Case Refs: 807353/MS and 778256/CB

IN THE MATTER OF:

PHONEPAYPLUS LIMITED

Executive

- and -

TRANSACT GROUP (HOLDINGS) LIMITED

Respondent

ORAL HEARING DECISION

TRIBUNAL

Michelle Peters (Chair)
David Clarke
David Jessel

Hearing at the offices of PhonepayPlus Ltd
on 2nd and 3rd June 2010

A. **INTRODUCTORY**

1. This matter concerns alleged breaches of the PhonepayPlus Code of Practice (11th edition, amended April 2008) ("the Code") by the Respondent, Transact Group (Holdings) Limited ("Transact").

2. On 29th October 2009 a Tribunal held that Transact was in breach of the Code, and it imposed a fine of £250,000 together with a formal reprimand. Pursuant to Section 8.11 of the Code, Transact requested an oral hearing to consider the matter afresh. This took place on 2nd and 3rd June 2010 before the Oral Hearing Tribunal ("the Tribunal") chaired by Michelle Peters sitting with David Clarke and David Jessel.

3. The PhonepayPlus Executive ("the Executive") was represented by Mr Selman Ansari (of Bates, Wells & Braithwaite LLP). Transact was represented by Mr Brian O' Neill QC (instructed by Barker Gillette LLP). The clerk to the Tribunal was Muhammed Haque of Counsel.

4. The Tribunal makes a preliminary comment that whilst these proceedings are not equivalent to a court of law with strict rules of evidence, it should undoubtedly act in a manner consistent with natural justice and fairness, and in a way that furthers the interests of justice. The Tribunal reminds itself of its obligation under Paragraph 1.1 to:

> … *have regard to five principles of good regulation, namely: transparency, accountability, proportionality, consistency, targeting.*

5. The Tribunal further emphasises the importance, and necessity, of transparency and openness. The system set out in the Code places the regulatory burden heavily, but not exclusively, upon service providers. In particular, paragraph 3.3.1 provides that:

> *Service providers are responsible for ensuring that the content and promotion of all of their premium rate services (whether produced by themselves, information providers or others) comply with all relevant provisions of this Code.*

6. Because the Executive has no formal investigative powers, where all relevant information is retained within the service provider's control the Tribunal regards it as absolutely fundamental that the service provider be completely transparent in co-

operating with any investigation by the Executive. In these circumstances any lack of transparency would tend to undermine the entire regulatory process. The Tribunal therefore regards any attempt to mislead it or the Executive as extremely serious. The Tribunal equally regards any deliberate lack of co-operation, or failure to provide relevant information, as being very serious.

7. In determining the facts in this case the standard of proof is the balance of probabilities, the legal burden being on the party who asserts any issue. It is also common sense that where allegations of fraud or deception are made, then the evidence must be cogent and compelling.

8. However the Tribunal is also mindful of the fact that the Executive in many instances will not be in a position to obtain the relevant evidence or compel its production. This may of course also apply to the Respondent service provider. Thus, whereas the legal burden of proof may well remain with the party asserting, the evidential burden of proof could fall upon the party holding the relevant information. Where information has deliberately been withheld, the Tribunal may, if appropriate, draw adverse inferences against the withholding party.

B. THE DECISION

9. The Tribunal's decision upon the alleged breaches of the Code is as follows:

(i) Transact was in breach of paragraph 5.2 of the Code because the promotion of the services in question was unlawful.

(ii) Transact was in breach of paragraph 5.4.1(a) of the Code because the promotional material in question was misleading.

(iii) Transact was in breach of paragraph 5.4.1(b) of the Code because the services took unfair advantage of circumstances which made consumers vulnerable.

(iv) Transact was in breach of paragraph 5.7.1 of the Code because clear pricing information was not provided to users prior to them incurring a charge.

(v) Transact was in breach of paragraph 5.8 of the Code because the identity of the service provider was not clearly stated.

(vi) Transact was not in breach of Paragraph 5.12 of the Code.

(vii) Transact was in breach of paragraphs 7.3.3(a) and (b) of the Code because the services were virtual chat services but no £10 spend reminders were sent to any users.

(viii) Transact was in breach of paragraphs 7.12.4 (a) to (f) of the Code because users did not receive a subscription initiation message containing the information required by these paragraphs of the Code.

(ix) Transact was in breach of paragraph 7.12.5 of the Code because suitable subscription reminders were not sent to users.

10. The Tribunal's decision as to the sanctions to be applied as a result of the breaches of the Code is as follows:

(i) Formal reprimand.

(ii) A Fine of £167,959.

(iii) Refunds for the full amount spent by complainants who claim them, unless there is good cause to believe that such claims are not valid.

(iv) A 6 month prohibition on Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, being involved in or contracting for any premium rate text chat services with or without an element of dating.

(v) If Transact intends to resume text chat services following expiry of the prohibition it must, no earlier than 8 weeks and no later than 4 weeks before the end of the prohibition, take further compliance advice from the Executive on (a) the validity of the opt-ins it holds in relation to such services and (b) the promotion of such services, and implement that advice to the satisfaction of the Executive prior to commencing those services.

(vi) A 6 month bar on all premium rate services operated or promoted by Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, on shortcodes **80988, 80877, 80848 and 69991**

suspended for 3 months to allow Transact to promptly seek compliance advice on (a) the use of opt-ins for the services operating on those shortcodes and (b) the promotion of those services. Unless such advice is implemented to the satisfaction of the Executive within 3 months of the date of this Decision, the bar will take immediate effect.

C. FACTUAL BACKGROUND

History of Transact

11. Transact is a premium rate service operator which runs services including virtual chat and date services. According to information held at Companies House, the company changed its name to Transact on 30th June 2008, having been previously known as Transact Group (Holdings) PLC.

12. Transact's business depends upon consumers accessing its services by means of telephone and/or SMS. Upon doing so, those consumers receive a service of which an example is virtual text chat with an operator. In this example, consumers would be charged a fee depending on the number of text messages sent or received. Almost unique to this case, Transact is a mobile aggregator, a service provider and information provider all at once. It is thus in complete control of information through the value chain. This makes it all the more important that Transact co-operates fully with any investigation by the Executive.

13. The directors of Transact are Mr Kevin Swayne (Group Chairman) and Mr Barry Peak (Group Finance Director). Both have a long history of involvement in the premium rate telephone service industry. Their businesses include Netbanx Limited and the Great British Quiz. Relevant to this matter, they were also the directors of Transact Group Limited. This company provided the same, or very similar services, as Transact. Transact Group Limited has a very recent history of non-compliance. In 2008 it was held to be in breach of the Code on 4 occasions, the last being in September 2008. Fines and sanctions were levied on each occasion[1]. For reasons that have not formed part of the case before this Tribunal, liquidators for Transact Group Limited were appointed on 9th September 2009[2].

[1] 12th February 2008 (£10,000 fine); 28th August 2008 (£5,000); 11th September 2008 (£7,500); 11th September 2008 (£15,000).
[2] http://www.london-gazette.co.uk/issues/59199/pages/16720/page.pdf.

14. There has been a regrettable lack of clarity concerning the overlap between Transact and Transact Group Limited. It is a matter of record that they shared the same directors and had the same address in Great Shelford, Cambridge. Transact's website still states that Transact Group Limited is the data controller for Transact for the purposes of the Data Protection Act 1988[3]. There is unarguably a close degree of factual connection between the companies, even if they are legally separate entities. For reasons that will be expanded upon below, the Tribunal does not accept that the 'corporate veil' will extend so as to shield the actual knowledge of the directors of Transact from Transact Group Limited. They had the same controlling mind. Any submission by Transact that there was no real connection between the two companies would need to be supported by evidence. No such evidence was adduced at the hearing.

