

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 22 January 2009 TRIBUNAL SITTING No. 19 / CASE 4  
CASE REFERENCE: 768886/AM**

Service provider & area:	Mobile Interactive Group Limited, London
Information provider & area:	Big Red Giant, Enfield, London
Type of service:	Chat and date/news alert
Service title:	Breaking News Alert
Service number:	87131/82772
Cost:	£1.50 per message
Network operator:	All Mobile Networks
Number of complainants:	17

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 17 consumer complaints during August and early September 2008, all of whom claimed to have received unsolicited reverse billed SMS messages from short code 87131. Most of the complainants reported to have received several messages, however, others only received one. For example:

*“BREAKING NEWS. Commuter Thrown On To Live Rails in Kent. For more breaking news txt NEWS to 87131. Msgs cost £1.50. STOP exits.08700110637”*

The information provider stated that all the complainants were customers of [www.motorflirt.com](http://www.motorflirt.com) (“Motorflirt”), a service which offered consumers the opportunity to chat, flirt and date with other members. Contact with other members was primarily initiated by ‘motorflirting’, whereby the consumer sent the car registration number plate of a 3<sup>rd</sup> party in an SMS message, to short code 82772, which the Executive understood to cost £1.50 per message. If the owner of that car also happened to be a member of the service, then the consumer could initiate contact and/or receive a reply message.

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

The service provider contracted with the information provider for the dedicated use of the shortcode 87131. The information provider contracted with Motorflirt, the company which promoted the service under investigation. The information provider stated that all the complainants were customers of Motorflirt and that that it had also purchased opt-in lists from third parties.

The Executive believed there to be three elements of the [www.motorflirt.com](http://www.motorflirt.com) service, as follows:

#### Element 1 – ‘Chat and Date’ ([www.motorflirt.com](http://www.motorflirt.com))

Element 1 was primarily promoted as a chat and date service and branded as ‘Motorflirt’. The Motorflirt website appeared to offer consumers ‘*absolutely free*’ membership, along with other benefits and free registration. Consumers were able to register for membership with Motorflirt via two methods:

### Method 1

The first method of registering was via the website, and required the consumer to click the 'REGISTER FREE' link, whereupon they were required to enter certain personal details including their mobile phone number and email address. Upon successful completion, a verification email was sent to the consumer's personal email address, which provided the following instructions:

#### *"IMPORTANT*

*Before you can login to the MF members area; you must first validate your mobile phone & activate your account, which will cost you just 50p plus your normal text charge for one message. This is a one-off - you won't have to do it again unless you change your phone number.*

*To activate your account, please send a text containing just the word "mf" to the phone number 82772".*

### Method 2

The second method of registration was by sending a preferred username or car registration number, to short code 82772. According to the terms and conditions, this automatically registered the consumer as a member, who would then receive a 'password' by text message, which the Executive understood to have cost 50 pence. Registration by this method did not give the member access to the website services provided by Motorflirt, until their registration details were entered onto the website. The Executive understood that the member was then required to activate their account, which cost a further 50 pence.

In order to become a Motorflirt member, the consumer incurred a charge regardless of which method of registration they chose. The Executive found that actual cost of registration was only contained at various points within the lengthy terms and conditions, which the Executive believed did not form part of the registration process.

### Motorflirt Reminder Message ("MF Reminder Message")

It appeared that if consumer's account remained quiet for some time, they would be sent a reminder message at a cost of £1.50. The Executive noted that some complainants received this message in addition to the 'News Alerts' message. An example of the Motorflirt message is as follows:

*"Your motorflirt account has been quiet for a while. To stay active, send YES to 27227 or to cancel send quit to 87131. Msgs cst"*

### "Free Message"

The Executive noted that all complainants who received the free message, did so immediately after they had sent an mobile terminating ("MT") message with the word 'QUIT' to cancel the above Motorflirt reminder message. An example of this message is as follows:

*"FREE MSG- For your FREE msg TXT back D.O.B & Name to start. 18+ ONLY. Other Msgs/Pics/Vids cost"*

This message failed to state to which service it related, whether replying to the message entered the consumer back into the same or another service, or whether the consumer's response would incur a charge. This message cost complainants £1.50.

