

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Thursday 29 April 2010**  
**TRIBUNAL SITTING No. 52/ CASE 1**  
**CASE REFERENCE: 826844/CB/AB**

Service provider:	Wireless Information Network Limited, High Wycombe
Information provider:	Venista GmbH & Co KG, Germany
Type of service:	Mobile content downloads
Title:	Various
Service numbers:	80707, 81213, 82324, 82344, 82355, 82442, 85222, 83044, 83435, 84437, 85051 and 88228
Cost:	£2.50, £4.50 or £5
Network operator:	All Mobile Network Operators
Number of complainants:	100+

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

### **BACKGROUND**

Between September and December 2009, PhonepayPlus had received 100+ complaints in relation to services operating on a number the shortcodes listed above. The services were download services offering mobile phone content and were operated by a German company known as Venista GmbH & Co KG.

Complainants said they had first heard of the service when they received an unsolicited text message or a promotional/service WAP-push link(s). Complainants said they had clicked on the WAP-push link without the knowledge that this would result in them downloading a video and incurring a charge of between £2.50 and £5 per download.

The Executive also identified problems with regard to the technical quality of the service, the fairness of the service, the adequacy of the pricing information and the lack of contact information.

During the investigation, the Information Provider demonstrated that the marketing of the promotions had been in huge volumes and targeted at consumers who were already on the Information Provider's database.

The Executive noted that the videos that were provided by the Information Provider were available for free on the YouTube website.

## Complaints

In relation to the consumer complaints, the Executive stated as follows:

- 89 of the complainants specifically stated that the text message(s) received from one of the shortcodes listed above had been unsolicited;
- 31 complainants specifically stated that they had been misled into opening the WAP-push promotion which resulted in a video download and the receipt of chargeable text message(s) from the service confirming successful download of the video;
- 24 of the complainants specifically stated that pricing had not been clear in the promotional WAP-push message(s) received and that a majority of the complainants who received a WAP-push message stated that mobile content started to download automatically without any further interaction.
- Many complainants had provided a well-documented and consistent account of the process and experience of the service.

## Monitoring

PhonepayPlus monitored the 'Embarrassing videos' service and experienced the following:

1. A monitoring handset was used to monitor the service on 27 November 2009.
2. The Executive accessed the Information Provider's website 'web-2-mobile.co.uk/' (the Information Provider confirmed that this website was an old promotion and therefore should not have been active). Nevertheless, the monitoring phone continued to receive promotional text messages.
3. The Executive entered the monitoring handset number into the call-to-action field on the website that was entitled: *'Get your personal invitation, now!'*
4. The Executive received a WAP link from the service that came from '1t0b'. When the message was opened, the text message read as follows:  
Video Message!  
[http://w03.w478.net/app/v4/FvPHEGhc/nYkkjfdhbijeiMutoYefibccMAYbMDYc/3dsWE6/I9Rsu\\_5Meo\\_no/](http://w03.w478.net/app/v4/FvPHEGhc/nYkkjfdhbijeiMutoYefibccMAYbMDYc/3dsWE6/I9Rsu_5Meo_no/)  
Nov. 27 2009  
03:13PM  
From: 1t0b
5. The Executive then clicked on the WAP link and was taken to the 'MOBILE TV' WAP site and downloaded a video of a snake being held by a television presenter.
6. The monitoring handset received a reverse-billed text message from shortcode 85051 which read as follows:  
*'Mobile TV: Thanks for downloading the video. Share it for FREE via Bluetooth or MMS! In case of any problem call 08706091794 £2.50/vid'.*

