

TRIBUNAL DECISION

Thursday, 26 November 2009
TRIBUNAL SITTING No. 41 / CASE 1
CASE REFERENCE: 812535/AB

Information Provider:	Antiphony Limited, Buckinghamshire
Service Provider:	WIN (Wireless Information Network) Plc, High Wycombe
Type of service:	Virtual Chat
Service title:	Adult Sex Exchange
Service numbers:	69844 and 89949
Cost:	£1.50 per message received from the shortcode
Network operator:	All Mobile Network Operators
Number of complainants:	20

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 20 complaints relating to a virtual chat service operating on shortcode 69844. The same service was also operated on shortcode 89949, which was promoted in the Daily Sport. The service was entitled the "Adult Sex Exchange" and was advertised as a contact and adult dating service. The Executive monitored the service, which was promoted in the Daily Sport. It was entered by texting a key word to a shortcode. Following complaints, and its own monitoring, the Executive alleged, amongst other things, that, after initiating the service, and without any further interaction, the Executive continued to receive chargeable text messages, did not receive a £10 spend reminder and that users who had sent the 'STOP' command in reply to promotions were still receiving them.

The Executive invoked its Emergency Procedure in respect of the alleged breach of paragraph 7.3.3b of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'), issuing a direction to the Mobile Network Operators to immediately withhold revenue and bar access to the services.

(i) The Service

The service operated on shortcodes 69844 and 89949. It was also promoted by the use of mobile long numbers operating on a 076 prefix.

The Executive monitored the service promoted in the Daily Sport on two different hand-sets. On both handsets, the service was initiated by sending the trigger word 'HOT'. The Executive then received a text message requesting the user's age and gender. Once the Executive had sent this information by text message, it did not interact any further with the service. Over the course of two days, the Executive continued to receive chargeable text messages from shortcode 69844 along with text messages from the 076 prefix. On both handsets, the Executive received over 20 text messages and was charged over £20.00.

The Executive's monitoring exercise demonstrated that even after being charged £10.00, the Executive still had not interacted with the service but continued to receive chargeable text messages. The Executive acknowledges that reminder messages were sent during the dialogue.

(ii)The Investigation

The Executive conducted this matter under the Emergency Procedure in accordance with paragraph 8.6 of the Code.

On being informed of the reasons for the Emergency Procedure, the Service Provider requested that PhonepayPlus dealt directly with the Information Provider under paragraph 8.7 of the Code and supplied the Executive with appropriate signed undertaking forms on 8 October 2009. The Executive accepted this pass through and raised potential breaches of paragraphs 3.3.3, 5.2, 5.4.1a, 5.7.1, 5.8, 5.11b, 7.3.2c and 7.3.3b of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code').

The Tribunal made a decision on the breaches raised by the Executive on 26 November 2009, having heard Informal Representations from the Information Provider.

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 monitored the service operating on shortcode 69844. It received numerous billed text messages following initiation of the service even though there had been no further interaction with the service by the Executive after initiation. It did not receive a £10 spend reminder. When this was put to the Information Provider it responded as follows:

"All Antiphony text dating services are designed to comply with the £10 cost warning & MO(user message [sic]) reply-to-continue functionality that is mandated for the industry. It appears the MO "reply-to-continue" functionality has not worked correctly in several cases. Since our investigations commenced Friday we have run analysis on our user base, services & set-up to try to isolate or replicate the problem. Our latest understanding is that the problem is being caused by a faulty section of code. This is affecting users intermittently depending on when they pass through this particular piece of code. As an intermittent problem it appears so far to have affected several hundred individual users of the service from our preliminary investigations and since we detect the problem was first introduced by a coding error."

Following the imposition of the Emergency Procedure and the suspension of the service, one of the mobile phones used by the Executive in its monitoring exercise continued to receive chargeable messages. When this was put to the Information Provider, it responded as follows:-

“This should not have happened. Whilst we had put a suspension on that service we had not had chance to test all the variables. It appears users who sent in a fresh MO yesterday were able to reactivate the service. We have now fixed this so that it is 100% barred.”

The Executive submitted that on both occasions, the Information Provider has accepted that these errors had occurred due to technical inadequacies.

2. The Information Provider stated that all its chat services were designed to be compliant but that it had been made aware of a technical fault, created by a faulty section of code that had caused its ‘reply-to-continue’ functionality to fail.

It stated that it was clear from reviewing the message logs that this fault had only occurred in certain instances and with certain users. Furthermore it stated that these faults had not occurred across the board and that this was symptomatic of an intermittent technical failure.

The Information Provider stated that the chat services that it (and its competitors) operated in the market were now very sophisticated and had been regularly updated and adapted to comply with new regulation and keep pace with changing market conditions. The Information Provider acknowledged that the numerous changes made to the source code of its services appeared to have created some instabilities that were/are affecting core parts of the service such as the “reply-to-continue” function.