### Element 2 – “News Alert”

The Executive considered that the second element was subscription based, whereby consumers received three variations of news alert SMS messages, entitled either ‘Breaking News’ ‘Latest News’ or ‘Headlines’.

The message logs demonstrated that the ‘News Alert’ message(s) were the first message all complainants received, and appeared to be promotional in nature. The messages prompted the consumer to text ‘NEWS’ to short code 87131, in order to receive ‘more breaking news’. For example:

*BREAKING NEWS. Commuter Thrown On To Live Rail in Kent. For more breaking news txt NEWS to 87131. Msgs cost*

### Element 3 – Other Charges

The Executive noted that users of the service were liable to incur other charges upon entering the Motorflirt service. The content of the messages were unknown, but details of the types of messages and potential charges appeared in the terms and conditions, which stated that receipt of such messages would cost the member between 50 pence and £1.50, but would not exceed £10 per year.

The ‘Other Charges’ element was contained in paragraph 4 of point 5 ‘Cost of Service’:

*MF™ may from time to time send text messages to you to let you know about changes to the site, improvements to the site and services, your entitlement as a member or user, any special features on our site, any promotions, any competitions, the MF™ services in general, or other services or products we think may be of interest to you or related information from third parties we think maybe of interest to you, as detailed within our privacy policy. Receiving these text messages will cost between 50p and £1.50. The cost of such text messages to you will exceed no more than £10 per year. If you would rather not receive this information, please text STOP to 82772 or email admin@motorflirt.com.*

### **Standard Procedure**

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

In a letter dated 2 September 2008, the Executive made a request for information from the service provider under paragraph 8.3.3 of the Code, including information on the service, all methods of promotion, message logs and opt-in details for eleven complainants. The Executive granted the service provider’s request for an extension of time in which to respond, until 16 September 2008. The Executive received a further six complaints from members of the public, and as a consequence, brought forward the previously extended deadline to 11 September 2008 and informed the service provider that any non adherence to the deadline, would result in an instigation of the emergency procedure.

As part of the Executive’s investigations, a questionnaire was issued to all of the complainants to develop an understanding of the service, and to ascertain whether the complainants had accessed the service via the website [www.motorflirt.com](http://www.motorflirt.com). The

Executive received six responses to the questionnaire, all of whom explicitly stated that had neither heard of, nor entered their details into the 'Motorflirt' website.

The Executive issued a further request for information under paragraph 8.3.3 of the Code dated 16 September 2008, seeking further clarification on the message logs previously provided and other aspects of the service. The service provider forwarded a response provided by the information provider in an email dated 19 September 2008, which contained limited information.

In a letter to the service provider dated 3 November 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8, 7.3.2d, 7.12.3a, 7.12.3b, 7.12.4a-f and 7.12.6a of the Code. The service provider duly responded in a letter dated 13 November 2008, forwarding a full response supplied by the information provider. All responses to the breaches have therefore been attributed to the information provider.

The Tribunal made a decision on the breaches raised by the Executive on 22 January 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. This is sometimes called 'a hard opt in', 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 sometimes called a 'soft opt-in'.

1. The Executive considered the News Alert, Free Message and the MF Reminder messages to be a promotion of a premium rate service, as per the definition found at paragraph 11.3.27 of the Code. The effect of the messages' content was to encourage consumers to text the keywords 'NEWS' 'name & D.O.B' or 'YES' to the short code and thereby use the premium rate service, or elements of that service. Neither the service provider nor the information provider supplied any evidence to establish that the recipients of the promotional messages, consented to their receipt to either the sender, a third party data provider, or for example by virtue of registration to the Motorflirt website. The Executive considered that where consumers had registered via the website, the information provider should have been able to supply at least details of consumers' username, email, number plate, surname, gender, date of birth or postcode.

The Executive noted the requirement of the Regulations that direct marketing should only be in respect of that person's similar products and services. The Executive considered that in respect of consumers whose details had allegedly been collected via Motorflirt.com (a chat a date service), the News Alert message(s) received were neither similar nor related.

The Executive also noted that consumers whose details were according to the information provider, collected on the Motorflirt website and who received the News Alert, MF Reminder Message or the Free Message, would not have been given an informed opportunity to opt-out of receiving future or current marketing information from the service, as no such opportunity was afforded on the registration page. This information was only contained within the lengthy terms and conditions, located in a different section of the site.

