

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 14 October 2010 TRIBUNAL SITTING No. 64 / CASE 1
CASE REFERENCE: 843809

Service provider:	Mobile Interactive Group Limited, London
Information provider:	Bang Channels Limited, London
Type of service:	Virtual text chat and picture service
Service title:	'The Pad Picture Chat'
Service number:	84958, 88912 and all other shortcodes in relation to this service
Cost:	£1.50/£2 per text and £4/£4.50 per picture
Network operator:	All Mobile Network Operators
Number of complainants:	5

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

BACKGROUND

PhonepayPlus received five complaints in relation to the virtual text chat and picture service called 'The Pad Picture Chat', operated by Mobile Interactive Group Limited (MIG) and Bang Channels Limited, through the latter's 'Tease Me TV' brand.

The service was promoted on numerous Sky TV channels which advertised the service on the shortcodes 84958 and 88912. These channels all involved premium rate chat services and primarily live operator chat.

The complainants stated that interacting with the service had accumulated high, unexpected costs and some complainants said that their children (as young as 12 years old) had been able to access and interact with the service.

The Executive monitored this service and received message logs detailing consumers' experiences from both the Service Provider and the Information Provider.

The Service

The service was an SMS virtual chat and picture download service that was promoted on the Sky TV channels 902, 911, 912, 915, 916 and 959.

The service appeared to gain its customers by initially offering pictures of glamour girls for a charge of either £4 or £4.50 (Appendix A). The price point depended upon the particular shortcode used:

- 88912 - £1.50
- 84958 - £2.00

The TV promotions had a banner running along the bottom of the screen which provided further details of costs and service information, as follows:

'YOU MAY RECEIVE PROMOTIONAL MATERIAL BY SMS PICS COSTS 4 EACH CHARGED BY TWO REVERSE BILLED MESSAGES, YOU WILL BE SENT A WAP LINK YOUR PHONE MUST BE WAP ENABLED YOUR STANDARD DATA RATES WILL APPLY SUBSEQUENT CHAT MESSAGES RECEIVED COSTS 2 PER MESSAGE. TO OPT OUT TEXT STOP TO 84958 YOU MAY RECEIVE MARKETING MESSAGES TO STOP TEXT STOP TO 84958'

Once the consumer requested a picture from the service, the following promotion/service message was received – this was specifically for the virtual SMS chat part of the service:

'FREEMSG This is a virtual service! Reply with ur name d.o.b +18 only opt out txt stop, txts £2pics £4 max 2replies per txt cust/02081447453 Teasemetv'

Immediately having received the above text message, the consumer received the following two text messages, supplying and charging the consumer for the picture content initially requested:

1. *'http://www.basekramer.com/BKV3/files/fp.php?id=215723&p=a8 click her for pic hope you like it terms apply! 1of2 £2 pics are £4'*
2. *'hope you like the pic babe! Chat service will follow...Have fun!!! chat service qwill follow terms apply 2of2 £2'*

The service then started to send reverse-billed chat text messages to the consumer in an attempt to engage the age verification process.

The Executive commented that the order in which the text messages are displayed above was in line with how the Executive's monitoring phone had received them, but not necessarily the order in which the chat platform had sent them out.

The Investigation

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

The Executive conducted a preliminary investigation into the Information Provider's service on 26 August 2010. The Service Provider provided a full response to the Executive's breach letter, dated 13 September 2010, and additional responses dated 29 September 2010.

The Tribunal made a decision on the alleged breaches raised by the Executive on 14 October 2010, following an Informal Representation by the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE FAIRNESS (MISLEADING) (Paragraph 5.4.1a)

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

1. The Executive submitted that the service operated by initially offering pictures of glamour girls at a cost of £4 and £4.50 to consumers via promotions on Sky television channels (channels 900+).

The Executive submitted that the additional virtual SMS chat service had been briefly alluded to in the terms and conditions that ran across the bottom of the television screen banner (Appendix A) that read as follows:

'...SUBSEQUENT CHAT MESSAGES RECEIVED COSTS 2 PER MESSAGE. TO OPT OUT TEXT STOP TO 84958...'

It submitted that, once content had been requested, and, at the same time as the content was delivered (via two or three reverse-billed text messages), the service announced the virtual SMS chat element of the service to the recipient by way of the following text message:

'FREEMSG This is a virtual service! Reply with ur name d.o.b +18 only opt out txt stop, txts £2 pics £4 max 2 replies per txt cust/02081447453 Teasemetv'

The Executive submitted that it had monitored this service and noted that, although it had not responded to the promotion, the service commenced operation and billed the Executive for the receipt of a 'chat' text message.