The Information Provider stated that it was not aware of the extent of the problem concerning reply-to-continue and this was not meant as an excuse as it fully acknowledged its responsibilities under the Code, and to its consumers.

It stated that, as well as rigorously addressing the problem (during which time the services was suspended), it had also implemented a proactive approach to user refunds. It acknowledges that the test handset referred to by the Executive was one handset that had been affected by this issue and, therefore, the handset had received text messages above the £10 threshold without the required positive user confirmation. The Information Provider stated that it accepted full liability for the problem relating to the £10 user spend limit/positive reconfirmation and stated as follows:

‘Suffice to say, it appears there has been a serious technical problem on our systems and based on the current facts Antiphony accepts full liability for the problem, acknowledges the breach, and shall endeavour to fairly compensate, through proactive telephone calls, all the users affected. I am still unsure of the exact amount of compensation due back to the users affected but am estimating a figure of between £2000 - £6,000 in refunds. We are also unclear as to the exact start date of the problem but hope to track this down imminently. As you can imagine finding and fixing the problem has been our number one priority since these issues were brought to our attention Thursday.’

It stated that it was not straight forward to suspend services on its system, as the code language had provisions at various points for text message handling of user interactions to re-start services. The Information Provider stated that it thought it had fully suspended services but had not sufficiently tested for every eventually and the item of

code that enables previous users to restart services that had not been disabled. This was an oversight on our part and was fixed very quickly once it became aware of it.

The Information Provider stated that as this was an Emergency Procedure ('EP'), it had been expected to suspend this and any similar services and achieve compliance within 24 hours – regardless of staff availability or any other factors. It stated that it was very difficult for it to carry out all necessary tests and checks within such a reduced period of time, given that it allowed several days to carry out such procedures under normal circumstances.

The Information Provider stated that, whilst it acknowledged the breach of 3.3.3 in respect of the intermittent failure of the £10 reply-to-continue functionality, it requested leniency in respect of the implementation of the services suspension under the EP. It stated that there had been no deliberate or wilful attempt to keep services running, though admitted it should have carried out more testing, more quickly, to establish every facet of the services had been suspended, however, it only had access to one developer and could only work as fast as one pair of hands can manage.

It stated that it was not a major multi-national with lots of resource and, with staff holiday around this time, it was a very challenging period.

3. The Tribunal considered the evidence and noted that the Information Provider had accepted that there had been a breach. The Tribunal found that, on the basis of the evidence, a technical issue had occurred that had affected several hundred consumers and it appeared that the Information Provider had failed to use all reasonable endeavours to ensure that all of its services were of an adequate technical quality. 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.”

1. The Executive stated 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”).

Prior to the raising of this breach, the Information Provider had commented:-

“Sending unsolicited chargeable messages

1) Any Antiphony chat service requires positive confirmation of the user's age, via an MO from the user, before any service and billing can commence. The service does not send unsolicited reverse-billed messages to consumers. All consumers are shown the price and key usage terms before that point, either via the WAP advertising site, via an SMS confirmation message, via the print or TV advert, via the web, etc.

2) Nowhere in the 18 complainants' logs provided is there any indication or proof of sending unsolicited chargeable messages. In my full correspondence due this Thursday 8th, I will include advertising copy examples to demonstrate these user's points of access to the service..."

The Executive made reference to complainant examples that indicated the receipt of unsolicited promotional text messages:

Example 1

The Executive stated that the message logs demonstrated that this complainant had sent 'STOP' on 27/05/2009 at 21:21 hours. The complainant had then received the following free message on 30/05/2009 at 10:33 hours:

Message 1

"Jenna Green tagged u in the album NAUGHTY WEEKEND on Adult FB! Click here to view <http://wap.mob365.net/tadltfb13.wml> Help08714742804 rply STOP2optout.FreeMsg"

The complainant again followed the instruction in this text message "...rply STOP2optout..." and on 30/05/2009 at 11:23 hours sent 'STOP' to 69844.

The complainant then received the following two free text messages:

Message 2 on 30/05/2009 at 11:52

Youve already unsubscribed! We will store any messages you're sent in case you return. Text MORE at any time to check your messages and start chatting!

Message 3 on 16/06/2009 at 19:40

Claudia Scott has poked you on Adult FB! You are currently offline. Click here: <http://wap.fbook.tv/tcl.wml> AdultFB Help08714742805 optout rplySTOP

The Executive noted that the first 'STOP' command should have opted the complainant out of the service and he should have received no further chargeable text messages. However, the complainant did receive a promotional text message. He followed the instructions in the promotional text message and sent the 'STOP' command. The Executive was of the opinion that in sending the second 'STOP' command, the complainant should have stopped the service and received no further promotional text messages. The Executive noted that this had not been the case and the complainant had then received a further promotional text message. It was this next promotional text message which the Executive considered to be unsolicited.

