

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 4 March 2010
TRIBUNAL SITTING No. 48/ CASE 2
CASE REFERENCE: 814721/CB

Information provider:	Blue Stream Mobile Limited, Bucks
Service provider:	MX Telecom, London
Type of service:	WAP pay-per-page
Title:	Various
Service numbers:	69122, 69700, 69898, 69944, 69990, 82007, 89995, 89966 and 69994
Cost:	£3 - £6 per page viewed, billed in £1.50 increments
Network operator:	All Mobile Network Operators
Number of complainants:	359

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

BACKGROUND

PhonepayPlus received 359 complaints between March 2009 and December 2009 in relation to the services operating on numerous shortcodes. The services were WAP pay-per-page services operated by Blue Stream Mobile Limited (the Information Provider) and promoted by way of promotional WAP links sent directly to consumers' mobile phones. Examples of promotional WAP links as provided by the Information Provider were as follows: *"12p Sex Vids"*; *"Download Lady Gaga Sex Video!"* and *"Cheryl Cole XXX Pics"*.

PhonepayPlus established that pages which were clicked and viewed varied in price between £3 and £6 and each page contained multiple items/thumbnails of material. The cost of viewing a page was applied to the consumer whether or not they had chosen to view any of the available thumbnails within that page. As such, the consumer was charged the same amount for simply browsing a page, regardless of whether the consumer decided to view the content.

Consumers stated that the service pricing had not been clear and as such they felt misled by the service mechanics (i.e. being charged large sums for just browsing the sites without always downloading content).

The Executive was also concerned that consumers stated to have received WAP-push messages, the content of which suggested they had been sent by users of the social network site 'Facebook'.

The Service

There was no spend-limit on any of these services; neither per session, or overall.

The Executive was concerned that these WAP pay-per-page services allowed for consumers to be billed large amounts of money in a short space of time. This concern was further enforced by the fact that the billing process takes place once the user had ended their interaction on the WAP page; therefore, there was no knowledge of how much money had been spent until the billing text messages had all been received at a later stage.

The cost of viewing a page was applied to the consumer whether or not they had chosen to view any of the available material within that page (videos/pictures). This meant that a consumer would be charged the same amount for viewing/browsing a page and not choosing to download any items as they would be for viewing a page and downloading the three items of content – both scenarios would result in charges being reverse-billed to the consumers handset.

Pricing information was provided on each WAP page:

Video pages you click & view cost £4.50 each.

Photo pages you click & view cost £3 each.

Each page contains a minimum of 3 items.

SCROLL DOWN

& CLICK ON

'UNCLAIMED

DOWNLOAD'

TO GET YOUR

UNCLAIMED ITEMS

CLICK HERE for your unclaimed downloads

Your unclaimed content can only be downloaded from the link above.

However, the Executive noted that consumers appeared to have had particular difficulty with the wording in that they did not seem to have understood that, by clicking onto a page and choosing not to view items, they would still be charged.

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 6 October 2009. The Executive received Information Provider undertaking forms on the 8 October 2009. The Executive received a formal response to its breach letter from the Information Provider on 20 October 2009.

The Tribunal made a decision on the breach raised by the Executive on 4 March 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS (MISLEADING) (Paragraph 5.4.1a)

“Services and promotional material must not mislead, or be likely to mislead in any way.”

1. The Executive considered the service to be in breach of paragraph 5.4.1a on the following grounds:

Ground 1

The Executive submitted that some complainants had indicated that the pricing information detailed on the WAP landing pages for these services had not offered full clarity and that, whilst some consumers expected to be charged for their use, they had not expected the charges to be anything like as high as those that were actually incurred once they had exited the services.

It submitted that many of the problems would appear to have centred on a lack of understanding in relation to the pay-per-page element.

It submitted that consumers seemed to have had particular difficulty with the wording in that they did not appear to have understood that clicking onto a WAP page but not viewing items would still result in them being charged – for example, the cost of viewing or flicking through seven landing pages (browsing), and not actually downloading or clicking on a thumbnail, would incur a charge of £21. Furthermore, consumers had not been able to see what material was on a page until they had actually clicked on it, thus seemingly depriving that consumer of any form of choice ahead of being charged £3 for that page, regardless of whether they chose to actually view any of the items that were available. It submitted that consumers may not have wished to view any items of content on the page, but were charged regardless.

