

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday, 29 October 2009

TRIBUNAL SITTING No. 39 / CASE 1

CASE REFERENCE: 807353 & 778256 MS/CB

Service provider:	Transact Group (Holdings) Limited, Cambridgeshire
Information provider:	N/A
Type of service:	Various reverse-billed shortcode related services: chat/date, subscription and one-off picture messages
Service title:	Various
Service numbers:	89885, 84048, 69991, 80877 & 80898
Cost:	80898, 80877, 84048 & 89885- £1.50 per message 69991 - £3 per week
Network operator:	All Mobile Network Operators
Number of complainants:	106

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 106 complaints in relation to a number of chat and date services operating on shortcodes 80898, 80877, 69991, 84048 and 89885. Complainants stated to have received unsolicited promotional text messages (WAP-push messages) and chargeable WAP-push messages (charged at £1.50 per text in relation to shortcodes 80898, 80877, 84048 and 89885, and £3 in relation to shortcode 69991).

Following consumer complaints and, during the course of the Executive monitoring, it was established that consumers appeared to have been misled into entering into the WAP service. In addition, it appeared that the text messages received by complainants had contained no pricing or contact information. Furthermore, complainants had not received an initial subscription text message or any subscription reminder text messages.

(i) The Service

The Executive monitored four '09' prefixed sexual entertainment services ('sex lines') belonging to the same Service Provider. The details of this monitoring exercise are as follows:

The service named '*1 minute Quickie*' operating on the premium rate number 0909 771 7111 was monitored from this mobile phone number on 1 June 2009. The service was promoted in the magazine named *Clout*, which is a supplement to the *Sunday Sport* newspaper – Issue 11, 31 May 2009.

The service named *'Listen & Jerk off'* operating on the premium rate number 0909 771 1460 was monitored from this mobile phone number on 1 June 2009. The service was promoted in the magazine named *Clout* – Issue 11, 31 May 2009.

The service named *'Cheap Filth'* operating on the premium rate number 0909 534 0346 was monitored from this mobile phone number on 9 June 2009. The service was promoted in the magazine named *Clout* – Issue 12, 7 June 2009.

The service named *'How long can you last?'* operating on the premium rate number 0909 534 9929 was monitored from this mobile phone number on 9 June 2009. The service was promoted in the July 2009 edition of the magazine *Loaded*.

A full and accurate record of the all of the marketing and chargeable text messages which were sent to these mobile phones after the calls had been terminated have been maintained by the Executive. All messages received remain on the SIM cards used. These four monitoring phone numbers were included within the batch of complainant mobile phone numbers sent to the Service Provider for opt-in information and message logs, in the letter dated 6 June 2009.

On these four phones, after call termination, chargeable text messages were received for a one-off picture text message (£1.50 from shortcode 80877, accompanied by the message: *"Thank you for calling our all new interactive multimedia service. Hope you enjoy yr picture xx"*), and a subscription service costing £3 per week was subscribed to the phone, by default. This meant that none of the free service text messages, as required under the Code, were received by the Executive during monitoring.

Whilst the 09 services were being monitored by the Executive, absolutely no menu options were selected from any IVR units which may have been available within the services – the 09 numbers were simply dialled, connected to for a short period of time, before being terminated. Chargeable text messages as noted above were then received on the handset.

A response to the Executive's 8.3.3 letter dated 6 June 2009 was received from the Service Provider dated 7 July 2009. This letter provided opt-in details and message logs for each of the 66 mobile phone numbers, including the message logs for the four Executive monitoring mobile phones.

The message logs supplied by the Service Provider clearly showed that the correct free text messages, i.e. the subscription initiation messages (paragraph 7.12.4 of the Code), the £10 spend reminder text messages (paragraph 7.3.3 of the Code) and the £20 reminder text messages (paragraph 7.12.5 of the Code), had all been sent at the correct and relevant stages of the services. None of these regulatory text messages were received on any of the mobile phones used by the Executive.

Independent verification of several complainant message logs on the Vodafone network (Vodafone mobile numbers) was sought through an external source, and this source clearly indicated that only the chargeable text messages had been sent in connection with all of the shortcodes 80898, 80877, 84048 and 89885. This meant that the service text messages included within the Service Providers' batch of message logs had not actually been sent.

The Executive also noted that on many occasions the Service Provider message logs showed that a consumer had received one weekly service text message charged at £1.50 as part of a service operating on the shortcodes 80877 and 80898. However, the independent Vodafone

verification sought by the Executive revealed that often two service text messages were, in fact, sent in the same week, or that several text messages had been sent by the Service Provider at a similar time, meaning that consumers were charged an extra £1.50 in each instance.