7. The Executive then attempted on several occasions to download different videos from the service on 27 November. It noted that, whichever video was downloaded to the monitoring handset, the same 'snake video' was provided to the user. No further reverse-billed charges were incurred for these downloads; however, data download charges would have been incurred.
8. The monitoring handset then received WAP-push promotions from the service on 7, 8 and 10 December (according to the Information Provider, this shortcode had been promoted between 3 and 4 December 2009). These WAP-push promotions all contained WAP links to the original 'MOBILE TV' WAP screen; these promotions came through and revealed the sender identity as '1t3l', '1t4u' and '1t5g'.
9. The Executive entered the WAP link from '1t5g' on 10 December and, on having scrolled to the bottom of the WAP site, the Executive selected the 'MORE' tab. This produced further video options for download. The Executive selected a video of a female on a bed and clicked to download, but when the video appeared once again, it was the same 'snake video' as before and this was followed by a reverse-billed text message from a new shortcode 88228, which read as follows:  
*'Mobile TV: Thanks for downloading the video. Share it for FREE via Bluetooth or MMS! In case of any problem call 08706091794 £2.50/vid.'*

## **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 dated 4 January 2010. The Executive received a response to the breaches raised in the letter on 6 January.

The case was initially presented to the Tribunal on 4 February 2010, but the case was adjourned because the Tribunal decided that it was unable to properly consider the alleged breaches as a result of further information and submissions presented by the Information Provider during an Informal Representation. The Tribunal instructed the Executive to prepare a response to the new information and submissions, and to re-present the case for hearing at a later date. The Executive issued a breach letter to the Information Provider dated 24 March 2010. The Executive received a response to the breaches raised in the letter dated 26 March 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 29 April 2010, having heard an Informal Representation from both the Information Provider and the Service Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

### **ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)**

*“Service providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality.”*

1. The Executive made reference to its monitoring exercise and submitted that the monitoring exercise demonstrated that the service had not been of an adequate technical quality. It submitted that the service had failed to provide the correct content which corresponded with the thumbnail on the WAP page. It submitted that it was of the opinion that the Information Provider had not used all reasonable endeavours to ensure that the service was of adequate technical quality.
2. The Information Provider stated that it took the greatest care that the content its brands distributed met customer expectations and it paid great attention to providing videos that were optimised for the customer’s handset. It stated that it checked all content and regularly went through the promoted services to see if all links and the linked content were as they should be. It stated that, in this instance, there had been a problem with the service and that it had been obvious from its check in late-December that a number of different videos were offered by preview pictures, yet after download they all turned out to be the same video. It stated that this had been a mistake on its site and was probably due to the wrong storage of data. It stated that it had had no indication of this prior to the Executive’s report.

The Information Provider apologised for the low quality of the ‘Mobile TV’ service. It stated that it was of the opinion that this had probably not affected a high number of customers as it had been an older service that was no longer actively promoted at the time of the Executive’s monitoring.

The Information Provider stated that this was the only instance of this technical issue that had ever been brought up. It emphasised that the Executive itself produced the only documented case in which a service had not operated to an adequate technical quality. It stated that this observation by the Executive was not related to customer testimony and appeared to have no relevance to the complaints leading to the investigation. It stated that, when weighed against the size of total marketing operations during the period under investigation, it considered this a material consideration.

3. The Tribunal considered the evidence and concluded that, on the basis of the Information Provider’s acceptance and the Executive’s monitoring exercise, the same video had appeared regardless of which thumbnail (displaying a different image) was clicked. It found that the Information Provider had failed to take reasonable steps to ensure that the service was of an adequate technical quality. The Tribunal therefore upheld a breach of paragraph 3.3.3 of the Code.

**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. The Executive submitted that, 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 (this is known as the 'soft opt-in').

The Executive submitted that it had received over 100 complaints in relation to this service from members of the public between September and December 2009. It stated that, of these complaints, 89 had expressly indicated that the WAP- push messages received from the Information Provider's mobile service were unsolicited.

The Executive submitted that it was of the opinion that the complainants insistence that they had not opted in or requested to receive text message promotions from the service suggested that consumers' mobile phone numbers had been used without direct or implied consent when promoting the various services.