Transact's services

15. The first issue in this case revolves around the manner in which Transact's services were promoted to consumers, and whether or not those promotions were lawful. The second linked issue is whether or not consumers were unlawfully charged after receiving those messages.

16. Transact sent SMS and WAP-push messages to the mobile phones of consumers to whom, it says, it was entitled to send those messages by virtue of some form of consent or reliance on an 'opt-in'. The messages were sent via WAP-push and SMS for services which were either:

(i) WAP-based. The consumer would receive a WAP-push message containing a link for either virtual text chat or virtual chat with a dating element. The shortcodes from which Transact sent these messages were **80988, 80877** and **80848; or**

(ii) SMS-based. There were of 2 types:

(a) The consumer would receive a chargeable SMS from Transact which, in this case, contained a text message followed by a picture of a woman. The shortcode from which Transact sent these messages was **80877**.

[3] http://www.transactgroup.net/PrivacyPolicy.aspx

(b) The consumer would receive a chargeable SMS from Transact which, in this case, was part of a monthly subscription service ("the GOLD account"). The shortcode from which Transact sent these messages was **69991**.

17. Transact alleges that the persons to whom it marketed its services opted-in to receive those message in one of the following ways:

(i) Direct calls to Transact's Interactive Voice Response ("IVR") services whereby the user selected an option to be opted-in to future marketing.

(ii) Mobile originating (MO) SMS sent by consumers to Transact shortcodes to initiate other similar services.

(iii) Use of similar services on WAP sites operated by Transact which thereby entitled Transact to market other services to them (according to the terms of the WAP page privacy statement).

(iv) Consent given by consumers to another business (Fonedata) which allowed a third party such as Transact to market services to them (under the terms of the WAP site which Fonedata operated).

18. The Executive contends that either there was no such opt-in given by consumers, or that any such apparent opt-in was not 'fresh' and therefore no longer valid. It further contends that these consumers were unlawfully charged after receiving the free promotional messages.

Complaints

19. Between January 2009 and October 2009, the Executive received complaints from members of the public that messages were being received from the above Transact shortcodes without any prior solicitation or any other engagement by the consumer, and/or charges were being levied simply upon receipt of those messages. It goes without saying that these are serious complaints going to the core of the provision of premium rate services.

20. The Executive received at least 103 separate complaints. It is no more than common sense that this will not represent the totality of consumers affected. A high proportion of mobile phone users do not receive itemised bills or, when they do, will not scrutinise those bills. Even when errors are found, not all consumers will complain, particularly when the amounts are of a few pounds. The Tribunal therefore rejects any suggestion that the total number of complainants equates to the total number of consumers affected. It is overwhelmingly more likely, and the Tribunal finds, that there were many more persons affected than have complained though, of course, it is not possible to say how many more.

21. The Tribunal does not intend to set out all the complaints in this Decision. It notes that there were complaints from mothers of children and from a substantial number of women. The consistent thread running through nearly all of the complaints was the lack of any solicitation of the service or promotional messages. Illustrative examples of the dates and nature of complaints (over all the shortcodes in question) are:

(i) On 11th January 2009 a consumer complained of receiving 15 messages over 6 months. He initially thought nothing of it but only complained after noticing he was being charged.

(ii) On 22nd January 2009 a consumer complained that he had been receiving messages for 4 months. He would not check his bill but did so on this occasion to find he was being charged for those messages. He said he had never given his number away.

(iii) On 2nd February 2009 a lady from Maidstone complained that she had been charged £29.38 for messages received from a service she had never subscribed to. When she sent STOP she actually received another message thanking her for signing up to another service.

(iv) On 9th February 2009 a consumer complained of receiving 21 messages in the space of 21 minutes, and was charged £3 each time.

(v) On 24th March 2009 a lady from Derbyshire was charged over £60 in one month for messages that were actually sent to a mobile broadband wireless adapter, or dongle.

(vi) On 7th April 2009 a married lady complained that she was receiving unsolicited messages purporting to be from females.

(vii) On 20th May 2009 a consumer complained that he had been receiving and was charged for unsolicited messages from 1st July 2008. He had not received itemised bills, and it was only when he saw his bills online that he realised what had occurred.

(viii) On 28th May 2009 a consumer complained after which he received a cheque of £105 from Transact.

(ix) On 27th July 2009 a consumer complained about messages that had only started coming to him from 11th July 2009.

(x) On 30th July 2009 a complainant complained that her son who had learning difficulties was receiving messages from someone who pretended to be a female friend. She complained that her son was topping up his phone at £40 or £50 per time. The previous month his bill was £1,000. Her son was now very depressed as he thought he had found a genuine friend.

(xi) A consumer complained after receiving a message on 15th September 2009.

22. These suggest that consumers had been receiving unsolicited messages from mid-2008 to September 2009. After receiving the early complaints, and in circumstances described below, the Executive launched an investigation in about June 2009. This ultimately led to a Tribunal hearing of 29th October 2009. Since the Code provides that an oral hearing Tribunal should decide matters entirely afresh, the Tribunal has not taken heed of the findings of the previous Tribunal. It has determined this matter solely on the evidence with which it was presented.

D. THE REQUIREMENTS OF THE CODE

The Code

23. The Tribunal will briefly deal with those sections of the Code which it is alleged have been breached.

Paragraph 5.2 - Legality

24. Paragraph 5.2 of the Code provides:

> *"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."*

25. The relevant provisions of the law are found in the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("the Regulations"):

(i) Paragraph 22(2) prohibits (except in the circumstances permitted under paragraph 22(3)) the transmission or instigation of unsolicited communications for the purposes of direct marketing by means of electronic mail[4] unless the recipient has previously notified the sender that he consents for the time being to such communications being sent.

(ii) Under paragraph 22(3) a person may send or instigate the sending of electronic mail for the purposes of direct marketing where (a) that person has obtained the recipient's details in the course of the sale or negotiations for the sale of a product or service to that recipient, (b) the direct marketing is in respect of similar products and services only; and, (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

26. The Tribunal notes that the exception set out in paragraph 22(3) is commonly referred to as a "soft opt-in" and it adopts that terminology in this Decision.

27. The Executive allege that messages sent from shortcodes **80877, 80898** and **84048** are in breach.

[4] Regulation 2(1) defines "electronic mail" as any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service.

Paragraphs 5.4.1(a) and (b) – Fairness and Unfair Advantage

28. Paragraphs 5.4.1(a) of the Code provides:

> *"Services and promotional material must not mislead, or be likely to mislead in any way."*

29. Paragraph 5.4.1(b) of the Code provides

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

30. The Executive alleges that messages sent from shortcodes **80877** and **69991** are in breach.

31. These requirements should be interpreted in a case by case way. They are also fact-sensitive. What is misleading, or likely to be misleading, or what could be deemed as taking an unfair advantage, will depend on the precise contents of the promotional material and the context in which it is sent.

Paragraph 5.7.1 – Pricing Information

32. Paragraphs 5.7.1 of the Code provides:

> *"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."*

33. The Executive alleges that messages sent from shortcodes **80877, 80898 and 84048** are in breach.

Paragraph 5.8 – Contact Information

34. Paragraphs 5.8 of the Code provides:

> *"For any promotion, the identity and contact details in the UK of either the service provider or the 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."

35. The Executive alleges that messages sent from shortcodes **80877, 80898 and 84048** are in breach.

Paragraph 5.12 – Inappropriate Promotional Material

36. Paragraphs 5.12 of the Code provides:

"*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 harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way*."

37. The Executive alleges that messages sent from shortcodes **80877, 80898 and 84048** are in breach.

Paragraph 7.3.3(a) and (b) – £10 Reminder

38. Paragraphs 7.3.3(a) and (b) of the Code provides:

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."

