

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

Thursday 6 November 2008 TRIBUNAL SITTING No. 14 / CASE 2  
CASE REFERENCE: 745112/JI

Service provider & area:	mBlox Limited, London
Information provider & area:	Millwind Ltd, London
Type of service:	Subscription – Cheaper Access to virtual Chat
Service title:	www.chatxt.net
Service number:	80160 and 79990
Cost:	£1.50 per week
Network operator:	Mobile Operators
Number of complainants:	18

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 18 complaints from consumers regarding an adult virtual chat subscription service. The complaints related to the receipt of unsolicited chargeable SMS messages (which had little or no content due to an alleged technical fault) and the ‘STOP’ command not working.

The service allowed subscribers to remain on a ‘whitelist’ where they could dial into a virtual chat service using an access number, which cost £1.50 per week. The service was promoted and operated through the website [www.chatxt.net](http://www.chatxt.net) on shortcode 80160. The service was also promoted and operated through the website [www.sxtxt.net](http://www.sxtxt.net) on a second shortcode 79990, and across multiple web-based media including but not limited to, Google Adwords and Google affiliate marketing.

The complaints centred on problems relating to legality, technical quality, pricing and contact information, and the ‘STOP’ command not being adhered to.

### **The Executive’s understanding of how the service operated**

The information provider informed the Executive that users joined the service by following a sign-up process:

- i) The user entered their mobile number on the website [www.chatxt.net](http://www.chatxt.net), at which point a confirmation message was sent to the user’s handset. The information provider did not supply the content of the message sent to users, but indicated that the message requested them to send the keyword ‘YES’ in order to activate the service.
- ii) Upon subscription, the user was sent a weekly access number from which they could dial into the virtual chat service. The information provider stated that the access number was 08714271100. The text message containing the access number costs the user £1.50 per message. (The Executive noted that

according to the promotional website, users were sent one text message per week charged at £1.50. However, the information provider stated in its second response to the Executive's request for further information, that users were sent 2 x £1.50 text messages per month at a cost of £3 per month to the user).

- iii) The information provider also stated that users could subscribe directly to the service from their mobile phone, but did not explain how this method of opt-in activated the service.

The Executive carried out monitoring of the service on 1 July 2008 and 4 September 2008.

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code of Practice ("the Code") 11<sup>th</sup> Edition (amended April 2008).

In a letter to the service provider dated 2 May 2008, the Executive asked a series of questions as well as requesting message logs and other corroborating information to be forwarded to substantiate the claims being made by complainants, in accordance with paragraph 8.3.3 of the Code. The Executive requested additional message logs from the service provider in a letter dated 7 May 2008. The information provider supplied a response on behalf of the service provider, dated 2 June 2008.

The Executive made a further request for information from the service provider on 1 July 2008, to which the information provider responded on 22 July 2008.

The Executive raised potential breaches of paragraphs 3.3.3, 5.2, 5.7.1, 5.7.2, 5.8, 5.14 and 8.3.3 of the Code, in a letter to the service provider dated 17 September 2008. Message logs requested within the breach letter were supplied by the information provider on behalf of service provider on 23 September 2008. A formal response to the breach letter was provided by the service provider on 10 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 6 November 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

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

*"Service providers much use all reasonable endeavours to ensure that all of their services are of an adequate technical quality."*

1. The Executive noted from the complaint logs that at least 29 consumers had received reverse-billed text messages. These messages had been sent due to a serious technical error which resulted in mobile numbers being overlapped and merged. This was further exacerbated by the fact that the messages contained a colon, full stop, the text "www", or were simply blank messages. This meant that recipients had no means of preventing the receipt of additional messages.

- The Executive asserted that as the two technical issues, which had occurred simultaneously, was caused by software being loaded which was not fully tested, the service provider had not used all reasonable endeavours to ensure that the service was of an adequate technical quality.
2. The service provider did not respond to the breach. However, the information provider stated in its response to the request for information under paragraph 8.3.3, that software code was loaded without being fully tested, and admitted that 29 consumers received billed messages in error due to mobile numbers in a send list being overlapped and merged. The information provider also admitted that a second technical problem existed on the SMS content, which resulted in content being overlapped if the message length exceeded 120 characters and only partial content being sent out.
  3. The Tribunal considered the evidence and noted the information provider's acknowledgement of the breach raised. The Tribunal 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.”*

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, 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. This is sometimes called ‘a hard opt in’, 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 sometimes called a ‘soft opt-in’.

1. The Executive noted that of the 18 complainants to date, 17 complainants indicated that they had received unsolicited reverse-billed messages for a service that they had not signed up to. Based on the complainants’ insistence that they did not opt-in to the service, combined with the information provider’s acknowledgement that some users received billed messages in error due to a technical fault, the Executive considered that consumers’ mobile numbers had been used without direct or implied consent, to charge consumers a fee for a service which consumers never agreed, either directly or indirectly to receiving.

The Executive considered this was further exacerbated by users having been given no option to opt-out. The Executive considers that the messages, even if sent in error, were promotional material for direct marketing purposes. Although

the content was not discernible to consumers, the shortcode was identifiable and consumers may have entered into the service by contacting the shortcode.