The Executive made reference to a number of complainant statements a sample of which read as follows:

- *"Never subscribed to this service or asked to subscribe, always tick boxes for my details NOT to be shared with anyone else. Sent text to the Service inbox instead of normal inbox to make recipient assume it was from their provider in this case Orange"*
- *"The complainant feels that the service is unsolicited as he is 55 years old and has not requested any service." (Mobile number: \*\*\*\*\*619).*
- *"I had £6.50 taken off my phone last night from some kind of rude text thing. I'm sending you a download, open now. I thought it was from my daughter in law, and I thought it was a video clip. Then I just got this disgusting filth sent to my phone, absolutely disgusting. I then asked her 'what are you sending me' and she said 'I never texted you'. This company somehow managed to make me believe it was from my daughter in law. I never open up anything that comes up 'http', but in this case it said 'Stacy' with an envelope on my phone. I'm registered with the TPS and everything. That is fraud, it's basically fraud. I'm a 50 year old granny, I don't want this filth." (Mobile number: \*\*\*\*\*137).*
- *"I received a text message with no number on, no company name. It simply said 'incoming message, open.' I thought it was from my network provider, so clicked the link, it went to a page with some videos on, I clicked on a video, it started to play, but was just rubbish, so turned the video off. 10 mins later I receive a message saying thank you for downloading the video, if you have any problem call 08706091795, 4.50/vid. I checked my balance and have been charged 4.50!! I looked back to the link they sent me, and when the video page comes up, in tiny writing that isn't very clear it says 4.50 per video. I feel totally conned!! I don't know where they got my*

*number from, how they were allowed to text me, especially when i have never signed up for this service, and the initial text did not say where it had come from, misleading me into thinking it was my mobile network! Surely this cannot be allowed?"* (Mobile number: \*\*\*\*\*847).

The Executive submitted that, following the adjournment of the case on 4 February 2010, it had contacted a random selection of 30 complainants by sending them a questionnaire that contained screen shots of all the promotions sent by the Information Provider (the Information Provider had stated that these complainants had opted in to receive service/promotional messages via sites shown on one of the screen shots (web or WAP). It submitted that, of the 30 complainants, 11 responded, reaffirming that they had never seen any of the screen shots supplied with the correspondence and confirming that they felt that the message(s) received had been unsolicited.

The Executive submitted that, of the 111 opt-in message logs provided by the Information Provider, 67 of them demonstrated an opt-in via a web promotion. The Executive also submitted that it was possible for a user on the website to enter any mobile phone number on the sign-up page. It submitted that, if another user's mobile phone number had been entered into the website, the first time that user would have heard of the service would have been via a promotional text message. The Executive submitted that it was of the opinion that, in this scenario, the text message received would have been unsolicited.

The Executive submitted that, where there was no evidence of a consumer's consent prior to the issuance of the text message, then that text message appeared to have been sent in contravention of paragraph 22(2) of the Regulations and it followed that there had been a breach of paragraph 5.2 of the Code.

2. The Information Provider stated it had addressed users that had previously been registered in its marketing database (based on prior activity), as well as users that had entered its site led by WAP and web advertising banners and the 'Tell a friend' option.

The Information Provider submitted that it had checked the mobile phone numbers submitted by the Executive and had established that a sizeable proportion of the users who claimed to have received unsolicited text messages from the services promoted under the relevant shortcodes had, in fact, surfed and interacted with the 'Mobile Tube' (a service operated by the Information Provider) earlier and, as such, were deemed by the Information Provider to have accepted the terms and conditions.

The Information Provider made reference to a specific term that read as follows:  
*"By entering your information, unless otherwise advised, you agree that we or trusted third parties carefully selected by W2mobile may use the submitted information to contact you for future promotional, marketing and publicity purposes by text messaging."*

It stated that it was of the opinion that users had received marketing text messages with links attracting them to access WAP sites associated with its premium rate services as a result of their prior interest in the 'Mobile Tube' offer.

It stated that, based on its checks of the database, users who complained to PhonepayPlus to have not solicited commercial text messages had, in fact, made use of its services such as 'Mobile Tube' and, as such, a customer relationship had been

entered long before the sending out of the marketing text messages that were now presumed as unsolicited.

It stated that it had evidence of customer consent in relation to the terms and conditions of an accessed WAP page that had displaying terms and conditions and clear price information in a manner that was coherent with the standards for the UK mobile phone market.