39. The Executive alleges that messages sent from shortcodes **80877** and **80898** are in breach.

Paragraph 7.12.4(a) to (f) – No subscription information

40. Paragraphs 7.12.4(a) to (f) of the Code provides:

> *"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) how to leave the service,*
>
> *e) service provider contact details."*

41. The Executive alleges that messages sent from shortcode **69991** are in breach.

Paragraph 7.12.5 – No subscription reminder

42. Paragraphs 7.12.5 of the Code provides:

> *"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."*

43. The Executive alleges that messages sent from shortcode **69991** are in breach.

E. THE EVIDENCE

44. The Executive called oral evidence from Mr Mark Szemelka. Transact called oral evidence from Mr Kevin Swayne, Mr Barry Peak and Mr Jerome Van den Oever. The parties further relied on the witness statements of several persons who did not

attend the hearing. The Executive relied upon a statement from Mr S[5]. Transact relied upon statements from Mr Andrew Middleton and Mr Anthony Wilson.

45. Before the hearing the Tribunal Chair determined that all such statements would be allowed to be adduced by the parties, but that the Tribunal would determine the weight to be allocated to each after closing submissions.

Evidence on behalf of the Executive

Mr Mark Szemelka

46. Mr Mark Szemelka is an Investigations Executive employed by the Executive. He was the person charged with investigating this case. In his witness statement dated 4th March 2010 Mr Szemelka described the nature of the services provided by Transact. He stated that 127 complaints had been received from consumers from January 2009 in relation to unsolicited messages and charges from Transact, despite Transact Group Limited being fined on four occasions in 2008 in similar circumstances.

47. Mr Szemelka said that the Executive was considering what action to take when "out of the blue" it was contacted by Mr S, a former employee of Transact. Mr S provided the Executive with information of deliberate practices that, he said, had been going on within Transact which resulted in consumers receiving chargeable messages without their consent. He said that Transact had fabricated call logs sent to the Executive and that it had lied in the past about revenues earned. He recommended that Mr Szemelka should not take at face value any information supplied by Transact and should have anything received independently verified wherever possible.

48. Mr Szemelka said that the Executive naturally took this information seriously, but did not simply accept it at face value. It tested the allegations by using 4 mobile phone numbers with 'clean' SIM cards to monitor the services run by Transact ("the Executive Monitoring"). When these phones were used to call Transact's premium rate services no menu options were accessed from any Interactive Voice Response ("IVR") system. Transact's numbers were dialled, the service connected to for a short period before the connection was terminated. There was no consent

[5] Mr S's full name was disclosed to the Tribunal but it was agreed by both parties that he would be given anonymity in this decision.

actively given on any of the four occasions to receive either chargeable messages, or indeed any other message. In fact the following occurred:

(i) Each phone received the following message from shortcode **80877**: "*Thank you for calling out all new interactive multimedia service. Hope you enjoy yr picture xx*". Each message was charged at £1.50. A picture of a woman was then sent.

(ii) 3 of the phones received the following message from shortcode **69991**: "*U have 120 mins left in your GOLD account Call 01223 553147 to listen to yr content To close yr acc text STOP to 69991 (1/1@300p)*". Each message received was charged at £3.00 and continued to be received weekly until the Executive sent STOP to the shortcode.

49. Mr Szemelka said this provided cogent proof of many of the assertions made by the complainants and, on its face, seemed to corroborate the information that had been provided by Mr S. In the light of this Mr Szemelka sent letters to Transact on 9th June 2009 and 16th June 2009 seeking information about opt-ins and message logs for a series of mobile phone numbers including those used for the Executive Monitoring. Transact replied by letters dated 24th June 2009 and 7th July 2009. The call logs that were supplied incorrectly showed that the Executive Monitoring phones, as well as the complainants' phones, had received the correct free messages as required by the Code – the subscription initiation message (Section 7.12.4) and the £20 reminder message (Section 7.12.5). Mr Szemelka also sought to independently verify whether the complainants were sent any such free messages as suggested by Transact's call logs. He contacted Mobile Enterprise UK, a company which monitors call logs on the Vodafone network. Its records showed the complainants did not receive those messages.

50. Mr Szemelka sent a 'Breach Letter' to Transact on 6th August 2009. This set out the results of his investigations and raised the breaches which are before this Tribunal. Mr Peak responded on behalf of Transact by letter dated 3rd September 2009. He stated that the information provided was inaccurate due to technical failings and that the individual involved "*is no longer with the company*".

51. Thereafter Mr Szemelka requested information from Transact about the revenue generated from each of the shortcodes at issue. In a letter dated 17th September 2009 Mr Peak responded that £256,789 of revenue was attributable to the shortcodes. This has subsequently been revised to £167,959. Mr Szemelka

commented that he would have expected to have seen a much more detailed breakdown of the figures, including by service.

52. Mr Szemelka has provided a second statement dated 23rd March 2010. This is in response to Paragraph 70 of Mr Peak's first statement, with which the Tribunal deal below. Mr Szemelka says that he attempted to find the websites that Mr Peak relied upon in that statement saying that they were websites Transact used to advertise shortcode 69991. The first website, http://thexxxfactor.net, showed that it was intermittently operational in 2002 and 2008, but had no connection to premium rate services. The second, http://thesexfactor.net, showed that it was only operational in 2005, 2007 and 2008 but otherwise was not. Visual images were not available from the searches done and only a small number of pages were caches. Ownership searches showed that both domain names were available for purchase. Mr Szemelka commented that he did not see how they could have been used to promote 69991 (save potentially for http://thesexfactor.net for a period in 2008).

53. Under cross-examination Mr Szemelka said that whilst he had originally stated that there were 127 complaints, he accepted that the total would come down to 103 if Transact's submissions were correct that there were some duplicate complaints, complaints relating to shortcodes not belonging to Transact and other complaints for which Transact could find no record of the complainant's mobile number ever having accessed its services.

54. Mr Szemelka was cross-examined on matters relating to Mr S's credibility. Whilst these were put to Mr Szemelka, they are really matters for submission and will be considered below. He did accept however that he had not taken any steps to investigate Mr S. He was not challenged as to his findings in relation to the websites mentioned above.

55. A suggestion was made that Mr Szemelka had deliberately altered an e-mail from Mr Maguire of The Three Network. That e-mail stated it was possible for a system to be coded so that consumers could be charged as soon as they clicked on a WAP link i.e. before they had seen and agreed to the terms and conditions on the WAP site. This possibility was later agreed by Mr Peak. Mr O'Neill alleged that Mr Szemelka had removed the caveat from Mr Maguire's email which said that systems could also operate in the way suggested by Transact i.e. no charging until users had viewed the WAP site terms and confirmed they wished to proceed.

Mr S

56. The Executive adduced a statement from Mr S dated 15th March 2010. He was a previous employee of Transact. He said that he did not know precisely which business he was employed by, but that he was confident it was the Transact Group. He was the Division Technical Manager, and was also responsible for compliance with the Code.

57. He made several damning allegations which, if accepted, would result in the most serious of consequences for Transact. He stated that he was instructed by Mr Peak to continue the premium rate services in a manner that would result in the unauthorised charging as alleged by the consumers. He said that Mr Peak also "*spent a considerable amount of time wilfully helping to doctor PhonepayPlus responses and to sanction more and more extreme courses of "questionable" practice*." He said that Mr Swayne would comment that the "*naughty activities*" were expedient "*for now*". He said that he and Mr Peak would fabricate message logs if there was an investigation by the Executive. He said that they would make up revenue figures as they knew the Executive would not check. He said that the whole system was broken and that it was an "*exercise in deception*". He said that Transact decided to send WAP push messages to dormant mobile phone numbers in its database, some of which had not been used for years. He said that he set up the system so that consumers would automatically be signed up to the GOLD account without consumers requesting it via the IVR system.