The Service Provider did not dispute any of the findings from the independent source and it was therefore not considered necessary to present the actual evidence to them. The identity of the independent source has also not been revealed to the Service Provider.

The Executive's monitoring only involved the receipt of a picture message from 80877 and subscription messages from 69991. For all of the other messages and services surrounding the shortcodes 80898, 80877, 84048 and 89885, information has been received by way of consumer complaints.

(ii)The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Service Provider on 6 August 2009 raising potential breaches of paragraphs 5.2, 5.4.1a, 5.4.1b, 5.7.1, 5.8, 5.12, 7.3.3a&b, 7.12.4a-f and 7.12.5 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided a formal response to the breach letter on 4 September 2009. The Executive originally ran the enquiries into these services as two separate investigations; however, it decided prior to the breach letter that the two investigations related to the same type of service and were therefore merged to form one investigation.

The Tribunal made a decision on the breaches raised by the Executive on 29 October 2009 following, having heard informal representation from the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE LEGALITY (Paragraph 5.2)

“Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful”

1. In relation to shortcodes: 80877, 80898, 84048 and 89885

The Executive submitted that under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions. This is sometimes called ‘a hard opt in’, or (2) the recipient’s details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication. This is sometimes called a ‘soft opt-in’.

The Executive submitted that that the marketing text messages that were sent to complainants in relation to these services were considered to be direct marketing electronic mail for the purposes of the Regulations. Complainants stated that the text messages received on their mobile phones from these numbers were unsolicited, and that they had absolutely no idea where their mobile number had been acquired.

The Executive submitted examples of some of the marketing WAP-push messages received by complainants:

- “*You about?*”;
- “*My contact details?*”;
- “*you still there? Have you changed your number? Lisa?*”.

The Executive noted that the Service Provider had supplied opt-in information for 66 mobile phone numbers in its response dated 20 July 2009 (case reference 807353); however, it submitted that there did not appear to have been any evidence supplied that proved the validity of the opt-ins.

The Executive submitted that, for these reasons, and the fact that there were 36 complaints overall from 1 January 2009 onwards (11 of which were taken from complainants in the original case ref: 778256), were received from women (who stated that they did not have any interest in virtual text chat or chat/dating services involving other females), it was the opinion of the Executive that the initial promotional WAP-push messages relating to these services had not complied with the law.

2. The Service Provider stated that, in its previous letter, it had enclosed detailed information regarding the original opt-in for each of the complainant phone numbers concerned and this had been acknowledged by the Executive. It stated that there were a number of ways in which the complainants opted into receiving promotional text messages, as follows:

WAP site usage

The Service Provider stated that, in these instances, the privacy statement on the WAP site stated: *"By entering this site / purchasing our services, you accept that we have the right to send you (free) marketing messages promoting similar products and services to you, and you also accept that our preferred partners may also offer you 3rd party marketing and promotions of products and services we think you may enjoy. By entering this site / purchasing our services, you acknowledge that such promotions may be some time in the future from when your initial purchases were made. You may choose not to receive any promotional messages from us or our partners, by replying to the promotional message with the word STOP to XXXXX"*.

SMS services

The Service Provider stated that, in these instances, the ability to send promotional text messages was in most cases highlighted in the advertisement concerned.

In addition, for customers that used services that were promoted directly via the Service Provider, these customers' details were obtained when they accessed similar services to those being promoted.

IVR services

The Service Provider stated that, in these instances, the ability to send promotional text messages was in most cases highlighted in the advertisement concerned, as per the example advertisement in point two above. In addition, certain services also highlight in the IVR script the possibility that promotional messages may be sent. Certain mobile phone numbers promoted to by the Service Provider were obtained from a third party company called Fonedata.

The Service Provider stated that the Executive had not disputed any of the opt-in details it had provided, some of which have been obtained from Fonedata. It stated that these calls / SMS interactions were a question of fact and could be independently verified by the Mobile Network Operators, if required, but the Service Provider could do no more that provide the information. It stated that it considered that the Executive should be able to verify these details by Mobile Network records if they so desired, and it appeared that the Executive was fully reliant on the representations of the complainants regarding the marketing text messages received and also gave specific weight to the fact that a number of complainants were female.

The Service Provider made reference to its response to the Executive's request in relation to a list of mobile phone numbers owned by females. It stated that the female-owned mobile phone numbers in question had been cross-referenced to the opt-in logs for Transact IVR, the 'Go Busker' website and SMS Touch 89077.

It stated that Transact IVR services were invariably adult-related and SMS Touch was a text chat service. As such, it considered that it was wholly reasonable and appropriate to promote virtual text chat and dating services to customers who had accessed such services. It stated that it considered that all promotional text messages sent were not unsolicited within the meaning of the Electronic Communications (EC Directive) Regulations 2003 and it fully refuted that this was the case.