The Information Provider responded to the complainant comments submitted by the Executive:

- *“Never subscribed to this service or asked to subscribe, always tick boxes for my details NOT to be shared with anyone else. Sent text to the Service inbox instead of normal inbox to make recipient assume it was from their provider in this case Orange”*

The Information Provider stated that, in relation to this comment, it did not offer subscription services in the UK. It stated that as it did not have the user's mobile phone number and it was unable to provide the Executive with an exact customer history but assumed that the customer had entered a relationship with it similar to the other customers it had checked.

- *“The complainant feels that the service is unsolicited as he is 55 years old and has not requested any service. (Mobile number:\*\*\*\*\*619).”*

The Information Provider stated, in relation to this comment, that the age of a customer was neither proof for nor against the solicited nature of a marketing action. It stated that, in effect, this customer had taken action on its site under the indicated terms and thus was established as an entry in its customer marketing database.

- *“I had £6.50 taken off my phone last night from some kind of rude text thing. I'm sending you a download, open now. I thought it was from my daughter in law, and I thought it was a video clip. Then I just got this disgusting filth sent to my phone, absolutely disgusting. I then asked her 'what are you sending me' and she said 'I never texted you'. This company somehow managed to make me believe it was from my daughter in law. I never open up anything that comes up 'http', but in this case it said 'Stacy' with an envelope on my phone. I'm registered with the TPS and everything. That is fraud, it's basically fraud. I'm a 50 year old granny, I don't want this filth.”*  
(Mobile number:\*\*\*\*\*137).

The Information Provider stated, in relation to this comment, that as much as it treasured a sound customer service, it would not take responsibility for customers acting irresponsibly. It stated that, in this instance, users had received marketing messages based on a well-established process and had not been charged and had not been sent any form of content without their own (deliberate) action. It stated that it had not sent billing messages without a prior request of service from the users. It stated that the Executive was well aware from its own monitoring process, videos were actively downloaded from a WAP site – the process that the Executive used was the same process of browsing and ordering content as that used by complainants.

- *“I received a text message with no number on, no company name. It simply said ‘incoming message, open.’ I thought it was from my network provider, so clicked the link, it went to a page with some videos on, I clicked on a video, it started to play, but was just rubbish, so turned the video off. 10 mins later I receive a message saying thank you for downloading the video, if you have any problem call 08706091795, 4.50/vid. I checked my balance and have been charged 4.50!! I looked back to the link they sent me, and when the video page comes up, in tiny writing that isn’t very clear it says 4.50 per video. I feel totally conned!! I don’t know where they got my number from, how they were allowed to text me, especially when i have never signed up for this service, and the initial text did not say where it had come from, misleading me into thinking it was my mobile network! Surely this cannot be allowed?” (Mobile number:\*\*\*\*\*847).*

The Information Provider made no further comment in relation to this complainant comment.

The Information Provider made reference to its customer call logs and provided the details of the time and date of previous interaction with its ‘Mobile Tube’ service, or another of its services, in relation to all of the mobile phone numbers that had were submitted by the Executive.

The Information Provider also stated the following for the attention of the Tribunal:

- Its mode of database marketing has been clearly communicated to PhonepayPlus throughout the last few years;
- The web- and WAP-based model of customer acquisition has been successful for more than four years and was fully compliant with the Regulations;
- The Information Provider sent out approximately 15 million commercial messages during the investigation period, yet there were only 67 complaints documented in the Executive’s letter that raised the issue that text messages were unsolicited. It stated that, although requested, PhonepayPlus had been unable to provide it with an industry matrix to see whether its marketing, in proportion to the number of users engaged in the services, was disproportionate in any way. It stated that the Service Provider had confirmed that, as a ratio, the Venista customer queries had not been disproportionate;
- Of the 129 complaints referred to by the Executive, 11 were duplicated, seven mobile numbers were unknown to them, four complaints related to services provided by another provider and 13 pre-dated closure of a previous investigation. It also said it had already refunded 72 of the remaining complainants, leaving just 21 complaints to be resolved;
- In its view, there was no consumer harm and it invited a proportionate response to the difficulties experienced;
- It stated that, of the 30 individuals contacted by the Executive, only nine considered the matter sufficiently relevant to reply. Importantly, three of the nine individuals who did answer the Executive’s questionnaire were submitted to the Information Provider only three days prior to the Tribunal sitting on 4 February 2010.