58. Mr S was not called to give oral evidence. The Executive acknowledged that he was able and willing to do so. It decided not to call him only because it had not met with him to discuss the evidence in rebuttal produced by Transact.

Evidence on behalf of Transact

Mr Kevin Swayne

59. Mr Swayne's first statement is dated 12th March 2010. He was Group Chairman of Transact and said that he was not actively involved in the day to day running of the business. He relied on a corporate management structure to ensure that the business operated smoothly.

60. Under cross-examination he denied suggestions that there had been a complete loss of control within the company. He said that there was no failure of the company in

this case, but a failure of an individual. He agreed that there was not an appropriate structure in light of the breaches that had been raised, but he said that he learnt as he went along. He thought that he could not undermine an employee's authority by checking, but expected them to perform. He accepted corporate responsibility for the actions of Mr S.

61. He accepted that Transact Group Limited was made up of the same people as Transact. He was asked questions about the previous sanctions received and whether they set alarm bells ringing. Mr Swayne said that they did, and that Mr S was questioned afterwards. He accepted Mr S's explanations at the time. His attitude was that sometimes people do not get it right. He professed to be mortified that the breaches were upheld. When asked why he did not do anything about it, he said that Mr S was asked to ensure that the systems were correct. It was not directly put to Mr Swayne that he knew or instructed Mr S to carry out the illegal practices ascribed to him.

Mr Barry Peak

62. Mr Peak's first witness statement is dated 12th March 2010. He is a Chartered Accountant and the Group Financial Director of Transact. He dealt with the provision of inaccurate information provided by Transact to the Executive as stated by Mr Szemelka. He said that the reason why Transact's call logs showed that messages had been sent when, in truth they had not, was because of a technical failure. His explanation was that if Transact sent a message that actually failed, it would not be recorded as failing until a message was received from the mobile network operator. Until that time the sent message would be regarded as "pending". He said that unless the system was updated, "pending" messages were ignored. In practice, as the Tribunal understand it, this meant that messages were registered as being sent when in fact they were "pending". He said that the reason why incorrect information was supplied was because the system had not been updated.

63. Mr Peak explained that the reason the messages failed at all was because of a fault at a Gateway layer in Hong Kong. This was apparently not picked up because the Gateway logs ran into many thousands of lines per day, and the volume of regulatory messages was small. He said that after the problem was notified to him it was rectified by correcting the routing tables. He asserted that the misinformation had not been provided with any kind of malicious intent.

64. Mr Peak also challenged some of the Executive's assertions about the complainants. He also mentioned an article had appeared in the Daily Mirror which repeated part of the findings of the previous Tribunal. His opinion was that all the marketing messages sent by Transact were not unsolicited but "*were as a result of customers having either used similar services or having agreed to receive promotional messages and were fully legally compliant".*

65. He gave further evidence on the revenue figures of Transact. He said that the revenues generated for the WAP push promoted service only formed part of the overall revenues on the shortcodes in question. He said that of the promotional messages sent by Transact, only 5% were WAP push. The remaining 95% were SMS and not the immediate subject of complaint.

66. At Paragraph 70 Mr Peak said the following:

> *As stated above, the revenue generated on this shortcode was generated from subscription payments for website access on-off billing for content. In particular there were a number of websites for which subscription payments were taken at £3 per week. I attach herewith at Annex 5 examples of some websites that were generating subscriptions.*

67. The websites that were annexed were: http://thexxxfactor.net and http://thesexfactor.net. These purported to be subscription services which could be joined by texting keywords to shortcode **69991**. Mr Peak also mentioned that revenue was generated for Transact through two other websites, www.bluvu.tv and www.youporn.com.

68. Mr Peak provided a second statement dated 8th April 2010. This was essentially in rebuttal of the statement of Mr S. Mr Peak denies the allegations made against him and makes points which go against the credit of Mr S. A third statement dated 8th April 2010 made some general comments in response to Mr Szemelka's first statement (though it stated that it was commenting on the second statement). These are really by way of argument and the Tribunal needs not discuss them in detail here.

69. In examination in chief, Mr Peak explained which of the breaches were accepted by Transact. He said there had been different figures forwarded for the revenue

earned by Transact because of a confusion as to which periods were being used by the Executive.

70. In cross-examination Mr Peak was asked to show the "workings" behind his calculations. His evidence was that he took the figures from the Transact Gateway. He said that to provide further analysis would be to produce a document thousands of pages long, and which would not add to the understanding of the process.

71. When questioned about the complaints, Mr Peak's view seems to be that the complainants had opted-in in the past. He said that customers used similar services in the past. His view was that therefore Transact was allowed to market services of a similar nature to those customers. He was specifically asked whether he relied upon a soft opt-in. He answered that he did. When asked about the reference to the customer receiving messages to a dongle, he replied that it may be a recycled number.

72. He was asked about the Executive Monitoring and the fact that 3 out of the 4 monitoring phones used by the Executive had been subscribed into the GOLD service without consent when they accessed the IVR service. Mr Peak accepted that there was a breach. He said that this occurred because of a manual error. His explanation was that the collation of the mobile numbers of customers who had opted in via the IVR had been done manually and some numbers had been included in error by the employee doing this.

73. In relation to the Executive's allegation that recipients of WAP messages had been charged as soon as they clicked on the WAP link, Mr Peak agreed that it would be *technically* possible for recipients to be charged before a WAP page had even downloaded if it was programmed to do so. He did not agree that it had happened in this case, though he nevertheless maintained that any technical errors were due to Mr S. It was not put to him that he had doctored the system in collaboration with Mr S.

74. He was asked about the letter of 3rd September 2009 in which Transact stated that it had dismissed the employee responsible. It was put to him that this could not have been Mr S, since he had already left. Mr Peak said that it in fact referred to Mr W[6], the employee who had been responsible for users being wrongly subscribed to the

[6] Mr W's full name was disclosed to the Tribunal but the parties agreed he would be given anonymity in this decision.

GOLD account under the shortcode 6999. He said that Mr W had never been mentioned because, until Mr S's allegations surfaced, Transact had not actually mentioned any individual who was at fault by name.

75. When asked about the websites which apparently did not exist, Mr Peak said that the websites were not coming up when searched for online because they were no longer taking revenue. When pressed further he said that the websites may have been withdrawn because they were close in name to the X-Factor.

Jeroen van den Oever

76. Mr Van den Oever gave a statement dated 9th April 2010. He was Transact's Group Technical Director, but was called to generally comment on Mr S's evidence. He said that it was in the middle of 2007 that Mr S started building the initial version of the SMS Proxy. He worked on the MMU project towards the end of 2008 before moving to the 'live cam' project in or about February 2009. Because of complaints about Mr S, Mr Van den Oever approached Mr Swayne. Mr Swayne instructed him to review the code that Mr S had produced over the past 3-4 months. He said that after this review, the Transact Board decided not to renew Mr S's contract.

77. In his oral testimony Mr Van den Oever said that Mr S was unpredictable in nature, and tended to get excitable if he did not get his own way. In cross-examination he said that Transact had no previous reason to doubt Mr S's honesty. He said that he had not recommended an audit of Mr S's work because he had a good reputation. He could not recall when and how Transact discovered Mr S's breaches. He was only loosely aware that Mr S was responsible for the 2008 breaches by Transact Group Limited. He said that after Mr S left there was a top-to-bottom review of the code. The system was now that changes to the code could not be implemented without inspection by senior staff.

