

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

Thursday 11 September 2008 TRIBUNAL SITTING No. 10 / CASE 2  
CASE REFERENCE: 755993/MS

Service provider & area:	Transact Group Limited
Information provider & area:	Argyl Infoservices Limited, Cyprus
Type of service:	Text Chat and Dating Service
Service title:	Love Match
Service number:	80877
Cost:	£1.50 per message
Network operator:	All Mobile Networks
Number of complainants:	64

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 64 consumer complaints regarding unsolicited promotional and chargeable messages for a text chat and dating service called “Love Match”. Complainants reported to have initially received various WAP push messages, for example:

- “I’ve been trying to contact you”
- “Are you free tonight?”
- “The contact info you wanted”
- “My contact details”

Following receipt of the above, complainants then received various unsolicited chargeable SMS messages, five examples of which are set out below:

“Hi I am Sintia I am Czech and I am 26 I am looking for English men or girls. I work in Wisbech but have a car and can travel x x x x”

“Sintia here so did you get my last text I hope so would love to chat today if you are not busy so text me back your name and age”

“Hello this is Sintia and I am looking for some fun. Whats UR name though? Do you want to swap some pics?”

“Hiya lets chat its me Sintia here tell me more about you sweety its so good to hear from you how have you been fancy a pic yeah let me know tb xx”

“Hi boys, I’m Lacey and I am 18 and a little princess. I am looking for a guy not too much older than me who will treat me nice. So get in touch x”

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

Consumers chose to enter into the WAP chat and dating service of their own accord, either through the viewing of clear and adequate promotional material, or having agreed to receive the promotional messages for the service by opting-in.

Recipients of the promotional message clicked onto a WAP landing page, where they could agree to the terms and conditions of the service. The consumer thereby consented to receive chargeable messages at a rate of £1.50 per text message, in respect of potential dates (as per the five examples above).

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

The Executive wrote to the service provider on 1 July 2008, requesting further information including message logs and opt-in details under paragraph 8.3.3 of the Code. The service provider supplied a response in a letter dated 28 July 2008. The Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8 and 5.14 of the Code in a letter dated 4 August 2008, to which the service provider responded on 8 August 2008.

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, 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. Furthermore, the 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 its understanding was that all numbers were opted in to receive promotional messages, either by interactive voice recognition (“IVR”) or on-line. It commented that the information provider had acquired and used a database for marketing purposes, in good faith. Whilst the service provider was aware that the use of such lists were a general issue within the industry and that PhonepayPlus had already formulated proposals to address issues that arose from such activity, it did not consider it appropriate for the matter to be adjudicated upon and suggested it be referred to the Information Commissioner’s Office.

The service provider considered that the billing carried out was not in contravention of the Regulations 2003. It acknowledged that the WAP push message did not contain precise details of how to stop the service, but disputed the suggestion that no opt-out information was made available “without charge”. Whether or not recipients incurred data charges to view the WAP landing page, was dependent on their network package deal. As the WAP landing page contained clear and concise opt-out instructions and clearly stated the customer service number, the service provider disputed that it was in contravention of the Regulations.

3. The Tribunal considered the evidence and concluded 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 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       mislead, or be likely to mislead in any way...”*

1. The Executive considered the wording of the unsolicited WAP push messages such as “*I’ve been trying to contact you*” or “*You free tonight?*”, suggested they were genuine text messages from people known to the recipients, and in some

instances misled the recipient into responding. Due to the unclear and ambiguous wording, only upon clicking on the message and in some cases attempting to reply to it, did it become apparent that it was in fact a WAP service. Once the service began to download, some complainants realised their mistake and tried to cancel it.

2. The service provider stated that the messages in question were not promotional messages per se and would have only been sent to people who had triggered the service. The service provider commented that as the chat and date service was populated with real people trying to contact each other, it made perfect sense for the “strap line” to read as it did. The service provider also commented that the WAP label would have clearly identified the service as a chat and date service. If the consumer did follow the link, then no premium rate billing would have taken place without a positive “click” on the WAP site. The service provider disputed that there had been a breach of paragraph 5.4.1a of the Code.
3. The Tribunal considered the evidence and concluded that the WAP push messages were misleading. Use of language such as “are you free tonight” without any other information, was likely to mislead recipients into thinking that the message was personal in nature, which led them to open messages or in some cases respond to them. Further, there was nothing in the message to suggest to recipients that by clicking on the link they would be taken to a dating site nor that they would incur costs by doing so. 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 after clicking on the unsolicited WAP push text messages, complainants stated that they then received unsolicited chargeable messages from the service, for example:

*“Hi I am Sintia I am Czech and I am 26 I am looking for English men or girls. I work in Wisbech but have a car and can travel x x x x”*

It was the opinion of the Executive that clicking on the WAP link (by mistake in many cases, and then cancelling the link prior to downloading the page, i.e. without requesting information of potential love matches) did not constitute consumer consent to receive chargeable messages, nor did it mean that consumers had agreed to any service terms and conditions, as suggested by the service provider. The Executive’s view was that since complainants had received unsolicited chargeable messages as a result of clicking on the link, without agreeing to the terms and conditions on the WAP site, the service was operating in breach of 5.4.1b of the Code.