The Information Provider stated that it had offered full refunds to all complainants, irrespective of the nature of the complaint. It stated that a cynical interpretation may be



that it wished to 'manage consumers'; however, it stated that there was absolute merit in terms of its reputation and commerciality in providing a 'no quibble guarantee' of a refund.

The Information Provider summarised its response as follows:

- It believed that it operated its service in a manner that had repeatedly been made transparent to the Executive;
  - Customers that used the service had successfully used the service for many years in the UK without material issue;
  - There had never been any consumer harm caused in relation to its service throughout six years of its operation (it noted that PhonepayPlus had changed its opinion since 4 February 2010 which it considered to be wholly unfounded and irrational);
  - Consumer acquisition in the last six years has been wholly in accordance with the Regulations and has been transparent to the Executive (in detail) for nearly two years;
  - It accepted that some consumers had complained and all (to the extent possible) had been refunded.
3. The Tribunal considered the evidence and concluded that the service model that had been operated had allowed for wrong mobile phone numbers (i.e. another person's mobile phone number) to be entered on the website (either in error or on purpose). The Tribunal noted that 89 complainants had stated that the text messages had been unsolicited. The Tribunal took into account the problems associated with the service model and the number of consumer complaints that stated the messages were unsolicited and found that, on the balance of probabilities, at least some of the marketing text messages received by complainants had been unsolicited. The Tribunal noted that, during the Informal Representation, the Information Provider had accepted that this was a possible reason for the complaints and noted that the Information Provider had stated that it would take steps in future to address this issue. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

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

1. The Executive submitted that, of the 100+ complaints in relation to this service, many had described a similar consumer experience.

It submitted that complainants reported to have received the following WAP-push messages to their mobile phone handset and stated that it had appeared on the mobile screen as follows:

- "Incoming Message"
- "Service Call"
- "Open Message"

- “Service Video”
- “Multi Media Message received”
- “New Media Message”

The Executive submitted that complainants had stated that the WAP-push had reportedly contained a further ‘Go To’ button only and, on clicking this button, users were immediately directed to the internet and started to download a video. It stated that, whether the download was completed or terminated, the user stated to have been billed between £2.50 and £5 by way of a service text message that read as follows:

*"Thank you for downloading the video share it for free via Bluetooth or mms! In case of any problems call 08706091795 £5/vid" "You will not receive further messages from this service unless you use it again stop promotions for all our services 08706091795 or info.uk@w2mobile.com"*

It submitted that, of these 100+ complaints received, 31 complainants reported that the content of the WAP-push messages had misled them into clicking the ‘Go To’ button and subsequently incurring a charge. It submitted that complainants had reported that the WAP-push promotions appeared to be in the format that they would expect to see from their Mobile Networks, or in a format that they would expect from family or friends.

It also submitted that the service had been consistently reported to operate as submitted above (i.e. charges were incurred as a result of simply selecting the ‘Go To’ option) and that this had led the Executive to believe that the WAP-push promotion had contained such poor service information that the service mechanic had been intrinsically taking advantage of the recipients who had been targeted with the promotions.

The Executive submitted that it was concerned at how widespread these promotions had been and, although over 100 complaints had been documented from September 2009 onwards, it submitted that the PhonepayPlus Number Checker had received 1,984 hits in relation to the Information Provider’s shortcodes for these WAP services.