78. In answer to questions from the Tribunal he said that there was a code repository system now, which was not in place previously. This meant that it would be possible to identify when, and by whom, any changes were made. He said that when a consumer complaint came in it would not go to the technical department unless customer services thought that there was a technical issue. Mr Van den Oever said that the whole applications layer of Transact's systems was outside his scope and control.

Anthony Wilson

79. Mr Anthony Wilson gave a witness statement dated 7th April 2010. He was previously the Media Manager of Transact. He said that Mr S was in fact passing customer shortcode information to another company, Danx Limited, which was set up by Mr Wilson. Mr S was then apparently receiving £5,000 to £7,000 per month. He also said that he was contacted by Mr S in May 2009, who told him that he wanted to get his own back on Transact after his dismissal.

Andrew Middleton

80. Mr Andrew Middleton gave a witness statement dated 9th April 2010. He was previously the Chief Operating Officer of Transact. His statement directly rebutted many of the allegations of Mr S.

81. Neither Mr Middleton nor Mr Wilson were called to give evidence. They were either out of the jurisdiction or had medical problems which prevented them from attending.

82. Both parties made oral representations, supported by final written closing submissions. These together with all other submissions and skeleton arguments have been considered by the Tribunal.

F. THE TRIBUNAL'S FINDINGS

83. Overall the Tribunal was impressed with the evidence given by Mr Szemelka. He was forthright and gave his answers honestly and openly. He readily conceded points when put to him, but stood his ground when he felt it correct to do so. The Tribunal rejects the suggestion made by Transact that Mr Szemelka deliberately doctored e-mails from Mr Maguire. As well as making a positive finding as to his general credibility, there was no suggestion from him that systems could not operate properly in the way suggested by Transact if so programmed, or that there was any benefit to the Executive in concealing the caveat from Mr Maguire that this should be mentioned.

84. The Tribunal was less impressed with the evidence given by Transact's witnesses. In particular it found Mr Peak's answers to be unsatisfactory and the manner in

which he answered his questions to be defensive. It also finds that Transact did not come to the hearing with the transparency that it should have. It failed to call any technical evidence from person involved in 'correcting' Mr S's code, any evidence to verify its internal systems, any independent evidence to justify its revenue figures or, indeed, disclose its accounts or provide the source material from which its revenue figures were derived.

85. However the Tribunal does not reject all of Transact's evidence, since some of it was unchallenged under cross-examination or in the evidence. The Tribunal, as stated above, has determined all the issues on the balance of probabilities.

Relationship with Transact Group Limited

86. The Tribunal finds that Transact and Transact Group Limited were companies whose existence overlapped, whose directing and controlling minds were identical, and who shared the same premises and people. There is certainly no suggestion that these companies had different employees, different coding systems, used different gateways or were in any way independent.

The Complaints

87. The Tribunal finds that there have been at least 103 complaints made by members of the public from January 2009. It finds as a fact that there were probably many more potential complainants who, whether through ignorance, inadvertence or a reluctant willingness to accept relatively small financial losses, did not come forward. It also finds, on balance, that the evidence of complaints is accurate. This is based, in part, on the striking similarities in many of the complaints which demonstrate a large number of consumers experienced the same problems. Although the Tribunal acknowledges that occasionally complainants exaggerate or even fabricate complaints, saying they did not want to interact with the service which in fact they did, this behaviour is usually evidenced by the message logs showing some interaction with the respondents' service through mobile originated ("MO") text messages. In this case over 80 pages of detailed call logs revealed no MO messages from complainants other than the STOP command, despite them being billed amounts of £1.50 or £3.00 on a regular basis. On this occasion there is also clear evidence of a problem in Transact's system which would lead to the underlying cause of the complaints.

The Allegations against Mr S

88. The Executive seems to have implicitly accepted that Mr S was responsible for changing the code so as to allow consumers to be charged when they should not have been. This would include charging upon opening WAP-landing changes. In his closing submissions Mr O'Neill blamed Mr S for much of the technical failings within Transact. Mr Ansari gave no indication in his submissions that this was not accepted.

89. The Tribunal must express its frustration that despite collectively spending over £100,000 in legal fees, neither party thought it necessary to instruct an appropriate computer-systems expert in this case. Transact chose not to do so. The Executive has no power to compel Transact to allow an inspection of its systems, but its legal advisers did not make any such request of Transact. The Tribunal would have been greatly assisted by an expert who could have shown whether and, if so, how Mr S single-handedly, and without anyone noticing, reprogrammed sections of Transact's code. Nevertheless, absent any such evidence, the Tribunal finds that Mr S did alter the code in the manner that has been suggested.

Collaboration with Peak/Swayne

90. The Tribunal next deals with the serious allegations made by Mr S against Mr Peak and Mr Swayne that they collaborated with him in his deceit. It is the Tribunal's opinion that no weight at all can be placed upon the evidence of Mr S in relation to those allegations.

91. The Tribunal regards the reason that Mr S was not called to give oral evidence as exceptionally weak. A party cannot expect much, if any, weight to be attached to the written statement of a witness who is not asked to give evidence despite being perfectly able to do so. Additionally, there was persuasive evidence that Mr S had deliberately edited an MSN chat conversation with Mr Swayne in a way designed to detriment Mr Swayne. This would have put his honesty in considerable doubt in any event and, it was submitted by Mr O'Neill, could have amounted to an attempt to pervert the course of justice. It should be added that other rationale was advanced by Mr O'Neill for rejecting Mr S's evidence including falsifying aspects of his CV, and he relied upon the written testimonies of Mr Wilson and Mr Middleton. He submitted that their evidence should carry more weight than Mr S's evidence as they had good reason not to attend. Given the Tribunal's view as to the weight to

be attached to Mr S, the Tribunal does not need to make any express findings about the evidence of Mr Wilson or Mr Middleton.

92. It follows that the Tribunal finds that there is no evidence to implicate Mr Swayne and Mr Peak in any wrongdoing that may have been undertaken by Mr S.

Responsibility of Transact

93. Transact accepts corporate responsibility for the failings of Mr S. It is the Tribunal's finding, however, that Mr S was only able to do as he did because of a complete and catastrophic lack of control by Transact over their technical systems. It is also the Tribunal's finding that there were other failings within Transact that were independent of Mr S.

94. First, it is clear, on any view, that Transact failed to learn any lessons from the previous sanctions imposed against Transact Group Limited. Having apparently identified Mr S as the person at fault for all those breaches, Transact does not appear to have made any changes to its system. The complainant evidence, which has been accepted, is that complaints were being made from at least January 2009. In light of that, any responsible company should have again checked its code since something was clearly going wrong. The Tribunal finds that it did not, or did not do so adequately, since the complaints continued well into September 2009.

95. Secondly, Transact did not take any steps to monitor Mr S or check his work. The Tribunal completely rejects Mr Swayne's assertion that employees be left to get on with their work without corporate interference. Clear and similar findings had been made against Transact Group Limited only months beforehand. It seems that Mr S was identified as being responsible for those failings, yet absolutely no checks were taken to ensure that his errors were corrected. At best, Transact relied upon his word. This was not enough for such a serious breach. Transact simply did not appear to have put in any proper system of compliance after those breaches in 2008. Indeed, the evidence of Mr Van den Oever was that Mr S was able to input code into the system without anyone checking. This is a dangerous position for any company to leave itself in, and makes it vulnerable to both innocent and non-innocent actions of employees.

96. Thirdly, even after Mr S left Transact on or about 1st May 2009 it still took several months for any code to be checked and remedied. Indeed no technical steps appear to have been taken even following the Executive's Preliminary Investigation letter

dated 9th June 2009. This is an appalling failure, particularly given the previous sanctions paid by Transact Group Limited.

