

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 23 July 2009

TRIBUNAL SITTING No. 32 / CASE 3

CASE REFERENCE: 771646/AM

Service provider & area:	Dialogue Communications Ltd, London
Information provider & area:	Mobilegate Ltd, Australia
Type of service:	Subscription-based chat and date service
Service title:	maybemeet.me, uksinglesonline.com
Service number:	80200 and 80177
Cost:	80200 (£1.50 to receive a message, subsequently charged £3 on 1 November) 80177 (£5 to receive the service)
Network operator:	All mobile operators
Number of complainants:	68

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 68 complaints (including two complaints from websites companies) in relation to the subscription-based chat and date service operating on shortcodes 80200 and 80177. The Information Provider described the service as a *'fantasy chat service where no relationships can be developed'* and stated they promoted it through two websites called maybemeet.me and uksingles-online.com.

Complainants stated that they received an unsolicited promotional and chargeable text message after posting a personal advertisement or profile on one of a number of other free dating or social networking sites, such as gumtree.com and flirtomatic.com. None of the complainants stated they had placed personal profiles or advertisements on maybemeet.me or uksingles-online.com. Complainants stated that the unsolicited text message they received had been similar to or along the lines of the following:

"FREE MESSAGE - Hi (complainant's name), Mandy from Gumtree wants to chat to you and maybe meet! TXT YES TO CONNECT NOW! SAFEDIVERT 080006800764 2end txtstop msg3gbp3subsc"

Complainants stated that they had responded 'YES' to the service text message in the belief that they were making contact with genuine individuals responding to their personal advertisement or profile, rather than an 'operator' who was operating through a premium rate service. Complainants who responded 'YES' were entered into the subscription-based service costing between £1.50 and £3 per message plus £3 or £5 per week subscription charge.

Complaint Investigation

Standard Procedure

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.7 of the Code.

A breach letter dated 8 April 2009 and an Information Provider undertaking form were sent by the Executive to the Service Provider raising potential breaches of paragraphs 3.3.1, 5.2, 5.4.1a, 5.7.1, 5.8, 7.3.3b, 7.12.2, 7.12.3a and 7.12.4 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). A formal response and a signed Information Provider undertaking form were received from the Service Provider dated 8 April 2009. The Information Provider requested further information and evidence regarding breach 5.2 and 5.4.1a. This was provided by the Executive who received no further response from the Information Provider in relation to this information. The Executive issued an addendum to the breach letter dated 26 June 2009 raising a potential breach of paragraph 8.3.3 of the Code. The Information Provider responded to the addendum in correspondence dated 7 July 2009 by submitting new responses to all the breaches raised in the original breach letter dated 8 April 2009.

The Tribunal made a decision on the breaches raised by the Executive on 23 July 2009.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE DESIGNATED NUMBER PREFIX (Paragraph 3.3.1)

'Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a network operator has restricted certain codes or number ranges from being used for a particular purposes or for the provision of particular categories of service, those codes or number ranges must not be used in contravention of these restrictions. Ofcom's designations will have precedence over any issued by a network operator'

1. The Executive submitted that it was of the opinion that the manner in which the service operated and its content appeared to suggest that this service was an 'adult' (sexual) service, in nature, and as such was operating on an incorrectly designated prefixed shortcode ('69' and '89' prefixed shortcodes are reserved by the mobile operators for services of a sexual nature). The Executive submitted that the service was promoted and operated via two shortcodes with the prefix '80'. The Executive made reference to the Information Provider's description of the service that stated as follows:

"this is a fantasy service with sexual overtones"

and

"our clients websites are titillating, with images of bare bottoms and partially exposed breast, bright colours and people in party mode. The website is directed at those looking for sexy fun"

The Executive also made reference to the complainant call log, alleging that it showed that the service had been of a sexual nature and, as such, should have been promoted via shortcode with a '69' or '89' prefix.

2. The Information Provider stated that the shortcodes 80200 and 80177 were obtained from the Service Provider to provide a non-adult moderated operator fantasy chat service and that the service had never been advertised as providing content of a sexual nature. As such, the designated number range in which the shortcodes were assigned had been correct.

The Information Provider stated that the content of the text messages supplied by the fantasy chat operators during the provision of the service had been of a sexual nature and users of the service had on numerous occasions attempted to engage the operators of the service in chat conversation of a sexual nature. It stated that fantasy chat operators had been given clear instructions not to respond with text messages of a sexually explicit nature. Unfortunately, on a limited number of occasions the Information Provider's quality assurance team identified fantasy chat operators not adhering to the guidelines which resulted in disciplinary action and, in extreme cases, a request for removal of that agent from its campaigns.