2. The service provider did not respond to the breach. The information provider admitted that a serious technical error had occurred, as detailed in its response to the request for information under paragraph 8.3.3 of the Code, which had resulted in messages being mistakenly sent to consumers with only partial content.
3. The Tribunal considered the evidence and noted from the complaint logs, that unsolicited chargeable messages had been sent to consumers, who had neither consented to receive the service via the 'soft' or 'hard' opt-in route. The Tribunal also noted the information provider's admission of the breach, which was as a result of a technical error. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

### **ALLEDGED BREACH THREE**

#### **PRICING INFORMATION (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 noted that the messages received by consumers did not contain any pricing information, although consumers had been charged £1.50 per message. The only content complainants claimed to have received, were: a colon, full stop, blank messages or messages containing "www.". Complainants on mobile phone monthly billing contracts explicitly stated that they did not realise they had been charged, until receipt of their phone bill.
2. The service provider did not respond to the breach. However, in the information provider's response to the Executive's request for further information, it stated that the advertising for the service had expired in April 2008. Costs were present on all web advertising and in each text message the customer received (with the exception of those that experienced the fault symptoms).
3. The Tribunal considered the evidence and noted that due to the technical error on behalf of the information provider, consumers had been charged to receive unsolicited SMS message with only partial content, which failed to include pricing information. As a result, consumers had not been made aware of the cost of the service in a clear and straight forward matter, prior to incurring any charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

### **ALLEDGED BREACH FOUR**

#### **PRICING INFORMATION (Paragraph 5.7.2)**

*“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.”*

1. The Executive considered that the written pricing information on the website [www.chatxt.net](http://www.chatxt.net) was not easily legible. The font used to display the information (Verdana size 7.5) was too small to read and not prominent, as it required users to scroll down in order to find the pricing information. For the same reasons, the Executive also considered that the pricing information as presented, did require closer examination. The Executive did not consider it clear that the webpage contained further information at the bottom of the page and consequently, users would be unlikely to scroll down.
2. The service provider did not respond to the breach. The information provider stated in its response to the request for information, that the pricing information was contained on the website.
3. The Tribunal considered the evidence and noted the requirement to scroll down on the chatxt.net website, in order to view pricing information which then required close examination. The Tribunal considered that the information had not been presented in a prominent way that did not require close examination. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

**Decision: 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. 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 obvious and easily available to the user.”*

1. This provision of the Code stipulates that contact information must be clearly stated in any promotion. The chargeable messages consumers received did not contain any contact details. The only content complainants claimed to have received were a colon, full stop, blank messages or messages containing “www.”. In the opinion of the Executive, due to the omission of contact information in the promotional message, it appeared that a breach of paragraph 5.8 has occurred.
2. The service provider did not respond to the breach. However, in its response to paragraph 8.3.3 of the Code, the information provider admitted that a serious technical error had occurred, which had resulted in messages being mistakenly sent to consumers with only partial content.
3. The Tribunal considered the evidence and noted that due to the technical error on behalf of the information provider, consumers had been charged to receive unsolicited SMS message with only partial content, which failed to include any form of contact information. Recipients of the unsolicited messages, who had

not seen the website, had no means of contacting the service. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH SIX**

#### **STOP COMMAND (Paragraph 5.14)**

*“Where a ‘STOP’ command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of ‘STOP’ within any message to be sent by the user. When a ‘STOP’ command has been sent, the service provider must make no further charge to the user for the service.”*

1. The Executive noted that of the 18 complainants, 3 had reported that the ‘STOP’ command had not been adhered to. Based on the complainants’ insistence that they continued to receive chargeable messages after sending ‘STOP’ to the service, the Executive considered that the command was not operating.
2. The service provider did not respond to the breach. However, the information provider stated in its response to the request for information under paragraph 8.3.3 that its system policed the ‘STOP’ command and immediately removed those users from the subscription lists.
3. The Tribunal considered the evidence, namely the consumer complaint logs in which allegations were made that the ‘STOP’ command was not operational. It also noted the information provider’s assertions to the contrary and the fact that the message logs supplied in respect of particular complainants, showed that no mobile originating “MO” or mobile terminating “MT” activity had taken place. The Tribunal determined that on the balance of probabilities, the information provider had failed to demonstrate that the STOP command was operating and it preferred the evidence of the complainants. The Tribunal upheld a breach of paragraph 5.14 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH SEVEN**

#### **FURTHER INFORMATION (Paragraph 8.3.3)**

*“During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents.”*

1. Throughout the course of the investigation, the Executive had concerns that the service provider had failed to provide certain pieces of relevant information and did not provide specific responses to the breaches raised. In particular, the Executive requested evidence that consumers were made aware of the costs of the service and evidence that a contact number was made available to consumers (i.e. copies of promotional material, screenshots and transcripts of messages).

2. The service provider did not respond to the breaches, or supply the specific information requested.
3. The Tribunal considered the information supplied by the service provider. The Tribunal observed that the service provider had not responded to the specific breaches raised by the Executive, nor had it responded to the specific questions raised by the Executive. The Tribunal did acknowledge the service provider's comment that it had encountered difficulties in this regard, due to the information provider's limited responses. The Tribunal upheld a breach of paragraph 8.3.3 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:

- The information provider's technical error was reckless.

In mitigation, the Tribunal noted the following mitigating factor:

- The service provider had co-operated with the Executive when notified of the breaches.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £25,000. The Tribunal did not impose an additional fine in respect of the service provider's breach history, in view of the service provider's current compliance activity. The Tribunal stated that if future cases were brought to PhonepayPlus involving services which demonstrated a failure in the new compliance structure, it would be open to the Executive to recommend that future Tribunals take into account the fact that there was no additional fine imposed for breach history in this case.
- The Tribunal ordered that the service provider remedy the breaches raised if it plans to run the service again.

**Comment**

The Tribunal also commented that it expected the service provider to provide full refunds to all users who experienced the technical problems.