supported by the message logs provided. It commented that the landing page actually stated ‘refer to site

for other content cost and terms and conditions'. Therefore, any visitor to the site received the pricing before deciding if they wanted to proceed to purchase content.

The service provider disagreed that it was unclear as to how many videos were contained per pack. The service provider also disputed that the content was far removed from the advertised description. With regard to the Executive's monitoring, the service provider accepted that in one instance, the pack contained three pictures instead of four, however it had not received any consumer complaints in this regard. In respect of the monitoring of the Shocking Uncensored site, it disputed that the Executive could have received three pictures instead of videos. It blamed this on the Executive failing to click on the video pack and incorrectly assuming they were pictures.

3. The Tribunal considered the evidence and concluded that the service was misleading, as verified by the consumer complaints and the Executive's monitoring of the service. The Tribunal was not persuaded that 'Included Items' was clear and preferred the evidence of the Executive regarding the downloaded content of pictures rather than videos. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **PRICING INFORMATION (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 noted that the webpage which users viewed prior to entering their mobile number, did not contain any pricing information. The Executive considered that the omission of the pricing information meant that users entering their mobile phone number had not been clearly, straightforwardly, or fully informed of the cost of using the service and therefore, users might believe the service to be free.
2. The service provider commented that the Executive's opinion on the alleged breach of pricing information appeared to be based on an assumption that a user of its service was obligated to make a purchase, after entering their number into a WAP landing page in order to access the service. This service provider emphasised that this was simply not the case. When a user entered their number in the WAP landing page, this initiated a free WAP push link which directed them to the 'shocking uncensored site' (the same also applied to three users with the Videostar site). The service provider emphasised that at this point, all the user has done was to request to view the site and was under no obligation to purchase anything. It stated that the user could exit the site without incurring any charges.

The service provider emphasised that the site was free to access and the pricing information was prominently displayed at the top of the site, prior to any content being offered. Should the user wish to purchase content, they were fully informed, clearly and straightforwardly, of the cost of using the service prior to incurring a charge. The service provider concluded that it was impossible to incur a charge without being first presented with the pricing information.

3. The Tribunal considered the evidence and found that the webpage through which users would enter their mobile number did not contain any pricing information. The Tribunal also found that the WAP site did not inform users how many videos or pictures would be contained in the

'pack' on offer and thereby concluded that such users had not been fully, clearly and straightforwardly informed of the cost of using a service prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FOUR**

### **PRICING INFORMATION (Paragraph 5.7.2)**

*“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.”*

1. The Executive observed that in The Sun' print promotion, the 'free adult video' was heavily promoted in very bold, colourful text and pictures, located at the top of the advertisement. In comparison, the pricing information was contained within the small print of the terms and conditions located at the bottom of the page, in a very small grey font on black background. The Executive considered that the size and colour combination of the text meant that a consumer eager to use the service, could easily overlook or miss the pricing information entirely. The Executive considered that the pricing information was neither not prominent nor presented in a way which did not require close examination.
2. The service provider commented that the basis of the Executive's argument appeared to centre on the alleged 'actual size' representations of its advertisement as supplied in correspondence. The service stated that the version supplied was an unrealistic and inaccurate representation of how its advertisement appeared in the newspaper. The service provider disputed that the low resolution and reduced size was how the advertisement would have appeared to readers. The service provider alleged that the copy of the advertisement supplied by the Executive had been reduced to 4.1 cm by 3.2 cm, when its actual size was 6.3 cm by 5 cm. The service provider supplied a real size copy of the advertisement and contended that the pricing information therein, was easily legible.
3. The Tribunal examined the original advertisement taken from The Sun newspaper. The Tribunal concluded that the pricing information required close examination and was not easily legible or prominent. The Tribunal upheld a breach of paragraph 5.7.2 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 service provider had been wilfully misleading when responding to the Executive's requests for information. On more than one occasion the information supplied could not be accessed by the Executive, which it then had to re-request. Also, the service provider missed deadlines to 8.3.3 requests, despite the granting of extensions of time by the Executive.
- The cost paid by individual consumers was high; one particular complainant having been charged a total of £378.



There were no mitigating factors for the Tribunal to consider.

Taking into account the aggravating 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:

- A formal reprimand.
- A fine of £40,000 fine (comprising £25,000 in respect of the upheld breaches and a breach history uplift of £15,000).
- The Tribunal ordered the service provider to seek compliance advice within 2 weeks from the date of this notice and implemented within 2 weeks of receipt.
- The Tribunal also ordered that claims for refunds are to be paid by the service provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.