It submitted that this had also been seen within the message logs provided by the Service Provider in relation to complainants' interaction with the service.

The Executive submitted that it was of the opinion that the promotion and the initial service text message for this virtual chat service had been misleading.

It submitted that the on-screen promotion had not made it reasonably clear that, by purchasing a mobile content picture, the user was also agreeing to enter a virtual chat service and incur additional charges without any interaction.

As a second ground, the Executive submitted that recipients of the initial virtual SMS chat-related text message (*'FREEMSG This is a virtual service! Reply with ur name d.o.b +18 only opt out txt stop, txts £2 pics £4 max 2 replies per txt cust/02081447453 Teasemetv'*) had been requested to reply to this text message. Furthermore, this text message confirmed that users would receive two replies per text message sent.

It submitted that it was of the opinion that it was a reasonable consumer expectation that, in not replying to this request, he or she would not be entered into the service and would not incur any additional charges, other than a charge for the picture initially requested.

Further, the Executive was of the opinion that the lack of information contained within the on-screen promotion(s) (Appendix A), and the manner in which the initial text message had been worded to recipients, whose intention was to simply purchase an item of picture content, was likely to have misled them into receiving and interacting with the virtual chat service and incurring further charges.

2. The Service Provider made reference to the Executive's submission that the banner that ran along the bottom of the television screen alluded, very briefly, to the terms and conditions of the virtual SMS chat service and said that it did not feel that this statement was accurate. It stated that the text chat service had been presented in the same font

size and prominence as the picture service (in the scrolling promotion at the bottom of the screen), and that the user had been notified again of the text chat service in the free SMS.

The Service Provider made reference to the Executive's monitoring exercise and said it believed the Executive had misinterpreted the service model and promotion. It stated that the initial service user message had prompted one picture request and one text chat billing cycle – and, in addition, a prompt to the user to complete the sign-up process by confirming their date of birth. The text size and prominence of the picture service and the text chat service in the scrolling promotional banner had been exactly the same. It stated that there had been an additional graphic that promoted the picture service – a small, rectangular box overlaid on the shortcode. It stated that, arguably, there could have been another box on the other side for the text chat service, and that it would work with the Information Provider to ensure that this was done, particularly if this small thing is what had caused the basis of the Executive's belief that *"the service operates by initially offering pictures of glamour girls"*.

The Service Provider provided a summary of the Information Provider's response and stated that its client understood the Executive's position, namely that consumers may have had an expectation that, by not replying to the chat service terms and conditions, they would not have incurred any additional charges, even though by sending their first user text message, they were entering into the text chat service. It further stated that the Information Provider acknowledged that, in order to have avoided confusion and to have enhanced clarity of the original terms, it may have been more appropriate to communicate the text chat conditions to the consumer via two free text messages, rather than one.

The Service Provider stated that the Information Provider had submitted all its promotional material to PhonepayPlus for compliance guidance and would act on any suggested changes immediately. In addition, consumers would now have to send a separate user text message to the service to initiate the text chat service.

3. The Tribunal considered the evidence and concluded that, in relation to the first ground raised by the Executive, it had not been clear from the television extracts viewed, nor the still images (Appendix A), what kind of service the consumer would be entering into when they texted in to receive a picture. It found that the screen graphics had been misleading, or were likely to have misled, as they did not make it clear the nature of the service. The Tribunal noted the presence of the rolling banner across the bottom of the television screen; however, found that it had not been sufficiently clear as to the mechanics or the nature of the service and, furthermore, had not been sufficiently brought to the attention of the consumer.

In relation to the second ground raised by the Executive, the Tribunal commented that there was insufficient evidence to find that the lack of information within the on-screen promotion, and the manner in which the initial text message had been worded, had misled consumers who had had the intention of purchasing content only. The Tribunal upheld a breach of paragraph 5.4.1a on the first ground only.

Decision: UPHELD on the first ground

ALLEGED BREACH TWO VIRTUAL CHAT SERVICES (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 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 the call logs it had received from the Service Provider in relation to the complainants' interaction with the service.

It also made reference to paragraph 7.3.3b of the Code and submitted that, every time users have spent £10, there is a requirement that the user must provide a positive response to confirm that they wish to continue with the service, and *"If no such confirmation is given, the service must be terminated"*.

