

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

Thursday 11 September 2008 TRIBUNAL SITTING No. 10 / CASE 3  
CASE REFERENCE: 755698/MS

Information provider & area:	Big Red Giant Limited
Service provider & area:	Mobile Interactive Group Limited
Type of service:	Text Chat and Dating Service
Service title:	None
Service number:	87131
Cost:	£1.50 per message
Network operator:	All Mobile Networks
Number of complainants:	16

### THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

#### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 16 consumer complaints relating to the following unsolicited reverse-billed text message, received from the short code 87131:

*“Looking for that perfect match. Text MATCH to 87131. First message FREE. All rcvd Msgs/Pics cst £1.50. 18+ FREE MSG. STOP exits. BRG 08700110637”*

Most of the complainants advised that they had received the one message, whilst some advised that they have received several. The complainants stated that each message received was reverse billed at a rate of £1.50 per message.

#### The Executive’s understanding of how the service was supposed to have operated

Consumers entered the “chat and dating” service, via responding to free promotional SMS messages:

*FREE MSG- TXT back D.O.B & Name to start, 18+ ONLY. First text FREE.  
Other Msgs/Pics/Vids cost £1.50. Max 2 Msgs sent back. STOP exits. BRG  
08700110637*

Once entered into the service, the consumer would then receive a billable message, charged at a rate of £1.50. For example:

*“mark I would really enjoy getting to know so much more about you could you possibly tell me all about your naughty ways and I would like to know how nice and fun you are”*

In a letter dated 10 July 2008, the Executive requested information from the service provider under paragraph 8.3.3 of the PhonepayPlus 11<sup>th</sup> Edition (amended April 2008) Code of Practice, to which the service provider responded on 15 July 2008. The Executive raised potential breaches of paragraphs 3.3.1, 5.2 and 5.4.1b of the Code in a letter to the service provider dated 8 August 2008. The service provider responded in a letter dated 15 August 2008.

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the Code. Upon receipt of the appropriate undertaking forms, the Executive proceeded to deal with information provider in place of the service provider.

The Tribunal made a decision on the breaches raised by the Executive on 11 September 2008.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **GENERAL DUTIES OF SERVICE PROVIDERS - DEDICATED PREFIX (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... those codes or number ranges must not be used in contravention of these restrictions...”*

1. The Executive considered that the promotional website for the service <http://www.1on1chat.co.uk> together with evidence gathered by the Executive when monitoring the service, suggested that the service was “adult” and thus sexual in nature. Upon joining the service, the Executive received the following message: *“mark I would really enjoy getting to know so much more about you could you tell me all about your naughty ways and I would like to know how nice and fun you are”*

The Executive responded with the following: *“hello you sound nice. are we allowed to talk about sex on this service?”* To which the service responded with: *“well of course babes your welcome to share all your naughty thoughts with me would you be Interested in me touching my juicy pussy for you tell me what it isyour wanting me to do to myself”*

The Executive also received a WAP link from the service showing a picture of a lady standing in a kitchen, who although fully-clothed appeared to have a sex-toy in her mouth. Furthermore, the call logs also show that one complainant had received the following message: *“if you are in the mood I have some hot hotpics for you babe. Would you mind if I sent you some XXX”,* and *“would love tostrip for you today babe and send you my sexy pics. Wud you mind if I did, xxx”.*

The Executive considered that the service was adult (sexual) in nature and was therefore operating on an incorrectly prefixed short code. The number prefix used for the service was 87, despite 69 and 89 being the prefixed short codes reserved by mobile network operators for services of a sexual nature.

2. The information provider commented that although compliance for its chat application was initially sought via ICSTIS (now PhonepayPlus) and a license issued, no prior advice was sought when setting up the service with its previous service provider. It stated that its chat service originally ran on shortcode 89811, which was an adult verified ("AV") shortcode. The information provider was not advised by its previous service provider that this was necessary, and was under the impression that it had followed all necessary steps.

