

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

**Thursday 18 February 2010**  
**TRIBUNAL SITTING No. 47/ CASE 2**  
**CASE REFERENCE: 815838/GL**

Information provider:	Switchfire Limited, London
Service provider:	MX Telecom Limited, London
Type of service:	Virtual Text Chat
Title:	Sex contacts
Service numbers:	80007
Cost:	£1.50 per message
Network operator:	All Mobile Network Operators
Number of complainants:	9

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

### **BACKGROUND**

PhonepayPlus received nine complaints regarding a virtual chat service under the name 'Sex Contacts' operating on shortcode 80007. Complainants stated that the service was unsolicited, that they had been charged for unsolicited chargeable text messages and the 'STOP' command had not worked.

Complainants stated they were texting in for a car registration service which operated on shortcode 86007 and allowed users to identify the make, model, cost and performance of a car by texting its licence plate number. However, it appears complainants inadvertently texted the 'Sex Contacts' service shortcode 80007 as opposed to the car registration service shortcode 86007. The Executive established that even with no further interaction or participation, the complainants were entered into the 'Sex Contacts' virtual text chat service and charged by way of reverse billed text messages.

### **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 dated 16 December and received a formal response from the Information Provider on 8 January 2010.

The Tribunal made a decision on the breaches raised by the Executive on 18 February 2010, having heard an Informal Representation from the Information Provider.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

#### USE OF THE WORD 'FREE' (Paragraph 5.11)

*"No premium rate service or product obtained through it may be promoted as being free unless:  
a a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge, or  
b a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call."*

1. The Executive submitted that message logs in relation to the shortcode demonstrated the prominent use of the word 'FREE' in the first initial service text message as set out in the following example:

*"FREE MSG Hi Babe, r u ready to get FREE Sex contacts of girls who want 2 chat 2 u rite now? Reply with ur age, location +name now."*

The Executive submitted that the use of the word 'FREE' should not be used as the service was a premium rate service which charged £1.50 per text message and had not fulfilled the requirements as per code paragraph 5.11 for the use of the word free.

2. The Information Provider submitted that the service in question was promoted via print advertising. However all ten complainants had freely admitted that they were not reacting to a 'Switchfire' promotion and were actually reacting to the promotion of a car registration lookup service operating on a different shortcode (86007).

It stated that it did not own shortcode 86007 and had not operated a car registration lookup service. It stated that its system had reacted as if the users had texted into a location based chat and contact service and therefore it believed that the users were already part of the registration process.

The Information Provider made reference to the free service text messages cited in the Executive's submission and stated that it had been sent to users during registration and that this had not been a promotional message. As such paragraph 5.11 was not of relevance and it believed that this potential breach should not be upheld.

It also stated that paragraph 5.11 referred to a "service or product" being "promoted as being free" and that the text message in question had not discussed the service, but was discussing a specific inducement to get people to supply enhanced registration details. Specifically, the message says that if a user supplied their age, location, and name then they would receive free sex contacts. It stated that the text message did comply with paragraph 5.11 – specifically subparagraph (b) as the free sex contacts were free in that the text message containing the URL to access the free sex contacts was sent free-to-user, and following the URL costs nothing over standard network data charges.

It ask that the text message quoted by the Executive had been reworded without prompting by PhonepayPlus prior to any of these complainants being raised and well

before this case was assembled. It stated that only six of the complainants received the text message in question and a seventh was offered free pictures.

3. The Tribunal considered the evidence and was persuaded by the complainant message logs. It concluded that several users had received a text message that offered 'free sex contacts' and had subsequently received no free contacts and had been charged. The Tribunal upheld a breach of paragraph 5.11 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH TWO 'STOP' COMMAND (Paragraph 5.14)**

*"Where a 'STOP' command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of 'STOP' within any message to be sent by the user. When a 'STOP' command has been sent, the service provider must make no further charge to the user for the service."*

1. The Executive made reference to one specific message log as provided by the Information Provider and submitted that it indicated that the 'STOP' command was sent on the 16 June 2009 at 18:37 which the service confirmed as an opt-out. However, it submitted that a further charge of £1.50 was then sent on the 17 June 2009 at 00:03. It appeared that a breach of paragraph 5.14 had occurred as a further charge was made a day after the 'STOP' command had been sent and confirmed by the service itself.
2. The Information Provider made reference to the message log submitted by the Executive and stated that the user in question had not texted the word 'Stop' but had texted 'St0p' – using a zero as opposed to the letter 'o'. It stated that in hindsight it could see that the user had meant to text in 'Stop' however the user had not actually done so.

It stated that the Stop Command had worked and all the other complainants who had texted 'Stop' the service had ceased.

3. The Tribunal considered the evidence including a further example not cited in the Executive's submissions which was raised with the Information Provider at the Informal Representations. The Tribunal concluded that, on the basis of this further example and the acceptance of the breach by the Information Provider during the Informal Representation, the 'Stop' command had failed in relation to the specific complainant. The Tribunal therefore upheld a breach of paragraph 5.14 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE VIRTUAL CHAT SERVICE – NOBODY UNDER THE AGE OF 18 (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 after complainants texted a car license plate number to the wrong shortcode 80007, they were opted-in to the 'Sex Contacts' virtual text chat service. It submitted that whilst the service did ask for the age of the person, even if no age was given the service started and would begin charging the consumer. It submitted that, in light of this, the Information Provider had not taken all reasonable steps to ensure that nobody under the age of 18 used a virtual chat service as no confirmation of age verification had been required.
2. The Information Provider stated that the service in question was only promoted in adult media and could only be joined if the user texted in a valid keyword or a postcode. The users in question had texted in valid keywords or postcodes and had therefore been joined into the service. It stated that it had therefore been reasonable for its system to assume that the users were aged 18 or over.

