

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 25 November 2010  
TRIBUNAL SITTING No. 67 / CASE 3  
CASE REFERENCE: 837881

Service provider:	Wireless Information Network Limited (WIN), High Wycombe
Information provider:	Frontier Limited, United Arab Emirates
Type of service:	Mobile content download service
Service title:	'XXX Factor'
Service number:	88222 and all other shortcodes in relation to this service
Cost:	£1.50 per text message received; video downloads cost £6 each and were billed by the receipt of four £1.50 text messages
Network operator:	All Mobile Network Operators
Number of complainants:	27

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

### BACKGROUND

PhonepayPlus received 27 complaints from members of the public regarding the 'XXX Factor' service operating on the shortcode 88222. The mobile content download service was operated by Frontier Limited, as Information Provider, and Wireless Information Network Limited, as Service Provider.

The service was promoted by WAP-push text messages which, when clicked on, took consumers to the service landing page. The service offered consumers the chance to download video content at a cost of £6 per video.

Complainants raised issues concerning the receipt of unsolicited WAP-push text messages. They expressed confusion concerning the receipt of service billing text messages. Some complainants stated that they had received high, unexpected bills and they did not understand why.

The Executive monitored the service, and also requested and received message logs, detailing some complainants' download and WAP usage information from the Information Provider. This information was verified with the Mobile Network Operator, O2.

### The Service

The service was a mobile content download service promoted by WAP-push text messages. Users would receive promotional WAP messages once a week. These messages would change every week. Examples of promotional messages include the following:

*Santa Girl Loves It! Free Msg ReplySTOP2STOP  
URL: http:78.136.19.69/xxf/userid  
Sent Dec 26 2009*

*Wayne Bridge Ex Lookalike Sex Vid! Free Msg ReplySTOP2STOP*

*URL: http:78.136.19.69/xxf/userid  
Sent 03 March 2010*

*Pixie Lott Lookalike Sex Tape! Free Msg ReplySTOP2STOP  
URL: http:78.136.19.69/xxf/userid  
Sent 20 March 2010*

If users clicked on the WAP-push message, they would be taken to the landing page of the site. Thumbnails of videos available for downloading would be displayed. Videos were priced at £6 per download. To download videos, users would send a text to a long number (either manually or by 'click to text' from the WAP site) and would then receive four messages charged at £1.50 each. The content of the videos was considered by the Information Provider to be non-adult ('glamour').

The service used the shortcode 88222 to bill consumers by sending four reverse-billed messages costing £1.50 each, with text such as:

*88222 Enjoy your Vid? To chat to girls like this text SLUTS to 81812 C/S 0844  
801 4058 150p/msg/rcvd. RplySTOP2STOP*

During the course of the informal representation requested by the Information Provider, the Tribunal was informed that the same promotional WAP-push messages were sent to all users. If a user responded to the promotion, the Information Provider's system would check whether the user was age-verified. If he/she was, he/she would be directed to a WAP site with adult content. If the user was not age-verified within the Information Provider's database, he/she would be directed to a WAP site with non-adult ('glamour') content. Thus, the promotional material (examples of which are given above) promoted two alternative services, one adult and the other non-adult.

### **The Investigation**

The Executive conducted this matter as a Standard Procedure investigation.

The complaints received about the service formed the basis of the Executive's preliminary investigation into the Information Provider's service. The Executive also sent questionnaires to complainants to obtain further information from them.

The Executive requested information on two occasions about the service under paragraph 8.3.3 of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition, amended April 2008) ('the Code') from the Service Provider. WIN replied and forwarded a response from the Information Provider, Frontier Limited ('Frontier'). The Executive also corresponded directly with Frontier, asking that a WAP-push message be sent to a monitoring handset. Once this was done, the service was monitored by the Executive.

The Executive sent a letter, dated 27 September 2010, to WIN, raising potential breaches of the following paragraphs of the Code: 3.3.1, 5.2, 5.4.1a, 5.7.1 and 5.8 ('the breach letter'). WIN provided its response and also requested that the case be dealt with directly by the Information Provider under paragraph 8.7 of the Code. Once the necessary undertakings had been provided, the case proceeded against the Information Provider in accordance with paragraph 8.7 of the Code.

Responses were submitted to the breach letter, and Frontier also supplied the Executive with download and WAP usage information for particular complainants. This information was verified with the Mobile Network Operator, O2. Following receipt of all information, the Executive decided to withdraw the allegations that paragraphs 5.4.1a and 5.7.1 of the Code had been breached. This decision was communicated in writing to Frontier in

a letter, dated 12 November 2010, and the case proceeded on the basis of potential breaches of paragraphs 3.3.1, 5.2 and 5.8 of the Code.

The Tribunal made a decision on the alleged breaches of the Code on 25 November 2010, following an informal representation by the Information Provider and Service Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **DESIGNATED NUMBER RANGES (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, or where Ofcom or a network operator has restricted certain codes or number ranges from being used 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. Ofcom's designations will have precedence over any issued by a network operator.'*

1. The Executive pointed out that services aimed at adults (18 years and over), including sexual entertainment services as defined by PhonepayPlus, must use the 69 or 89 prefixed shortcodes as designated by the Mobile Network Operators. These shortcode prefixes are often referred to as 'adult shortcodes'. The 'XXX Factor' service operated on shortcode 88222, which is not an adult shortcode.

The Code of Practice defines sexual entertainment services in paragraph 7.11.1, which states:

*Sexual entertainment services are services of a clearly sexual nature or any services for which the associated promotional material indicates, or implies, that the service is of a sexual nature.*

The Executive received a complaint from an industry member who provided screenshots of the service by putting the WAP URL into a web browser. The screenshots were of an adult service and caused the Executive to believe that the content available within the 'XXX Factor' service was of a sexual nature. Additionally, the WAP-push messages used to promote the service implied that the service was of a sexual nature, for example those mentioned above, and the following:

*3 teens gobble one dick  
Fittest Blond teen ever swallows cum  
Dirty English milfs fucks cock free  
He Came in My Wet Mouth! Cumshot Compilation Free*

As the service appeared to be a sexual entertainment service, and was not using the one of the adult shortcodes as designated by the Mobile Network Operators, the Executive submitted that a breach of paragraph 3.3.1 of the Code had occurred.

2. The Information Provider pointed out that its content management system was designed to work purely on the mobile web, and not on the fixed web. When the industry complainant inputted the URL into a PC browser, this bypassed the age verification systems and the system defaulted to an adult service. The Information Provider stated that this 'bug' had now been fixed.

With regard to the WAP-push promotional messages, the Information Provider stated that these were examples of adult WAP-push promotions that had been sent to its age-verified database. As the Information Provider believed users to be age-verified and opted-in, it felt they were free to receive adult WAP-push messages. At any rate, the promotions were sent from a mobile long number, and the Information Provider believed the number from which the promotions originated need not be an adult shortcode.

During the course of the informal representation, the Information Provider informed the Tribunal that the same promotional WAP-push messages were sent to all users. If a user responded to the promotion, the Information Provider's system would check whether the user was age-verified. If he/she was, he/she would be directed to a WAP site with adult content. If the user was not age-verified within the Information Provider's database, he/she would be directed to a WAP site with non-adult ('glamour') content. Thus, the promotional material (examples of which are given above) promoted two alternative services, one adult and the other non-adult.

For the above reasons, the Information Provider believed that no breach of the Code had occurred.

3. The Tribunal considered the evidence before it. It found that the evidence in relation to the entering of the WAP URL into a PC browser was irrelevant and did not give any weight to it. It also found it irrelevant that the WAP-push promotions had been sent to an age-verified database.

The Tribunal noted that the definition of sexual entertainment services, as found in paragraph 7.11.1 of the Code, is that: "*Sexual entertainment services are ... any services for which the associated promotional material indicates, or implies, that the service is of a sexual nature*".

The Tribunal held that the promotional WAP-push messages used for the service indicated, or implied, that the service was of a sexual nature. This meant that, due to the nature of its promotional material, the service fell within the definition of a sexual entertainment service (even if the downloadable videos were not adult in nature). Sexual entertainment services must use adult shortcodes, as designated by Mobile Network Operators. As the 'XXX Factor' (a sexual entertainment service) did not use one of the number ranges designated for sexual entertainment services, a breach of the Code had occurred.

## **Decision: UPHELD**

### **ALLEGED BREACH TWO LEGALITY (Paragraph 5.2)**

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

1. Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions, 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.

The Executive noted that a number of the complainants had stated that the promotional messages they had received had been unsolicited.

At the preliminary stage of the investigation, the Executive brought 13 complainants' mobile phone numbers to the attention of the Service Provider and requested evidence as to how these numbers had opted in to receive marketing text messages from the 'XXX Factor' service. The Information Provider responded and stated that all of the 13 mobile numbers provided by the Executive related to a batch of 26,000 numbers that were purchased from a company called Mobile Content and Services Ltd (MCS) on 18 December 2009. The Information Provider had been assured that the numbers had validly opted in and it had received a sample of 3,000 opt-ins as evidence. Two of the 13 complainants' numbers were part of this sample of 3,000 opt-ins, and the following information was provided in response to the Executive:

MSISDN	Time and Date	Session ID	MO
Complainant 1	20/09/2009	9830555444	Long number
Complainant 2	17/12/2009	2033621195	Orange 69161 voice sc

The Information Provider explained that MCS had been dissolved and, thus, information about the other 11 numbers could not be provided.