The information provider explained that it was then advised by its previous service provider that an adult shortcode was not necessary, and in any event, many customers were being lost through the fact that their handsets were not AV. On this advice, the information provider purchased another code 87131, upon which the service had been running since February 2008. The information provider acknowledged that although the responsibility for the service was its own, it had trusted the advice provided. It stated that the service in question was promoted on website [www.smsdating.co.uk](http://www.smsdating.co.uk), not [www.1on1chat.co.uk](http://www.1on1chat.co.uk) as indicated in the Executive's correspondence, and launch of the latter had been postponed as a result of on the current investigation.

3. The Tribunal considered the evidence and determined that the service did offer content which was adult and sexual in nature. The Tribunal noted that the Executive had received messages of a sexual nature and that the message logs contained similar adult content, and concluded that the service was operating on an incorrect shortcode. The Tribunal upheld a breach of paragraph 3.3.1 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 ('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”).

1. The Executive noted the information provider had stated that consumers were sent the messages in error. The Executive considered that the reverse billed promotional text messages which complainants received from the service, were both unsolicited and direct marketing electronic mail for the purposes of the Regulations.
2. The information provider did not dispute that the promotional messages were direct marketing electronic mail, and acknowledged that they had been sent in error. The information provider explained that each of the numbers came from a database provided by a 3<sup>rd</sup> party data provider in February of 2007, who previously ran its own chat services and partnered with the information provider in late 2006. As part of the partnership, the 3<sup>rd</sup> party data provider brought live customers from its own chat services, and these numbers had consequently entered the information provider’s system. The information provider had ceased to work with the 3<sup>rd</sup> party data provider as of May 2007, and thus never intended to broadcast to those numbers. The information provider acknowledged that it did not have opt-in information for any of the numbers, nor was it in contact with the 3<sup>rd</sup> party and was unable to obtain the information. The information provider emphasised that it had worked hard to refund all those whom it had managed to contact, or who had contacted them. The information provider queried the Executive’s assertion that the messages were not compliant with the law, as the messages had included all necessary information, including its own customer care number (manually answered during office hours and an answer phone otherwise).
3. The Tribunal considered the evidence and noted the information provider’s acknowledgement of the breach, namely that it was not in receipt of an appropriate opt-in for any of the numbers and that the messages in question had been sent as a result of a computer error. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **UNFAIR ADVANTAGE (Paragraph 5.4.1b)**

*“Services and promotional material must not:*

*b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”*

1. The Executive considered that although the information provider had stated that consumers were sent the messages in error, in view of the fact that the recipients were charged £1.50 to receive the same, the service had taken unfair advantage of the recipients.
2. The information provider reiterated that the entire broadcast was made in error, and was intended to be sent as a re-promotion to live customers within its chat system. The information provider stated that it was never its intention to take

unfair advantage and again commented that it had worked hard to refund those affected by the promotion.

3. The Tribunal considered the evidence and found, that a number of complainants had received unsolicited reversed billed messages without their consent. The service had accordingly taken unfair advantage of circumstances which made consumers vulnerable because consumers were not able to prevent the service provider from making use of mobile phone data it held in order to send them unsolicited chargeable messages. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

### **Decision: UPHELD**

### **SANCTIONS**

The Tribunal's initial assessment was that, overall, the breaches taken together were **serious**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The information provider was negligent in using an incorrect database of mobile numbers to send chargeable messages;
- There was an appreciable amount of consumer harm; 16 complaints were received about the service, the costs causing annoyance and resolution of the matter causing frustration and stress; and
- The cost paid by consumers was high; £1.50 per message received and some consumers said they received multiple messages.

In mitigation, the Tribunal noted that:

- The information provider cooperated with the Executive when notified of the breaches;
- Refunds were provided to consumers; and
- The information provider suspended the service on 10 July 2008.

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; and
- A fine of £5,000.