THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday, 26 November 2009
TRIBUNAL SITTING No. 41 / CASE 2
CASE REFERENCE: 824573/AB

Information Provider:	Instant Dialogue Limited, London
Service Provider:	MX Telecom, London
Type of service:	Virtual Chat
Service title:	Local Sex Buddies
Service numbers:	69200
Cost:	£1.50 per message
Network operator:	All Mobile Network Operators
Number of complainants:	3

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

BACKGROUND
The PhonepayPlus Executive (the 'Executive') received three complaints in relation to this virtual chat service entitled 'Local Sex Buddies' and operating on shortcode 69200. The Executive monitored the service as advertised in the Daily Sport. Arising from the 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 and that users who had sent 'STOP' in respect of promotions were still receiving them.

(i) 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 27 October 2009. The Executive accepted this pass through and raised potential breaches of paragraphs 5.2, 5.4.1a, 5.7.2, 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
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").

   In support of its submission the Executive referred to a complainant who had texted 'STOP' twice and had received a service text message confirming exit from the service. The complainant then received a further promotional text message that read as follows:

   "Hi Im feeling V. Naughty & wearing no knickers Txt MORE to 69200 & I will send U XXXPics that make U cum freeMSG Txt stop"

   The complainant again followed the instruction in this text message ie: "...Txt stop". The complainant then received the following three free text messages:

   *"Hi its Suzy 23Blonde LapDancer gr8 Bod Huge Tits Wet Pussy needs a f*ck Txt MORE to 69200 & lets get it on FreeMSG txt stop 2exit msg rcvd@£1.50 help08706093042"*

   "Hi its me cum act out my fantasy 2nite I am tied up Wet Horny & waiting4U Txt MORE to 69200 for my details FreeMSG txt stopexit msg rcvd@£1.50 help08706093042"

   "Hot Horny girl 34D seeks man for no string sex will travel I luv 2 give tit wanks! Txt MORE to 69200 now! FreeMSG Txt stop2exit msg"

   Within seconds of receiving the last text message of the above sequence, the complainant sent 'STOP' to 69200 and received a further two promotional text messages. On 20 September 2009, the complainant sent 'STOP ALL' and then 'STOP' to shortcode 69200 and still received the following text message:

   *"Remember me Kim want 2bend me over & fu*k me 2nite Im not wearing any knickers want a pic Txt MORE to 69200 freeMSG Txt stop exit msg rcvd@£1.50 help08451740076"*

   The Executive submitted that the first 'STOP' command sent by the complainant should have opted that user out of the service. The complainant had followed the instructions by again sending 'STOP', yet had continued to receive billed text messages. It was the opinion of the Executive that sending the second 'STOP' command should not only have

stopped the service but should also have stopped this complainant from receiving any further promotional text messages. However this was not the case. This complainant continued to receive promotional text messages, to which he or she continued to send 'STOP' and 'STOP ALL' but to no avail. The Executive considered the majority of the text messages in its example to have been unsolicited for the purposes of the Regulations.

2. The Information Provider stated that the text messages it sent were always solicited. It stated that it took this matter very seriously and had never sent any text messages without first receiving a valid user text message.

   The Information Provider stated that some of the text messages submitted as evidence by the Executive had not been represented in full as it always included the price and help line number in any message it sent. It stated that all the text messages detailed by the Executive were free text messages that had been sent over a two-month period. These text messages were sent as promotional text messages and its terms and conditions stated that users would be sent promotional material. The Information Provider stated that it had believed and understood that it was acting in accordance with the regulations. It understood that it was required to have an opt-out mechanism and that it did operate such a mechanism as well as providing a helpline phone number on every promotional text message sent.

   Furthermore if a user texted 'OPT OUT2' then that user would not receive promotional material. The Information Provider stated that it had not breached paragraph 5.2 of the Code as it had always provided an opt out on all marketing text messages.

3. Having considered the evidence, the Tribunal concluded that, although the service was set up to give users an opportunity to opt-out of receiving promotional text messages, this mechanism had not worked in all cases,with the effect that the complainant, who had opted out of receiving promotional messages, had continued to receive them. The Tribunal found that this constituted the sending of unsolicited promotional messages and 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 referred to the promotion operating on shortcode 69200 in the newspaper 'Daily Sport' (824573_promotion App A). It noted that the advertisement was entitled "*LOCAL SEX BUDDIES*" and that smaller text stated "*THE STORY OF ONE READER'S SMS AVENTURE! There are guys like Frank all over the country, hooking up with*

genuine Local Women for Hard Sex Action. Become a member of Sex Buddies and never spend a night without Sex again!"

The Executive submitted that the language of the advertisement would mislead users into believing that the service was a contact and, potentially, a dating service when in fact, it was only possible to chat with operators. For this reason, the Executive considered the promotional material to be misleading.