The Executive made reference to some of the consumer complaints to support its submissions. It noted that some of the extracts have been written by complainants directly, whilst others have been noted down by members of the PhonepayPlus Contact Centre:

- *“Receiving texts from 69700, 69898. Received billing messages. Says he has not viewed anything.”*
- *“The txt msg took me into a link which i immediately went out off as i didn’t wish to buy any videos; it was thumb nail pictures advertising the videos that were available from the site. I have been charged 1.50 around ten times, and every time i top up they are taking money off me. I even sent stop to the number and they said i was opted out and they have still been charging me, i still have the msgs on my phone. I rung the number and unsubscribed which didn’t work 08700631180, this number is meant to have operators to talk too but it says they are always busy. I would like a refund for all the money they have scammed off me, i did a bit of research on the net, and they have been doing it to lots of people.”*
- *“It was a txt msg saying Chanelle from bb, i clicked on it by mistake and it took me into a link which i immediately went out off as i didn’t wish to buy any videos, it was thumb nail pictures advertising the videos that were available from the site.”*

- *"I just can't afford to have £70 gone from my phone Im on job seekers allowance. I only downloaded 1 video it said it would be 3 minutes long but it only lasted 30 seconds anyway so they're ripping me off there as well I didn't even view anything other than the video I downloaded."*

The Executive submitted that, in light of the complainants, the evidence in support of its submissions and the high consumer charges in relation to the high usage, it was of the opinion that the operation of these services had misled consumers.

Ground 2

The Executive submitted that complainants had stated that many of the WAP-push text messages received had appeared as if they were from the social networking site known as 'Facebook'. It submitted that this appearance had served to mislead recipients who had made the connection with Facebook as being a free service/social networking site.

It submitted that the WAP-push messages had appeared to have led users to click the 'Click here to view' tab on the WAP-push and that they were then directed to one of the WAP pay-per-page services. It submitted that, as a result of entering and navigating these pages, consumers had incurred charges for navigating (see Ground 1) and not actually downloading pictures or videos. It submitted examples of some of these WAP-push messages, as reported by complainants:

- *"Adult FACEBOOK Jenna Green has sent you a snog. Click here for her profile";*
- *"Jenna Green has sent you a snog on Adult FB. Click here for her profile";*
- *"Jenna Green tagged u in the album NAUGHTY WEEKEND on Adult FB! Click here to view";*
- *"Claudia Scott has sent you a virtual blow job on facebook";*
- *"Hi its Sara, contact me on Facebook".*

The Executive submitted that it was of the opinion that 'Facebook' is a trusted global brand and sending promotional WAP messages to members of the public which purported to be from Facebook had been highly misleading. It made reference to reports from complainants specifically relating to the receipt of these type of text messages. Three of the complainant reports referred to are set out below:

Complaint 1

"The exact nature of the service was not clear. It appeared to be an adult version of facebook and that certain members of your facebook friends have invited you to join.

"Once you access the link, it is very difficult to view the page and thumbnail as everything is fairly small on the mobile. Once on this page if you click on the first

thumbnail of the person who has sent the text 3 further thumbnails are shown on screen. On the bottom of the page there is a 'next' button. Having pressed next on a number of occasions to try and get back to the main menu, the screen kept loading with three different thumbnails. After reaching a certain point you could not press next anymore and you were still not back to the menu screen.

"I then received within in the space of 1minute 40 messages from the company saying that they were billing messages having contacted my service provider they have told me that the charges were in excess of £50.00.

"Having spoken to the customer services of the above company on 0870 063 1180 I was told that there was nothing they could do, and that they were not interested and that they would not make any refund.

"I was told the service was called fantasy fuckbook and that they charged me £6.00 every time I moved to a different page and was no way affiliated with facebook. So having pressed the next button trying to get back to the menu i was charged £6.00 every time. I was then told that somewhere on the menu screen it does mention you will be charged £6.00, but this after the first link so having clicked the first link, this is not seen and the charges were not mentioned on any of the other pages, nor did it say that clicking next would cost a further £6.00!! (for nothing other than being on that page) This charge was not mentioned on the initial text message either.

"They have blatantly designed a site to mislead its users into being charged extortionate amounts of money which the consumer is not clear about and take advantage of its customers who may feel owing to the sites contents slightly more reserved in complaining."