97. Fourthly, the Tribunal is concerned about the apparently defective Gateway in Hong Kong which only came to light after the Executive Monitoring. This was the reason given why consumers were not receiving the free regulatory messages. It seems, though it is far from clear, from Mr Peak's evidence, that this error was independent of any programming deceit by Mr S. It again shows a complete lack of regard to compliance. It demonstrates that Transact had a casual at best, and cavalier at worst, attitude to compliance.

98. Fifthly, and as will be discussed below, the very fact that demonstrably wrong information was given to the Executive demonstrates the wholly inadequate technical systems in place within Transact. It seems that this was caused by a combination of a Gateway failure in Hong Kong and an incorrect message recording system here. Both of these are independent of Mr S.

99. Sixthly, there was a complete lack of urgency in Transact's response to the new batch of complaints coming in 2009. It appears to have made refunds to many of the claimants, yet did not conduct any kind of investigation to determine why this level of consistent complaint existed. The Tribunal was not impressed with Mr Van den Oever's evidence that the technical team in Transact did not see the complaints unless they were considered to be caused by a technical fault, nor his assertion that, as Group Technical Director, he had no technical responsibility for the whole applications layer of Transact's systems. The Tribunal regards this as evidence of at best, a complete lack of concern by Transact for the quality of its customer-facing systems.

100. The Tribunal was not at all impressed in the failure of both Mr Peak and Mr Swayne to acknowledge the seriousness of the level of complaints. Mr Peak continued to insist that he was entitled to rely on old opt-ins, and that this was sufficient to satisfy the requirements of the Code. This, as the Tribunal has said above, shows a fundamental misunderstanding of the Code, made even more serious by the fact that Mr Peak and Mr Swayne profess to have years of experience in the industry.

101. Seventhly, during the hearing Mr Peak said that a Mr W was responsible for wrongly entering the details of subscribers to the GOLD service on shortcode 69991. This explained why the Executive Monitoring demonstrated that which it

did. However the Tribunal regards this explanation as unsatisfactory. This was not presaged in any of Transact's responses to the letters of the Executive before these proceedings, in any of the written evidence relied upon or any of Transact's submissions. Even if accepted, it seems that Transact relied on unchecked manual entries to go on to charge consumers considerable sums of money. It demonstrates a wholly disingenuous attitude to compliance.

102. For these reasons, the Tribunal finds that Transact had wholly inadequate technical systems in place and a near non-existent attitude to compliance. Whilst Mr S's actions may have been the reason for some of the complaints, it is undoubtedly the case that he was permitted to operate in an environment and for a company with scant regard to compliance. The Tribunal is of the view that even had the complaints been caused by incompetent coding (as opposed to malice by Mr S) then the technical systems in place within Transact still would not have recognised the problem. There was, therefore, actual and serious culpability on the part of Transact as well as the admitted corporate responsibility.

Evidence of Opt-ins

103. Transact first relied on a list of users who had used other Transact services and, as a result of which, Transact claimed to be able to send marketing messages to them for the services in question. Transact provided apparent opt-in information to the Executive in relation to these users. There was no source data which showed from where the information was derived. The majority of complaints were made on the basis that they had never opted-in. It is another frustrating part of this case that no independent verification was given by either party in relation to the opt-ins.

104. Transact said, through Counsel, that it had attempted to contact at least one network operator who had replied that they could not release the information for data protection reasons and reasons of proportionality. However Transact did not then take any more steps. The Executive had also not apparently attempted to verify the information by asking the network operators to provide proof of the MO (mobile originating) opt-ins sent by users to other services upon which Transact relied.

105. As above, the Tribunal has accepted the record of complainants that they did not directly solicit these services from Transact, nor did they give consent to receive unsolicited marketing messages from Transact. This inexorably follows from Mr

Peak's evidence in which he accepted that Transact relied on a soft opt-in, rather than any form of consent from the customers on Transact's database. He said that customers on Transact's database were sent promotional WAP push messages in relation to these services because they had accessed other similar services provided by Transact.

106. The Tribunal takes into account the possibility that some complainants may have accessed another Transact services in the distant past and forgotten about it, or are simply reluctant to admit the same. Transact's own evidence shows some of the opt-ins go back as far as 2004. Even if they had accessed those other services, they would not necessarily have realised at the time (let alone recalled later) that Transact was going to send them marketing messages in relation to other services in the future, which would explain why many complainants simply said the subsequent messages were unsolicited. Mr Ansari invited the Tribunal to conclude from the complaints evidence (and in the absence of any evidence to the contrary from Transact) that these users had not been given an opportunity to decline further marketing at the time their details were collected, as required if Transact wished to rely on paragraph 22(3) of the Regulations, because if they had been given such an opportunity, they would have recalled it.

107. However, the Tribunal does not need to make a finding on whether complainants had accessed another Transact service in the past, nor whether, if they did, such a service was "similar" for the purposes of the Regulations, nor whether they were given an opportunity to opt-out at the time their details were collected. This is because the message logs clearly show that WAP push promotional messages did not provide the recipient with a simple means of refusing further marketing (for example by including words such as *Text STOP to [shortcode]*). On that basis, Transact did not comply with paragraph 22(3) of the Regulations when sending the promotional messages for the services in question. It cannot, therefore, rely on a "soft opt-in" in any event.

108. The Tribunal rejects Mr O'Neill's submission that all the messages did contain a "*STOP"* message. He identified subsequent service messages sent under shortcodes **80898** which contained the message**,** but failed to address the point that none of the initial messages contained the "STOP" message. This also applies to shortcode **80877**. Indeed the logs also show that <u>none</u> of the messages sent from shortcode **84048** had any STOP information, chargeable or otherwise.

109. The second type of opt-in evidence relied upon by Transact was the customer details purchased from Fonedata. Transact's witnesses were not asked about this evidence during cross examination.

110. The information presented by Transact in relation to the Fonedata opt-ins was, like the other opt-in information, lacking in any evidence as to its source (other than that it had been supplied by Fonedata) or any substantiation or means of verification. It consisted merely of a list of mobile numbers of users who had allegedly visited a WAP site called vis-videos.com with a list of time and date stamps to show when this was supposed to have taken place. The Tribunal was concerned that this was not evidence of opt-ins, but merely assertion.

111. According to the documents presented to the Tribunal, the privacy statement on that 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 we think you may enjoy. By entering this site you also agree that 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 at any time to 81404 or calling customer support on XXXXXX"*

112. The Executive did not specifically seek to challenge the Fonedata evidence; it merely said that Transact's opt-in evidence was invalid.

113. The Tribunal has concluded that it does not need to make a finding of fact in relation to whether or not the users listed by Fonedata did, or did not, visit the WAP site or see the privacy statement. This is because the Fonedata opt-ins do not, in the opinion of the Tribunal satisfy the requirements of the Regulations because:

(i) They cannot amount to a soft opt-in under paragraph 22(3) of the Regulations. Soft opt-ins can only be relied upon where the person or legal entity seeking to send direct marketing messages is the same person or entity which collected the details originally in the course of a sale or negotiations for sale of its own similar products or services. In other words, a soft opt-in cannot be relied upon where the user's details have been obtained from a third party.

(ii) Although it is not clear that Transact was relying on these opt-ins being "consent" for the purposes of paragraph 22(2) of the Regulations, the Tribunal is of the view that the wording in the privacy message, even if seen by the users whose details were provided by Fonedata, was not sufficient to give consent for Transact to send them unsolicited direct marketing messages. This is because the Tribunal does not consider it sufficient to rely on a statement in the "small print" (in this case, very small print) which requires a user to opt-out if he or she does not wish to receive messages from a third party and, further, which does not allow that opt-out to be given at the time the customer's details are collected. The Tribunal interprets paragraph 22(2) to require an active consent on the part of the user and not the mere failure to take steps, at a later stage, to indicate a wish to opt-out.

