

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

**Thursday 11 September 2008 TRIBUNAL SITTING No. 10 / CASE 1
CASE REFERENCE: 735013/GL**

Service provider & area:	Transact Group Limited, Cyprus
Information provider & area:	Argyl Infoservices Limited
Type of service:	Chat and Date
Service title:	First Chat and Date
Service number:	84405
Cost:	£1.50 per message
Network operator:	All Mobile Networks
Number of complainants:	91

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 91 complaints regarding unsolicited promotional and chargeable messages for a text chat service called “First Chat and Date”. Complainants said they had received various unsolicited chargeable SMS messages, for example:

‘I’m Lucy and lonely, lets exchange details at
<http://matchme.dynalias.net/default.aspx?id=7013249>’

‘Hi Rachel here, I’m looking for love so find me at
<http://matchme.from-me.org/default.aspx?id=7869989> To stop send STOP to
84405 CS 08704 541000’

The Executive’s understanding of how the service should have operated

Consumers opted-in either by telephone or via the internet and as a result they consented to receive promotional SMS messages for the chat and date service, for example:

FREEMSG Lonely girls looking for love PhotoMatch Msgs £1.50 recvd STOP to 84405 to end 08701122338 <http://matchme.dynalias.net/default.aspx>

FREEMSG Find love at PhotoMatch, girls in your area. Msgs £1.50 recvd STOP to 84405 to end 08701122338 <http://matchme.dynalias.net/default.aspx>

FREEMSG Todays match for at PhotoMatch just for you Msgs £1.50 recvd STOP to 84405 to end 08701122338 <http://matchme.dynalias.net/default.aspx>

Recipients of the promotional message then clicked onto a WAP landing page via a link contained in the message, where they could agree to the terms and conditions of the service. Users would then receive billed introductory messages, charged at £1.50 per message, for example:

I'm Lucy and lonely, lets exchange details at
<http://matchme.dynalias.net/default.aspx?id=7013249>

Hi Rachel here, I'm looking for love so find me at
<http://matchme.from-me.org/default.aspx?id=7869989> To stop send STOP to
84405 CS 08704 541000

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

In a letter to the service provider dated 23 April 2008, the Executive issued a request for information on the service and its promotion including message logs and opt-in details, under paragraph 8.3.3 of the Code. On 24 April 2008, the service provider advised that it had suspended the service following receipt of the Executive's letter and pending closer scrutiny of the service. The service provider provided a full response on 12 May 2008.

The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8, 5.12, 5.14, 7.3.2d, 7.3.3a, 7.3.3b in a letter to the service provider dated 2 June 2008. The service provider responded to the breach letter on 20 June 2008. In its response, the service provider advised that the messages shown in the logs were in fact chargeable introductory messages, not the promotional messages which recipients would receive after subscribing via an initial promotional message and WAP landing page.

The service provider directed the Executive to the information provider to obtain remaining outstanding information including promotional material and opt-in details, which it was unable to provide itself. The Executive sent a paragraph 8.3.3 request letter directly to the information provider on 4 July 2008. The information provider responded on 11 July 2008, supplying transcripts of the promotional messages sent together with screenshots of the service's WAP landing page.

In light of the information provider's response to the Executive request for information, the service provider submitted an amended response to the breach letter dated 22 July 2008.

In order to verify the information supplied by the service provider and information provider, the Executive sent out a questionnaire to complainants with examples of the promotional messages and WAP landing page. The responses suggested that the recipients had not opted-in to receive promotional messages, either by phone or via the internet and had not agreed to any terms and conditions via the WAP landing page.

The Tribunal heard informal representations from the service provider on 11 September 2008. The Tribunal made a decision on the breaches raised by the Executive on 11 September 2008.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

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 considered that the unsolicited WAP push messages sent to recipients were direct marketing electronic mail for the purposes of the Regulations. Complainants stated that the promotional messages sent to their mobile number were unsolicited and that they had not consented to receive promotions for this service. Furthermore, the Executive considered that recipients of the promotional WAP push messages had not been given the opportunity within the message, to opt-out (without charge), of further promotions. Recipients were required to further click on the WAP link, incurring WAP data charges, in order to go through to the WAP homepage and discover how to “opt-out” of receiving further promotions.
2. The service provider stated that its understanding was that all the numbers were opted in to receive promotional messages, either by interactive voice recognition “IVR” or via the internet. It commented that the messages shown in the logs were not promotional messages per se, but were sent as part of the dating service provided by the information provider and therefore were not required to contain the opt-out message (although it was evident that a number of messages did so). The service provider noted that the information provider had been unable to satisfy the Executive, due to its acquisition of a third party database, of proof of opt-in. Whilst the service provider considered this to be regrettable, it said it was inappropriate for PhonepayPlus to adjudicate on the matter and suggested it be referred to the Information Commissioner’s Office.
3. The Tribunal considered the evidence and concluded that it demonstrated that consumers had not consented to receive promotional messages from the service provider, and as such, the messages received were unsolicited direct marketing communications which were sent in breach of the Regulations. The Tribunal also noted the service provider’s acknowledgement of the breach and the information provider’s inability to provide proof of opt-in. The Tribunal considered that the lack of information in the WAP push message as to how to opt-out was irrelevant

in this particular case because the service provider was not relying on the “soft opt-in” provision of the Regulations. However, there was still a breach of Regulation 22 because the service provider was relying on the consent of the recipients and the evidence showed, on balance, there was no consent to receive the unsolicited messages. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (Paragraph 5.4.1a)

“Services and promotional material must not:

a misled, or be likely to mislead in any way...”