The Executive noted the following response from the Information Provider after the alleged breach had been raised:-.

'We concur in this instance the Adult FB promotion should not have been repeated to a user who had sent in STOP to a previous promotion.

The Adult FB promotion should not have been repeated after the user expressed their request for this promotion to cease. This was caused by an administrator error when cleaning the marketing database prior to sending the promotion on 16th June.'

Example 2

On 27/08/2009, the complainant sent 'STOP' to shortcode 69844 at 19:48 hours. Instantly, the complainant received a free text message confirming that he had been unsubscribed and would not receive any more text messages. On the same day but at 19:58, the complainant received the following text message:

Message 1

"Youve already unsubscribed! We will store any messages you're sent in case you return. Text MORE at any time to check your messages and start chatting!"

Then on 02/09/2009 at 20:22 (six days later) received the following promotional message:

Message 2

"FREE MSG Sarah's Message! Hi GEORGE57. Just 2 let u know that we have dropped our price by 25p for u! To accept this offer and meet our new girls txt MORE"

To this, the complainant sends again 'STOP ALL' and receives the following two text messages:

Message 3

"Youve already unsubscribed! We will store any messages you're sent in case you return. Text MORE at any time to check your messages and start chatting!"

Message 4

"FREE MSG Sarah's Message! Hi GEORGE57. Just 2 let u know that we have dropped our price by HALF for u!now only 38p/msg! To accept & meet new girls txt MORE"

The Executive submitted that it was of the opinion that Message 4 was an unsolicited promotional text message.

2. The Information Provider stated that it concurred that Message 4 should not have been dispatched following receipt of 'STOP ALL' and it was investigating the causes of this issue. It stated that it had always treated 'STOP ALL' as a complete opt-out and the user should not have been re-contacted in this manner. It stated that, as before, it appeared that a section of program code relating to pricing promotions had conflicted with code relating to processing the 'STOP ALL' requests. It stated that it hoped that the overall impression was that the service was compliant and complied with the 'STOP' command in relation to the ceasing of premium-rated services. The Information Provider stated that as far as it was aware, the 'STOP ALL' command was effective at removing users from all future promotions and would ensure this issue was addressed at a technical level.

3. The Tribunal considered the evidence and noted that the Information Provider had accepted that there had been a breach. The Tribunal found that, by sending the 'STOP' command in response to the first promotional text message, complainants had made a decision to opt-out of receiving any further promotional material however there were numerous examples where the service had then continued to send promotional text messages in relation to this service.
It followed that any further promotional text messages received by these complainants were unsolicited for the purpose of the Regulations. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE MISLEADING (Paragraph 5.4.1a)

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

1. The Executive submitted that the service operated by sending a free marketing text message from a shortcode with the purpose of getting the recipients to enter the 'Sex Exchange' service. It submitted that, when the recipients of these text messages did not respond to the marketing text message, the service sent out 'teaser' text messages in an attempt to engage the recipients into replying to the service.

The Executive submitted that the 'Teaser' messages were sent after the initial promotion via a mobile long number and it was of the opinion that messages from mobile long numbers looked like messages from other users of the service not the Information Provider.

The Executive considered there to be a breach of paragraph 5.4.1a of the Code on the following grounds:

Ground 1

The Executive submitted that the 076 mobile long numbers used in this service had misled complainants into responding to the text messages and providing their age when persistently asked to do so. On providing this information, users were opted-in to the service and subsequently received reverse billed text messages at a cost of £1.50 per text message from the shortcode. The 076 'teaser' text message did not explicitly state, or give any indication of, being part of a subscription service. The Executive made reference to several examples, which read as follows:

"Jenny107 > Im ready to have some fun! wots ur name?"

"Hey gorgeous, im Jill.Im an experienced lover, looking to dominate and WHIP a toyboy into shape!RU up to the challenge! Text me back!"

*"Hey there! Im single again and lonely.tell me what you would do to me right now?
Please text back, il be waiting for you Lau x"*

The Executive submitted that there were numerous message logs that showed complainants receiving this type of text message. The Executive examined the message logs provided by the Information Provider and submitted that there were several occasions where users had responded to the initial text message. It submitted that responses were only sent by recipients following the receipt of the 076 teaser text message. The Executive submitted that the recipients of text messages from the 076 mobile long numbers had misled users into thinking that they were communicating on a personal level to genuine females when in reality they were interacting with a commercial premium rate business. The Executive made reference to a complainant, who had received a number of teaser texts, who had responded *"Is this genuine Jill?"*.

The Executive submitted that the mobile long numbers had been used in this service to take advantage of the average user's lack of knowledge in relation to the origin of 076 numbers and, as such, had the purpose to mislead.

Ground 2

The Executive submitted that the service was an adult service and the Information Provider was therefore required to verify that users are over the age of 18 years old before they can be entered into the service and charged for its use. It submitted that the message logs appeared to show that complainants had been misled into providing their ages and that, having done so, they were immediately subscribed into the service. Users were unaware of the significance of giving their age.