3. The Tribunal considered the evidence and noted the number, the similarity and the overall consistency of the complaints received by the Executive. It noted that

complainants had stated that they had not opted in or used similar services in the past, and the Tribunal was not persuaded that the opt-in evidence provided by the Service Provider was sufficiently detailed to establish that there had been a valid opt-in. The Tribunal was not persuaded by the information provided to it by the Service Provider during the Informal Representation as it considered that there was insufficient documentary evidence in support of the contentions made. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (FAIRNESS) (Paragraph 5.4.1a)

“Services and promotional material must not mislead, or be likely to mislead in any way”

1. In relation to shortcodes: 80877, 80898, 84048 and 89885

The Executive submitted that, as referred to above under paragraph 5.2, complainants received promotional WAP-push messages that they claimed to have been unsolicited. It submitted that, only upon clicking on the messages, would it have become apparent to consumers that they were, in fact, WAP services which would begin to download. At this point, complainants would have then have tried to cancel the download, having realised that the text message (WAP-push message) received was not personal to them but was, in fact, related to a premium rate service.

The Executive submitted that it also appeared that, by simply clicking on the WAP-push message, it was enough to enter consumers into the service, ensuring they then received chargeable text messages on a regular basis in relation to their ‘latest match’, and not actually choosing to enter into the service.

The Executive submitted that it of the opinion that the phrasing of some of the promotional text messages was far too similar to that which mobile users would expect to receive on an everyday basis (i.e. ‘genuine’ text messages from people who are known to them) and consumers were therefore misled into responding to these service text messages.

It submitted that the wording of some of the promotional WAP-push messages was ambiguous and thus did not indicate in any way that these were promotions for premium rate services, or that the WAP-push link would proceed to a chat/date or a text chat WAP site for which consumers would incur regular costs by reverse-billed text message through the apparent joining of an unwanted service.

It submitted that complainants stated that they did not wish to receive these text messages, meaning that they certainly had no interest in interacting with the service. Many complainants received many months worth of chargeable text messages (one complainant received £241.50 worth of messages over a 12-month period, and many others received upwards of £50 worth of text messages) prior to realising that they were being charged to receive them.

2. 89885

The Service Provider refuted that the original promotional text messages were unsolicited. Services on 89885 were not promoted by WAP-push messages and, as

such, it did not consider the Executive's statements to be valid in respect of this shortcode.

80877, 80898, 84048

The Service Provider stated that, as per the above paragraph, it refuted that the original promotional text messages were unsolicited. It stated that services operating on 84048, 80877 and 80898 were indeed promoted using WAP-push messages and it was acknowledged that certain marketing text messages, such as "You about?", "My contact details", were initially used during 2008 to promote the service. It stated that it had been adjudicated on at the end of September 2008 (Case 755993) in a case against Transact Group Limited that such promotions were misleading.

It stated, therefore, that it considered that only the promotional text messages sent post-September 2008 (with a reasonable time for changes to be implemented) should be considered as part of the current case.

It stated that, as a result of the previous case, promotional text messages for this service were changed to address the perceived ambiguous wording and to include a customer services or helpline number in all promotions. In that way, it was felt that customers would be in no doubt that such a text message was a promotional one and not otherwise.

It stated that it fundamentally disagreed with the Executive's assertions regarding the operation of the service and it wished to clarify precisely how the service worked. It stated that there were two separate clicks required before the service became active. The first click was on the WAP link that landed on the consumer's phone. If this was "accidentally" clicked, no premium rate billing occurred. It stated that it did not claim, nor had it ever claimed, that at this stage the consumer had agreed to any terms and conditions.

It stated that there was a button on the home page that invited the user to "chat" or "contact me" with a potential date, be it male or female. If that button was clicked, then the consumer was placed in contact with the person advertised on the page – it was only at that point that the consumer entered into premium rate chat, and was bound by the terms and conditions that were prominently displayed at the top of the WAP page.

The Service Provider stated that the Executive's assertion that, by simply clicking on the promotional WAP link and then cancelling it (without entering in the WAP site) was enough for customers to receive unsolicited reverse-billed text messages, was completely incorrect. The WAP logs and the relevant session table information proved that the button was positively clicked on. It stated that it could, if required, provide this session information to the Executive.

It stated that simply cancelling a WAP page in mid-download would not have activated a chat session. The consumers were given the full terms and conditions on the WAP site and the customer had agreed to receive such additional "match" text messages as part of the service terms and conditions.

