

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 25 June 2009 TRIBUNAL SITTING No. 30 / CASE 1

CASE REFERENCE: 766055/CB

Information provider & area:	Mytxt.co.uk Limited, London
Service provider & area:	Dialogue Communications Ltd, South Yorkshire.
Type of service:	Virtual Chat Service
Service title:	Mytxt.co.uk Chat Service
Service number:	60077, 66611, 87478 and 88898
Cost:	£1.50 - £2.00 per service message received, 25p for every user message sent
Network operator:	All Mobile Operators
Number of complainants:	44

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 44 complaints regarding services operating on shortcodes 60077, 66611, 87478 and 88898. These complaints related to an adult virtual chat service operated by Mytxt.co.uk Limited (the 'Information Provider'). The service had been promoted through television adverts which were broadcast in the early hours of the morning on UK television channels. PhonepayPlus was alerted to this service by complaints made by members of the public.

A number of complainants stated that the service continued to charge them for chat text messages without any user interaction which resulted in high mobile phone bills. Some complainants stated that they had been misled into interacting with the service because they had been led to believe the operators were local women who genuinely used the service rather than paid operators.

PhonepayPlus 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 logs further showed that the operators engaged in adult chat with children as young as 13 years old.

The Service

The service was initially promoted to end users through print media, text message and in particular television advertisements which had been shown on many channels including those available on terrestrial and satellite television. 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 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.

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 (11th 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 11 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 prompted the user to enter the service by sending their postcode to the shortcodes and that complainant statements indicated that the request for a postcode had led users to believe that they were going to be interacting with 'real' 'local' girls.

The Executive submitted that the 'girls' advertised as being involved in the service were purported to live in the same area as the user which added to the assumption that in some way the women were 'real' when the reality was that the services were 'operator-mediated' with women being employed and paid to engage in chat.

The Executive submitted that complainants had stated that the promotions that prompted their opt-in had implied that they would be able to get in touch with 'local girls'.

Furthermore, the Executive made reference to the message logs supplied by the Service Provider and submitted that when users came to the assumption that the 'girls' with which they were communicating were not genuine users, the service operators misled and provided false information in order to keep the user unaware of the reality and continue to spend money on the service.

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, it had performed a complete review of all its virtual chat services and this had comprised of a marketing material review and an examination of the service life cycle. The Information Provider stated that the Executive had provided extensive examples of television advertisements; however, it had found no issue with the way in which the services were marketed. No claims were made of 'dating', 'meeting', 'contact' or 'real' users.

The Information Provider stated that any complainant statement that the service was advertised as an adult service offering to meet local girls was false and referred to the numerous examples of television advertisements it had provided to the Executive as part of the investigation stating that none of them had made reference to 'meeting local girls'.

The Information Provider stated to have used approximately 175 chat operators spread across the UK that were able to offer a truly localised chat service. It stated that in prompting the user for a postcode as part of subscribing to the service, it had been able to match an end-user to a chat operator.

The Information Provider stated that it had a clear policy with its chat operators that users should not be misled into believing they were chatting with an individual that they could meet or date and that chat operators were clear that misleading a user in this manner was a dismissible offence. The Information Provider stated that in instances where chat operators had made remarks that may have misled the user, despite its 24/7 message moderation; there was a possibility of content being sent which was beyond its control. The Information Provider stated that there was no evidence from the supplied complainant message logs that misleading users in this manner had been commonplace.

The Information Provider made reference to examples from four message logs and in each of the examples, it was clear that requests made by the user to meet an operator had been firmly rejected.

The Information Provider stated that not all aspects of the service were within its control and that there had been no issue with the aspects over which it had had control (i.e. the programs/systems, television advertisements, etc.). The Information Provider stated that the vast majority of its chat operators had worked correctly and within the rules and like any organisation, from time to time, individuals could make errors that were out of the control of management.

3. The Tribunal considered the evidence and found that users' requests to meet the operators had not been adequately dealt with by the operators. They failed to explicitly state on a number of occasions as demonstrated by the message logs that a meeting was never going to occur. The Tribunal also found that the local references within the service had helped create the impression that the 'girls' were local to the user's area and the expectation that they could meet the 'girls' when in fact this was not the case. The Tribunal further found evidence that call operators on a number of occasions kept users who had requested a meeting chatting which created an impression, that a meeting with them would be possible. The Tribunal also 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 complaints from parents of children under the age of 18 years old who had used the service and had been billed for large sums of money. The Executive made reference to one example in which one of the children was a 13-year-old, and it submitted that it was of the opinion that in this particular case the service had not taken all reasonable steps to ensure that the user was 18 years old or above. In this case, the Executive submitted that the nature of the user's text messages should have raised sufficient doubt in the mind of the operator as to the age of the user that the service should have been immediately terminated.
2. The Information Provider stated that its policy and procedure for detecting underage users and taking 'all reasonable steps' to exclude these types of user was as follows: It examined the date of birth submitted by the user; it then examined any MMS images sent in by a user to determine if that user appeared underage; it examined the user's language to determine if it appeared to be immature; and it provided a 24/7 platform moderation of messages and offered a 'reporting' feature to chat operators such that if they detected a potential underage user, they could notify the platform moderator. The Information Provider stated that if someone initially provided an age of over 18 years old and then 'jokes around', it was difficult to establish the actual age of the user.

The Information Provider further stated that the services were clearly not marketed to underage consumers and that the television advertisements had run between the hours of 11pm and 3am and on channels that would not typically be watched by children. The Information Provider stated that the UK TV advert clearance authority (Clearcast) had placed restrictions on its advertisements that would only allow them to be shown late at night and on channels that would not be regarded as suitable for children. In addition, it stated that the initial service welcome message and the television advertisements clearly stated the service is for 18+ users only.

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 under aged 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 effectively monitor the service and thereby ensure that nobody under the age of 18 used the chat service. The Tribunal considered by examining the message logs that there were a number of missed opportunities to question a user's age. The Tribunal also found that the Information Provider had failed to adequately train and monitor its operators as it did not consider that on the evidence of the message logs before it that there was any evidence of effective monitoring. 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:

"FREE MSG: Chat with hot girls tonight. 0909 967 5175 (150p/min) (u have spent £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, it 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 any messages into to the service after receiving the £10 reminder message. 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 44 complaints and evidence of users being charged very large sums of money as a result of sending and receiving text messages by the service;
- The cost paid by individual consumers was high; one complainant had received 86 text messages without any positive interaction and had incurred costs of £129;
- 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's breach history.

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, bearing in mind the materiality of the breach history, the revenue received by the Information Provider and the scale of the 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 £120,000. The Tribunal considered that the level of revenue generated by these services was such that it felt it necessary to exercise its discretion to fine outside the Sanctions Guide's upper limit of £100,000 for a case rating of '**serious**'

in order for the fine to have any meaningful effect and be sufficiently punitive. The Tribunal did not consider the case fell into the '**very serious**' rating which would have enabled it to fine up to £250,000 per breach;

- 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.