The Executive also made reference to complainants’ comments, a sample of which read as follows:

- *The nature of the service seems to be a scam! They send you a link in a message then when you go on the link and click the video they charge you £4.50...It simply said 'incoming message, open:’ I thought it was from my network provider (Mobile number:\*\*\*\*\*847)*
- *I received a 'new media message' and only had 'goto' on it. I clicked on it and as a result I have been charged £5. My phone is so simple doesn't even show videos. Normally when I get these types of 'goto' messages they are normally genuine ones from o2. This practice is wrong, they should not be doing this and it is a disgrace. With o2 content you are given the option to decline the offer however with this it was all too sudden and no way to get out of being charged. When I clicked on goto it was connecting but I immediately tried to terminate the connection yet my phone company state that I was on for 30 seconds, it seems as if the company prevents quick termination once the 'goto' is clicked. (Mobile number:\*\*\*\*\*150)*

- *I believe I got scammed last night by a text message. I just thought it was a friend of mine sending me a video clip so I didn't read anything I just started downloading it and then I cancelled it halfway through I didn't know what it was. O2 said it was uk@w2mobile.com (Mobile number:\*\*\*\*\*367)*

The Executive submitted that it was of the opinion that, in light of its submissions, the operation of this service(s) had misled consumers.

2. The Information Provider stated that it had no control over the way that its text messages were displayed on the mobile handset of a mobile customer. It stated that it had very little space for a short text and a unique link for users. It stated that it had absolutely no control over what flashed up when a user received a WAP-push service message and the WAP-push itself only had approximately 20 characters for a marketing slogan.

It stated that it could not influence the way the 'Go To' button was displayed and that these aspects were influenced solely by the customer's handset and its software.

It stated that it did not take responsibility for the way that customers perceived a text message. It stated that, if a service text message was what a consumer would usually receive from their relatives, that may be confusing, but the manner in which WAP-push is designed meant that any text message received would look alike. It stated that network operators offered mobile email reminders that had a format similar to the Information Provider's WAP-push.

It stated that, within the WAP-push, it did use wording such as "NEW VIDEOS HERE" or "MULTIMEDIA FILES" in order to attract users to its WAP page.

It stated that, in all cases where charges had been incurred, the users had clicked on the link and accessed a landing page with a unique session per user and, as such, no billing occurred without security and identity.

It stated that, if users selected to download a video from the WAP page, they had acted freely and done so in consent of the terms and conditions and would be charged the appropriate amount of money. It stated that, if a user interrupted the download, it was not for the Information Provider to decide why, at what point and with what success they did so – the user would still be charged unless they raised a customer care problem which was justified, leading them to a full refund.

It stated that customers in all cases did access a WAP page before incurring a charge and no automatic download or billing had been initiated. It stated that all information had been provided on the WAP landing page: clear price information, full terms and conditions, customer contact, etc. It stated that, if customers consistently reported otherwise, it was due to the fact that the complainants were a group of users that did not want to take personal responsibility for what they had chosen to do at a previous point in time in answering to its commercial proposal. It stated that it may be that consumers regretted the purchases made; however, they still made the purchase.

The Information Provider made reference to the customer comments submitted by the Executive and provided the details of the time and date of previous interaction with

'Mobile Tube', or another of its services, in relation to mobile phone numbers ending in \*\*\*\*\*150, :\*\*\*\*\*367.

The Information Provider summarised its position as follows:

It stated that free WAP-push messages were sent to existing customers (those consumers who had purchased services from the Information Provider previously, who had consented to receive future free marketing and who have been given the details to opt out of such marketing at any time). In addition, those who had specifically requested the free marketing (who have shown an interest in its products by visiting its websites and entering their mobile phone number). It stated that full terms and conditions regarding the free promotion of its services were included on the relevant websites.

It stated that, once the customer reached the landing page, there was an option to download one of a number of content items that were shown in preview pictures. It stated that all of these preview pictures were links to purchasing content as indicated on the page. It stated that there was also an option to opt out of receiving any further promotional text messages.

It stated that it was industry practice that a promotional WAP link delivered the consumer to a landing page that provided details of the service, pricing, Information Provider details, etc. It stated that it had demonstrated the service, in real time, to PhonepayPlus throughout 2009 and that the service had also been subject to ongoing monitoring by the Executive. It stated that the ratio of volume of complaints to total amount of marketing messages sent out was 0.0009%.

It stated that the WAP pages that users accessed before downloading content had shown all details regarding prices and terms and conditions.

It stated that the appearance of a WAP-push message on a mobile phone handset was down to the user's handset/operator and it was responsible for giving the marketing messages the subject line 'service message'.