2. The service provider stated that the Executive appeared to have misunderstood precisely how the service worked, in that two separate clicks were required before the service became active. The first click was on the WAP link sent to the consumer's phone, which if "accidentally" clicked, did not trigger premium rate billing. The service provider did not claim, nor had it ever claimed that at this stage, that the consumer had agreed to any terms and conditions. There was a button on the home page which invited the user to "chat" to a potential date, which if clicked, placed the consumer in contact with the person advertised. Only at that point did they enter into the premium rate chat service and were bound by the term and conditions (which were prominently displayed at the top of the WAP page). The service provider emphasised that simply clicking on the promotional material WAP link and then cancelling it (without entering in the Love Match WAP site), was not enough to trigger unsolicited reverse-billed text messages, and that the WAP logs and relevant session table information proved that the button had been positively clicked on. The service provider disputed that it was in breach of the Code.
3. The Tribunal considered the evidence and found that, on the balance of probabilities, a number of complainants had received unsolicited reversed billed messages without having agreed to receive them by clicking on the WAP site. 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. This was particularly evidenced by the fact that recipients were unable to prevent the receipt of unsolicited chargeable messages after they had clicked on the WAP link even though, in many cases, they had not visited the WAP site nor agreed to the terms and conditions on the WAP site. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

**Decision: UPHELD**

**ALLEGED 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 both the complaints from consumers and content of the call logs, suggested that consumers were not informed about the potential costs of the service. The WAP landing page itself did state that messages received would each be charged at £1.50, but despite some consumers not getting as far as actually viewing the WAP site, they began to receive reverse billed text messages.
2. The service provider stated that the Executive's assertion was incorrect; WAP pages could not be partially downloaded. The service provider emphasised that a WAP page needed to be downloaded completely, before the functionality of the page was made available to the user. The service provider emphasised that a user could not consume anything without the page being downloaded in its entirety and it was technically impossible to be billed otherwise. The service

provider was unclear as to how the Executive had concluded from the call logs that consumers were not informed about the potential costs of the service, as the terms and conditions and promotional material contained the requisite pricing information.

3. The Tribunal considered the evidence and concluded that the WAP site did contain appropriately presented pricing information which was easily legible, prominent, horizontal and presented in a way that did not require close examination. The Tribunal therefore did not uphold a breach of paragraph 5.7.2 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. 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 WAP push messages received by complainants failed to provide either contact details in the UK of the service provider or information provider, or a helpline telephone number as required by the Code. The Executive acknowledged that although the WAP landing page provided this information, consumers did not appear to get as far as viewing it.
2. The service provider responded that the WAP page clearly displayed all of the required information. It commented that in a world where the mobile phone was increasingly becoming the device of choice for browsing the internet, it should be sufficient to place all contact details on the web page itself. The service provider reiterated that simply accessing the WAP page did not incur a premium rate charge, and only subsequent consumer actions following receipt of the full terms and conditions, triggered any billing. As such, the service provider considered that the consumer was fully in possession of all contact information prior to accessing the service and that there had been no breach of paragraph 5.8 of the Code.
3. The Tribunal considered the evidence and concluded that the promotional WAP push messages failed to contain either contact details in the UK of the service provider or the information provider, or a helpline telephone number. The Tribunal considered that it was not sufficient to display this information on the WAP site as the Code required it to be contained in each and every promotion. 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 the promotional WAP push received by complainants from the service failed to provide information relating to the “STOP” command, as required by the Code. Again, whilst the WAP landing page itself did state this information, consumers did not appear to get as far as actually viewing the WAP site itself.
2. The service provider noted the Executive’s observation that clear instructions as to the use of the “STOP” command were made available on the WAP landing page. The service provider again disputed the Executive’s assertion that consumers did not get as far as viewing the WAP site, and commented that the call logs illustrated that 18 of the 23 complainants text “STOP”. The STOP commands were duly acknowledged with a free message and all further communication with the service ceased. The service provider disputed that a breach of paragraph 5.14 had occurred.
3. The Tribunal considered the evidence and concluded that the wording of paragraph 5.14 of the Code did not specify *when* the STOP command should be provided, and noted that the information was available on the WAP site. The Tribunal did not uphold a breach of paragraph 5.14 of the Code.

**Decision: NOT 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 service provider’s conduct had been wilful in respect of the misleading WAP push message and negligent in respect of the failure to obtain proof of opt-in by the recipients of the messages;
- There was an appreciable level of consumer harm; 64 complaints were received about the service, the costs causing annoyance and resolution of the matter causing frustration and stress.
- The cost paid by some consumers was high, most consumers reported a single charge of £1.50 per message received, but others reported having received multiple messages;
- The service provider’s breach history.

In mitigation, the Tribunal took into account that:

- The service provider had cooperated with the Executive when notified of the breaches;

- The service had been voluntarily suspended; and
- Refunds had been provided 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 fine of £7,500 (comprising £5,000 in respect of the upheld breaches and a breach history uplift of £2,500); and
- The Tribunal also ordered that the service provider 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.