114. In relation to the complainants who said they were subscribed to the GOLD service without their consent (including 3 of the 4 monitoring phones used by the Executive), Transact admitted that these users had not given their consent and they had been wrongly subscribed due to a manual error on the part of a Transact employee.

The Investigation by the Executive

115. It is accepted by Transact that incorrect and misleading information was given to the Executive. This in itself is a serious matter in light of the opening comments of this Decision.

116. It was agreed that Transact's systems failed to send out the free messages required by the Code. Mr Peak said that the reason why Transact's logs did not record this failure was because the message was logged as 'sent' but was in reality only 'pending' until a 'fail' was confirmed. It was only when a 'fail' was confirmed that the message would be removed as 'sent' from the system. This would occur when the system was updated. There was again no independent technical evidence adduced in support of Transact's explanation though it does not seem that any request for the same was made by the Executive.

117. It appears to the Tribunal that Mr Peak's evidence was an explanation that fitted the facts. It was, and remains, assertion. However the Tribunal reminds itself of its duty to consider the evidence on the balance of probabilities and the level of cogent proof required for a very serious allegation of deception. On a very narrow balance,

and with considerable hesitation, the Tribunal accepts the explanation given by Mr Peak. Had the Executive made a request that such information be provided and Transact refused, the Tribunal would not have been deterred from finding that Transact had deliberately altered its logs to mislead the Executive. The fact that such expert evidence, or underlying data, was not positively forwarded by Transact is something the Tribunal will bear in mind when assessing the sanction to be imposed upon Transact.

The Website Evidence

118. The Tribunal finds that there was a deliberate attempt to mislead made by Mr Peak. He said that two websites: http://thexxxfactor.net and http://thesexfactor.net were used to advertise services on shortcode 69991. The reason Mr Peak adduced this evidence was to show that this shortcode was used to run other services which were not promoted through WAP Push messages. Mr Szemelka's investigations showed this was unlikely to have been the case. Mr Szemelka's evidence on this point was not challenged during cross-examination, and Transact have not produced any other evidence against it. They had ample opportunity to do so, and chose to rebut other parts of the Executive's case. They remained silent in relation to the website evidence. The Tribunal rejects Mr Peak's weak assertions in his evidence that the website may have been withdrawn or not launched because of a similarity to the "X-Factor" or that they did not generate any revenue. This was a comment made in response to a searching question, and made without any evidential basis. It also does not make sense. The very purpose that Mr Peak adduced the website evidence was to show that there were other services through which Transact generated revenue on shortcode 69991 so it is reasonable for the Tribunal to expect him to select his best examples to put into evidence, not the worst ones. Accordingly the Tribunal finds that there was no other website generated revenue on this shortcode.

119. This was a very serious deception by Mr Peak as it goes to the central matter for Transact – namely the level of revenue which should be taken into account by the Tribunal. The Tribunal takes the dimmest view of Mr Peak's conduct here and will bear this in mind in considering the sanctions as well assessing the Executive's case that there was a pattern of deliberate evasion. It was suggested during the cross-examination of Mr Peak that the print advertising provided – which purported to consist of photocopies of pages from magazines with adverts for other services running on the shortcodes in question – was without provenance and therefore could not be trusted. The Tribunal had some sympathy with that submission since

it would have been the easiest thing for Transact to produce a schedule of advertising or pages with dates which could be verified. The Tribunal finds it was presented with no cogent evidence that other services were advertised on the shortcodes in question through print media.

The Revenue Information

120. The evidence of Transact was that a total of £167,959 was generated across the shortcodes in relation to the WAP push promoted services complained of which, it says, the percentage of "wrongly generated" income (i.e. revenue generated from complainants) was between 0.12% and 2.07%.

121. The Tribunal does not accept that any real attempts have been made by Transact to be full and open about the revenue they have received via the shortcodes in question. Transact is a company which, according to documents supplied by it, has had an annual turnover of between £6.5 million and £8.5 million since 2007. Transact Group further had a turnover of between £10 million and £27 million between 2000 and 2009. However Transact has not supplied the raw data from which the Tribunal could check the revenue figures claimed. It has not supplied any accounts, or anything which could come close to satisfying a competent auditor. The Tribunal accepts the Executive's submission that it was for the first time during cross-examination that Mr Peak said the reason he could not provide any further figures was because it would run to thousands of pages. The Tribunal does not accept, however, that this is a reason why a sample could not have been given.

122. Given the poor evidence, all of which is in the possession of Transact, the Tribunal does not accept Transact's figures at face value. However it is also reluctant to engage in speculation as to the true level of revenue. It is sufficient for the purposes of this Decision that the Tribunal finds that at least £167,959 was generated by the shortcodes in question.

123. The Tribunal does not accept that of £167,959 only £17,000 was retained within Transact. Transact did nothing to support any such assertions or provide adequate documentary information of any profit margins. Furthermore Mr Peak's oral evidence was that 2/3rds of the revenue was accounted for by services through Transact-owned Information Providers, so 2/3rds of revenue received from the mobile networks would have been retained within Transact Group (Holdings) Ltd. This, on the face of it, seems to contradict the assertion that only £17,000 was retained.

G. BREACH OF THE CODE

Breach 1: Paragraph 5.2 - Legality

124. The Tribunal finds that Transact is in breach of Paragraph 5.2 in relation to the promotional messages sent from short-codes **80877, 80898** and **84048**. These were unlawful pursuant to the Regulations for the following reasons:

(i) The initial WAP push messages were sent for the purposes of direct marketing.

(ii) The Tribunal finds that the WAP push messages sent by Transact were unsolicited because users had not invited the messages by, for example, texting a keyword to the shortcode or, in the case of those wrongly subscribed into the GOLD service, by selecting the relevant option from the IVR system when they called the premium rate number.

(iii) With the exception of the opt-ins provided by Fonedata (which are addressed separately below), Transact did not rely on recipients having given consent for the time being to receive unsolicited marketing messages for the purposes of direct marketing under paragraph 22(2) of the Regulations, meaning it relied on the soft opt-in under paragraph 22(3).

(iv) Transact could not rely on a soft opt-in because the WAP push promotional messages it sent to recipients did not comply with sub-paragraph 22(3)(c) of the Regulations which requires that the recipient is provided, in each communication, with a simple method of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing.

(v) In relation to the promotional messages sent to the customers acquired from Fonedata, Transact could not rely on a soft opt-in because paragraph 22(3) of the Regulations does not apply to marketing sent from third parties (which is what Transact was in that case).

(vi) Further, the opt-in data provided by Fonedata was invalid for the purposes of allowing Transact to send unsolicited direct marketing messages to those users under paragraph 22(2) of the Regulations because the wording and

prominence of the privacy statement was not sufficient to infer that users had given consent to receive unsolicited direct marketing messages from third parties.

(vii) Transact admitted that no consent of any kind was obtained from the 400 users who, as Transact admitted, had been wrongly subscribed to the GOLD service.

Breach 2: Paragraph 5.4.1(a) – Misleading Messages

125. The Tribunal finds that Transact is in breach of Paragraph 5.4.1(a) in relation to messages sent from shortcodes **80877, 80898** and **84048**. These were misleading for the following reasons:

(i) The WAP-push messages appeared to be from genuine people encouraging friendship. Examples were "*You about? Lucy x"* and "*Fancy chatting with me? Suzie"* and "*You about for a chat? Antonia".*

(ii) The failure (in some of the messages) to include a clear customer service number further added to the illusion that they were from genuine people. But even the messages which included a telephone number with the letters "c/s" next to the number were misleading as it was not sufficiently clear that this was a customer services number and that therefore the message was a commercial one.