3. The Tribunal considered the evidence of the complainants and, in light of its earlier finding that at least some of the messages received by complainants had been unsolicited, the Tribunal concluded that, given the unsolicited nature of the text messages, some consumers had not realised that these were commercial messages and had been misled into thinking they were messages from their network operator, or a friend or relative. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FOUR PRICING INFORMATION (COST) (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 submitted that, of the 100+ complaints in relation to this service, many had described a similar consumer experience.

It submitted that complainants reported to have received the following WAP-push messages to their mobile phone handset and stated that it had appeared on the mobile screen as follows:

- “Incoming Message”
- “Service Call”
- “Open Message”
- “Service Video”
- “Multi Media Message received”
- “New Media Message”

The Executive submitted that complainants had stated that the WAP-push had reportedly only contained a further ‘Go To’ button and, on clicking this button, users were immediately directed to the internet and started to download a video. Some complainants stated that, whether the download was completed or terminated, they were billed between £2.50 and £5 by way of a service text message that read as follows:

*“Thank you for downloading the video share it for free via Bluetooth or mms! In case of any problems call 08706091795 £5/vid” “You will not receive further messages from this service unless you use it again stop promotions for all our services 08706091795 or info.uk@w2mobile.com”*

The Executive submitted that, according to paragraph 5.7.1 of the Code, users must be fully informed of the cost of using a service prior to incurring any charge. It submitted that the WAP-push messages that had been reported by complainants did not appear to have contained any pricing information to enable the consumer to make an informed decision.

The Executive made reference to the complainant comments, the majority of which suggested a similar consumer experience. A sample of the complainants read as follows:

*“He opened the text and was immediately taken to a downloading site. He cancelled the download but has now received a billing message. There was no mention of pricing whatsoever.”*

(Mobile number:\*\*\*\*\*696)

*“The consumer says he received a incoming message which said open which he did because he did not know the message would charge him it automatically down loaded a video of a male doing press up. The video was for 15 seconds then he received a text message thanking him for down loading the video and saying that he can share the vide via blue tooth and it charged him £5.00”*

(Mobile number:\*\*\*\*\*085)

*“My main complaint is the initial message did not provide any information or warning regarding charges or any related terms and conditions, it only provided a link to a website. The charge information was only sent after this, approximately 10 minutes of a delay.”*

(Mobile number:\*\*\*\*\*401)

*“Received a WAP link which he clicked on it but cancelled the download. Received 3 chargeable texts after that which seem to be billing messages. No pricing.”*  
(Mobile number:\*\*\*\*\*851)

The Executive submitted that, in light of the evidence, it appeared that a breach of paragraph 5.7.1 of the Code had occurred.

2. The Information Provider stated that in all cases customers had accessed a WAP page before being charged and no automatic download or billing had been initiated. It stated that on the WAP page there was clear information about the price per download, as well as all additional information necessary for the customer to understand the nature of the contract.

It stated that the WAP-push messages would be the wrong place for pricing information and stated that users should see the relevant information after deciding to enter the WAP page. Furthermore, it stated that its service flow had more than one step prior to any charge and that all users decided to click the link, access the WAP page and then decided to download content at the indicated price.

It stated that as there were no automatic downloads following the reception of a marketing message and the complaints by the users seemed to be based on an incomplete recollection of the way that they interacted with the service.

The Information Provider made reference to the customer comments submitted by the Executive and provided the details of the time and date of previous interaction with ‘Mobile Tube’, or another of its services, in relation to mobile phone numbers ending \*\*\*\*\*696, \*\*\*\*\*085, \*\*\*\*\*401 and \*\*\*\*\*851.

The Information Provider stated that its response to the alleged breach of paragraph 5.4.1a was materially connected with the alleged breach of paragraph 5.7.1 of the Code. It stated that, as previously explained, its marketing WAP sites (i.e. its storefronts) had contained full pricing information, opt-out information and terms and conditions.