1. The Executive noted that the messages received by consumers appeared to be promotional messages for a text chat service, and it considered that complainants were misled as to the nature of the messages. The content failed to provide any information identifying them as chargeable billing messages, which the Executive considered to be verified by the call logs supplied by the service provider.
2. The service provider stated that the information provider had provided a dating service not a text chat service, which enabled individuals to receive details of potential matches. The service provider stated that the messages were sent to users as part of their terms and conditions, and that users would have expected to receive them (and therefore would have expected to be charged for them).
3. The Tribunal examined the evidence and concluded that recipients were unaware that they were being charged to receive the messages, or of the nature of the service. The Tribunal found that it was not clear, from the evidence, whether some of the recipients of the WAP message had also received the first free message which gave pricing information. However, the Tribunal concluded that, even if some recipients had received the first message, the second message was still misleading because (a) it was unclear that the two messages were connected, so recipients would not have realised they were being charged £1.50 for the second message and (b) in any event the evidence showed that recipients of the first message had not signed up to the service via the WAP link and therefore would not have expected to subsequently receive chargeable messages from the service. The Tribunal upheld a breach of paragraph 5.4.1a 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 noted that 91 complainants stated that they had received unsolicited chargeable messages. It appeared that consumers’ mobile phone numbers had

been used without their direct or implied consent, to charge them a fee for a service they had never agreed to receive. The Executive considered that by operating a service in such a way that consumers were billed without their consent or knowledge, took advantage of their inability to block the receipt of SMS.

2. The service provider reiterated that the information provider had supplied a dating service not a text chat service, which enabled individuals to receive details of potential matches. The service provider again stated that the messages were sent to users as part of their terms and conditions, and that consumers would have expected to receive billable messages as part of the service. The service provider also reiterated that its understanding was that all the numbers were opted in to receive promotional messages, either by interactive voice recognition “IVR” or via the internet. That being the case, the service provider believed the service was fair and in compliance with the Code.
3. The Tribunal considered the evidence and found that, on the balance of probabilities, a number of complainants had received unsolicited reverse billed messages to which they had not consented. The Tribunal found that the service had 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

ALLEGED BREACH FOUR

PRICING (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 complainants alleged never to have initiated the service, and as such, were unaware that the reverse billed SMS were chargeable until after receipt. The Executive considered that recipients of the messages were not informed clearly and straightforwardly of the cost of the service, prior to incurring a charge. In addition, the Executive considered that call logs supplied by the service provider did not show any pricing information.
2. The service provider stated that the terms and conditions and promotional material viewed by the end consumers (on the WAP landing page), contained the requisite pricing information. As such, it believed that the consumers were clearly and straightforwardly informed of the cost of using the service. It agreed that each billing message did not contain pricing information, but considered the wording of the original promotional material sufficiently clear, to inform consumers that each message received would be chargeable.
3. The Tribunal considered the evidence and concluded that even if the first message, which did contain pricing information, had been received, recipients would be unlikely to connect that message to the later reverse billed SMS, which did not. Therefore pricing information had not been provided in a clear and straightforward way prior to incurring a charge. Further, the Tribunal noted that

many complainants had said they did not access the WAP site so would not have seen the pricing information on there before incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 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. The Executive noted that the promotional messages failed to provide the identity of either the service or information provider. Although a contact number was supplied in some of the promotions and call logs, it was not supplied in all.
2. The service provider stated that the original promotional messages did contain the required information, which was clearly demonstrated by the information provider in its response.
3. The Tribunal considered the evidence and conceded that although the first message contained a contact number, it did not contain the identity of the service or information provider, which was in breach of paragraph 5.8 of the Code. On the basis that the Tribunal found that recipients did not connect the second message with the first, it concluded the second message was also promotional and should have contained contact details. Since the second message did not contain any contact information at all, this was also a breach. The Tribunal therefore upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX

INAPPROPRIATE PROMOTION (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. The Executive considered that the service and its promotion were inappropriate for certain recipients. The service appeared to be aimed at heterosexual men, yet the Executive received 36 complaints from women including those who were married and a 61 year old widower. Furthermore, the 55 complaints received from men included married men and a gay man. The Executive also received complaints from two mothers in respect of their children; a twelve year old son and eleven year old daughter. The Executive considered that certain recipients were likely to find the material offensive or harmful.