2. The Information Provider stated that it had not meant to mislead the users in any way and that it had taken all reasonable care in relation to pricing information and the type of service. However, due to human error the advertisement in question had appeared as a 'filler' in the Daily Sport without its knowledge or express approval. It explained that a filler advertisement is one kept by a publication as a 'stand by' and placed by the publication at short notice without reference to the Information Provider, and that it had understood that this particular advertisement had been removed and as such should never have appeared in print.

   The Information Provider summarised as follows:

   - It was an old advert
   - It was pulled out of the press at the end of January 2009 as a result of the notice to industry.
   - Due to human error it was used as a last minute filler without going through its copy proof process.
   - It was not in print continuously. It was a filler advert that was placed when it was late with new copy and was only published a total of 9 times from February to October.
   - Not many people replied to this advert
   - This advert has been permanently removed
   - This advert was never consciously placed in the Daily Sport, its placement was an accident.

3. Having considered the evidence and the Information Provider's acceptance of the breach, the Tribunal found that the promotional material (824573_promotion App A) had misled users into thinking that the service enabled them to actually meet with other like minded individuals with a view to a sexual liason, when in fact users were only able to interact with operators who could not be met. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE
GENERAL PRICING PROVISION (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 must be easily audible and discernible."

1. The Executive noted that the promotional material stated at the very bottom of the advertisement *"18+only£1.50 FOR EACH TEXT MESSAGE RECEIVED..."* It submitted that it was of the opinion that the pricing information could have been more easily legible and prominent within the advertisement considering all other text on this advertisement had been of a larger sized font.

2. The Information Provider submitted that it had taken all reasonable care regarding pricing information and had used large fonts so as to ensure that the cost of participating in the service was clear, legible and prominent. It stated that it used a 'copy and proof' service to avoid breaching paragraph 5.7.2 of the Code. It stated that it had not intentionally tried to mislead its customers and did display the price with correct symbols and in an easily legible size. It further stated that it used standard sized fonts for all promotional material and took guidance from publishers. It asked the Tribunal to note that it had followed guidance and best practice on the sizing, noting no specific font size was specified in the Code. It stated that it had never received any complaints from either consumers or publishers that indicated that they could not read the font on any of its advertisements

3. Having considered the evidence, the Tribunal found that, in the context of the promotional material (824573_promotion App A) as a whole, it had contained pricing information that was not sufficiently prominent and had required close examination. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR
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 made reference to the promotional material (824573_promotion App A) which appeared in the newspaper 'Daily Sport' and the Information Provider's registered details on Companies House. It noted that the company name stated in the promotion was "BCM SF" and on the Companies House website, the name registered was 'Instant Dialogue Limited'. The Executive submitted that it was of the opinion that "BCM SF" did not serve to identify the Information Provider and as such the identity of 'Instant Dialogue Limited' was not otherwise obvious and was not clearly stated as required by the Code. The Executive further submitted that it had examined the website 'INFOSMS.CO.UK' which was stated on the promotional material. The Executive noted that throughout the 'Terms and Conditions' present on this website there was no mention of the company running this service as being called 'Instant Dialogue Limited' but instead it was stated that: *"The Service is provided by Switchfire, which is provided by: Switchfire Limited 2nd Floor 66 Wilton Road London SW1V 1DE".* The Service Provider had confirmed that it was contracting with the Information Provider –Instant Dialogue Limited. In turn, the Information Provider had contracted with Switchfire.

The Executive also questioned the Information Provider identifying its contact details with the postal address: WC1N 3XX. The Executive was aware that this postcode was also registered to 511 other companies, some of which operated in the premium rate industry and also promoted this postal address in their advertisements. The Executive was of the opinion that the address WC1N 3XX did not clearly identify the Information Provider.

2. The Information Provider stated that it was established in August 2002 and had been trading in the mobile marketing sector and more recently promoting PRS within the chat/flirt product genre. It stated that it had always attempted to ensure any products, services and promotions were compliant with the Code.
It stated that it was a promoter of a third party service and used a technical partner to provide the actual service. It did not have access to the actual service or even to the database but was given access to basic statistics. It stated that whilst this type of arrangement was not currently recognised under the Code it considered itself as a 'Service Promoter'.

It stated that it also provided a website with full terms and conditions and contact numbers to further support the user. Furthermore it outsourced its Customer Service which was operated by its technical partner, Switchfire.

It stated that it used the name of Switchfire for its contact details helpline, email support and address for the following reason.

- To avoid any confusion with multiple company names.
- It believed that it is better customer service practice and a better user experience to give a unified address, helpline and contact details.
- The user can be helped immediately as they have access to the database and user history.
- It is more consistent to give our technical partners/customer service details as this is who they deal with if they phone the helpline.
- To reduce the number of points of contact-The consumer is already dealing with a network and an aggregator and to avoid even further confusion they would then have to deal with 2 further companies the Information Provider and its technical partners/customer service.
- It believed it to be reasonable for users to be told about the technical partner as they deal with their customer service.

