

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 7 January 2009
TRIBUNAL SITTING No. 44/ CASE 1
CASE REFERENCE: 804158/MS

Information provider:	Switchfire Ltd, London
Service provider:	Wireless Information Network Ltd, High Wycombe
Type of service:	Reverse-billed WAP pay-per-page services
Service title:	Various
Service numbers:	69877 & 69394
Cost:	£1.50 per text message received
Network operator:	All Mobile Network Operators
Number of complainants:	49

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

BACKGROUND

PhonepayPlus received 49 complaints in relation to various reverse-billed WAP pay-per-page services operated on shortcodes 69877 and 69394. The service was a reverse-billed WAP pay-per-page service for adult content. Each page viewed within the site incurred a cost of £6 or £3 to the user, and such pages typically contained four thumbnails of content. Once charged for viewing the WAP page, consumers could click any of the thumbnails on that page and view the content therein.

The nature of the complaints centred on the high cost of the charges in relation to the minimal amount of content viewed. Some complainants stated that they had not expected to be charged at all, as some of the promotions for the services received by text message had indicated that the material viewed would be free.

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 Information Provider on 11 September 2009, raising potential breaches of paragraphs 5.4.1a, 5.8 and 5.12 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). A formal response was received by the Executive on 18 September 2009. Following the response from the Information Provider, the Executive decided to withdraw the alleged breaches of paragraphs 5.8 and 5.12 of the Code.

The Tribunal made a decision on the breach raised by the Executive on 7 January 2009, 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 there to a breach of paragraph 5.4.1a on the following grounds:

Ground1

The Executive submitted that some of the promotional text messages sent to consumers by the Information Provider for these services had used the word ‘free’ (e.g. “10 FREE VIDS”, “Dirty Blond Gushers! Free2view 61115”). In addition, the Executive submitted that the text messages that may have appeared whilst consumers were browsing their phones had advertised ‘free videos’. It submitted that some complainants stated that, because of this, they had not expected the service to charge them for the content that they viewed upon following the WAP-push message in relation to this service. The Executive made reference to extracts from the consumer complaints that read as follows:

- *"I went on this site that said free downloads, it said nothing about any charges that's the only reason I went on it. It said 24 hours free in big bold writing at the top of the page. If I thought i was going to be charged I wouldn't have even gone on the page as I'm not working at the moment. I got 80 messages one after another every minute and I didn't go on the site again but 24hours later I got another 276 messages! When I spoke to them at Switchfire they said the pricing's at the bottom of the page but I didn't even get down to look at the bottom of the page." (4 June 2009)*
- *"I received a service message offering free videos. I connected to their site and looked at only one page and downloaded only 1 movie but have been billed £40 for this." (20 May 2009).*
- *"I have been receiving txts from 69394 today and believe these texts are costing about £1.50 each to receive. I did not register with this service and have texted STOP to 69394 and 61115 straight away and went on the wap url on my phone to opt out from the service and still these texts are coming through when I've received confirmation it's been stopped and it's not fair I'm to pay at all and it's over 60txts I've so far received and continuing. The first message i received was a push message which stated FREE! then I followed FREE VID link". (28 May 2009)*

Ground 2

The Executive submitted that some complainants stated that the pricing information detailed on the WAP landing pages for these services had not offered full clarity and that, whilst they had expected to be charged for use, they had not expected the charges they incurred to be as high as those that were charged once they had exited the services. It submitted that many of the problems reported by consumers appeared to have been in relation to a lack of understanding in relation to the pay-per-page element. The Executive submitted that it was aware that the landing pages of the sites offered pricing information at the head of the pages that read as follows:

“vids just £3.00 plus network data charges each for free vids see Bottom HELP 08458697559” for the £3 video sites, and

“vids just £9.00 plus network data charges each for free vids see Bottom HELP 08458697559” for the £9 video sites (The Executive noted that this information had been taken from the Payforit version of the WAP sites and, thus, could differ from the pay-per-page versions).

The Executive submitted that consumers appeared to have had particular difficulty with the wording, as they did not appear to have understood that they were charged for clicking through to the page containing the thumbnails and not for viewing any of the videos that were accessed by clicking on a thumbnail. It submitted that the cost of viewing the videos on seven landing pages would be £21 – the same cost as browsing the thumbnails on those landing pages without viewing any videos.

The Executive also submitted that consumers were not able to see what videos they could view until they had actually clicked through to the page containing the thumbnails. It was submitted that consumers were thus deprived of any form of choice in the material that they viewed ahead of being charged £3 for access to that page. Consumers were charged regardless of whether they chose to actually view any of the items on that page.

The Executive submitted that consumers had stated that the video content was quite short in length. It appeared that some consumers had felt let down; it was this that had prompted them to try another video and to continue browsing in the search of better material, thus incurring further charges without having viewed any content.