3. The Tribunal considered the evidence and concluded that the initial free text message that was sent to the user did not give an accurate impression of the service being promoted, and that users were misled into thinking that someone was trying to contact

them and into accessing the service. The Tribunal was persuaded by the message logs which showed a number of complainants receiving chargeable text message without interacting with the service in any way. The Tribunal concluded that users that clicked on the WAP link had automatically triggered the service's charging mechanism and had subsequently incurred a charge. The Tribunal accepted the argument made by the Service Provider in the Informal Hearing that the alleged breach had related to shortcodes 80877, 80898 and 84048, and had not related to shortcode 89985. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
MISLEADING (UNFAIR ADVANTAGE) (Paragraph 5.4.1b)**

"Services and promotional material must not take unfair advantage of any characteristic or circumstance which may make consumers vulnerable."

1. In relation to shortcodes: 80877 and 69991 (Executive Monitoring)

The Executive stated that, during the course of its investigation, each monitored 09 number was called once, using brand new (meaning that they had never been used in conjunction with any other service) SIM cards. It submitted that, after calling the four monitored 09 numbers and then terminating the calls, reverse-billed text messages began to arrive on the mobile phones charged at £1.50 from 80877, and at £3 from 69991.

The Executive submitted that first text message received on each phone read as follows: *"Thank you for calling our all new interactive multimedia service. Hope you enjoy your picture xx"*, which was sent from shortcode 80877 and charged at £1.50. The picture of a female was then received in a separate text message which was not chargeable, from the number 07717 989656. This was not something which had been requested at any point during the call.

It submitted that from then on three of the four monitoring mobile phones began to receive text messages from shortcode 69991 that read as follows:

"U have 120mins left in your GOLD account. Call 01223 554147 to listen to yr content. To close yr acc text stop to 69991 (1/1 @300p)".

The Executive submitted that each text message received was charged at £3, and the text messages were sent on a regular basis (i.e. once per week, at exactly the same time and on the same day). These text messages continued until 'STOP' was texted back to 69991 by the Executive. It submitted that, as before, this was not a service that was requested at any point during the call.

The Executive submitted that no buttons on the phone keypads were pressed during any of the calls – meaning that the 09 numbers were simply dialled, and the service was listened to for a while, before being terminated.

The Executive submitted that, for these reasons, it was of the opinion that any consumers calling the 09 services offered by the Service Provider from a mobile phone were made vulnerable when the service took their mobile details to use to bill them without consent when they dialled the original premium rate number. Consumers were then taken

advantage of upon termination of the call by the sending of reverse-billed messages being sent immediately to their handsets, and then on a regular basis without any knowledge or consent whatsoever.

2. 80877

The Service Provider stated that certain interactive services (but only a limited number) operated by it contained an interactive menu option to receive an MMS message billed by way of reverse-billed text message. In addition, picture sending was also initiated on request via the interaction with live operators. In the cases highlighted by the Executive, the sending of the picture was meant to have been set up on a request basis, such that a picture was only sent and billed for when an interactive menu option was selected.

The Service Provider stated that, on investigation, it would appear that, on certain numbers the application had been incorrectly programmed to send a picture at the end of each call.

It acknowledged that, as a result of incorrect programming, certain customers would have been billed incorrectly and, as a result, accepted the Executive's assertion that a breach of paragraph 5.4.1b had occurred in this instance. Where requested, the Service Provider stated that it had given a full refund to the affected customers. It stated that it had now undertaken a thorough review of all the relevant program numbers, had corrected the technical fault and it was confident that no further occurrences of this nature could be repeated.

69991

The Service Provider stated that the service operating on shortcode 69991 was a subscription service to adult recorded stories. It was charged at £3 per week by reverse-billed text message providing 120 minutes of premium content, but accessed using expensive 090 services (especially expensive from a mobile phone). As such, the premium element of the service equates to an average cost of 2.5p per minute, if all the allocated minutes are used up.

It stated that this provided the customers with extremely good value for money, when compared to other services being offered at 60p per minute, £1.50 per minute or more, on 090 prefixes.

The Service Provider stated that the service has been operating for a long period of time with little or no complaint from customers and, in general, they felt that the service provided excellent value for money. Customers opted into the service by way of a request by text message, or by an option on the interactive service menus. In the case of a request by text message, then the subscription was set up automatically in the subscription management application.

It stated that the process for setting up a 'Gold' account for a customer who initiated the request by IVR was, however, a manual process. Each day a report was collated from the IVR equipment detailing the mobile numbers to be set up to be allowed access to the 'Gold' account service. It would appear that, in collating the daily lists for entry into the 'Gold' account, certain numbers were included in error – an incorrect query was run to ascertain the new numbers opting into the service. This is also the reason why only some, and not all, of the Executive's test calls were caught in this way.