2. The service provider reiterated that it understood the promotion of the service was only made to opted-in individuals, and those who were in the habit of utilising similar services. In any event, it did not consider the promotional material enclosed with the information provider's letter, likely to be treated as offensive or harmful. However, the service provider acknowledged that certain recipients were not as envisaged and that the issue appeared to have arisen as a result of the information provider's use of 3rd party data.
3. The Tribunal considered the evidence and noted that the apparently heterosexual adult service (which appeared to be aimed at males) had been promoted to an eleven and twelve year old, married men and women and a gay man. The Tribunal upheld a breach of paragraph 5.12 of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

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 the message logs demonstrated that the “STOP” command was not operational. Despite recipients sending the “STOP” and “STOP ALL” commands, the service still continued and recipients received further messages from the service.
2. The service provider stated that from a technical perspective the “STOP” command was working correctly. It had passed the stop notifications onto the information provider for processing, and concluded that the problem related to a database issue, which was the information provider's responsibility. The service provider concurred with the Executive that a breach had occurred, and stated that it had increased its review procedures to avoid a repetition of the problem. The service provider considered its enhanced procedures to be working effectively.
3. The Tribunal considered the evidence, noted that the message logs demonstrated that the STOP command was not operational and also noted the service provider's acknowledgement of the breach. The Tribunal upheld a breach of paragraph 5.14 of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT

VIRTUAL CHAT SERVICES (Paragraph 7.3.2d)

d In the case of text virtual chat services, the ‘STOP’ command must be available and consumers must be so informed before entering the service.”

1. The Executive considered from the complaints and call log information supplied, it did not appear that the “STOP” command was available. It said the call logs showed that recipients had not been informed of the “STOP” command.
2. The service provider reiterated that the service was not a text chat but a dating service, albeit some interaction was allowed between users. In the event that the service was deemed to fall within the definition of a virtual chat service, the service provider concurred with the Executive’s view that the “STOP” command notification should have been stated in all communications.
3. The Tribunal considered the evidence and concluded that the service was a virtual text chat service, in that it facilitated two or more users to exchange messages whilst engaged in the service. The message logs demonstrated that only the first message contained the “STOP” command and it was not clear whether all recipients had received this first message. Furthermore, the Tribunal considered that even if the first message had been received, recipients were not aware that the two messages were connected and therefore, since the second message did not contain information about the “STOP” command, recipients would not have known that the “STOP” command information in the first message applied to the second message. The Tribunal noted that the service provider had acknowledged the breach. The Tribunal upheld a breach of paragraph 7.3.2d of the Code.

Decision: UPHELD

ALLEGED BREACH NINE

VIRTUAL CHAT SERVICES (Paragraph 7.3.3a)

“All virtual chat services must, as soon as is reasonably possible after the user has spent £10 of spend thereafter:

- a inform the user of the price per minute of the call,*
- b require users to provide a positive response to confirm that they wish to continue. If no such confirmation is given, the service must be terminated.”*

1. The Executive considered that the complaints and call logs demonstrated that consumers had not been informed of the cost of the service, after each £10 spend. The Executive also noted that the service continued, despite no positive response from the user.
2. The service provider reiterated that the service was not a text chat but dating service, albeit some interaction was allowed between users. The service provider expressed confusion and stated that its understanding was, and always had been, that the £10 warnings only applied when a user had spent £10 or more in an individual chat session, not on a cumulative basis throughout his/her lifetime as a user. It noted that the warning messages for virtual chat services run by the information provider operated in this way. Its review of the call logs showed that no consumer had spent more that £10 in any one session and as such it did not consider that a breach of paragraph 7.3.3 of the Code had occurred.

3. The Tribunal noted the assertion of the service provider, but rejected its interpretation of the Code. The Tribunal held that the wording of paragraph 7.3.3a did not state that the £10 service reminder applied to an individual session; in any case it considered it impossible to define a session of “text chat”. The Tribunal held that the cost reminder applied in respect of each £10 spent, and that the service provider had failed to send the appropriate service cost message after one user had exceeded the £10 total spend. The Tribunal upheld a breach of paragraph 7.3.3a of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The service provider was negligent in failing to obtain proof of opt-ins by recipients
- There was an appreciable level of consumer harm; 91 complaints were received about the service, the costs causing annoyance and resolution of the matter causing frustration and stress.
- The cost paid by consumers was high, £1.50 per message received and many reported receiving several texts; and
- The service provider's breach history.

The Tribunal noted the following mitigating factors:

- The service provider had cooperated with the Executive when notified of the breaches;
- The service provider had suspended the service and shortcode on receipt of the 8.3.3 letter; and
- Refunds had been issued to consumers.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand; and
- A total fine of £15,000 (comprising £10,000 in respect of the upheld breaches and a breach history uplift of £5,000).
- The service provider to pay all claims made by users for refunds of the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid.