

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 25 June 2009 TRIBUNAL SITTING No. 30 / CASE 4  
CASE REFERENCE: 791415/DM**

Information provider & area:	Mobvista Ltd, London
Service provider & area:	MX Telecom Limited, London
Type of service:	Virtual Chat Service
Service title:	Mobvista Chat Service
Service number:	67000 and 78222
Cost:	£1.50 - £2.00 per service message received, 25p for every user message sent
Network operator:	All Mobile Operators
Number of complainants:	45

### **THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER BY AN EMERGENCY PROCEDURE UNDER PARAGRAPH 8.6 OF THE CODE**

#### **BACKGROUND**

The PhonepayPlus Executive (the 'Executive') received a total of 45 complaints relating to an adult virtual chat service that operated on shortcodes 67000 and 78222. The Executive was alerted to this service by complaints made by members of the public.

Complaints included the receipt of unsolicited texts, problems with the operation of the 'STOP' command and being misled into interacting with the service by operators purporting to be local women who genuinely used the service rather than paid operators.

The Executive investigated the service and requested complainant message logs from the Service Provider. These logs showed that the service sent message spend reminders to users after they had spent £10 but continued to send them chargeable messages without requiring a positive response from them that they wished to continue with the service resulting in high mobile phone bills. The logs also showed that users were being misled by the service operators into believing that they were chatting to genuine local girls rather than fantasy chat operators.

#### **The Service**

The service offered the user the opportunity to engage in fantasy chat and was staffed by operators who responded to users' text messages. The service was promoted via the web, print and through promotional text messages being sent to consumers. The Executive formed the view that the service operated as a virtual text chat service and operated in the following way: A user would respond to an advertisement by sending a text message stating the user's postcode and this action triggered the service. The user would then receive a service text message which informed the user of: the service

name; the service cost; the 18 years old and over age restriction; instructions on use of the 'STOP' command; company contact details; and the fact that the service was provided by operators. The service text message also requested that the user send his or her date of birth. The user then received a service text message which prompted the user to send a multimedia picture message (MMS) so as to enable the service moderator determine whether the user was over the age of 18.

Once the user began a text chat conversation with the operators, the service, depending on the shortcode, had a cost range of between £1.50 and £2.00 per individual text message received. In addition to these costs there was a charge of 25 pence per text message sent by the user to the service shortcode.

It appeared that there was no specific or uniform 'brand name' for the service on these shortcodes, however, each was run through the Service Provider's platform and included text chat of an explicit adult nature. The text chat service operators interacted with consumers in chat messages until consumers sent the 'STOP' command.

The Executive formed the view that the service operated as a virtual chat service and mirrored the actions of each individual participant to activate the services on all of the respective shortcodes.

### **Complaint Investigation**

#### **Emergency Procedure**

The Executive decided to investigate the service using the Emergency Procedure under paragraph 8.6 of the Code. A Formal Emergency Procedure letter dated 15 May 2009 was issued to the Service Provider by the Executive alleging breaches of paragraphs 3.3.1, 5.3.1b, 5.4.1a, 5.14, 7.3.3a and 7.3.3b of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code') addressed. The Executive also issued formal directions to the respective Mobile Network Operators ('MNO's') to withhold revenue.

The Service Provider subsequently requested a review of the use of the Emergency Procedure on 21 May 2009, and provided, in accordance with paragraph 8.6.3(b) of the Code, reasons why it considered that the service should be allowed to continue operating.

Having considered the Service Provider's request for a review, a Tribunal agreed to allow the virtual chat service to continue operating pending adjudication, subject to specific conditions as were set out in a letter dated 22 May 2009 sent to the Service Provider by the Executive. The Mobile Network Operators were informed of this decision and were directed to continue to withhold revenue pending adjudication.

The Executive subsequently received the undertaking forms from the Information and Service Provider (dated 22 May 2009 respectively) in relation to a joint request for PhonepayPlus to deal directly with the Information Provider.

The Executive raised potential breaches of 5.4.1a, 7.3.3a and 7.3.3b of the Code against the Information Provider in a letter dated 9 June 2009. The Information Provider responded to the breach letter in a letter dated 16 June 2009.

The Tribunal made a decision on the breaches raised by the Executive on 25 June 2009 having heard informal representations from the Information Provider and the Service Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

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

*Services and promotional material must not:*

*(b) mislead, or be likely to mislead in any way*

1. The Executive submitted that the service was misleading due in part to the manner in which the female participants (call operators), in certain instances, had held themselves out to be 'genuine' users interested in meeting their male counterparts.

The Executive made reference to the series of promotional text messages that had been sent out in the first instance that informed consumers upon subscribing into the service, that the service itself was a '*service provided by operators*'. However, the Executive submitted that this text message was made redundant by the use of deliberate and intentionally provocative promotional text messages that were being periodically sent out to consumers which clearly suggested that the girls were 'real' and willing to engage in some form of sexual activity. One example of a service text message read as follows:

*'FREE MSG: Pull 2nite with REAL girls in your area who are looking for sex. Call 0909 967 5175 (150p/min) (spent £10.00)'*

The Executive submitted that these text messages alluded, or at the very least implied, that the women were in fact 'real' and 'available'. Furthermore, the Executive submitted that the fact that interested parties had been encouraged to text their postcode, as well as being connected to a person in their 'local area' suggested the possibility of both individuals meeting.

2. The Information Provider stated that users would have started this service in response to an advertisement in a national newspaper, it made reference to the terms and conditions and specifically the line 'Fantasy chat service - no meetings implied'. The Information Provider also stated that there were no references to 'meeting' or 'dating' in the advertisement and upon activation of the service by the user (by means of a user text message), the service began by informing the user that it consisted of a 'Service Provided by Operators'.

The Information Provider made reference to one complainant message log where the chat operator had stated '*I am sorry steven but I didn't join this for a meeting or date with anyone I am afraid x*'. The Information Provider stated that it believed that this statement was very clear to the user and had given no cause for misunderstanding.

3. The Tribunal considered the evidence including the complainant message logs and concluded that the text messages using the words 'real', 'in your area' and 'local' were misleading and had led users to believe that the operators were genuine and real users of the service, and that there was a possibility of meeting with them. The Tribunal found that the wording in the subscription initiation text message which advised that the service was provided by operators was not re-emphasized or repeated by the operators when meetings were discussed. Reference to 'joining' the service in the messages implied that the operators were users of the service in the same way. The Tribunal took into account the Information Provider's argument that they were not responsible for what amounted to one or two isolated incidents of operators acting outside their guidelines. The Tribunal concluded from looking at the message logs provided that these incidents were not isolated examples and the operators were frequently misleading individuals with their messages. The Tribunal therefore concluded that overall a significant proportion of consumers were misled by the service into believing that the 'girls' were local and that a meeting with them was possible.

The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH TWO  
VIRTUAL CHAT SERVICE (INFORMING USER OF PRICE PER MINUTE AFTER  
£10.00 SPEND) (Paragraph 7.3.3a)**

*'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) inform the user of the price per minute of the call'*

1. The Executive submitted that after each approximate £10 spent, the user received a free message and stated the following example;

*'FREE MSG: Chat with some very sexually experienced horny girls. 0909 967 4£10 (150p/min) (spent£10)'*

The Executive submitted that in text messages such as these the cost warning (i.e. 150p/min) appeared at the end of the promotional message which appeared to highlight the cost of the cross-promotion (of the 09 number) rather than detailing the price per minute for the virtual chat service in question. As such the Executive submitted that, based on how the spend remind messages were drafted, the individual recipient would not have fully appreciated the cost warning being provided.

2. The Information Provider stated that before they were billed for the service, users had been provided with cost information in four different ways: on screen in large font as part of the television advertisements, the initial service welcome text message, the initial service welcome MMS message and notification by text message each and every time the user spent £10. It stated that users then had the opportunity to send the 'STOP' command and thus incur no further costs.

The Information Provider made reference to paragraph 7.3.3a and how the paragraph read price 'per minute' as opposed to price per text message, the Information Provider stated that it was unclear how this paragraph should be applied to text messages. The Information Provider stated that it was of the opinion that a cumulative cost reminder was of more value to the user.

In advance of the alleged breach (and as a result of the industry guidance issued in January 2009), the Information Provider moved the 'Spent £10' reference to the beginning of the spend warning rather than the end.

The Information Provider further stated that the requirements recommended by the Executive following the Emergency Procedure and set out in the Code of Practice were contradictory in respect of the £10 spend reminder.

The Information Provider also stated that it was of the opinion that the transmission of a text message could in no way be interpreted as a call or referred to as a communication and that the transmission of a text message was actually a series of signals.

The Information Provider stated that it considered that the alleged breach was a technicality and that it had demonstrated a willingness to provide £10 spend reminders. The Information Provider stated that in the absence of a specific statement in the Code that stated that the service and user text messages costs should be given (and in a particular format), it was of the opinion that sufficient cost information had been given.

3. The Tribunal considered the Code and concluded that paragraph 7.3.3a clearly applies to text messages as well as calls by virtue of the definition of virtual chat services contained in paragraph 7.3.1 of the Code. The Tribunal concluded that whilst the terminology 'price per minute' in paragraph 7.3.3a did not make specific reference to texts this was implicit by virtue of paragraph 7.3.1. The Tribunal also noted that the intent of paragraph 7.3.3a is to ensure that users are reminded of the ongoing cost of using a service after each £10 had been spent. The Tribunal concluded from the message logs evidence that the service did not inform the user of the ongoing cost of using the service after each £10 had been spent. The Tribunal therefore decided to uphold a breach of paragraph 7.3.3a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
VIRTUAL CHAT SERVICE - REQUIRING POSITIVE RESPONSE TO CONTINUE  
SERVICE AFTER £10.00 SPEND (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 complainant call log entries which showed that no positive user response was received indicating the user's consent to continue participating in the service, following receipt of the £10 spend reminder. In the absence of this positive user response the service should have been terminated.
2. The Information Provider stated that it accepted that in a very small number of instances, the virtual chat had continued without the presence of an additional service text message. However, in the vast majority of cases, the nature of the service was such that users had constantly indicated their willingness to continue using the service because they were sending further user chat messages.

The Information Provider stated that immediately following notification of the alleged breach and in order to prevent further alleged breaches of the Code, it had modified the service to ensure that additional user text message opt-in was required in order to continue the service

3. The Tribunal considered the evidence including the complainant message logs and concluded that the service had continued to send chargeable messages even though users had not sent any positive confirmation messages to the service. The Tribunal noted the changes made to the service which required the user to send a text message into the service in order to continue. However, the Tribunal concluded that this was not a positive response that the user wanted to continue the service for the purposes of the Code. The Tribunal commented that it was crucial for users to have an opportunity to positively indicate a wish to continue using the service after receiving adequate pricing information, given the lack of any other means of controlling the costs which this type of service can incur. The Tribunal therefore decided to uphold 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 behaviour of the Information Provider was deliberate as similar issues had been the subject of a previous Tribunal decision on 14 August 2008;
- There was material consumer harm on the basis that there were 45 complaints and evidence of users being charged very large sums of money as a result of sending and receiving text messages to the service;
- The cost paid by individual consumers was extremely high. Complainants had incurred costs between £1000 and £8000;
- The issue of operators indicating to users that they can meet local girls has been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive during the investigation.

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**.

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A fine of £50,000;
- A bar on the Information Provider's chat service operating on the shortcodes and any related promotional material for a period of 12 months, suspended for three months (from the date of publication of the adjudication) within which time the Information Provider is to remedy the breaches to the satisfaction of the Executive. If, after three months, the Executive is satisfied that the Information Provider has remedied the breaches, then the bar will be lifted but, if the Executive is not satisfied, the 12-month bar will take immediate effect;
- Claims for refunds are 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.

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 25 June 2009 TRIBUNAL SITTING No. 30 / CASE 5  
CASE REFERENCE: 790276/CB

Information provider & area:	K2 Media Limited
Service provider & area:	Dialogue Communications Ltd, South Yorkshire
Type of service:	Virtual Chat Service
Service title:	K2 Media Chat Service
Service number:	87011
Cost:	£2.00 per service message received, 25p for every user message sent
Network operator:	All Mobile Operators
Number of complainants:	7

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER BY AN  
EMERGENCY PROCEDURE  
UNDER PARAGRAPH 8.6 OF THE CODE**

### **BACKGROUND**

The PhonepayPlus Executive (the 'Executive') received a total of seven complaints relating to an adult virtual chat service that operated on shortcode 87011 (through the MyTxt.co.uk Limited platform). The Executive was alerted to this service by complaints made by members of the public.

Complainants stated that the service continued to charge them for chat text messages without any user interaction which resulted in high mobile phone bills.

The Executive investigated the service and requested complainant message logs from the Service Provider. The logs indicated that users were being misled by service operators into believe the operators were genuine local women using the service rather than fantasy chat operators. The logs also showed that the service sent message spend reminders to users after they had spent £10 but continued to send them chargeable messages without requiring a positive response from them that they wished to continue with the service resulting in high mobile phone bills. The logs further showed that the operators engaged in adult chat with children as young as 10 years old.

### **The Service**

The Information Provider informed the Executive that it had subcontracted MyTxt.co.uk Limited ('MyTxt') to operate the virtual chat service on its behalf. The Information Provider did not have the infrastructure to run a virtual chat service (including the



platform or the necessary network of operators) and as such employed the services of MyTxt to manage the virtual chat service in its entirety.

The service offered the user the opportunity to engage in fantasy chat and was staffed by operators who responded to users' text messages. The Executive formed the view that the service operated as a virtual text chat service and operated in the following way: A user would respond to an advertisement by sending a text message stating the user's postcode and this action triggered the service. The user would then receive a service text message which informed the user of: the service name; the service cost; the 18 years old and over age restriction; instructions on use of the 'STOP' command; company contact details; and the fact that the service was provided by operators. The service text message also requested that the user send his or her date of birth. The user then received a service text message which prompted the user to send a multimedia picture message (MMS) so as to enable the service moderator determine whether the user was over the age of 18.

Once the user began a text chat conversation with the operators, the service shortcode, had a cost of £2.00 per individual text message sent. In addition to these costs there was a charge of 25 pence per user text message sent by the user to the service shortcode.

It appeared that there was no specific 'brand name' for the service on this shortcode, however, it was run through the Service Provider's platform and included text chat of an explicit adult nature. The text chat service operators interacted with consumers in chat messages until consumers sent the 'STOP' command.

### **Complaint Investigation**

#### **Emergency Procedure**

The Executive decided to investigate the service using the Emergency Procedure under paragraph 8.6 of the Code. A Formal Emergency Procedure letter dated 15 May 2009 was issued to the Service Provider by the Executive alleging breaches of paragraphs 3.3.1, 5.3.1b, 5.4.1a, 7.3.2a, 7.3.3a and 7.3.3b of the PhonepayPlus Code of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code') addressed. The Executive also issued formal directions to the respective Mobile Network Operators ('MNO's') to withhold revenue.

The Service Provider subsequently requested a review of the use of the Emergency Procedure on 18 May 2009, and provided, in accordance with paragraph 8.6.3(b) of the Code, reasons why it considered that the service should be allowed to continue operating.

Having considered the Service Provider's request for a review, a Tribunal agreed to allow the virtual chat service to continue operating pending adjudication, subject to specific conditions as were set out in a letter dated 21 May 2009 sent to the Service Provider by the Executive. The Mobile Network Operators were informed of this decision and were directed to continue to withhold revenue pending adjudication.

The Executive subsequently received the undertaking forms from the Information Provider and Service Provider (dated 29 May 2009 and 1 June 2009 respectively) in relation to a joint request for PhonepayPlus to deal directly with the Information Provider.

The Executive raised potential breaches of 5.4.1a, 7.3.2a, 7.3.3a and 7.3.3b of the Code against the Information Provider in a letter dated 4 June 2009. The Information Provider responded to the breach letter in a letter dated 9 June 2009.

The Tribunal made a decision on the breaches raised by the Executive on 25 June 2009 having heard informal representations from the Information Provider and the Service Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **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 initial service promotions and the behaviour of the service operators had misled complainants into believing that they were interacting with 'genuine' female users.

Furthermore, the Executive made reference to the complainant message logs supplied by the Service Provider and submitted that when users came to the assumption that the 'girls' they were communicating with were not genuine users, the service operators mislead and provided false information in order to keep the user spending money within the service.

The Executive made reference to the message logs and submitted that they indicated that the operators on the service had purposely misled users to prolong their interaction and enhance their costs incurred.

The Executive submitted that it had previously addressed the misleading nature of these types of 'interchanges' and it made reference to its Notice to Industry dated January 2009 entitled 'Virtual Chat and date services advertising that consumers can meet others through the service' which read as follows:

*'Services should not imply that users are exchanging messages with other users, or that users will be able to meet others by using the service, unless that is in fact the case.'*

The Executive submitted that on the basis of the complainant message logs it was of the opinion that the service operators had purposely misled users to prolong their interaction and thereby enhance their revenue.

2. The Information Provider stated that following the industry guidance issued in January 2009, the Information Provider/MyTxt had performed a complete review of all its virtual chat services.

The Information Provider stated that geographical references made within the services were in no way attempted to mislead users and that both itself and MyTxt had used a significant number of call operators spread across the UK in order that the service could operate as a local service.

The Information Provider stated that it had a clear policy with its chat operators that made it clear that users should not be misled into believing they were chatting with an individual that they could meet or date. The Information Provider stated that the instances where chat operators had made remarks that had misled users, despite 24/7 message moderation, this content was beyond its control.

The Information Provider stated that immediately following notification of the alleged breach and in order to prevent further alleged breaches of the Code, the Information Provider/MyTxt had taken the following steps: it had issued further written guidance to chat operators that users should not be misled into believing that they are chatting with an individual that they could meet or date, displayed on the online chat platform screen a constant reminder that end-users should not be misled, modified the 'second line of defence' profanity filter to include words such as 'meet' or 'date' and further increased the moderation of messages that were already under selective 24/7 moderation.

3. The Tribunal considered the evidence and found that users' requests to meet the operators had not been adequately dealt with by the operators. The Tribunal took into account the evidence of the complainants which stated that users had been misled into continuing to use the service because they thought a meeting was possible. The Tribunal took into account the Information Provider's argument that they were not responsible for what amounted to one or two isolated incidents of operators acting outside their guidelines. The Tribunal concluded from looking at the message logs provided that these incidents were not isolated examples and the operators were frequently misleading individuals with their messages. The Tribunal therefore concluded that overall a significant proportion of consumers were misled by the service into believing that the 'girls' were local and that a meeting with them was possible. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH TWO  
VIRTUAL CHAT SERVICES - NO UNAUTHORISED AND UNDER-18 USE (paragraph 7.3.2a)**

*'Service providers must take all reasonable steps to ensure that the participant in any virtual chat service is an authorised user and that nobody under the age of 18 uses virtual chat services.'*

1. The Executive submitted that it had received a complaint from a parent of a 10-year-old child who had used the service and had been billed £266 for interactions with the service. The Executive was of the opinion that in this

particular case the service has not taken all reasonable steps to ensure that the user was not under the age of 18.

The Executive made reference to the complainant message log where the user initially gave a false age to the service operator to commence the service. The Executive submitted that the user service messages should have raised sufficient doubt in the mind of the service operator as to the age of the user that the service should have been immediately terminated.

2. The Information Provider stated that the service was not promoted as an adult service, that 'all reasonable steps' to ensure that participants were not underage had been taken as it had requested a date of birth at the start of the service and had examined the user MMS images where available. The Information Provider stated that the service was terminated when it was alerted to an underage user.

The Information Provider stated that if someone initially provided an age of 18 years old or above and then 'jokes around', it was difficult to establish the actual age of the user. The Information Provider stated that in the example cited by the Executive the operator had taken immediate note of the user's comment and had tried to clarify the situation in the first instance. It stated that, had the operator not challenged the individual immediately as she did, it could have led to further attempted communication and confusion for the user.

3. The Tribunal considered the evidence and concluded that the Information Provider had not taken all reasonable steps to ensure that consumers under the age of 18 could not use the chat service. The Tribunal did not accept that entering a date of birth nor the request for an MMS text message were sufficient enough to discourage those under 18 years old as these steps could easily be satisfied by an underage user and therefore additional steps would be required. The Tribunal took into account the Information Provider's submissions during the Informal Representations regarding the monitoring of the service. However, when considering the evidence in the message logs the Tribunal was not convinced that the Information Provider had taken all reasonable steps to ensure that consumers under the age of 18 did not use the chat service. The Tribunal concluded that there was no evidence of effective monitoring on the basis of the message logs provided. The Tribunal noted that the operator had failed to question the age of the user where it was reasonable to assume that the user was under 18 years old. The Tribunal also found that the Information Provider had failed to adequately train and monitor its operators to recognise potential underage use and act appropriately. The Tribunal therefore decided to uphold a breach of paragraph 7.3.2a.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
VIRTUAL CHAT SERVICE (INFORMING USER OF PRICE PER MINUTE AFTER £10  
SPEND) (Paragraph 7.3.3a)**

*'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) inform the user of the price per minute of the call'*

1. The Executive submitted that it had received complainants message logs from the Service Provider, and that these logs specifically set out the interaction that users had experienced with this service.

The Executive made reference to paragraph 7.3.3a and submitted that the term 'call' was defined under paragraph 11.3.11 of the Code and could be interpreted 'as any communication which passes through an electronic communications network and this included a text message'.

The Executive made reference to the message logs for the complainants' mobile numbers which indicated that the users had received £10 worth of text messages to their mobile phones and had therefore received their free text message informing them of their spend amount. One example of these messages was as follows:

***"are you busy? Is there something that you want us to do? I hope you have something in mind. (spendA£10)"***

The Executive submitted that as the Code stated that the term 'call' could be interpreted as any communication which passes through an electronic communications network and that a text message could be defined as an 'electronic communication', the Executive would have been expected to see a breakdown as to how much the service had cost per text message sent and received rather than just the £10 total cost. The Executive submitted that complainant message logs indicated that the service had not informed the user of the price of using the service.

2. The Information Provider stated that before they were billed for the service, users had been provided with cost information in four different ways: on screen in large font as part of the television advertisements, the initial service welcome text message, the initial service welcome MMS message and notification by text message each and every time the user spent £10. It stated that users then had the opportunity to send the 'STOP' command and thus incur no further costs.

The Information Provider made reference to paragraph 7.3.3a and how the paragraph read price 'per minute' as opposed to price per text message, the Information Provider stated that it was unclear how this paragraph should be applied to text messages. The Information Provider stated that it was of the opinion that a cumulative cost reminder was of more value to the user.

In advance of the alleged breach (and as a result of the industry guidance issued in January 2009), the Information Provider moved the 'Spent £10' reference to the beginning of the spend warning rather than the end.

The Information Provider further stated that the requirements recommended by the Executive following the Emergency Procedure and set out in the Code of Practice were contradictory in respect of the £10 spend reminder.

The Information Provider also stated that it was of the opinion that the transmission of a text message could in no way be interpreted as a call or referred to as a communication and that the transmission of a text message was actually a series of signals.