The Executive made reference to two extracts from consumer complaints received by PhonepayPlus, which read as follows:

- *Consumer has been charged over £700 for downloading 2 items. "I was on the site for 10 minutes, maybe less than that. I tried to download 2 videos but i didn't even get them. They sent me 17 messages a minute non-stop and charged me £746. I never used their service that much."
5 May 2009*
- *Customer stated he received a text from 69877. He had clicked on the site and came straight back out, but received nearly 100 messages at £1.50. "I couldn't have been on the site for more than 2 minutes - no way did i view that many items"
14 May 2009*

The Executive submitted that, whilst not all of the complainants had been able to give a perfect description of the actual sequence of events, many consumer complaints were similar in nature.

The Executive also made reference to one complainant who stated to have been sent over 1,000 reverse-billed text messages, mainly from the shortcode 69877, over a period of ten days, resulting in charges of approximately £1,300 + VAT. It submitted that, following this, the consumer's mobile phone company had barred him from using its network. The Executive noted that these events pre-dated the current investigation and

that the consumer had used the service in previous months without complaint. On those occasions, he had only been billed for small amounts of usage. The Executive submitted that the problems in relation to this consumer on these occasions appeared to have been in relation to the pay-per-page element of the services, in that he had 'browsed' through many pages within a WAP site, choosing to view a small number of items of actual content. The Executive submitted that this implied that he had been unaware of the browsing charges (pay-per-page) in using these services and that this had been the case with many of the other complainants.

The Executive submitted that a consumer would not have chosen to spend such high amounts of money had they been made clearly and fully aware of the cost, and had fully understood the ongoing charges associated with the use of these services, and that, accordingly, the consumers were misled.

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

Ground 1

As to the use of the word 'free', the Information Provider noted that the complainant who had allegedly received a service message offering free videos connected to the site, looked at only one page and downloaded one movie, but had been billed £40. The Information Provider stated that this complainant should not have been billed, but that he had not been misled. It stated that the complainant accessed WAP sites on six different days (23-Mar, 26-Mar, 29-Mar, 13-Apr, 16-Apr and 12-May) and, on every occasion, had only accessed free content. The Information Provider stated that this complainant was caught by a bug in its system that occurred for 163 minutes on 12 May 2009, and had been accidentally charged £86 as a result. It stated that this complainant had already received a full refund directly from the relevant network operator.

The Information Provider stated that this complainant had, in fact, demonstrated that its service did make free content available. It asserted that the accessibility of its free content was demonstrated by the fact that 245,000 users had accessed it.

The Information Provider then dealt with the other two complainants by reference to their detailed logs. It submitted that the first complainant had accessed its WAP sites on three separate days. On the first two occasions, he had only accessed free content and, on the third occasion, he had purchased a lot of premium rate content. It stated that it believed that its site was very clear about what content was free and what content was premium rate. It stated that this complainant's activity during the first two sessions tended to suggest that the distinction was clear.

As to the other complainant, the Information Provider stated that he had accessed its WAP sites on nine separate occasions, and that it was only during the seventh and eighth visits that he purchased any content. It stated that it believed that its site was clear and that the fact that this complainant had not purchased any content during seven of the nine sessions tended to support this conclusion. The Information Provider denied that its promotion had been misleading. It stated that the WAP-push had stated that there was free content, and that there had been free content which was readily accessible. It stated that it had also been clear that there was chargeable content on the

site and that it was very clear that, if the users accessed that content, they would be charged.

Ground 2

The Information Provider provided an analysis of the 46 complaints for which it had been supplied with phone numbers. Of these, it produced evidence to show that only 32 had accessed its services. Of these 32, seven had spent no money at all and seven had spent no money on pay-per-view. The Information Provider gave a detailed response to the 13 cases that were referred to with quotations in the complaint. It established, by reference to its logs, that there were inaccuracies in each of the complaints. The Information Provider accepted that one of the complainants should not have been charged due to a bug in the system, but submitted that this problem had not arisen because of any misleading promotion.

3. The Tribunal considered the evidence and noted the Information Provider's detailed written and oral submissions. It considered this to be a borderline case, with the number of complainants establishing a strong prima facie argument. However, based on the evidence that was submitted to the Tribunal and on the balance of probabilities, the Tribunal found that the alleged breach of paragraph 5.4.1.a of the Code was not proved. Nevertheless, the Tribunal expressed concern at the potential for this service mechanic to result in users incurring high charges without fully understanding the continuing costs being incurred, in particular by browsing regardless of whether or not content was viewed. The Tribunal did not uphold a breach of paragraph 5.4.1a of the Code.

Decision: NOT UPHELD