Complaint 2

"I had a text on my mobile phone the other night, and O2 said that I should ring you. It come through as an ordinary mobile number, and said that someone I knew wanted to contact me through Facebook. I'm not registered on facebook, but I went onto it. I went onto the actual site that come up in the message and it had to stop send stop to 69700 and that is where I got the number. There is a link on the site that come up. I suppose you could call it a link. After that they just kept sending me these messages. I thought it was just facebook. He says his phone is locked for 18+ content, so he shouldn't have been able to access it anyway".

Complaint 3

"I received a link from the company that I clicked onto for a site called adult facebook. It took me to the site that was charging Â£6 for each item to be viewed. I didn't click on anything and exited the site. I must have been on for about 10-15 seconds. Then I started to receive text messages saying this is a billing message for content accessed on 28/05/2009. I sent a message back saying stop and that didn't work so I rang the number on the text message to opt out of the service which I entered my mobile number and also left a message on

their answer phone. The messages kept on coming so I rang three my mobile company to tell them, they told me to try sending a text message and the number again which I did but that still didn't work. So I rang three again and they let me have a different number which was 0871 7503155 and the messages stopped. All in all I think I was getting these messages for nearly an hour and a half."

The Executive submitted that the Information Provider appeared to have explained to one consumer that the service was not 'Facebook', but was actually entitled 'Fuckbook'; the Executive submitted that none of the complaints had made any mention of 'Fuckbook' within any of the WAP-push details (in fact only 'Facebook' and 'Fbook' had been mentioned).

Ground 3

The Executive submitted that many complainants stated that they had received one of the following promotional text messages from the service:

"Free message: you have paid for but not claimed some adult videos. Click on this WAP.MOB365.net/61.WML"

OR

"You have paid for, but not claimed your adult video at ultimate porn get your item here wap.mob.365.net/tx4wml"

The Executive submitted that these text messages were promotional text messages providing users with the necessary WAP link to access the pay-per-page service and run up further bills for simply browsing pictures/videos. It submitted that it was of the opinion that the wording of the promotional WAP-push had given consumers the expectation that there would be some form of content on the service that had already been paid for and could lead to unnecessary WAP page browsing by the user in hope of accessing this purportedly already paid for content.

2. The Information Provider responded to the Executive's allegations as follows:

Ground 1

The Information Provider stated its terms clearly stated that:

*Video pages you click &
View cost £ () each. Photo
Pages you click & view cost
£ () each. Each page contains
Minimum of () items.*

It stated that these terms had already been submitted and approved following an initial case against it for the use of pay-per-view services. It stated that, at that time, the terms were deemed to have been clear, fair and just to the consumer and no breach was upheld against it in relation to this issue.

The Information Provider referred to the Executive's submission that consumers had had difficulty with the wording and stated that its terms specified that the user was billed 'per page you click and view' and that each page contained a minimum of three items. In order to access a new page, and thus incur further charges, the user must have clicked on 'Next Page.' It stated that it was therefore unsure as to how users could have misinterpreted this information as suggested by the Executive's submissions.

The Information Provider referred to the Executive's submission that consumers had not been able to see what material was on a page until they had clicked on it. It stated that within any of the site homepages there were up to, and in most cases, at least 40 different descriptive content links that a user could click on to access content. It referred to categories such as: "Outdoor Action", "Candid Camera", "Group Action", "Brunettes".

The Information Provider said it refuted the Executive's submission that the user had been deprived of any choice prior to being charged.

The Information Provider stated that the nature of the content being provided to users was 'Glamour Content'. It stated that it was of the opinion that a user interested in glamour models would not purchase a glamour magazine that was tailor-made to their likes/dislikes, but would pay an overall fee for the selection that was included. It stated that its sites were designed with the same mindset; however, it had made a conscious effort to provide as many different/unique categories of content.

It also stated that a user was never billed for accessing the homepage of any of its sites. The Information Provider said that its sites included banners/advertising for other sites that it offered, so a user could potentially browse through multiple sites, with the ability to see a vast range of different content categories, without incurring any charges.

The Information Provider stated that it had reviewed and responded to each statement made by consumers and given reasons as to why it felt strongly that these did not offer a factual insight to the operation/user experience of this service. It responded to the Executive's first three examples were as follows:

"Receiving texts from 69700, 69898. Received billing messages. Says he has not viewed anything."

The Information Provider provided evidence to show that the user had been in its records since 2007 and had sent a text message to shortcode 69944 requesting content.