The Information Provider stated that it considered that the alleged breach was a technicality and that it had demonstrated a willingness to provide £10 spend reminders. The Information Provider stated that in the absence of a specific statement in the Code that stated that the service and user text messages costs should be given (and in a particular format), it was of the opinion that sufficient cost information had been given.

3. The Tribunal considered the Code and concluded that paragraph 7.3.3a clearly applies to text messages as well as calls by virtue of the definition of virtual chat services contained in paragraph 7.3.1 of the Code. The Tribunal concluded that whilst the terminology 'price per minute' in paragraph 7.3.3a did not make specific reference to texts this was implicit by virtue of paragraph 7.3.1. The Tribunal also noted that the intent of paragraph 7.3.3a is to ensure that users are reminded of the ongoing cost of using a service after each £10 had been spent. The Tribunal concluded from the message logs evidence that the service did not inform the user of the ongoing cost of using the service after each £10 had been spent. The Tribunal therefore decided to uphold a breach of paragraph 7.3.3a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR  
VIRTUAL CHAT SERVICE - REQUIRING POSITIVE RESPONSE TO CONTINUE  
SERVICE AFTER £10 SPEND (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 submitted that it was a requirement under the Code that every time users had spent £10 on the service there was a requirement that the user must provide a positive response to confirm that they wish to continue with the service.

The Executive made reference to the complainant message logs which indicated that the service had not required users to provide a positive response to the service, once £10 had been spent, and as a result users who no longer wanted the service had continued to be billed and incurred further substantial costs.

2. The Information Provider stated that it accepted that in a very small number of instances, the virtual chat had continued without the presence of an additional user text confirmation message. However, in the vast majority of cases, the nature of the service was such that users had constantly indicated their willingness to continue using the service because they were sending further user chat messages.

The Information Provider stated that immediately following notification of the alleged breach and in order to prevent further alleged breaches of the Code, MyTxt had modified the service to ensure that additional user text message opt-in was required in order to continue using the service.

3. The Tribunal considered the evidence including the complainant message logs and concluded that the service had continued to send chargeable messages even though users had not sent positive confirmation messages to the service. The Tribunal noted the changes made to the service which required the user to send a text message into the service in order to continue. However, the Tribunal concluded that this was not a positive response that the user wanted to continue the service for the purposes of the Code. The Tribunal commented that it was crucial for users to have an opportunity to positively indicate a wish to continue using the service after receiving adequate pricing information, given the lack of any other means of controlling the costs which this type of service can incur. The Tribunal therefore decided to uphold 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 behaviour of the Information Provider/MyTxt was deliberate as similar issues had been the subject of a previous Tribunal decision on 14 August 2008;
- There was material consumer harm on the basis that there were seven complaints and evidence of users being charged very large sums of money as a result of sending and receiving text messages to the service;
- The cost paid by individual consumers was high. One complainant had incurred costs of £1,700;
- The issue of operators indicating to users that they can meet local girls has been singled out for criticism by PhonepayPlus;
- The service was harmful to children as there was evidence of children using the service and incurring high phone bills;
- The Information Provider/MyTxt was involved in a service where breaches of the Code were previously upheld.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive during the investigation was contrite and expressed regrets about the how the case had developed. The Tribunal was mindful of the fact that the service had been operated by another party. However, the Tribunal concluded that the responsibility for the breaches remained with the Information Provider.

Having taken into account the aggravating factors and the mitigating factors, the Tribunal concluded that bearing in mind the involvement of the Information Provider/MyTxt in previous breaches, the revenue received by the Information Provider and the number of complaints received by the Executive, the seriousness of the case should be regarded overall as **serious**.

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A fine of £100,000;
- A bar on the Information Provider's chat service operating on the shortcodes and any related promotional material for a period of 12 months, suspended for three months (from the date of publication of the adjudication) within which time the Information Provider is to remedy the breaches to the satisfaction of the Executive. If, after three months, the Executive is satisfied that the Information Provider has remedied the breaches, then the bar will be lifted but, if the Executive is not satisfied, the 12-month bar will take immediate effect;
- Claims for refunds are 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.