It submitted that the call logs provided by the Service Provider demonstrated that the service had sent the cost reminder text message, as required by the Code. However, the call logs also demonstrated that the service had not terminated in the absence of a positive response to the spend reminder text message from the consumer. The service, without having received the required positive response, continued to send reverse-billed service text messages to the consumer.

The Executive made reference to examples from the call logs as follows:

07875*****

(08/06/2010)

- 22:36 - Service sends a spend reminder.
- 22:37 - Consumer sends a positive response to the service.
- Service continues.
- 23:06 - Further £10 has been spent and the service sends a spend reminder.
- The consumer then does not send a positive response, but is sent a further 15 reverse-billed text messages, some containing virtual chat text and others providing and billing for picture messages that have not been requested by the consumer.

(09/06/2010)

- 08:11 - The consumer responds.

07921*****

(24/06/2010)

This call log highlights where the service sends the spend reminder to the consumer, and then follows this up with further reverse-billed service messages, prior to receiving a positive response from the consumer:

- Service sends a spend reminder.
- Service then sends five reverse-billed text messages, without a positive response having been received. These text messages are not just billing for a picture sent, but also continuation of chat.

The Executive submitted that the call logs provided had demonstrated that the service had not required users to provide a positive response to the service once £10 had been spent, thereby permitting the continuation of the service.

2. The Service Provider made reference to the Executive's submissions in relation to the continuation of the service in the absence of a positive response from the consumer, and stated that paragraph 7.3.3b of the Code includes the following: *'as soon as is reasonably possible after the user has spent £10'*.

The Service Provider stated that it did not dispute that, on the face of it, the call log(s) appeared to demonstrate that this provision of the Code had been breached. However, it stated that the service was configured on the iTxt platform and functioned as follows:

The platform sent out the cost warning at as near to £10 as possible. One user text message would only trigger one operator response cycle (in this example, two service text messages at £2 each). If a user stopped texting in the message, he or she would stop being billed. Therefore, at any point when a cost warning was sent out, the user must have sent a user text message (positive response) to chat again and re-opt in.

The Service Provider provided a figurative example as follows:

1. User has spent £8, then texts in a user text message. This prompted two billed service text responses.
2. User receives first billed text message.
3. At this point, user has spent £10 and so receives a £10 spend reminder.
4. User receives second billed text message.
5. User will now not receive any more messages unless they send another user text message.

It stated that the above example showed how the system had responded correctly, in spite of call logs giving the appearance that there had been a potential breach of the Code. It stated that did not feel that it had breached the Code.

The Service Provider stated that, as it had previously explained, if a user stopped texting into the service, he or she would stop being billed. Therefore, at any point when a cost warning was sent out, the user must have sent a user text message to chat again and re-opt-in. However, as spend reminders must be sent as near to £10 as possible, during a text conversation, billed text messages from a previous request may fall after the spend reminder, giving the appearance the provision of the Code has been breached.

*07875******

After the spend reminder sent at 23:06 in the Executive's example, and 00:06 in its example (the time on the Service Provider's logs showed as an hour later because of GMT), the user received further billed messages because these text messages were outstanding from previous user text message requests.

*07921******

Again, the examples shown were due to previous user text message requests, but the spend reminder still needed to be sent every £10, whilst the chat request was fulfilled.

3. The Tribunal considered the evidence and concluded that, on further analysis by the Service Provider, the messages logs that it had provided appeared to demonstrate that the text messages had been sent in response to a user text message sent by the consumer, prior to the receipt of the spend reminder. The Tribunal accepted the Service Provider's argument and found no breach. The Tribunal did not uphold a breach of paragraph 7.3.3b of the Code.

Decision: NOT 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 Service Provider's behaviour was careless in its failure to check the service was compliant and in not performing ongoing monitoring of the service, given that this type of service has been singled out for criticism by PhonepayPlus.
- The cost paid by individual consumers was high. One consumer was charged over £900 in under a six-week period.
- This was a virtual SMS chat service, which is a category of service previously singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive.
- The Service Provider has provided refunds to users.

The revenue in relation to this service fell within the low range of Band 4 (£50,000-£100,000).

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**.

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

- A Formal Reprimand;
- A fine of £10,000;
- The Tribunal ordered that the Service Provider remedy the breach by seeking and implementing compliance advice to make the nature of the service clearer to the consumer;
- The Tribunal ordered refunds 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.

Appendix A – Screenshots of the television broadcast – ‘The Pad’