"The txt msg took me into a link which i immediately went out off as i didn't wish to buy any videos; it was thumb nail pictures advertising the videos that were available from the site. I have been charged 1.50 around ten times, and every time i top up they are taking money off me. I even sent stop to the number and they said i was opted out and they have still been charging me, i still have the msgs on my phone. I rung the number and unsubscribed which didn't work 08700631180, this number is meant to have operators to talk too but it says they are always busy. I would like a refund for all the money they have scammed off me, i did a bit of research on the net, and they have been doing it to lots of people."

The Information Provider provided evidence to show that the user had browsed the site and that the user had returned to the homepage and selected a further content page.

"I just can't afford to have £70 gone from my phone Im on job seekers allowance. I only downloaded 1 video it said it would be 3 minutes long but it only lasted 30 seconds anyway so they're ripping me off there as well I didn't even view anything other than the video I downloaded."

The Information Provider provided evidence to show that the user selected two different items for download.

The Information Provider summarised its position as follows:

- Users were not charged for accessing the site homepage – if the user only clicked onto the WAP site and then come off, they would have incurred no charges.
- The maximum charge for viewing a pay-per-view page was £6 – this equated to four reverse-billed £1.50 service text messages. In order to be charged such large amounts as described above, users entered multiple pages.
- Users could only access one pay-per-view page at one time – a user can only access a new pay-per-view page by actively clicking the 'next' button, or returning to the site homepage and selecting a new content category.
- Users will not be billed for accessing the same content packs during a browsing session – a user was only billed for entering new content packs within a site during a single browsing session.
- Users could return to the homepage at any time – on each chargeable page (below the 'next' button), there was a second button labeled 'home'; by clicking on this, users were automatically redirected to the site homepage, at no time were users forced to click through multiple pages.

The Information Provider stated that it noted that many of the complainant statements provided by the Executive offered a similar description of how charges had been incurred; however, when considering its above statements and the details of how the service worked, it was clear that these were not an accurate portrayal of how billing for this service had taken place.

The Information Provider has stated that it had responded to every user statement in turn by providing evidence/factual information to demonstrate that the information supplied by the customer had been either inaccurate or untrue.

It asked the Executive to consider how many users had provided dramatically misinformed information. It requested that the Executive consider further the exact mechanics of the service (as provided by it previously) as opposed to basing its decisions solely on information given by customers, which as demonstrated can be completely misleading in itself. It also asked the Executive to recognise the number of complaints which had been included but were either not relevant to the case, were outdated, or could not be used due to lack of evidence.

Ground 2

The Information Provider stated that its content categories were explicit and exact; a user was not restricted to one site and could browse freely through the homepages to get an idea of what was offered before incurring charges.

It stated that it was of the opinion that the Executive's comments implied that users had had absolutely no concept of the type of material that they were about to access when they clicked on a content link and this was simply not the case.

The Information Provider made reference to the message logs and stated that a promotion of this nature had only been sent out on one occasion. It stated that this description was only ever used once through copy error on the 27 May 2009 in a promotional text message and had at no time been used in any of its WAP sites or further promotions relating to this service.

The Information Provider made reference to the complainant examples submitted by the Executive and addressed each example in turn. The Information Provider's responses to the first three complaints are set out below.

Complaint 1

The Information Provider stated that the user's first statement was that *"it appeared to be an adult version of facebook"* and this would imply that from the outset that the user was aware that the site was not actually 'Facebook'. It stated that the user had also stated that it appeared that *"certain members of your facebook friends have invited you to join"*, and that it did not understand, from the promotion received how the user arrived at this conclusion as the message did not mention anything about the user 'joining any services.'

The Information Provider also stated that the terms and conditions of the site were directly above the first interactive content link/thumbnail on the site homepage and that the user would have had to click on a thumbnail of content (an image of a woman) in order to proceed further.

The Information Provider provided the usage statistics of the complainant in question, which it stated demonstrated that, having pressed the 'next' link on a number of occasions, the user had actively clicked through the pages *"to try and get back to the main menu/ having pressed the next button trying to get back to the menu"*. The Information Provider stated that it was of the opinion that the intention of the user had not been to click 'next' in order to return to the main menu as the user had the option of pressing either back or home to access the homepage and the user has entered two content categories within the site.