The Service Provider acknowledged that, as a result of incorrect collation of information, certain customers will have been billed incorrectly and, as a result, accepted the assertion that a breach of paragraph 5.4.1b had occurred in this instance. Where billing problems had been identified, it had given a full refund to the affected customers.

It stated that the system had now been modified to remove the manual element of subscription initiation and that it was confident that these errors could no longer be repeated.

3. The Tribunal considered the evidence and concluded that, on the basis of the evidence submitted by the Executive, when consumers called the 090 numbers related to the service, they were made vulnerable to reverse-billed text messages from the Service Provider. It followed that the Service Provider had taken unfair advantage of those consumers because, upon termination of the call, some consumers were immediately sent reverse-billed text messages to their handsets, and then on a regular basis without any knowledge or consent whatsoever. The Tribunal upheld a breach of paragraph 5.4.1b of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR PRICING (COST) (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. In relation to shortcodes: 80877, 80898, 84048 and 89885
The Executive submitted that complaints from consumers and call logs supplied by the Service Provider both suggested that consumers were not informed about the costs which would have been incurred prior to using these services.

It submitted that, whilst the WAP landing page itself had appeared to state that text messages received from these shortcodes would be charged at £1.50 as part of the service should a consumer agree, consumers did not appear to get as far as actually viewing the WAP site and scrolling down the page in order to view it (as noted above in the Executive’s submissions in relation to the alleged breach of paragraph 5.4.1a of the Code).

It submitted that consumers would have received the promotional WAP-push message stating “you about?”, for example, and then clicked on the WAP-push link, only to cancel the WAP-push download action which followed. The Executive submitted that it was the act of clicking the link, only then to cancel, that was in itself enough to begin charging consumers by reverse-billed text message. It followed that the consumer had made no choice in becoming a user of the service.

2. 89885
The Service Provider stated that the shortcode 89885 was directly promoted in various publications. It stated that the pricing had been clearly displayed in directly promoted advertisements. Furthermore, shortcode 89885 was not used to bill for WAP-initiated services and, as such, the Service Provider did not consider that the Executive’s comments applied to this shortcode.

80877, 80898, 84048

The Service Provider stated that the Executive's assertion was incorrect and that WAP pages could not be partially downloaded – a WAP page needed to be downloaded completely before the functionality of the page was made available to the user. It stated that a user could not consume anything without the page being downloaded in its entirety.

It stated that it was technically impossible to get billed without obtaining the service, and that the terms and conditions/promotional material viewed by the end consumers contained the pricing information. The WAP landing page contained all the pricing information required under the Code, and the Executive acknowledged that the WAP landing page had stated that the text messages received from these shortcodes would be charged at £1.50.

It stated that the Executive claimed that there was a need to "scroll down" to see the terms and conditions. The positioning of the pricing information was located at the top of the WAP landing page. In particular, it considered that the WAP site contained appropriately presented pricing information which was easily legible, prominent, horizontal and presented in a way that did not require close examination.

The Service Provider stated that it believed that consumers were clearly and straightforwardly informed of the cost of using the service and that no breach of the Code had occurred in this respect.

3. The Tribunal considered the evidence and concluded that, on the basis of the consumer evidence submitted by the Executive, it had been possible for consumers to be charged without seeing the terms and conditions on the WAP site and the charging mechanism had been triggered when users accessed the WAP site for the first time. The Tribunal accepted the argument made by the Service Provider in the Informal Hearing that the alleged breach had related to shortcodes 80877, 80898 and 84048, and had not related to shortcode 89985. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

**ALLEGED BREACH FIVE
CONTACT DETAILS (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. In relation to shortcodes: 80877, 80898, 84048 and 89885
The Executive submitted that the promotional WAP-push messages received by complainants from the services failed to provide either contact details in the UK of the Service Provider or the Information Provider, or a helpline telephone number (in some instances), as is required by the Code.

Again, whilst the WAP landing page itself did appear to state this information, consumers did not necessarily seem to have gotten as far as actually viewing the WAP site itself in order to scroll down the page and read through this information.

2. 89885

The Service Provider stated that the shortcode 89885 was directly promoted in various publications. It stated that the pricing had been clearly displayed in directly promoted advertisements. Furthermore, shortcode 89885 was not used to bill for WAP-initiated services and, as such, the Service Provider did not consider that the Executive's comments applied to this shortcode.

80877, 80898, 84048

The Service Provider acknowledged that the level of compliance of promotional text messages up to October 2008 was deficient in some cases in this area. It stated that, up until that point, it had considered that the name of the Information Provider and customer services contact numbers, as stated on the WAP sites, would be sufficient to make the service Code compliant.