The Information Provider stated that the address it used was its PO Box address as it dealt with clients directly. It stated that if because of the timing of promotions, the amount of mail it receives fluctuates and when this is the case the Post office will request that a company uses a PO Box address.

3. Having considered the evidence, the Tribunal found that the contact and identity details that had been provided in the promotional material had been those of a contracted third party and not of the actual Information Provider as is required by the Code. Accordingly, the Tribunal upheld a breach of paragraph 5.8 of the Code. 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.

Decision: UPHELD

ALLEGED BREACH FIVE
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 the advertisement stated in a large font *"FREE Registration" (*824573_promotion App A). It submitted that it was of the opinion that this was a misuse of the word 'free' because the message logs supplied by the Information Provider had demonstrated that within minutes of initiating the service, users received chargeable text messages.

   The Executive noted that the first match sent to users was free. However it also noted that, at the same time, the user was sent chargeable text messages.

2. The Information Provider stated that it was not trying to mislead consumers by using the word 'FREE' in the advertisement but had nevertheless removed this word from this advertisement.

   It stated that it understood that, as this service operated a Free Registration process and the first text message was free, this could be stated in the body of the promotional material. It pointed out that the advertisement stated that the user would receive three to five billed text messages so they were made aware of this prior to them texting in and registering.

   It stated that, in theory, a user could register and then immediately text 'STOP' and would not receive these further text messages. It stated that this was "in theory" as it would make no sense for a user to do this. If a user did not want the service, there was no reason to register.

   The Information Provider argued that it was not misleading to state that registration was 'Free' as, before users registered, they were told that after registration they would be charged 5x£1.50.

   It stated that it had spoken to its technical partners about the way the text messages were sent and had requested a further delay between the matches so that the user had more time to stop the service.

3. Having considered the evidence, the Tribunal accepted that registration was in fact free and, accordingly, did not uphold a breach of paragraph of 5.11b of the Code. However, the Tribunal noted with concern that, following registration, the mechanism had quickly triggered paid for service text messages. It was noted that the Information Provider had extended the period between registration and first billed message to give users more time in which to change their mind.

Decision: NOT UPHELD

ALLEGED BREACH SIX
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 with different names 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. The Executive made reference to a message log that indicated that once the service had been initiated, although there was no interaction, text messages were received from the following profiles:

   ANGELX, nicki109, MONICA111, BUBBLE29, STAR35, BECKS118, BETH33, KATE129 and SLIM35.

   The Executive submitted that it classified this as a 'virtual chat service' and as such there was a requirement that the user to be informed of the minimum number of text messages they would receive and the price per message before entering the service. The Executive noted that this information was not stated in the promotional material.

2. The Information Provider stated that it believed that this was not a "group text virtual chat service". It stated that it was of the opinion that group chat services forwarded text messages from one person to a group of people (like a chat room) whereas this particular service had forwarded text messages from one person to another person. As such it stated that this service was a "virtual chat service" but not a "group virtual chat service". It further stated that it believed that the minimum spend was zero as registration had been free. It stated that after the keyword but before registration, the user was sent the following service text message:

   " FREE MSG : Welcome to Sex Club.Please reply with your age and location to receive 5 matches of HOT LOCAL girls near you."

   It stated that users knew that they would be charged 5 x £1.50 if they registered and, as such, the minimum price (post registration) had also been provided to the user. Furthermore, in the main body of the advertisement it stated that the user would receive three-five text messages so they were made aware of this prior to texting in and registering. It stated that, as far as it understood, the user had been informed.

3. Having considered the evidence, the Tribunal concluded that the service did not come within the meaning of a group text virtual chat service. 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 SEVEN

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 having spent £10 during the monitoring exercise, and not having sent a positive response, the service had continued to send chargeable text messages.

2. The Information Provider stated that this was an old promotion that it had not intended to have published anymore. It stated that it had not been updated and checked to reflect paragraph 7.3.3b of the Code. It stated that it believed that the positive user text message after £10 was in place for all services and it was an unfortunate oversight as it had not believed that this particular service mechanism was still in operation. The Information Provider stated that it had changed the service to reflect the requirements under paragraph 7.3.3b of the Code.

3. Having considered the evidence and the Information Provider's acceptance of the breach, the Tribunal found that 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 **significant.**

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

- The advertisement for the Information Provider's service (824573_promotion App A) was wilful in its original design, execution and motives.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.

The Tribunal took into account the following mitigating factors:

- The Information Provider did co-operate with PhonepayPlus and responded immediately and in full with the Emergency Procedure.
- The Information Provider had already offered refunds to users affected by the breaches.
- The Information Provider asserted that it was a small company and that it had outsourced its regulatory and support functions to a third party in good faith.

The Tribunal noted that the advertisement in question had been published in the Daily Sport due to an error but found that it had not been beyond the control of the Information Provider to prevent the error from having occurred.

The revenue in relation to this service was Band 5 (£5,000 - £50,000).

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 **significant**.

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 £4,500
- The Tribunal commented that it expected claims for refunds to continue to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.