The Information Provider stated that the above actions did not appear to be those of someone who was either uninterested in the service, or had an intention of coming directly off the site without first using the service.

Complaint 2

The Information Provider stated that, having viewed the message logs for the user, it could confirm that this handset had been affected by the isolated instance whereby the term 'Facebook' was directly used within a promotional text message.

It stated that it had advised the Executive previously that it was in the process of contacting users and arranging refunds to those that had received and responded to a text message including the incorrect copy.

Complaint 3

The Information Provider stated that, having viewed the logs for the user, it could confirm that this handset had been affected by the isolated instance whereby the term 'Facebook' was directly used within a promotional text message.

It stated that it had advised the Executive previously that it was in the process of contacting users and arranging refunds to those that received and responded to a message including the incorrect copy.

The Information Provider stated that the WAP sites relating to these promotions had all been entitled 'Fantasy Fuckbook or 'Fantasy F**kbook'.

Ground 3

The Information Provider stated that these text messages were targeted promotions which were only sent to users who had previously selected to purchase/download content from its sites.

The promotion was primarily aimed to offer the existing users some content at no additional charges.

The Information Provider stated that it was aware that some consumers may have been confused as the text message had been sent to any user who had selected to download content – this included users who had only selected to download free content.

The Information Provider stated that it was clear to users that the site contained premium rate content and that the unclaimed prepaid content was only available within the specific link. A user would therefore only incur charges if he or she scrolled past the prepaid link to access further chargeable content pages below.

3. The Tribunal considered the evidence and concluded as follows:

Ground 1

The Tribunal acknowledged that the complaints submitted by the Executive and analysed by the Information Provider had contained significant factual inaccuracies and exaggerations.

The Tribunal also noted that the Information Provider's analysis showed that, in general, the number of WAP pages visited by users was significantly higher than the number of content items that had been downloaded. The Tribunal considered it was unusual that consumers were incurring charges, but then not downloading the content they had paid for, and that it was reasonable to infer from this that at least some users must have been unaware that they were being charged per page visited rather than per video or picture downloaded

The Tribunal noted that the pricing information stated "Video pages you click and view cost £() each" and considered the use of the words 'click and view' was likely to have

misled consumers into thinking that the cost of the service was per image or video actually viewed (i.e. downloaded), as opposed to per WAP page viewed. Although the pricing information did refer to charges being per 'page' clicked and viewed, the Tribunal was of the opinion that consumers might well have considered a video 'page' to be something which was accessed by clicking the thumbnail of the video, as opposed to meaning the 'menu page' which showed three thumbnails of videos which could be accessed by the user.

Ground 2

The Tribunal took into account the admission by the Information Provider that text messages had been sent out using the brand name 'Facebook' (referred to by the Information Provider as an isolated incident on 27 May 2009) and found that the use of the name of a well known social networking site was misleading for consumers. The Tribunal also found that the use of 'fbook' was misleading as users were likely to be misled into thinking that it was somehow connected to 'Facebook'.

Ground 3

The Tribunal noted the Information Provider's acceptance that the message it had sent had caused confusion to some users. The Tribunal concluded that the text messages had been worded in a way which gave some consumers the false expectation that there would be content on the service that they had already paid for and that this was likely to mislead them into incurring further charges which they would not expect.

The Tribunal upheld a breach of paragraph 5.4.1a of the Code on grounds 1, 2 and 3.

Decision: UPHELD on grounds 1, 2 and 3

SANCTIONS

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

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

- The Information Provider was reckless in its use of the word 'Facebook' in a promotional text message;
- The cost paid by individual consumers was high;
- WAP pay-per-page services have been singled out for criticism by PhonepayPlus;
- The breach history of the Information Provider.

In mitigation, the Tribunal noted the following factors:

- The Information Provider had tried to comply with the rules by taking steps in advance to identify and mitigate risk, it had followed the requirements of its Prior Permission;
- The Information Provider co-operated with the Executive's investigation;

- The Information Provider asserted that it had made refunds to some consumers.

The revenue in relation to this service was in the range of Band 1 (£500,000+).

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

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

- A Formal Reprimand;
- Fine of £50,000 (there was not uplift for breach history).
- The Tribunal ordered that the Information Provider remedy the breach by seeking compliance advice in relation to this service and its promotion within two weeks from the date of publication of this adjudication, such advice to be implemented to the satisfaction of the Executive within two weeks of receipt