The Service Provider stated that changes were made to the service after that date to rectify this and promotional text messages after that date contained the customer services contact number and, in a number of cases, the Service Provider name. It also stated that it believed that the WAP link address was in itself a fair indicator of the Service Provider and this had been further enhanced by the information on the WAP sites themselves.

It stated that, on reviewing the detailed logs, it accepted that the Information Provider details were missing from a minority of promotional text messages after October 2008 and, in that respect alone, it agreed that a breach of paragraph 5.8 of the Code had occurred.

The Service Provider stated that it did, however, consider that the customer services number was by far the most important piece of information for the customer and the number of queries it had already dealt with prior to the involvement of the Executive was testament to the fact that customers had no problem in ascertaining the customer services number concerned. It stated to have further amended promotional text messages to ensure that any deficiencies were covered.

3. The Tribunal considered the evidence and concluded that, on the basis of the Service Provider's acceptance that contact information had been absent up until October 2008 and had been incomplete from that point on, consumers had not been sufficiently informed of the identity and contact details of either the Service Provider or the Information Provider. The Tribunal accepted the argument made by the Service Provider in the Informal Hearing that the alleged breach had related to shortcodes 80877, 80898 and 84048, and had not related to shortcode 89985. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

**ALLEGED BREACH SIX
INAPPROPRIATE PROMOTION (Paragraph 5.12)**

“Service Providers must use all reasonable endeavours to ensure that promotional material does not reach those whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. In relation to shortcodes: 80877, 80898, 84048 and 89885

The Executive submitted that, in many instances, both the promotional text messages and the reverse-billed text messages which followed were sent to complainants whom the Executive felt were inappropriate recipients. Many complainants stated to have found these text messages to be offensive.

It submitted that, of the 106 complainants, 36 (a third) were women who had received the text messages and had absolutely no interest in the services (which were targeted at men). Furthermore, a 15-year-old boy was also the recipient of these text messages. The Executive submitted that many of the other complainants were married men who have also stated that they had absolutely no interest in receiving such text messages or using such services. Lastly, the most recent complaint received was from a female pensioner who had been receiving text messages.

2. The Service Provider made reference to its response to the alleged breach under paragraph 5.2 of the Code above. It stated that it had demonstrated that it had full opt-in information from the various mobile numbers concerned. All of these numbers had accessed either adult-related chat products, an adult WAP site, a WAP video site or adult IVR services.

It stated that, for customers falling into these categories, it considered that it was wholly appropriate and reasonable for promotions to be sent to prior users of such services. Furthermore, it stated that it did not consider that the promotions could be reasonably considered offensive, as they were not explicit in any way.

It acknowledged that this was a personal view of the recipients and stated that promotions had been targeted to those customers who had previously accessed similar services, or had demonstrated an interest in adult-related telephony/mobile services. It stated that, as such, it considered that it had acted reasonably in the promotions sent out and, therefore, did not consider that a breach of paragraph 5.12 of the Code had occurred.

3. The Tribunal considered the evidence and concluded that, on the balance of probabilities, the promotion had not been offensive or harmful to the majority of recipients and, therefore, considered that the fact that people had not consented to the receiving the promotions had been adequately addressed in upholding the breach of paragraph 5.2 of the Code. The Tribunal did not uphold a breach of paragraph 5.12 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH SEVEN

VIRTUAL CHAT SERVICE (£10 REMINDER) (Paragraph 7.3.3a&b)

“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,*
 - 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. In relation to shortcodes: 80877, 80898, 84048 and 89885

The Executive submitted that several of the mobile phone numbers belonging to complainants on the Vodafone network had been independently verified, and that discrepancies had been found between the message logs provided by the Service Provider and the text messages which appeared to have been received by the consumers.

It submitted that the message logs supplied by the Service Provider suggested that a text message stating the following had been sent to consumers subscribed to the service once every month at the same time, as required by the Code. The text message logs provided showed this text message read as follows:

“FreeMsg: LoveFind £1.50 / suitable match. CusServ 08704541000. If matches no longer required send stop to 80877”.

The Executive submitted that its independent verification of complainants’ mobile phone records on the Vodafone network suggested that these text messages had not been sent to consumers as shown in the message logs provided by the Service Provider.

The Executive submitted that the required spend-reminder text messages for virtual chat services appeared not to have been sent out in relation to these services. As a result, it appeared that consumers had therefore not offered their consent by positive confirmation after £10 had been spent in order for the service to continue.

The Executive submitted that, instead, it appeared that the only text messages that had been sent in connection with this service had been reverse-billed text messages which formed part of the service itself, for example:

“For your latest chat see <http://backchat.fotoflirt.co.uk/nina/default.aspx?id=1039900> customer service on 08704 541000 send STOP at anytime”.