3. The Tribunal considered the evidence and noted that, whilst some complainants stated to have been charged by clicking the WAP link, the Executive’s monitoring exercise had indicated that charges were incurred only after a download. In light of the Executive’s monitoring experience, the Tribunal concluded that there was insufficient evidence that users were charged as a result of clicking on the WAP link. The Tribunal concluded, on the balance of probabilities, that charges were only incurred after users had seen the WAP page which contained the pricing information and then clicked on a thumbnail to download a video. The Tribunal did not uphold a breach of paragraph 5.7.1 of the Code.

**Decision: NOT UPHELD**

#### **ALLEGED BREACH FIVE 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.”*

1. The Executive submitted that it received complaints from members of the public in relation to the receipt of the following “unsolicited” WAP-push promotions (the initial contact from the service) that read as follows:

- “Incoming Message”
- “Service Call”
- “Open Message”
- “Service Video”
- “Multi Media Message received”
- “New Media Message”

The Executive submitted that complainants had stated that the service messages had been unsolicited and their first contact with the service. It submitted that, in light of this, it would have expected the WAP-push promotions displayed above to have contained the contact identity of either the Service Provider or the Information Provider.

The Executive submitted that complainants appeared to have only been made aware that the service was from the Information Provider on receipt of the reverse-billed ‘receipt’ text message from the various shortcodes, which read as follows:

*"Thank you for downloading the video share it for free via Bluetooth or mms! In case of any problems call 08706091795 £5/vid" "You will not receive further messages from this service unless you use it again stop promotions for all our services 08706091795 or info.uk@w2mobile.com"*

The Executive submitted that it had monitored the service and had observed the WAP-push promotions that were sent and which read as follows:

*“1t0b’ when message is opened the text message reads:  
Video Message!  
http://w03.w478.net/app/v4/FvPHEGhc/nYkkjfdhbijeiMutoYef  
ibccMAYbMDYc/3dsWE6/I9Rsu\_5Meo\_no/  
Nov. 27 2009  
03:13PM  
From : 1t0b”*

The Executive submitted that this promotional WAP link for the service had not contained the contact identity details required by the Code. It submitted that this information was only available once the user had ‘pushed’/‘clicked’ the message and was transferred to the WAP landing page.

2. The Information Provider stated that users had interacted with its services prior to receiving the marketing text messages that they had perceived to be unsolicited. It stated that, under its terms and conditions, personal data of established customers was used again for marketing purposes in the future and, as such, the messages could not be legitimately classified as unsolicited.

It stated that, if this was the first time users had been contacted by a particular service (content type, case), it had still been a well-established business relationship with the companies running the service.

It stated that the sender details contained within the received service text messages were inconsistent with the Information Provider's contact information. It stated that the sender ID '1t0b' had been displayed due to technical issues with the type of route that was employed to manage this marketing campaign.

It stated that, in light of the fact that it only targeted established customers and that its full details were contained on the WAP page, it could not be held that it had disguised its identity. It stated that each user had the immediate possibility to check its identity and engage with its customer support, as indicated on its marketing landing page reached by clicking the link within the marketing message.

3. The Tribunal considered the evidence, including the Information Provider's acceptance that the text message was unsolicited, and found that the marketing text message had been promotional material. The Tribunal found that the use of '1t0b' had been insufficient to identify the Information Provider or the Service Provider. The Tribunal 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 factor:

- There had been material consumer harm as there had been over 100 complaints.

In mitigation, the Tribunal noted the following factor:

- The Information Provider asserted to have offered refunds to all complainants who contacted it directly or via PhonepayPlus.

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;
- The Tribunal ordered that the Information Provider seek compliance advice in relation to this and any similar service and related promotional material within two weeks of the publication of this decision. Compliance advice is to be implemented to the satisfaction of the Executive within two weeks of receipt;
- The Tribunal also ordered that claims for refunds are to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

The Tribunal noted that the service model operated by the Information Provider, whereby users could enter any mobile number into the website and that mobile would then receive marketing messages from the service, involved an inherent risk of breaching the Regulations (and therefore paragraph 5.2 of the Code). It commented that it would expect any Information Provider or Service Provider using this model to take significant steps to mitigate those risks and it would be open to future Tribunals to take into account any failure to take such steps as an aggravating factor when setting sanctions.