The Executive was concerned about potential discrepancies in the information supplied regarding the marketing list and any opt-in evidence that may, at some stage, have been available. Information from Companies House showed that MCS was dissolved on 11 November 2009. On 18 December 2009, the Information Provider purchased 26,000 mobile numbers from MCS. On 17 December 2009, Complainant 2 allegedly agreed to receive marketing after dialling the Orange 69161 voice shortcode and was supplied to the Information Provider for marketing purposes one day later. This is despite MCS having been dissolved for over five weeks.

Taking into account the complainants' statements of having received unsolicited text messages for the service, and the lack of available evidence to counter these claims from the Information Provider, the Executive submitted that the Information Provider had acted in breach of the Regulations and, therefore, that a breach of paragraph 5.2 of the Code had occurred.

2. The Information Provider responded that it had purchased the list of numbers from a MCS employee and was unaware at the time that the company had been dissolved. It later understood that, although the company was dissolved, some members of staff were still acquiring databases. It appreciated that the timing, as set out above, did look strange, but it assured the Executive that the database was bought in good faith.

The Information Provider said that, after receiving the preliminary investigation material from PhonepayPlus, it had halted all marketing to numbers from the database purchased from MCS and, subsequently, levels of complaints were

drastically reduced. It had taken action as soon as being made aware of the issue by PhonepayPlus. The Information Provider stated that it had been the victim of a sting concerning the database.

3. The Tribunal accepted the complainants' evidence that they had received unsolicited promotional messages. Furthermore, the fact that the database had been purchased after the company purportedly supplying it had dissolved threw into question the reliability of the data.

There was no opt-in evidence for 11 of the complainants, for which such information was requested. The opt-in evidence concerning the other two complainants was insufficient. The Tribunal pointed out that providers should be able to show that users have specifically consented to receive marketing material (a 'hard opt-in'). Alternatively, for a 'soft opt-in', the Tribunal would expect to see how a service was entered by a user, how he/she actually consented to receive marketing material, that the service was a similar, or related, service to the one now being promoted and that users were given the opportunity to opt out of receiving marketing material. This level of information was not provided by the Information Provider. The opt-in information that was provided was insufficient to establish the requisite consent of the complainants.

For the reasons set out above, the Tribunal considered there had been a breach of the Regulations and, therefore, 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 otherwise obvious and easily available to the user.'*

1. The Executive pointed out that the 'XXX Factor' service operated by sending promotional WAP-push messages to consumers' mobile handsets. Examples of the WAP-push messages that were received by recipients were supplied by the Information Provider, and appeared as follows:

*Santa Girl Loves It! Free Msg ReplySTOP2STOP  
URL: http:78.136.19.69/xxf/userid  
Sent Dec 26 2009*

*Wayne Bridge Ex Lookalike Sex Vid! Free Msg ReplySTOP2STOP  
URL: http:78.136.19.69/xxf/userid  
Sent 03 March 2010*

*Pixie Lott Lookalike Sex Tape! Free Msg ReplySTOP2STOP  
URL: http:78.136.19.69/xxf/userid  
Sent 20 March 2010*

The Executive was sent a promotional WAP-push message and monitored the service; it confirmed that the information supplied above was consistent with what it saw. No company identity, contact details or service shortcode were provided in the WAP-push promotional messages.

In addition, once the WAP landing page was accessed, no information enabling the consumer to identify the company responsible for the service was provided on the landing page. An 0844 helpline number was provided on the landing page, but this only became visible upon scrolling down the page.

For those reasons, the Executive submitted that a breach of paragraph 5.8 of the Code had occurred.

2. The Information Provider responded that the customer support number was provided on the front page of the site and that company information was available in the Terms & Conditions, to which there was a link from the front page of the site. For these reasons, the Information Provider strongly disputed that the contact information was not clear enough and, therefore, believed no breach of the Code had occurred.
3. The Tribunal noted that the requirement of paragraph 5.8 of the Code is that the identity and contact details of either the Service Provider or Information Provider must be clearly stated in *any promotion*, where not otherwise obvious. In this case, there was no contact or identity information on the WAP-push promotional messages. On the landing site, there were contact details, but no identity details. It was not otherwise obvious who the Service Provider or Information Provider was and how they could be contacted. The Tribunal therefore upheld a breach of paragraph 5.8 of the Code.

#### **Decision: UPHELD**

#### **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 recklessly used a database of numbers for marketing purposes, without sufficient evidence that the numbers had properly opted in; and
- The Information Provider knowingly failed to include contact or identity details in its WAP-push promotional messages.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive; and
- The Information Provider provided refunds to users.

The revenue in relation to this service fell within the range of Band 5 (£5,000 to £50,000).

Having taken into account the aggravating factors and the 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;
- A fine of £6,000;
- The Tribunal ordered the Information Provider to remedy the breaches by seeking compliance advice in relation to the service (including any promotional material) within two weeks of the date of publication of this adjudication – such advice must be implemented to the satisfaction of the Executive within two weeks of receipt; and
- The Tribunal ordered that the Information Provider continue to pay refunds to complainants for the full amount spent by them, except where there is good cause to believe that such claims are not valid.