The Executive submitted that, in many instances, complainants had received the reverse-billed text messages over many weeks and months, prior to realising that they were being charged to receive them and eventually sending ‘STOP’ back to the service.

2. The Service Provider stated that the Executive's assertions regarding the accuracy of the call logs supplied were a cause of great concern and an urgent investigation had been carried out in this area

84048, 89885

The Service Provider stated that it did not consider that the Executive's assertions applied in respect of shortcodes 84048 and 89885.

80877, 80898

The Service Provider stated that the Executive's assertions appeared to relate to services operating on shortcodes 80877 and 80898.

The Service Provider stated that, as part of its investigations into the Executive's findings regarding the call logs, it had regretfully identified a significant technical error. It stated that the spend warnings had been generated by an application proxy system, separate from the message gateway. As such, in order to provide, the logs requested by the Executive, the message logs of the message gateway and the application proxy logs were combined.

It stated that the proxy server was set up to interact with the application and to keep track of interaction between the end user utilising the service. After each seventh text message, the application proxy was programmed to send out a reminder/spend warning text message similar to:

"FreeMsg: Chatbook £1.50/ suitable match. CustServ 08704541000. If matches no longer required send stop to 89098 "

It further stated that the application proxy was indeed attempting to send these text messages via the message gateway. However, the application proxy was receiving a false positive response from the gateway regarding the outgoing text messages and, therefore, had classified it as sent. The Service Provider stated that the outgoing text message was not sent out, as intended, and had actually failed at the gateway level due to an incorrect return path routing issue. The net result was that the spend warning text messages were shown as having been "sent" in the application proxy logs, which were then used to compile the combined logs that were supplied to the Executive. The Service Provider stated that, in actual fact, these text messages had failed.

The Service Provider stated that it had now corrected the message logs in this respect and they now showed that the status of the spend warning text messages as "failed", rather than "sent", as previously stated. The Service Provider stated that, as a result if these failings, it acknowledged that it had breached Paragraph 7.3.3a&b of the Code.

It stated that it had now rectified this problem and could confirm that the cost warnings did now appear to be working correctly on shortcodes 80877 and 80898.

3. The Tribunal considered the evidence and noted the Service Provider's acceptance that the initial message logs it had supplied were not correct and, in fact, there had been a failure to send the £10 reminder text messages. It found, therefore, that consumers had not been informed of their continued spend and had not been given the opportunity to provide a positive response to continue the service. The Tribunal accepted the argument made by the Service Provider in the Informal Hearing, that the alleged breach had related to shortcodes 80877 and 80898, and had not related to shortcodes 84048 and 89985. The Tribunal upheld a breach of paragraph 7.3.3a&b of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT

SUBSCRIPTION SERVICES (SUBSCRIPTION INITIATION) (Paragraph 7.12.4a-f)

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

- a name of service,*
- b confirmation that the service is subscription-based,*

- c what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of the messages being sent,
- d the charges for the service and how they will or can arise,
- e how to leave the service,
- f service provider contact details.”

1. In relation to shortcode: 69991 (Executive Monitoring)

The Executive stated that it had monitored some of the 09 sexual entertainment services ('sex lines') operated by the Service Provider and was of the opinion that some of the message logs supplied by the Service Provider may have been altered.

It submitted that, after having called the 09 numbers, the Executive's monitoring mobile phones did not receive the message shown as "sent" in the message logs supplied by the Executive. The message set out in the message logs read as follows:

"FREE MSG: Welcome to Gold Account 3GBP per week subscription. cs 08445616410. Send stop to 69991 to unsubscribe"

It submitted that, after receiving the picture message from the mobile long number 07717 989656 and the reverse-billed text message from the shortcode 80877 which accompanied it (as set out in the Executive's submissions in relation to the alleged breach of paragraph 5.4.1b of the Code), the first text message received on each of the three monitoring mobile phones had read as follows:

"U have 120mins left in your GOLD account. Call 01223 554147 to listen to yr content. To close yr acc text stop to 69991 (1/1 @300p)".

The Executive submitted that this same text message was then received on a weekly basis until 'STOP' was sent to the relevant shortcode. The Executive confirmed that each text message received from shortcode 69991 incurred a £3 charge.

2. 69991

The Service Provider stated that the Executive's assertions regarding the accuracy of the message logs supplied was a cause of great concern and an urgent investigation had been carried out in this area. It stated that, in a similar way to the spend warnings described above, the subscription text messages had also been generated by the application proxy system which was separate from the message gateway.