2. The information provider stated that it had provided the 87131 facility based on Motorflirt's verbal confirmation that messages would only be sent to its database of opted-in consumers. Motorflirt advised that its opted in database was built from its Motorflirt service as per the Motorflirt website and from 3<sup>rd</sup> party opted-in lists. The information provider did not supply 3<sup>rd</sup> party opt in lists to Motorflirt for this service, or any numbers for use on this service. Furthermore the information provider had no involvement in any other aspects of Motorflirt's business. When the information provider had received complaints (through the service provider's customer care line), the information provider had repeatedly asked Motorflirt of evidence of opt-in subscribers. When this was not forthcoming it suspended the service. The information provider commented that Motorflirt did not and still have not provided any of this information.

The information provider stated that all messages sent through its systems contained its customer care number and 'STOP' instructions. It commented that the log files might not reflect this as the log database dropped messages at the '£' sign. However, this did not affect what was actually sent, for example where the log file stated:

*"BREAKING NEWS. Commuter Thrown On To Live Rail in Kent. For more breaking news txt NEWS to 87131.Msgs cost"*

The actual message received by the consumer was:

*"BREAKING NEWS. Commuter Thrown On To Live Rails in Kent. For more breaking news txt NEWS to 87131.Msgs cost £1.50. STOP exits.08700110637"*

The information provider explained that its gateway had an automated STOP mechanism whereby if a consumer replied with: Stop, Stop all, Stop!, Stop. or Stop txt, they would automatically be blocked from receiving any further free or billable messages from the service, until they reactivated the service and remove the block. Therefore, every consumer who received a message through 87131, had the option to immediately opt-out for free via that short code, and also had access to its customer care line. The information provider commented that obviously, it had no control over any other Motorflirt services.

3. The Tribunal noted that the information provider had relied on a data list supplied by Motorflirt, for which it could not obtain any evidence of consumer opt-in. The Tribunal also noted that Motorflirt had been unable to supply

evidence of consumers purportedly opting in via the Motorflirt web registration process. The Tribunal concluded on the balance of probabilities that unsolicited marketing messages had been sent to consumers who had not opted into the service, in breach of the Regulations. The Tribunal upheld a breach of paragraph 5.2 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWO**

### **MISLEADING (Paragraph 5.4.1a)**

*“Services and promotional material must not:*

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

The Executive considered the service to be misleading for the following reasons:

#### Reason 1

1. The Executive noted that where consumers registered as members online, they were required to complete an online registration form. Upon completion, they received an email which contained the following instructional message:

*“IMPORTANT*

*Before you can login to the MF members area; you must first validate your mobile phone & activate your account, which will cost you just 50p plus your normal text charge for one message. This is a one-off - you won't have to do it again unless you change your phone number.*

*To activate your account, please send a text containing just the word "mf" to the phone number 82772”.*

The service required consumers to pay a charge of 50 pence plus their standard network rate, in order to activate their account. The Executive checked the terms and conditions to ascertain why the 50 pence charge was being levied upon the intended member and found the following explanation under point 5 “Cost of Services” (paragraph 1):

*“It is free to register as a member. Upon completion of your registration, you must however activate your account. Activating your account will cost 50p (plus your standard network rate). For a member to send and receive messages, they must activate their account. This is a requirement of ICSTIS the governing body responsible for premium SMS messages”*

The Executive considered that it appeared the information provider was misleadingly seeking to imply that the 50 pence account activation charge, was a requirement of PhonepayPlus.

#### Reason 2:

The Executive considered that Motorflirt website offered free membership:

*“Your membership is absolutely free” and “Register Free”, “Free to join for chat, personals and Motor-flirting”.* The Executive was of the opinion that it could be quite legitimately be construed that a consumers’ expectation upon accessing the service, was that ‘absolutely free’ registration would mean all registration steps required in order to use the service. The Executive considered the absence of a distinction between registration and activation

(the latter costing 50 pence), defeated the consumer expectation, and was likely to mislead by ambiguity and/or omission.

### Reason 3:

#### Free Message

The Executive noted that the Free Message did not state what the service was, or what type of service the consumer would enter. All complainants who received the message did so exactly one minute after they had text the word 'QUIT', as a positive action to cancel the MF reminder message previously sent to their handset.

The Executive considered that by failing to provide any information or indication that this was a charged service via the free MT message, before (or in the absence) of the opt-in MO subscription message, the Executive considered it likely that consumers would be misled or likely to be misled, by ambiguity and/or omission, to opting into a chargeable service which they did not fully understand.

The Executive considered this further aggravated by the fact that the 'Free Message' was sent immediately after the consumer had sent 'QUIT' to a previous message from the same service. The consumer might therefore believe the 'Free Message' service message to have been sent by their network operator and respond to it, inadvertently opting back in to the same or another service.

2. The information provider stated that it did not thoroughly investigate Motorflirt's subscription practices, and had relied on Motorflirt's assurance that it would only promote to consumers subscribed to short code 87131. The information provider commented that 'QUIT' was not a registered 'STOP' command on its gateway. Furthermore, Motorflirt had never requested this be set up as a keyword on the service. As such the message content was not recognised and defaulted to its 'default service', which requested further information from the consumer.
3. The Tribunal considered the evidence and determined that the service was misleading, for the reasons raised by the Executive, namely, the misleading suggestion that registration to the service was totally free and the misleading content of the free message, which was sent to consumers shortly after they had attempted to exit the service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

### **Decision: UPHELD**

#### **ALLEGED BREACH THREE**

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

*"Services and promotional material must not:*

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

1. The Executive raised concerns that all complainants stated that they had been charged £1.50 charge to receive the 'News Alert' and 'MF Reminder' messages, by reverse-billed text message without the sender having previously obtained their consent. The Executive noted the information provider's statement that all complainants who received the reversed billed

messages were consumers of Motorflirt, which was inconsistent with the claims of all 17 complainants, who stated they had never previously seen or heard of the service, and therefore had not consented to receiving the messages. According to the information provider, such consent had been obtained by the consumer registering as a member on the Motorflit.com website or through purchased opt-in lists. The information provider confirmed that no other promotion was available. However, no evidence was provided to show complainants were customers of Motorflirt, which the Executive considered demonstrated that the complainants' consent had not been obtained.

The Executive considered this further aggravated by the fact that the message logs showed that at 1am on the 28 August 2008, five of the 17 complainants sent a blank MO to short code 87131. The blank text MO message appeared to have opted-in all the complainants into the service, as at 19.35pm that same day all five complainants received their first chargeable MT (News Alert) message. The Executive contacted the network providers for those complainants, one of which confirmed that one particular complainant had not sent the blank MO to 87131 on that date.

The Executive considered that all the consumers' mobile numbers were used without direct or implied consent, and had been used to charge consumers a fee for a service which consumers never agreed either directly or indirectly to receive. Consequently, the Executive believed that the circumstance which made consumers vulnerable was that the service provider or information provider held details of their mobile numbers and had the facility to charge them at will, using reverse billed messages. The Executive considered that the information provider had taken unfair advantage of this circumstance by charging consumers without having obtained either their direct or indirect consent.

2. The information provider reiterated that it had relied upon Motorflirt's assurance that all recipients were Motorflirt subscribers and had turned the service off when no evidence was provided. The information provider stated that Motorflirt operated its own service using its own numbers, through the information provider's online portal. With regard to the five blank inbound messages in the log file, the information provider confirmed that the messages were never received, and did not exist in any of its log files.
3. The Tribunal considered the evidence and found that a number of complainants had received unsolicited reverse billed messages and that the service had accordingly taken improper advantage of mobile data it held. The circumstances of being unable to prevent the receipt of unsolicited chargeable messages made the recipients vulnerable. The Tribunal upheld a breach of paragraph 5.4.1 b of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FOUR**

##### **PRICING INFORMATION (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."*



The Executive considered that the service had failed in inform consumers of the cost of the service in a clear and straight forward manner, for the following reasons:

1. Reason 1:

Chat and Date ([www.motorflirt.com](http://www.motorflirt.com))

During the Executive's monitoring of the website, it noted that although the service offered free membership, both methods of registration did not only cost the consumer, they also unknowingly entered them into a subscription service. The Executive found that consumers were only made aware of the cost of registration in the terms and conditions, which were located at the bottom of the webpage in small font. Furthermore, the manner in which the pricing information was presented in the terms and conditions required the consumer to refer to various different paragraphs, in order to fully ascertain the actual potential cost. At no point of the registration process (by either method), were consumers' attention bought to the terms and conditions. As a consequence, the Executive considered that the pricing information and full cost of the service, had not been made available in a clear or straightforward manner. The Executive considered this further aggravated by the fact that consumers were unknowingly entered into a subscription service.

Reason 2:

The Executive considered that where according to the information provider, consumers' details were collected on the motorflirt.com website, but where it could not be verified that a consumer had been fully informed, either via the website or a WAP message, no prior knowledge of the service could be assumed. Therefore, it was the opinion of the Executive that consumers with no prior knowledge of the service, would be unaware of the costs they could potentially incur in joining.

2. The information provider reiterated that it did not thoroughly investigate Motorflirt's subscription practices, but relied on its assurance that it would only promote to consumers subscribed to short code 87131. The information provider stated that it had no involvement in the Motorflirt website or services via short code 82772
3. The Tribunal considered the evidence and determined that the service had failed to ensure that consumers were fully informed of the cost, in a clear and straight forward manner. The Tribunal determined that the subscription element of the service had not been clearly stated on the website, and that the pricing information although contained in the terms and conditions, was unclear and confusing. Furthermore, recipients of the unsolicited SMS messages would not have had an opportunity to view the website and the content of the messages received failed to make clear the cost of the service. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FIVE**

### **CONTACT INFORMATION (Paragraph 5.8)**

*"For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user."*

1. When monitoring the service, the Executive found that the Motorflirt website failed to state the identity or contact information of either the service provider or information provider on either the web homepage, within the terms and conditions or the privacy statement. The Executive noted that the only contact details provided on the entire site were those of Motorflirt. Furthermore, the 'Contact Us' link on the website, provided for consumers who encountered problems, only provided Motorflirt's contact address and details. The Executive considered that the relevant contact information had not been made obvious or clearly stated, and noted the lack of customer service number, anywhere on the Motorflirt website. The Executive also noted that the promotional messages received by consumers, also failed to contain the requisite identity or contact details, or to provide a customer services phone number.
2. The information reiterated that it did not thoroughly investigate Motorflirt's subscription practices or review the terms and conditions on the website. The information provider reiterated that although log files did not show the customer care number or 'STOP' instructions, these were included in messages delivered to recipients mobile devices. The information provider reiterated this was as a result of the log database dropping messages at the '£' sign, although this did not affect what was actually sent, for example where the log file had message of:

“BREAKING NEWS. Commuter Thrown On To Live Rail in Kent. For more breaking news txt NEWS to 87131. Msgs cost”

The actual message received by the consumer was:

“BREAKING NEWS. Commuter Thrown On To Live Rails in Kent. For more breaking news txt NEWS to 87131. Msgs cost £1.50. STOP exits.08700110637”

The information provider stated that this could be evidenced by the calls received to its customer care number, and the 'STOP' messages “received by its gateway”.

3. The Tribunal considered the evidence and concluded that the information provider had failed to provide the identity or contact information of either itself or the service provider on the Motorflirt website or in the promotional messages. The Tribunal commented that it was insufficient to have provided the contact details of Motorflirt. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SIX**

### **VIRTUAL CHAT SERVICES (Paragraph 7.3.2d)**

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

1. The Executive noted that in relation to the 'Motorflirt' element of the service, it appeared that consumers who did not register via the website, were not informed of the availability of the 'STOP' command, prior to entering the

service. From the sample logs provided, the Executive considered that consumers were entered into the service without their knowledge and consequently, were not informed of the 'STOP' command. The Executive noted that the content of the first message mentioning 'Motorflirt' advised consumers to text 'QUIT' and therefore failed to inform them of the 'STOP' command.

2. The information provider reiterated that the 'STOP' command was included on all outbound messages, sent via short code 87131.
3. The Tribunal considered the evidence and noted that consumers had not been informed of the availability of the 'STOP' command, but had been advised to send 'QUIT'. The Tribunal noted that the QUIT command did not serve to stop the service, because it had not been registered as a key word. The Tribunal upheld a breach of paragraph 7.3.2d of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH SEVEN**

### **SUBSCRIPTION SERVICES (Paragraph 7.12.3a-b)**

*"Promotional material must:*

- a. *clearly indicate that the service is subscription based. This information should be prominent and plainly visible and/or audible to consumers,*
- b. *ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,*

1. The Executive was of the opinion that the promotional 'News Alert' SMS messages failed to clearly indicate that the service was subscription based. Even in the event the consumer had registered as a Motorflirt member, the website did not clearly indicate that it was subscription service. The Executive therefore considered that a consumer receiving the 'News Alert' message would be unaware that the service was subscription based. The Executive considered the placing the terms of use of the subscription service within the terms and conditions, meant that this information was presented to the consumer in such a way that the whole cost pricing and opt-out information was not clearly visible when entering the service.
2. The information provider stated that it did not thoroughly investigate Motorflirt's subscription practices, and relied on Motorflirt's assurance that they would only promote to consumers subscribed to short code 87131.
3. The Tribunal considered the evidence and determined that the promotional 'News Alert' SMS messages failed to indicate that the service was subscription based. The Tribunal was also of the view that the information given was not presented on the Motorflirt website, in a clear and visible fashion. The Tribunal upheld a breach of paragraph 7.12.3a-b of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH EIGHT**

### **SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)**

*“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:*

- a name of service,*
- b confirmation that the service is subscription-based,*
- c what the billing period is ... or, if there is no applicable billing period, the frequency of messages being sent*
- d the charges for the service and how they will or can arise,*
- e how to leave the service,*
- f service provider contact details.”*

1. The Executive noted the information provider’s statement that all the complainants who received the News Alert messages did so as a result of being customers of Motorflirt. The Executive considered it clear from the complainants and the message logs provided by the information provider, that the News Alert message was the first MT message received by all complainants. Therefore, the first message complainants received was chargeable and not in the format required by paragraph 7.12.4 of the Code.
2. The information provider stated that it did not thoroughly investigate Motorflirt’s subscription practices, and relied on its assurance that it would only be promoting to subscribed customers on 87131.
3. The Tribunal noted the first message sent to consumers was the News Alert message, which was chargeable and failed to contain the requisite information as stipulated by paragraph 7.12.4a-f of the Code. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH NINE**

### **SUBSCRIPTION TERMINATION (Paragraph 7.12.6a-b)**

*“a After a user has sent a ‘STOP’ command to a service, the service provider must make no further charge for messages.*

1. The Executive noted that in its response to the request for further information, the information provider stated that as indicated in its log files, there was not a single case whereby the ‘STOP’ command was received and a further message sent to the customer. However, the Executive found that those same message logs showed that at least three of the complainants did continue to receive chargeable SMS message after sending the ‘STOP’ command. In at least two of the cases, after having received a News Alert message, the complainants sent the ‘STOP’ command, which was followed by a MT message informing them that their ‘STOP’ command had been received and that they would not receive any further texts. Immediately following the MT ‘stop received’ message, the complainants received a chargeable MF Reminder Message.
2. The information provider stated that ‘STOP Service’ and ‘QUIT’ were not recognized STOP commands on its gateway even though they might be picked up by individual applications. As such, STOP messages could be issued by individual applications but might not be managed by its gateway STOP process. The information provider commented that given the situations brought to light in this investigation, it had shifted all STOP management into its gateway to ensure that the situation could not reoccur.

3. The Tribunal considered the evidence and noted that the message logs demonstrated that complainants had continued to receive chargeable messages, further to initiating the 'STOP' command. The Tribunal also noted the information provider's admission that 'STOP service' and 'QUIT', were not recognised commands on its gateway. The Tribunal upheld a breach of paragraph 7.12.6a-b of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

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

- The service was valueless; the content of the messages provided no real benefit to consumers; and
- The information provider had been reckless in using an unverified 3<sup>rd</sup> party opt-in list, which resulted in the sending of unsolicited reverse billed SMS messages.

In mitigation, the Tribunal noted the following factors:

- The service provider and information provider both co-operated with the Executive when notified of the breaches.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A combined confiscatory and punitive fine of £50,000
- A bar on the service until compliant.
- The Tribunal ordered that claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.