3. The Tribunal considered the evidence, including the message logs and the promotional websites. It concluded that the service was of an adult (sexual) nature and was therefore operating on an incorrectly designated prefixed shortcode. The Tribunal therefore upheld a breach of paragraph 3.3.1 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 submitted 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').

Complainants stated that they had received an unsolicited promotional text message after having placed their profile on their chosen dating/social networking websites. The Executive submitted that the promotional text message received by complainants had read similar to, or along the lines of the following;

"FREE MESSAGE - Hi [John], Mandy from Gumtree wants to chat to you and maybe meet! TXT YES TO CONNECT NOW! SAFEDIVERT 080006800764 2end txtstop msg3gbp3subsc"

The Executive made reference to how the Information Provider's response as to how the service operates, and how they obtained the complainants' mobile numbers, the response stated the following:

"The service operates as follows: 1. The customer responds to an advertisement, dating profile or via website uksingles-online.com and maybemeet.me. Email communication is made with one of the female operators fantasy chat operators. Some customers choose to give the give the operator their mobile number and request further chat through text messaging, rather than email"

"All mobile numbers were provided voluntarily"

and

"Initial communications with the customers are conducted via email for which there is no charge. After a consumer chooses to provide his/her mobile number, the consumer is sent an initial opt-in request message which sets out the cost of the service"

The complainants' evidence showed that none of the complainants had entered the service through the website uksingles-online.com and maybemeet.me or via a pop-under banner/advertisement. The Executive also submitted that the two website companies gumtree.com and flirtomatic.com had both lodged complaints with PhonepayPlus. They stated that they had received numerous complaints from their own customers who had complained about other Gumtree and Flirtomatic users (known as profiles) sending them chargeable text messages. The Executive submitted that both of these website companies had provided substantial evidence of not only the profiles used by the service but also the methods that had been used to entice 'genuine' users of their websites into forwarding their mobile phone number for the purposes of sending those users a promotional text message from the service. Gumtree.com had provided information that its customers had received text messages from the offending service asking for their mobile phone number (subsequently sending the promotional text message) or where the Gumtree user had already provided a mobile phone number the promotional text message was sent and appeared to be from someone wanting to meet the user.

The Executive submitted that it was of the opinion that the 'operator' profiles placed on dating/networking websites such as gumtree.com by the Information Provider had been designed in such a way as to appear to the user similar to any other dating profile on the same website. The Executive also submitted that the 'operator' profiles appeared to be describing a 'real' person based in the UK looking for some form of relationship, despite the fact the service claimed to operate a *"fantasy chat service where no relationship can developed"* and *"operated by female chat operators"*. The Executive noted that all the websites on which the Information Provider had posted 'operator' profiles had been online dating services/social networking websites where their customers had actively been looking to find a relationship. The Executive submitted that a reasonable consumer receiving a message from one of these 'operator' profiles, on a dating/social networking site of their own choosing, would have had no reason to suspect that the person who had contacted them was in fact an 'operator' working for a fantasy chat service.

The Executive submitted that flirtomatic.com had provided it with message logs in relation to numerous complaints of 'spammers' who had been removed from their service after their customers complained of receiving message from shortcode 80200 after they had provided their mobile phone numbers to one of the spammers. The message logs indicated that operators had initiated contact with genuine users and sent numerous text messages, in quick succession, to male profiles. These initial text messages all appeared to be requesting the genuine user's mobile phone number, under the false pretence of showing interest in the user.

The Executive submitted that a reasonable consumer receiving this type of message via their chosen dating/social networking site from someone with a similar profile would have no reason to suspect that the person requesting their mobile phone number was in fact an 'operator' touting their mobile phone number for the purpose of sending them direct marketing material.

2. The Information Provider stated initially that it was unable to respond to the alleged breach without being provided with full details of the complainants, including their mobile phone numbers, and gave an overall response that set out the manner in which it believed the service operated.

The Information Provider failed to respond to the further information provided by the Executive. However, it provided a secondary response to the alleged breach which stated that the services and promotional material used during the provision of the fantasy chat service on shortcodes 80200 and 80177 had been lawful to the best of its knowledge. The Information Provider also stated that prospective users of the service had willingly supplied their mobile phone numbers to the service website, chat service operators or had made it available to the public domain with the intention of being contacted using the supplied number, thus giving consent or at a minimum implied consent to the use of their phone number for the purposes of engaging in its chat services. The Information Provider stated that when users were subsequently invited to use the fantasy chat service the invitation was provided at no cost to the end user and the invitation supplied in the character-limited text message format (160 characters) had contained information in regard to the supplier of the service, the subsequent cost of electing to use the service as well as the option to opt out of any further communications.

3. The Tribunal considered the evidence including the message logs and concluded that the text messages from the service operators had been unsolicited promotional text messages that users had not provided their consent to receive. The Tribunal therefore upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE FAIRNESS (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 was operated in a manner in which consumers were or were likely to be misled into participating, unaware that they were entering a

chargeable subscription-based service. The Executive considered there to be a breach of paragraph 5.4.1a of the Code on the following grounds:

Ground 1

The Information Provider stated that it operated a *“fantasy chat service where no relationships can ever develop”* via a premium rate subscription service and did not class itself as a dating service. In light of this, the Executive submitted that the following aspects of the Information Provider’s service were misleading or likely to be misleading: the creation of dating profiles depicting a female wishing to date; the posting of those profiles on a UK-based dating and social networking websites; initiating contact with UK consumers who had placed their own profiles with a genuine desire to date; and requesting the consumer to forward their mobile phone number for the purpose of getting to know the user better, to meet or because they were busy. The Executive submitted that the operator profiles had been created and posted on UK websites to capture unsuspecting consumers for the purposes of obtaining their mobile phone number in a deceptive manner and entering them into a subscription-based chat and date service operated by female operators.

Ground 2

The Executive submitted that once the unsuspecting complainants had provided their mobile number via email, they were sent the following promotional text message:

“FREE MESSAGE - Hi (John), Mandy from Gumtree wants to chat to you and maybe meet! TXT YES TO CONNECT NOW! SAFEDIVERT 080006800764 2end txtstop msg3gbp3subsc”

The Executive submitted that it was of the opinion that the following aspects of the promotional text message had misled consumers or were likely to do so: the use of the consumer’s first name, the use of the complainant’s chosen dating/networking website and the name of the female contact. The Executive submitted that the text message had misled consumers into believing that it had been sent by the same person with whom they had been corresponding via their own dating/networking website, and to whom they had already provided their mobile phone number. The Executive submitted that this promoted users to text back ‘YES’ to continue the correspondence with that person and unknowingly to enter themselves into a premium rate subscription-based fantasy chat service.

Ground 3

The Executive submitted that there was no real possibility of the consumer and the operator meeting, having regard to the Information Provider’s description of the service as a *“fantasy chat where no actual relationships can be developed by the service”* and *“operated by female operators”*. The Executive submitted that the free promotional text message and the content of the message logs did suggest a possibility of the complainant meeting with the operator. The Executive submitted that the website address ‘maybemeet.me’ had been altered to *“maybe meet”*, manipulating the context of the message which then read as *“Mandy from gumtree wants to chat and maybe meet”* thus making it appear to the recipient that the sender may want to chat and may want to meet, but at the same time retaining part of the company website address within the body of the message. The Executive made reference to the message logs and submitted that they indicated that ‘operators’ had suggested to meet up in person with

the complainant and, as this was an impossibility, this had misled or was likely to have misled the consumer.

Ground 4

The Information Provider informed consumers of a price change from £1.50 per text message to £3 per text message in a manner that was misleading. The Executive made reference to two text messages received by a user who had remained in the service during the price change. These messages stated the following:

"We have new girls this week looking for someone like you! Reply YES now 2 chat! Maybemeet.me 08006800764 2endtxt stop GBP1.50MSG GBP5pw"

"We have new girls this week looking for someone like you! Reply YES now 2 chat! Maybemeet.me 08006800764 2endtxt stop GBP3MSG GBP5pw"

The two above text messages would have cost the user £10. They triggered a free reminder message which stated as follows:

"Free message Thank you for using SafeDivert remember, BE SAFE! if you require any help, or have a problem with your chat partner call08006800764 10spent3gpb msg"

The Executive submitted that the recipient had been informed of the price change via a subscription text message (costing the complainant £5) that was identical in content to all other subscription messages previously received, with only the '1.50' changed to '3'. The Executive submitted that by having various pricing structures and by promoting one pricing tariff and charging consumers another tariff, the Information Provider had misled, or was likely to have misled, consumers.

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

Ground 1

The Information Provider stated that it was unable to respond to the alleged breach without being provided with full details of the complainants, including their mobile phone numbers. The Information Provider then provided an overall response that set out the manner in which it believed the service operated.

Ground 2

The Information Provider stated that it was of the opinion that the promotional text message clearly indicated that it was a service which would cost the consumer. It maintained that the name of the service (Safe Divert) was provided along with a telephone number to contact for further information. In addition, a means of unsubscribing was provided, as well as the cost of the service. The Information Provider also stated that due to the limited characters available in a text message it was not possible to provide all of this information in full and so common abbreviations were used to ensure required information is provided in as clear and succinct a manner as possible. The Information Provider made reference to a complainant who received high phone bills of £700 and stated that in order to incur a bill as high as this, the complainant would have sent and received many text messages and was therefore likely to be very familiar with the abbreviations used in sending text messages. It was argued that it was unlikely that such a complainant did not realise that he or she was paying for a service. The

Information Provider stated that it was more likely that complainants had experienced 'buyer's remorse' after receiving the mobile phone bill and had subsequently made a complaint.

Ground 3

The Information Provider stated that this had been due to a new operator who had not been fully aware of the extent to which she should engage a customer in SMS fantasy chat. It also stated that it had put proper quality assurance measures in place (together with appropriate further training) to avoid any further instances.

Ground 4

The Information Provider accepted that, when the price of using the shortcode had been increased from £1.50 to £3, the consumer should have received a free text message advising them of the change. The Information Provider stated that when it had set up the service in the UK it had experienced some problems in relation to pricing issues which it had only resolved when the service was suspended.

The Information Provider stated initially that it was unable to respond to Ground 1 of the alleged breach without being provided with specific information.

The Information Provider failed to respond to the further information provided by the Executive. However, it submitted a secondary response to the alleged breach which stated that any user entering into the fantasy chat service provided on shortcodes 80200 and 80177 during the initial opt-in process received a free text message from a premium rate number. As such, users are made aware that the service provided on the shortcode may be charged at higher rate than standard services. The Information Provider also stated that users would therefore be aware that no real person would be entering into a genuine dialogue with them. Users must have been aware that they were engaged with a product. The product provided in this case was a virtual fantasy chat service. Users could also at any time contact the 24-hour helpline if any real doubt existed.

The Information Provider stated that the services supplied on shortcodes 80200 and 80177 were virtual fantasy chat. Whilst some customers fantasised that they could meet the fantasy chat characters provided by operators, this was not physically possible due to the chat operators being in Australia and company policy strictly prohibiting interaction with customers outside of normal working conditions. Some users of the service enjoyed the fantasy that they could meet the character/operator and sometimes the chat operators indulged their fantasy. It stated that contracted agents had been given clear instructions as to the limits of the service to be provided but that on rare occasions its guidelines had been breached. When this occurred, it had requested that the operators in question be removed from its campaigns. Furthermore the Information Provider had employed a further two full-time auditors to review message logs to ensure compliance as a result of the emergency order in January 2009.

3. The Tribunal considered the evidence. In relation to Ground 1, the Tribunal concluded that the service had misled consumers into thinking that they were receiving emails and text messages from genuine participants, similar to themselves, of their chosen dating or social networking website. In relation to Ground 2, the Tribunal found that the wording of the free text message had misled the recipient into thinking that it was a message from a

genuine participant of their chosen dating or social networking website. In relation to Ground 3, the Tribunal found that the free text message suggested that the operator wanted to chat to and maybe meet the recipient user. As such the text message misled genuine users into interacting with the operator, in the false belief that they were organising a meeting with a similarly-minded member of the public, rather than an operator who had no intention of there being a meeting. In relation to Ground 4, the Tribunal found that the text message purportedly informing consumers of the price increase was misleading as it had procured the user's agreement to the pricing increase by way of misleading wording. The Tribunal therefore upheld a breach of paragraph 5.4.1a of the Code on all grounds.

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.'

1. The Executive submitted that the cost of the service had, varied over the duration of the service and made reference to an example of a text message that stated as follows:

"msg3gbp3subcs GBP.1.50MSg gbp5pw"

The Executive submitted that by displaying pricing information as above the consumer was neither fully nor clearly or straightforwardly informed of the cost of using the service. It stated that this was demonstrated by complainants who stated they were confused as to the meaning of the above text message and unaware that it had been about pricing information. The Executive argued that, as a result of the pricing information being displayed in this way, complainants responded to the text message and had unknowingly entered themselves into a chargeable service with a subscription element. The Executive also submitted that this had been aggravated by the fact that complainants would have no reason to suspect that the message they received would contain any pricing information, as the message appeared to be from someone from their chosen free dating or social networking site.

2. The Information Provider stated that any user entering into the fantasy chat service provided on shortcodes 80200 and 80177 during the initial opt-in process received a free text message from a premium rate number. As such, users are made aware that the service provided on the shortcode may be charged at higher rate than standard services. The Information Provider also stated that the cost of using the service was provided within the constraints of a text message (160 characters) in the free introductory text message and that the cost per text message and the cost of subscription had been described using the international currency code for Pounds Sterling 'GBP'. It stated that it had not been made aware by its aggregator of the requirement by PhonepayPlus to only use the pound symbol until after this matter had arisen and there was no mention of this from the Service Provider during the integration process. The Information Provider stated that the examples of high call charges incurred by some complainants given by the Executive were untypical as they had made large usage of the service in a relatively short period of time. The Information Provider stated that it provided an interactive

service and the level of involvement was at the user's discretion. It maintained that, as with any charged service, some users had failed to inform themselves of the true cost of using the service and had subsequently suffered 'buyer's remorse'.

3. The Tribunal considered the evidence and concluded that, for the reasons given by the Executive, users had not been fully informed, clearly and straightforwardly of the cost of using the service prior to incurring any charge. The Tribunal therefore 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 otherwise obvious and easily available to the user.'

1. The Executive referred to the promotional text message :-

"FREE MESSAGE - Hi [John], Mandy from Gumtree wants to chat to you and maybe meet! TXT YES TO CONNECT NOW! SAFEDIVERT 080006800764 2end txtstop msg3gbp3subsc"

It submitted that this message failed to provide the required contact information details. Neither the contact details of the Service Provider nor the Information Provider was supplied in the promotional text message.

2. The Information Provider stated that the identity of the service and contact details for the service had been provided in both the text messages and on the websites. It stated that the text messages contained the UK toll free contact number, the website address and the previous name of the service. The websites provided contact details including the UK toll free number and the name of the Information Provider.
3. The Tribunal considered the evidence and concluded that, as the above text message was unsolicited, it was a promotional message within the meaning of paragraph 11.3.27 of the Code. The Tribunal found that the text message did not contain the details of the Information Provider or the Service Provider and therefore upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX VIRTUAL CHAT SERVICES (POSITIVE USER RESPONSE) (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:

a.

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 a complainant message log that indicated that the complainant had not been sent a reminder text message, despite having received approximately 299 service text messages charged at £1.50 per text message. The Executive submitted that this complainant had not been informed of the cost as soon as reasonably possible after having spent £10, and after each £10 spent thereafter.
2. The Information Provider stated that after every £10 of expenditure users had been automatically given the necessary information by a free text message. The Information Provider stated that the example to which the Executive referred had been identified as a technical error isolated to this user and that this technical error had been rectified. The Information Provider accepted that users who had received a reminder had received a further charged message before they had replied positively to the reminder but maintained that this was also due to a technical error that affected a limited number of users and had been rectified.
3. The Tribunal considered the evidence and concluded that the Information Provider had failed to send the complainant in question the required text messages with a £10 spend reminder and the complainant had therefore been unable to reply with a positive confirmation that he or she wanted to continue subscribing to the service. The Tribunal therefore upheld a breach of paragraph 7.3.3b of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

SUBSCRIPTION ('STOP' COMMAND) (Paragraph 7.12.2)

'It must always be possible for a user to leave a subscription service by using the 'STOP' command'.

1. The Executive had monitored the service on a mobile phone used exclusively for monitoring purposes. On 12 January 2009, a £5 subscription message from the service had been received on this monitoring mobile phone. The Executive replied 'STOP ALL' to this text message but had nevertheless received a further £5 subscription text message on the 19 January 2009. The Executive submitted that this incident demonstrated that, by sending 'STOP ALL' to the service, it was not possible for the Executive to leave the subscription service. It submitted that this was aggravated by the fact that the service, at that time, should have been switched off. As the result of a potential Emergency Procedure, the Service Provider had given assurances that the service would be switched off on the 29 December 2008.
2. The Information Provider stated that the 'STOP' and 'STOP ALL' commands were functional elements of the service throughout the term of its normal operation. The failure of the 'STOP ALL' command evidenced by the Executive had been an exception that occurred after the voluntary cessation of the service due to a programming loophole created by the cessation of service. The Information Provider stated that the Executive's monitoring phone had been the only example raised in relation to this alleged breach and that the monitoring phone had entered the service after its voluntary cessation, exploiting a loophole in the system created by the cessation of normal services.

3. The Tribunal considered the evidence and found that, during the Executive's monitoring exercise, the 'STOP' command had not worked, with the effect that the Executive had been unable to leave the service. The Tribunal therefore upheld a breach of paragraph 7.12.2 of the Code.

ALLEGED BREACH EIGHT
SUBSCRIPTION (PROMOTION) (Paragraph 7.12.3a)

'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.'

1. The Executive considered there to be a breach of paragraph 7.12.3a of the Code on the following grounds:

Ground 1

The Executive had monitored the website maybemeet.me and found that the homepage made no reference to the fact the service was subscription-based. It submitted that the only pricing information provided on the home page relate to the chat service. The Executive submitted that it had clicked the terms and condition link on the homepage and found that the terms and conditions did mention pricing, but without specifically mentioning a 'subscription service' charge. It also submitted that the pricing information on the website was confusing as it was placed together with costs incurred in dollars. The Executive noted that the homepage terms and conditions link stated as follows:

"Current service cost 19724253 - (carrier charge to send, \$5 to receive), 19753787 - (Carrier charge to send, \$6.50 to receive) 80200- (3.00 Pounds to receive message, FREE to send), 8017- (10 pence to send 5.00 to receive) Users will be notified of any changes in the cost of using the service at any time of the charge coming into effect. If you do not accept the new fees (you may cancel your account effective immediately upon termination"

The Executive submitted that the only place that users were made aware of a subscription cost was within the lengthy terms and conditions link within each of the 'Clubs' promoted on the site. The user would have to choose a 'Club' click on it to open it, and then click its terms and conditions link. The pricing information contained within the 'Clubs' terms and conditions read similarly to the following:

"SMS Subscription

Subscription is 5.00 Pounds per week. To cancel SMS subscription text STOP to 80200 or call customer support on 0 800 6800 764"

The Executive submitted that, by not displaying the subscription element and charges on the homepage or within the terms and conditions of the homepage, the Information Provider had not clearly indicated that the service was subscription-based. Furthermore, by displaying only the subscription charge within the terms and condition link – accessed through a secondary link ('Club') – the information had not been prominent or plainly visible to consumers.

Ground 2

The four pop-under and banner advertisements that had been provided by the Information Provider did not clearly indicate in a prominent and plainly visible manner that the service was a subscription service. The Executive also noted that that these banner and pop-under advertisements appeared to be very similar or identical to those of the dating and social networking companies on which the service had placed profiles.

Ground 3

The profiles posted on the dating and social networking site were created to depict a real person interested in dating and/or voluntary social networking. The content of these profiles did not indicate in any way that that they were profiles of a commercial service. The Executive submitted that the operator profiles had not indicated clearly that the service was subscription-based.

2. The Information Provider relied on the response from the Service Provider, which stated that both the websites and the initial opt-in message had outlined the subscription component of the service. The Information Provider also stated that before entering the service all users received the initial opt-in message which clearly outlined the subscription component of the service. The Service Provider observed that the user must reply to the opt-in message to accept the charges and opt into the service and this occurred before the user received any premium rate charges.
3. The Tribunal considered the evidence and concluded that the website was non-compliant as it did not clearly indicate that the service was subscription-based. The Tribunal also found that the pop-under and marketing banner were promotions and did not state that the service was subscription-based. Further, the Tribunal found that the operator profiles were promotional material, which encouraged users to engage in the premium rate service, and they did not clearly indicate that the service was subscription-based. The Tribunal therefore upheld a breach of paragraph 7.12.3a.

Decision: UPHELD

ALLEGED BREACH NINE SUBSCRIPTION (INITIAL MESSAGE) (Paragraph 7.12.4)

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 (e.g. per day, per week or per month) 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, service provider contact details.*

1. The Executive submitted that the only free initial text message the complainants received was to the effect:

“FREE MESSAGE - Hi John, Mandy from Gumtree wants to chat to you and maybe meet! TXT YES TO CONNECT NOW! SAFEDIVERT 080006800764 2end txtstop msg3gbp3subsc”

The Executive submitted that if this text message had been intended as a subscription initiation message then the name of the service was not present. The Executive stated that the Information Provider had argued that the name of the service was 'maybemeet.me' and 'uksingles-online.com'. The Executive submitted that that "maybe meet" in the above message may be a reference to the website that this service purports to operate through (maybemeet.me) but by removing the prefix 'www' and the suffix 'me' from the web address and placing it after the wording "want to chat to you and" made it appear to be part of the text message and not the name of the service. Secondly, where the pricing appeared as "3subsc" it did not state the billing period or the frequency of the charged text messages as required under the Code.

2. The Information Provider stated that users were sent a free initial subscription text message when joining the service and that in the limited space offered in a text message (160 characters) standard accepted abbreviations were used to convey as much information as possible. It stated that the text message had contained the name of the service, confirmation that the service was subscription-based, the charges for the service, instructions on using the 'STOP' command to leave the service and the Service Provider contact details in the form of a toll free phone number and website. The Information Provider acknowledged that the initial format of the messages had not included the subscription billing period. It maintained that this information had been omitted due to an oversight and that, when informed of this requirement, the text message was modified to indicate a 'per week' subscription period.
3. The Tribunal considered the text message relied upon by the Executive in relation to the alleged breach and found that, for those consumers who had not already subscribed, it was not a free initial subscription message. For them, it was a promotional message that induced them to respond and thereby become subscribed. Accordingly, such users did not receive, subsequent to subscribing, a free initial subscription message. The Tribunal therefore upheld a breach of paragraph 7.12.4 of the Code.

Decision: UPHELD

ALLEGED BREACH NINE INFORMATION REQUEST (Paragraph 8.3.3)

During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in [paragraph 1.5](#) and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:

- a. call volumes, patterns and revenues,*
- b. details of the numbers allocated to a service provider,*
- c. details of services operating on particular premium rate numbers,*
- d. customer care records,*
- e. arrangements between networks and service providers,*
- f. arrangements between service providers and information providers*

1. The Executive submitted that in its breach letter of the 23 March 2009 it had raised potential breaches of paragraphs 3.3.1, 5.2, 5.4.1a, 5.7.1, 5.8, 7.3.3b, 7.12.2, 7.12.3a, 7.12.4 of the Code. The Information Provider had responded to the breaches but had included in its response a request for both further information and evidence from

the Executive in relation to the alleged breaches of paragraphs 5.2 and 5.4.1a of the Code. The Executive duly provided the further information to the Information Provider but it had failed to respond by the deadline set by the Executive of 5pm Monday 25 May 2009. On finding that the Information Provider's solicitors no longer acted for it, the Executive contacted the Service Provider and further extended the deadline giving the Information Provider another opportunity to respond. On 12 June 2009, with no further correspondence from the Information Provider, the Service Provider contacted the Executive to inform it that no response was to be provided to the further request for information by the Executive.

2. The Information Provider stated that it understood there had been time delays in the correspondence and provision of information between itself and the Executive and that this had been due to a number of factors including problems with its legal representation. It stated that it had not intentionally incurred any delays in regard to dealing with this matter.
3. The Tribunal considered the evidence and concluded that, even though the Information Provider had been in protracted correspondence with the Executive, it had failed to respond to the Executive's letter of 6 May 2009 seeking further information. The Tribunal therefore upheld a breach of paragraph 8.3.3 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 behaviour of the Information Provider was wilful in relation to the promotion and the content of the service.
- There was material consumer and societal harm as unsuspecting consumers who posted profiles on free dating or social networking websites received premium rate text messages. This undermined consumer confidence in such free websites.
- The cost paid by individual consumers was high – one complainant incurred charges of over £4,000 over the course of a few evenings.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Information Provider failed to co-operate with PhonepayPlus as it failed to stop the service despite assuring the Executive that it would do so; the Information Provider missed deadlines causing a delay in the investigation; and the Information Provider provided false revenue figures that were significantly lower than those provided by the networks and the Service Provider.

There were no mitigating factors for the Tribunal to take into account.

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

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- A £250,000 fine;
- The Tribunal imposed a bar on all the Information Provider's services and related promotional material until the Information Provider seeks and implements compliance advice to the satisfaction of the Executive;
- The Tribunal also ordered that claims for refunds are to be paid by the Information Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.