The Service Provider stated that, in order to provide the logs requested by the Executive, the message logs of the message gateway and the application proxy logs were combined. It stated that the proxy server was set up to interact with the application and to keep track of interaction between the end user utilising the service. It stated that, on the original set up of the subscription, the application proxy was programmed to send out three text messages, including an initial subscription text message.

The Service Provider stated that the application proxy was indeed attempting to send these text messages via the message gateway. The application proxy had received a false positive response from the gateway regarding the outgoing text messages and had, therefore, classified them as "sent". However, the outgoing messages were not sent out as intended and actually failed at the gateway level due to an incorrect return path routing issue. It stated that the net result was that the subscription initiation text

messages were shown as having been “sent” in the application proxy logs, which were then used to compile the combined logs that were supplied to the Executive. The Service Provider stated that, in actual fact, these text messages had failed.

The Service Provider stated that it had now corrected the message logs in this respect and they now showed that the status of the subscription initiation messages as “failed”, rather than “sent”, as was previously stated. The Service Provider stated that, although it had attempted to send the subscription initiation text messages, it acknowledged that they were not received by the end users.

As a result of these failings, it acknowledged that it had breached Paragraph 7.12.4a-f of the Code.

It stated that it had now rectified this problem and could confirm that the initial subscription text messages and subscription reminder text messages were working correctly on shortcode 69991, as originally intended.

3. The Tribunal considered the evidence and noted the Service Provider’s acceptance that the initial message logs it had supplied were not correct and, in fact, there had been a failure to send the subscription initiation text messages. It found, therefore, that consumers had not been provided with the information required under the Code when entering a new subscription for a premium rate service. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

Decision: UPHELD

ALLEGED BREACH NINE

SUBSCRIPTION SERVICES (SUBSCRIPTION REMINDER) (Paragraph 7.12.5)

“Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers.”

1. In relation to shortcode: 69991

The Executive submitted that several of the mobile phone numbers belonging to complainants on the Vodafone network had been independently verified, and that discrepancies had been found between the message logs provided by the Service Provider and the text messages which appeared to have been received by the consumers.

It submitted that the message logs supplied by the Service Provider suggested that a text message was sent to consumers within this subscription service once a month at the same time that read as follows:

“FREE MSG : Thank you for using Gold account. Call 01223 554147 to listen to yr content. To close yr acc text stop to 69991 (1/1 @300p)”.

It submitted that one complainant mobile phone on the Vodafone network was independently verified and indicated that these text messages had not appeared to have been sent. The Executive submitted that, therefore, it was of the opinion that the required subscription spend-reminders may not have been sent out in relation to this service.

It submitted that, instead, it appeared that the only text messages that had been sent in connection with this service read as follows:

“U have 120mins left in your GOLD account. Call 01223 554147 to listen to yr content. To close yr acc text stop to 69991 (1/1 @300p)”.

2. 69991

The Service Provider stated that the circumstances surrounding this breach had been outlined by its response in relation to the alleged breach of paragraph 7.12.4a-f of the Code.

The Service Provider stated that, as a result of the technical error regarding the interaction between the application proxy and the SMS gateway, it acknowledged that the required subscription reminders, although attempted to be sent, were not received by users. As a result, it acknowledged that the service had breached paragraph 7.12.5 of the Code. It stated that it had now rectified this problem and could confirm that the repeat subscription messages and subscription reminder messages were working correctly on shortcode 69991, as originally intended.

3. The Tribunal considered the evidence and noted the Service Provider’s acceptance that the initial message logs it had supplied were not correct and, in fact, there had been a failure to send the subscription reminder text messages. It found, therefore, that consumers had not been informed of their continued spend. The Tribunal upheld a breach of paragraph 7.12.5 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 Service Provider had been reckless in its failure to adopt systems of adequate technical quality.
- There was material consumer harm as there were 106 complaints regarding the service.
- The cost paid by individual consumers was high – some consumers were charged several hundred pounds.
- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Service Provider supplied the Executive with false and misleading information in relation to the message logs which stated that regulatory messages had been sent when, in fact, this was not the case.
- The Tribunal considered that the Service Provider – Transact (Holdings) Ltd – was a new company and, as such, had no breach history. However, the Tribunal noted the breach history of Transact Group Limited, which had the same directors as the Service Provider and had been involved in similar services over this period. The Tribunal considered that, in these circumstances, it was reasonable to take this into account as an aggravating factor.

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

The revenue in relation to this service was in Band 1 (£500,000+).

Having taken into account the aggravating factors, mitigating factors and the other assessment criteria listed above, 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 number and seriousness of the Code breaches, and the revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- A fine of £250,000;
- The Tribunal ordered that claims for refunds are to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.