The Executive submitted that users were misled as the age verification text messages were sent from mobile long numbers rather than the shortcodes and users were not aware that, by confirming they were over 18 years old, they would be entered into a service that charged for premium rate text messages. The Executive made reference to complainant examples that supported its submission that, on confirming their age, users were then sent charged text messages.

It submitted that the text messages they received from the 076 mobile long numbers persistently requested their age without notifying them that they would then be entered into the service.

Ground 3

The Executive submitted that the promotional material which appeared in the newspaper 'Daily Sport' (812535_promotion App A) was misleading for the following reasons:

- The promotion was entitled "ADULT SEX EXCHANGE THE UK'S # 1 PICKUP POINT" and gave the impression that users of the service could have sexual encounters with the individuals promoted in the advertisement. The Executive submitted that the use of the above language would be understood to mean that users would be able to meet the individuals whose profiles were displayed within the promotion.
- One individual profile stated *"Still single after all these years, if I find someone out there we can have some fun with no strings, or maybe it could become more!"*
- Another profile in the advertisement stated: *"Wondering where the hot guys got to, cant find any locally, so we might have to travel to each other...I don't mind if you don't"*

The language used in the two profile descriptions above strongly implied that the individuals were looking to meet people through the service and as such it was purporting to be a contact and dating service. The Executive submitted that this

misleading impression was exacerbated by the wording of the advertisement which stated "GET LOCAL AND COUNTRY WIDE SEX CONTACTS". The use of the word 'CONTACT' implied the possibility of meeting individuals through the service and the use of the word 'LOCAL' implied profiles relating to specific areas in the UK. The Executive considered the language used within the promotion implied that the service was a contact and dating service when in fact, users could only chat with the individual promoted by the service in the teaser text message.

2. The Information Provider stated that the Executive had not provided an accurate description of how the service worked and described the service that could be entered online. It outlined the dynamics of the service as follows:

- A free WAP push is sent to users
- User browses the site, which contains the pricing information.
- User clicks to select a profile.
- User receives free text follow-up to take them through registration.
- Registration is triggered once the age is confirmed.
- A registration confirmation is dispatched.
- The service operates as standard.

Ground 1

The Information Provider stated that the Executive's statement that the 'teaser' text message was only dispatched if the user did not respond was incorrect. It stated that the user was sent a chat text message from a long number in response to the user selecting a profile from the WAP site. The text messages the user received from the long number were clearly labelled as text messages from the same profile name that the user selected from the WAP site. The WAP site clearly advised users of the costs of the service and how to unsubscribe as well as full company information and details of the shortcode used in the service.

Ground 2

The user was then sent a text message directly from 69844 advising the user to respond with their age to engage in chat conversation with the chosen girl: *To chat to (profilename) reply with your AGE Reply STOP to quit. 18+ Help: (tel)* The Information Provider stated that it felt that this demonstrated a clear link between the long number and the premium rate shortcode. The 'see terms in next message' text was therefore removed as it had believed that the association was explicitly clear to its users.

Ground3.

The Information Provider stated that in response to the Executive's comments in Ground 3 it did not feel that a breach had occurred, as users had been able to meet through this service. It stated that it presently had 4,398 active females across its mobile chat services and that it could provide evidence of; advertising spend; database logs of numbers of users; actual conversations and police enquiries in relation to isolated incidents where male and female users had met up and alleged assaults had taken place. The Information Provider stated that it believed that its adverts promoted a genuine option to engage in adult based conversations with users throughout the UK, which on some occasions may have resulted in physical relations. It stated that whilst users had been able to meet through the service it did not believe that any of its advertisements had promised that this would occur on any occasion. It stated that with

respect to the use of mobile long numbers in dating services, it was still awaiting any official confirmation from OFCOM or PhonepayPlus concerning the general use of long numbers in services and that, as of now, there was no reason not to use them provided they were accompanied with clear pricing and that it is sufficiently clear to users that they are part of a premium-rate service.

3. Having considered the evidence, the Tribunal concluded that users had been misled by text messages that appeared to be from a user profile when, in fact, they were promotional text messages from a fictitious character. It further found that users had been misled into thinking that, by responding to the text message with their age, they were interacting with one of the individual's from a profile rather than completing the final stage of the registration process. In relation to Ground 3, the Tribunal did not accept, on the basis of the evidence provided, that there was no circumstance in which dating could not have happened. The Tribunal therefore decided to uphold a breach of 5.4.1a on the first two grounds but not Ground 3.

Decision: UPHELD

ALLEGED BREACH FOUR GENERAL PRICING PROVISION (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 considered there to be a breach of paragraph 5.7.1 of the Code on the following grounds:

Ground1

The Executive monitored the service on shortcode 69844 and noted that once the user had sent his or her age and gender, the first text message received stated:

“Your registration is now complete! We will send you a set of matches shortly. To chat with someone, just reply to their number.”

It submitted that the message logs demonstrated that this first text message received was chargeable. It submitted that under the Code, the service should be fully informing users of costs that will be incurred before any charges are initiated. In this monitoring exercise, the Executive was not informed of the cost involved in using the service prior to incurring a premium rate charge.

Ground2

The Executive submitted that certain message logs indicated that the first text messages received by users read as follows:

“You pay150p for every 2 messages you receive. To get more matches, text MORE. To unsubscribe, text STOP. Antiphony PO Box 2952 WC1N 3XX”

It submitted that these users had then received the following reminder text message:

“Thanks for using the service. You pay 75p per message (+ network charges). Txt MORE to get more matches. Send queries to POBox 2952 WC1N 3XX. Txt STOP to unsubscri”

The Executive submitted that the pricing had changed from 150p to 75p and as such the text messages had not informed users clearly and straightforwardly of the cost of using the service. The Executive made reference to other examples where the price of the service was changed in the reminder text message (the second text message received) and differed from the pricing information set out in the first text message. The Executive submitted that it was of the opinion that these particular examples demonstrated the inconsistency of the pricing information provided to users. Some users had been told 38 pence, some 50 pence and others 78 pence when in fact; the actual cost was £1.50 per message received from the shortcode.

2. The Information Provider responded to both grounds of the Executive’s allegations as follows:

Ground1

The Information Provider noted that the Executive had made reference to the general public having less industry knowledge and as such being less aware of long number services. It stated that it would therefore assume from the Executive’s statement that, in the cases where a user had sent a user text message to the service directly without receiving a promotion from the company, that user could only have obtained the details of its service by viewing its print/TV advertisement.

It stated that all of its Print/TV advertisements clearly stated the costs of the service and how a user may unsubscribe to the service by sending a ‘STOP’ command. It therefore felt that, as full information had been provided to the user prior to him or her requesting such a service, it need not have reconfirmed this information until users had actively registered with the service by providing their age.

The Information Provider stated that, in the cases where the user had responded to a promotional WAP push message, again full terms/pricing of the service had been provided to the user within the WAP site homepage. The user would only receive further text messages from the service once they had actively selected a user’s profile, at which point, they were re-directed to a confirmation page that, again, confirmed the pricing and terms for the service.

Ground 2

The Information Provider referred to one example raised by the Executive that implied that the user had been unaware of the change from 150p per two text messages received to 50p per message received. It referred the Executive to a free promotional text message sent to the user on the 15 April that read as follows:

FREE MSG Adult Friends! Hi ALEXANDER1269. Just 2 let u know that we have dropped our price by 25p for u! To accept this offer and meet our new girls txt MORE to

This clearly indicates, to the user, that the service has been discounted by 25p.

The Information Provider believed that its users could relate 150p per two messages received as having the equivalent value as 75p per message and, therefore, that a drop of 25p would make the text message cost stand at 50p per message received. It stated that, as with the other examples submitted by the Executive; in both instances the user received a free promotional text message informing them that the costs of the services had been reduced.

The Information Provider stated that it did not believe that its choice of wording had deliberately misled/confused users with regard to the cost of the service. It asked that it be considered that the majority of the complaints date back several months, during which time, it had started implementing the decision to change all pricing structures to ensure that the wording remained consistent throughout. The Information Provider suggested that: 'this service costs X per X messages received' would replace 'you pay Xp per message received'. It stated that whilst it made the decision to amend these text messages for the sake of added clarity, it submitted that the original wording was not overly confusing or misleading. It stated that there were not many chat services out there that actively reduced their prices to engage users, thereby offering greater value for money.

It stated that it had been operating chat and dating services in the UK market for four years and had grown to become one of the industry leaders during that time. For the 20 or so complaints cited by the Executive, it stated to have many satisfied and repeat users, numbering into the thousands and it was important to retain some perspective on the Information Provider's service offering.

3. Having considered the evidence, the Tribunal concluded that, in relation to Ground 1, the cost of using the service had not been expressed clearly and straightforwardly in the print advertisement (812535_promotion App A). It found that it was not clear that on completing the registration process a user would receive five charged text messages without further engaging in the service. The Tribunal did not uphold Ground 2. The Tribunal upheld a breach of paragraph 5.7.1 of the Code on Ground 1.

Decision: UPHELD on ground 1

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 otherwise obvious and easily available to the user."

1. The Executive considered there to be a breach of paragraph 5.8 of the Code on the following grounds:

Ground1

The Executive noted from the complainant message logs, and its monitoring exercise, that the service sent out promotional text messages from the shortcode and then, when the recipient did not respond, they were sent 'teaser' promotional messages from an 076 long number. The Executive submitted the message logs demonstrated that contact

information was not stated in the 'teaser' text messages. It submitted the following example:

User message sent – “23 M”

Service Message received from 69844 – “Your registration is now complete! We will send you a set of matches shortly. To chat with someone, just reply to their phone number.”

Service Message from 69844 – “You pay 150p for every 1 messages you receive. To get more matches. Text MORE. To unsubscribe, text STOP. Antiphony PO Box 2952 WC1N 3XX”

Service Message from 07624803217 – “Leona2 > Brazilian beauty dying to feel a mans cock between her incredibly plump butt cheeks. Txt me and maybe you can help :p-23F,,Picture”

Ground 2

The Executive identified several of the Information Provider's printed advertisements for their services as well as their letter-headed paper and Information Provider's registered details on Companies House.

It noted that the name stated on the Information Provider's letter-headed paper and registered at Companies House was 'Antiphony Limited' but that on one of its advertisements, the identity of the Information Provider was stated as 'Antiphony'.

On other printed advertisements, the identity of the Information Provider was one of the following; 'AL MB', 'ALMB' or 'ALM'. The message logs demonstrated that some of the text messages received by recipients stated 'Antiphony'. The Executive submitted that it was of the opinion that users responding to the advertisements where the 'Antiphony' name has been abbreviated may not have made the connection between the abbreviation and the full name 'Antiphony'.

The Executive also noted that, on printed material, there were fewer restrictions in relation to the number of characters available as there was the case with text messages. It noted that the Information Provider had provided its full name in the text message and had been capable of doing so, whereas, it had failed to do so in its printed material. The Executive submitted that it was of the opinion that the identity of the Information Provider was not otherwise obvious and had not been clearly stated as required by the Code.

The Executive also questioned the Information Provider's of the postal address WC1N 3XX as a means of identifiable contact details. It submitted that it was aware of this PO Box postal address being registered to 511 other companies, some of which operate in the premium rate industry and also promoted this postal address in their advertisements.

The Executive noted that the address registered on Companies House was a Buckinghamshire postal address and this was the address on the Information Provider's headed paper. It further noted that, the address listed on the Information Provider's own website was a Hemel Hempstead address. The Executive questioned why the Information Provider had used what appeared to be a commonly used postal address as

opposed to the one registered with Companies House and was of the opinion that the WC1N 3XX did not clearly identify the Information Provider.

2. The Information Provider responded to the grounds of the Executive's allegations as follows:

Ground1

The Information Provider made reference to the Executive's monitoring exercise and questioned how a typical user would have obtained the shortcode 69844 unless they had seen it advertised in the first instance. It stated that it also assumed that a user would not send a user message to the shortcode directly unless they had the intention of using said services. The Information Provider stated that long numbers were no longer being used as a direct promotion but were sent in conjunction with the premium shortcode, only once a user had manually engaged in the service by selecting a profile or, in the case of the above, where the user has sent a user text message directly to a shortcode.

It stated that, in both cases, full terms/pricing had been provided to the user directly prior to the user receiving any text messages from the long numbers. It also highlighted that no charges were ever submitted to a user through the long number itself. The charges come solely from the shortcode. The Information Provider submitted therefore that, in either scenario, it felt that the user would have been fully aware of the costs of the service and that no breach of the Code had occurred.

Ground 2

The Information Provider stated that it was not aware of any direct restriction/regulation against using abbreviations of the company name. The Information Provider made reference to the Executive's submission that users may not make the connection between AL/ALMB etc and may view these as separate companies. In response it stated that the following were always consistent across our advertisements:

- PO Box Address
- Careline number
- In this instance, shortcode used 69844.

The Information Provider stated that it did not believe that the user would be unable to identify 'Antiphony Limited' from 'AL'.

It re-iterated that once a user had joined the service, all cost reminders/welcome text messages included full details of the company.

It stated that it would update any future print advertising to include the full name 'Antiphony Limited' and there has been no deliberate obfuscation of its identity by using abbreviations in the past. The Information Provider stated that, in relation to the issue of the PO Box address raised by the Executive, whilst many of its consumers were clear minded it was aware that Chat/Adult services tended to attract some individuals that were not always of a completely stable mindset. It stated that it had received occasional

letters, phonecalls and emails that had proved to be somewhat concerning to a number of its employees.

It stated that as its services provided genuine text dating, it had also received occasional police enquiries relating to physical incidents between users of the service. It stated that it had therefore seemed logical to carry a PO Box address in its advertising, primarily so that it did not have 'nutters' turning up on its office doorstep. It stated that the vast majority of user complaints arrived through the careline number which was professionally staffed by in-house agents and offered immediate live call handling from 07:00 to 23:00, seven days per week.

3. Having considered the evidence, and particularly the evidence of the Executive's monitoring exercise of the service as entered after reading the promotion in the Daily Sport (812535_promotion App A), the Tribunal concluded, in relation to Ground 1, that the initial welcome text message and the teaser text message were both promotional text messages and neither contained information that allowed users to identify the Information Provider or the Service Provider.
In relation to Ground 2, the Tribunal found that the abbreviations such as 'ALMB' was insufficient to clearly state the identity of the Information Provider. However, the Tribunal found that the use of a PO Box number was sufficient as an address to enable users to contact the Information Provider.
The Tribunal upheld a breach of paragraph 5.8 of the Code on both grounds.

Decision: UPHELD

ALLEGED BREACH SIX USE OF THE WORD 'FREE' (Paragraph 5.11b)

"No premium rate service or product obtained through it may be promoted as being free unless: b a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call."

1. The Executive noted that this service was a full-page promotion which featured in the 'Daily Sport' newspaper. The Executive noted that the small print at the very bottom of the page had stated *"Free 1st match, Free reg. Then just £1.50 per message..."*

Monitoring Example 1

The Executive made reference to its monitoring of shortcode 69844. It submitted that the service had been instigated by sending the user text message '29m' and, almost immediately, the Executive received the following text message at a cost of £1.50:

"Your registration is now complete! We will send you a set of matches shortly. To chat with someone, just reply to their phone number."

Within seven minutes, the Executive received ten text messages, five of which were charged at £1.50 per message (Total cost £7.50).

Monitoring Example 2

The service was instigated by sending the user text message '23 M' and, almost immediately, the Executive received the following text messages one immediately after the other:

Message 1

"Your registration is now complete! We will send you a set of matches shortly. To chat with someone, just reply to their phone number."

Message 2

"You pay 150p for every 1 messages you receive. To get more matches, text MORE. To unsubscribe, text STOP. Antiphony PO Box 2952 WC1N 3XX"

Message 3

"Leona2 > Brazilian beauty dying to feel a mans cock between her incredibly plump butt cheeks. Txt me and maybe you can help :p-23,,PICTURE"

The Executive noted from the logs supplied by Antiphony that Message 1 and 2 were charged at £1.50 whilst message 3 was free. The Executive made reference to a complainant's message logs that showed seven of ten text messages being charged at £1.50 directly after registration was complete.

The Executive acknowledged that some of the complainants' message logs indicated that the first one or two text message(s) received had been free, nevertheless, either at the very same time or a couple of seconds later, the complainant received chargeable text message(s). The Executive was of the opinion that some of the message logs demonstrated that some users could not register for free as stated in the promotional material.

2. The Information Provider stated that the term 'free registration' was used as the user incurred no cost to text the service in the first instance. There was no user text message billed charge for the user to contact the service. It asserted that the statement, that the first match was sent free of charge, was technically correct. The match was sent for free. However it may not have been the first text message dispatched to the handset, and may have been received several seconds after a charged message.

It stated that this had been caused by message scheduling but the match was dispatched for free. It stated that it would review how it could adapt the scheduling to try and ensure that the first free match always went out first. It stated that a user would only incur charges once he or she had completed the registration and positively confirmed that he or she was over 18. It stated, therefore, that, technically, the registration process was free and without premium rates.

3. The Tribunal considered the evidence and accepted that registration to the service had technically been free as described by the Information Provider. However, it noted the Information Provider's acceptance that the first match sent by service text message had not always been the first free text message in the sequence of text messages sent to the user. It followed that the first match had not always been free as stated in the relevant promotional material (812535_promotion App A). The Tribunal upheld a breach of paragraph of 5.11b of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

VIRTUAL CHAT SERVICES – GROUP TEXT CONDITIONS (Paragraph 7.3.2c)

“In the case of group text virtual chat services, consumers must be informed of any conditions before they enter the service and, in particular, of the minimum number of messages they will receive and the price per message.”

1. The Executive submitted that it considered ‘group text virtual chat services’ to be a service which enabled a number of different people to chat to the user. It was of the opinion that users were not informed of any conditions before they entered the service and, in particular, were not told the minimum number of text messages they would receive.

Monitoring Example 1

The Executive submitted that on eventually engaging with the service, text messages were only sent to ‘JenG’s’ questions. However, the Executive continued to receive free text messages from the following profiles:

“Jess26, JennaG1, Leanne25, Emma140, Clarice676, CINDY4, Dani26, Annah1, Cloe83, Samia, ODESSA and Beatrix44.”

All of the text messages were sent from different long number beginning +4476.

The Executive made reference to a second monitoring exercise and several complainant examples that indicated a similar pattern as the example above.

The Executive noted that the Code required ‘group text virtual chat services’ to inform users of the minimum number of text messages they will receive as part of the service. The Executive submitted that this information had not been given to users either by text message or in the promotional material featured in the ‘Daily Sport’.

Promotional material in the ‘Daily Sport’

The Executive noted that this service was being promoted as a full page advertisement in the newspaper the ‘Daily Sport’. The Executive noted that towards the top right hand corner of the advertisement were the following graphical instructions as to how to use the service:



The Executive submitted that it was the opinion that this suggested that contact with the profiles would be on a one-to-one basis and this was supported by the images of the mobile phones whereby 'YOU TEXT' one text message and then 'YOU RECEIVE' one text message; further implying that the user would be chatting with one person at a time.

2. The Information Provider stated that it did not believe that the service constituted group service or chatroom. It stated that a user responded to a promotion for a particular profile was put directly in touch with that user profile, but may receive promotions for other users of the service. The user was only ever engaged in one-to-one conversations, not group conversations. It stated that there was an expectation that a dating service would offer users the ability to chat to other users, but this did not make it a group service as there was never a group interaction or conversation.

It stated that users were aware that pricing related to 'per message received' and were made expressly aware every time their spend reached £10. In this respect, it did not believe that the provisions under 7.3.2 applied to this service. It stated that, on a separate point, it was unfair of the Executive to suggest that during testing they were not informed of service conditions. It was the opinion of the Executive that users were not informed of any conditions before they entered the service and in particular were not told the minimum number of text messages they would receive. However, the Executive had chosen to send in 'HOT' to 69844 without any prompting from the Information Provider and usually consumers texted a short code because they were responding to an advertisement which contained service conditions and pricing.

3. The Tribunal considered the evidence and concluded that the service was not a group text virtual chat service within the meaning of paragraph 7.3.2c. It found that, even though users had been texted by multiple profiles on each occasion, the message logs

showed that any interaction between the user and a profile occurred on a one-to-one basis. The Tribunal did not uphold a breach of paragraph 7.3.2c of the Code.

Decision: NOT UPHELD

**ALLEGED BREACH EIGHT
SUBSCRIPTION REMINDER MESSAGES (Paragraph 7.3.3b)**

*“All virtual chat services must, as soon as is reasonably possible after the user has spent £10, and after each £10 of spend thereafter:
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 made reference to its monitoring exercise and submitted that it established that having spent £10 and not having sent a positive response the service had continued to send chargeable text messages. The Executive made reference to the Information Provider’s response that stated that there had been a ‘*serious technical problem*’.
2. The Information Provider stated that, whilst the majority of complainants had submitted a reply / new message (regarded by it as a positive response) before being enabled to continue with the billed service after each £10 spent, the Executive raised several worrying issues relating to the operation of its billing practices on this service. It noted that, in several instances, the service had continued to “interact” with and bill users, without a positive confirmation - indeed without a user text message. It had highlighted this issue in the users’ logs affected. The Information Provider stated that all its text dating services were designed to comply with the £10 cost warning and user reply-to-continue functionality that was mandated for the industry. It appeared the user “reply-to-continue” functionality had not worked correctly in several cases. The Information Provider stated that it appeared that there had been a serious technical problem on its systems and, based on the current facts, it accepted full liability for the problem, acknowledged the breach, and would endeavour to fairly compensate, through proactive telephone calls, all the users affected. It was still unsure of the exact amount of compensation due back to the users affected but estimated a figure of between £2000-£6,000 in refunds. It was also unclear as to the exact start date of the problem but hoped to track this down imminently.

The Information Provider accepted liability for this issue and was actively seeking to compensate anyone affected and comply with any further actions /requirements requested by the Executive

3. The Tribunal considered the evidence and concluded that, on the basis of the message logs and the Information Provider’s own acceptance of the breach, the subscription reminder text messages had not been sent to all consumers after spending £10 and the service had continued to charge without a positive user response as required by the Code. The Tribunal upheld a breach of paragraph 7.3.3b 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 Information Provider was reckless in relation to its operation of the service as it had failed to sufficiently monitor its service.
- The cost paid by individual consumers was high – consumers were charged £1.50 a week and one consumer was charged £292 pounds.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Information Provider did not immediately implement the Emergency Procedure so as to effectively suspend all services.
- The Tribunal noted the Information Provider's breach history.

The Tribunal took into account the following mitigating factors:

- The Information Provider had tried to comply with the rules as it had taken and implemented compliance advice.
- The evidence suggested that the Information Provider had made refunds to affected users.
- The Information Provider asserted that it had been caught out by an underlying technical problem and the Emergency Procedure had incurred costs for it of £116,000.

The revenue in relation to this service was Band 3 (£100,000 - £250,000).

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

Having regard to all the circumstances of the case, including the number and seriousness of the Code breaches, and the revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand
- A fine of £50,000 (comprising £40,000 in respect of the upheld breaches with an uplift of £10,000 in respect of breach history).
- The Tribunal ordered the Information Provider to seek compliance advice in respect this and all similar virtual chat services (whether or not these incorporated a contact or dating element) within two weeks of the publication of the Tribunal's decision, such advice to be implemented to the satisfaction of the Executive within two weeks of it being given.