

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 7 January 2009**  
**TRIBUNAL SITTING No. 44/ CASE 2**  
**CASE REFERENCE: 808867/MS**

Information provider:	Switchfire Ltd, London
Service provider:	MX Telecom, London
Type of service:	Reverse-billed WAP pay-per-page services
Service title:	Various
Service numbers:	89996, 69997 & 69939
Cost:	£1.50 per text message received
Network operator:	All Mobile Network Operators
Number of complainants:	151

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

#### **BACKGROUND**

PhonepayPlus received 151 complaints in relation to various reverse-billed WAP pay-per-page services operated on shortcodes 89996, 69997 and 69939. The service was a reverse billed WAP pay-per-page service for adult content. Each page viewed within the site incurred a £6 or £3 cost to the user, and each page 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 8.7 of the Code.

The Executive issued a breach letter to the Information Provider on 10 September 2009, raising potential breaches of paragraphs 5.4.1a, 5.8 and 5.12 of the PhonepayPlus Code of Practice (11<sup>th</sup> 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 by 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 5.4.1a on the following grounds:

#### **Ground1**

The Executive submitted that some of the promotional text messages sent to consumers for these services had used the word ‘free’ (e.g. “10 FREE VIDS”, “Dirty Blond Gushers! Free2view 61115”), and that 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 was on the internet yesterday on my phone and I was downloading mp3 tones, and then it offered me 10 free videos, and I started to download 2 of them, and watched them, but they weren't that good, and I text stop to cancel them. They then sent me 50-odd texts saying 'thank you for viewing our content' which amounts to £80, but I only downloaded 2 videos. I didn't know it was going to charge you for watching the free videos. There was also nothing there to say it was chargeable per page.” (15 May 2009)*
- *“The site advertised as free and i had read the same print on what they sent and nowhere did it state any charge then they sent me a barrage of which somehow has sent my bill over 100 pounds. i have called virgin to see if they can stop it but they told me no. they gave me the txt reply numbers and told me to send the word STOP ALL to them. i did, and they keep on sending the them, which there is no way i can pay this bill now. I've called virgin and told them again they have gave me your number, i would like this resolved please.” (22 May 2009)*
- *Consumer received a promo message saying "free porno vid" so he clicked on it. Consumer viewed the video and then came out of the site; "I must have been on it for about one minute." He then received chargeable messages to the sum of just under £300. (5 August 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 several extracts from consumer complaints received by PhonepayPlus, two of which read as follows:

- *The complainant would like to log a complainant about Switchfire on the shortcode 61115 which he has been unable to stop. The complainant has been charged over £600 in the last year. The complainant has called the customer service number but is unable to leave his details as the mailbox is full, and sent back numerous texts with stop. They also have written to Switchfire at the London address and sent it by recorded post but have received no response (10 August 2009).*

*The complainant has received a bill of £392 for texts received. The complainant did go on a WAP link but texted back stop to cancel the service. He is still being charged (23 July 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 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 the six complainants the Executive had submitted in support of this alleged breach. It examined each complaint and concluded that the complainant was either vague in his or her comments, or was anonymous and, as such, it was impossible for the Information Provider to verify the complainant's version of events. With regard to the complaints it could investigate in detail, the Information Provider submitted evidence which cast doubt on that of the complainants with regard to the number of sessions and time spent online. It stated that its logs could be verified by the relevant Mobile Network Operators. The Information Provider further stated that the majority of users admitted that they knew the site contained premium content and that they would be paying for this content, and that their complaints were in relation to the size of their bill, not simply due to the fact that they were billed. It asserted that there had been free content on the site, and that it had been clear to complainants where it was and how to get to it. 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. It stated that all the complainants would have been able to access the free content, as it had over 175,000 users who had done just this.

### **Ground 2**

The Information Provider provided an analysis of the 151 complaints and concluded that only 66 had used the service. It noted that the Executive had attempted to make good its case with reference to quotations from just 18 complainants.

The Information Provider addressed each of the 18 complainant comments in detail and maintained that they were either too vague to maintain the alleged breach, were anonymous and incapable of being tested, or were contradicted by its evidence of usage, which was capable of being checked by the records of the relevant Mobile Network Operator. The Information Provider denied that its promotions, or its service, were misleading.

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**