It stated that this was a specialised flaw in its keyword detection code that was extremely unlikely to have been exploited accidentally by a child. It stated that it did not consider that children would text car registration numbers to shortcodes to ascertain their make, model, and age.

It stated that in any event, the question had to be raised and to see if it was reasonable to foresee the possibility of users texting the wrong shortcode with car registration numbers that look like postcodes, and hypothesising that some of these users may be children.

3. The Tribunal considered the evidence and concluded that it was not satisfied that all reasonable age verification procedures had been in place and did not give significant weight to the Information Provider's argument that the service had been advertised exclusively in adult media and that this could be considered as 'all reasonable' steps in these circumstances. The Tribunal upheld a breach of paragraph 7.3.2a of the Code.

## **Decision: UPHELD**

### **ALLEGED BREACH FOUR**

#### **VIRTUAL CHAT SERVICE – INFORMED OF THE PRICE PER MINUTE (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 made reference to one specific message log, dated 28 June 2009, as provided by the Information Provider and submitted that it indicated that information must be sent as soon as reasonably possible after a user spends £1, that informs the user of the price of the call.

The Executive submitted that this message log also indicated that £12 (8 x £1.50) had been charged before the information required following a £10 spend was sent. It submitted therefore that this information had not been provided as soon as was reasonably possible after the user has spent £10, as it should have been provided after £10 spend (7 x £1.50 = £10.50) not £12.

2. The Information Provider made reference to the message log submitted by the Executive and stated that some of the text messages (one of them being a reminder text message) had been sent in the exact same second. The text messages sent in the same second could be interchanged, in which case there would have been no breach at all. The Information Provider provided some background on bandwidths; and the issues surrounding Network latency.
3. The Tribunal considered the evidence and concluded that, bearing in mind the well known problem of network latency, the Information Provider had not taken all reasonable steps to send the £10 reminder text message before further charges were incurred by the user. The Tribunal also found that one call log showed no reminder text message had been sent at all. The Tribunal upheld a breach of paragraph 7.3.3a of the Code.

### **Decision: UPHELD**

#### **ALLEGED BREACH FIVE VIRTUAL CHAT SERVICE – REQUIRE POSITIVE RESPONSE TO CONTINUE (Paragraph 7.3.3b)**

*“All virtual chat services must, as soon as is reasonably possible after the user has spent £10, and after each £10 of spend thereafter:*

*b require users to provide a positive response to confirm that they wish to continue. If no such confirmation is given, the service must be terminated.”*

1. The Executive made reference to one specific message log, dated 28 June 2009, as provided by the Information Provider and submitted that it indicated that no positive opt-in after £10 spend although the service had continued to charge the user.
2. The Information Provider confirmed that the service had billed more than £10 after the last user text message.

It stated that all promotion of this service had been stopped in April 2009 (over eight months ago). The service was being wound down. The complaints were from June and July (over five months ago). It stated that since then the service had been made compliant.

The Information Provider also gave an indication as to how much each user had spent and stated that the majority of complainants had not spent over £10 and that those that had represented a technical breach.

The Information Provider stated that a "positive response" had only been defined within the past month and up until a month ago it had been of the understanding that the user could be billed £10 since the last "positive response" not that they must be cut off every £10 regardless of how many "positive responses" they gave before the £10 warning. It stated that this distinction is of relevance to the two users who had spent £12 before being cut off. Under the definition supplied last month this was a breach, however this had not been a breach before and therefore it understood that there had been no breach at the time that the text messages were sent.

It stated that all users charged over £10.50 had texted in more than just a keyword. They had interacted with the service in some way (beyond simply texting in 'Stop').

3. The Tribunal considered the evidence including the message log referred to by the Executive and concluded that there was no evidence of a positive response from the user. The Tribunal took into account the argument brought forward by the Information Provider, but in the absence of any evidence in support it decided on the balance of probabilities that there had been no positive response. The Tribunal upheld 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 Tribunal took the view that the Information Provider had taken insufficient care in ending its services during what it had described as the 'run down' its services.
- The Tribunal considered that there was no age verification and the service could have been potentially been accessed by children although there was no evidence that this had occurred in this case.
- The Information Provider's breach history.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive's investigation.
- The Information Provider asserted that it had provided full refunds to the consumers concerned.

The revenue in relation to this service was in the mid range of Band 5 (£5,000-£50,000).

Having taken into account the aggravating and 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;
- Fine of £10,000.
- The Tribunal imposed a bar on all of the Information Provider's adult services and related promotional material for a period of six months, suspended for three months (from the date of the publication of the adjudication) to enable the Information Provider to demonstrate, to the satisfaction of the Executive, that it has in place systems and processes; and the supporting governance structure and resources, to better assure future compliance with the Code. If, after three months, the Executive is satisfied in

accordance with the above criteria, the bar will be lifted; but, if the Executive is not satisfied, the six month bar will take immediate effect.