(iii) Consumers were able to click on a message and be charged despite trying to cancel it before entering the next part of the process. The complainant's evidence on this is accepted. This is considered below.

(iv) The message contents also did not make it clear that the recipient would be charged by clicking on the link.

126. Transact accepted the breach in part.

Breach 3: Paragraph 5.4.1(b) – Unfair Advantage

127. The Tribunal finds that Transact is in breach of Paragraph 5.4.1(b) in relation to messages sent from shortcodes **80877** and **69991**. These messages took unfair

advantage of circumstances which made consumers vulnerable for the following reasons:

(i) The Executive Monitoring showed that consumers could be subscribed into the subscription service on the GOLD account and receive chargeable messages without consent or even any positive interaction other than the act of calling the IVR service.

(ii) Having called the IVR service, and thereby provided their mobile numbers to Transact, consumers could not then prevent receipt of these chargeable messages from Transact. These were circumstances which made them vulnerable.

(iii) Transact took unfair advantage of these circumstances by sending these consumers chargeable messages without their consent.

128. Transact accepted the breach in full.

Breach 4: Paragraph 5.7.1 – Pricing Information

129. The Tribunal finds that Transact is in breach of Paragraph 5.7.1 in relation to messages sent from shortcodes **80877, 80898** and **84048**. These messages did not contain pricing information. The Tribunal accepts the evidence of the complainants that:

(i) They received unsolicited WAP push messages.

(ii) The messages did not indicate that the complainants would be charged when they clicked on the WAP link in the message without prior notification of pricing information.

(iii) It was possible to click on a WAP link and then cancel it, but still be charged before entering the WAP site and seeing pricing information on the site.

(iv) Subsequently, some complainants received many messages over a short period of time, for which they were charged, many of whom had not seen any pricing information before incurring a charge.

130. Transact did not accept this breach. It insisted that its coding did not permit users to be charged simply by clicking on the WAP link. The Tribunal regards this as a puzzling stance given (i) the acceptance by Mr Peak that it was theoretically possible to set up a system this way; (ii) Transact's submissions that Mr S had altered code without anyone knowing, and (iii) Transact's submission that Mr S was to blame for other breaches caused by altering Transact's coding.

131. It would also follow from Transact's non-admission that it does not accept that Mr S played any part in this breach. Accordingly it would be open to the Tribunal to conclude that this breach is solely the responsibility of Transact, and that it had internal errors in its coding not produced by the improper conduct of Mr S. However it may be that this non-admission was an error caused by Transact's legal team in failing to advise that Transact should accept the breach. The Tribunal therefore does not draw any adverse inferences from this non-admission.

Breach 5: Paragraph 5.8 – Contact Information

132. The Tribunal finds that Transact is in breach of Paragraph 5.8 in relation to messages sent from shortcodes **80877, 80898** and **84048**. These messages did not contain the correct contact information. None of the promotional messages contained the identity of the service provider.

133. Transact accepts this breach in part. It says that the Transact customer service number appeared on the promotions, and that the fact that a substantial number of the complainants contacted Transact directly is testament to the fact that the contact details were available and that this was the most important requirement. The Tribunal does not accept this argument as being material to the issue. The Code is very clear on what is required. When consumers are receiving promotional messages it is important that they know who sent those messages, as well as receiving a helpline number. If, for example, they are not satisfied with the advice received from the helpline, or they cannot get through to an operator, then without the actual information as to who runs the service it becomes more difficult for a complaint to be continued. It is not a technical breach as Transact alleges. This only serves to demonstrate that Transact does not take its compliance obligations seriously.

Breach 6: Paragraph 5.12 – Inappropriate Promotion

134. The Tribunal finds that Transact is not in breach of Paragraph 5.12. The Tribunal finds that, on balance, the WAP push messages would not have been offensive or harmful to the majority of recipients.

Breach 7: Paragraph 7.3.3(a) and (b) – No £10 Reminder

135. The Tribunal finds that Transact is in breach of Paragraph 7.3.3(a) and (b) in relation to messages sent from shortcodes **80877** and **80898**. No £10 reminders were sent to any user of the services. Transact accepts this breach, saying that Mr S was responsible.

Breach 8: Paragraph 7.12.4(a) to (f) – No Subscription Information

136. The Tribunal finds that Transact is in breach of Paragraph 7.12.4(a) to (f) in relation to messages sent from shortcode **69991**. No subscription initiation message was sent prior to users being opted-in to the subscription service, as proven by the Executive Monitoring. Transact accepts this breach, saying that Mr S was responsible.

Breach 9: Paragraph 7.12.5: No Subscription Reminder

137. The Tribunal finds that Transact is in breach of Paragraph 7.12.5 in relation to messages sent from shortcode **69991**. No subscription reminder was sent either monthly or when the user had spent £20, as proven by the Executive Monitoring. Again Transact accepts this breach, saying that Mr S was responsible.

H. SANCTIONS

The Impact of Breach

138. The PhonepayPlus Sanctions Guide provides that non-exhaustive considerations to sanctions include:

(i) The revenue generated by the service

(ii) Materiality

(iii) Actual consumer or societal harm

(iv) The effect on vulnerable groups of people such as children

(v) The potential for further material consumer harm

(vi) The degree of trust that the party in breach enjoyed

(vii) The loss of confidence of consumers in premium rate services

139. As to (i), in this case the Executive argued that the entirety of the revenue generated by the shortcodes in question should be taken into account, and not just that generated by the issues at hand. This would be a figure in the region of £1,000,000 though, again, there was no independent means of checking or verifying the figure sought. Transact argued that the wrongly generated income (i.e. revenue generated from customers who had complained) was only in the region of £1,746 out of a total revenue of £167,959.

140. The Tribunal does not agree with the approach sought by the Executive. Whilst there may be considerable aggravating features, the Tribunal does not agree that it is reasonable or proportionate to take into account revenue generated from services that have not been criticised. It also does not agree with Transact's argument that the only relevant revenue is that spent by the complainants or alternatively Transact's own profit from running the services which have been found to be in breach. The correct approach is for the Tribunal to consider the service provider's gross revenue, which means the total spend by customers less the network's share and VAT.

141. The Tribunal considers the relevant revenue figure to be at least £167,959. However, as indicated above, the Tribunal is far from satisfied that this is the totality of the revenue generated. Transact has been opaque with the evidence it has chosen to adduce.

142. As to (iii) there has been clear and serious consumer harm. The Tribunal regards the number of complaints to be high, and the individual sums also to be high. Mr O'Neill stresses the fact that the highest sum involved was only £88. The Tribunal regards this as being high. It also notes that sums in excess of £100 were refunded by Transact. It also notes that some complainants made complaints for much

higher sums and, further, that not all persons who suffered losses would be complainants. More significantly, the Tribunal regards as highly damaging the fact that the complaints did not just receive unsolicited messages, which would be serious enough, but were also unknowingly charged for those messages. It is not easy to see how the individual consumer could be more materially affected.

143. As to (vii) the Tribunal regards that the breaches by Transact is highly likely to have lead to a loss of confidence in premium rate services amongst those users who were affected. The sheer number of complainants, and the fact they are about mis-charging and not just unsolicited promotion, is testament to this fact.

Aggravating Factors

144. Aggravating factors which may increase the severity of the sanction:

(i) Continuation of the breach after the party in breach has become aware of the breach or been notified of the breach by PhonepayPlus.

(ii) Incomplete, inaccurate or false information supplied by a party in breach as part of a defence.

(iii) Failure to co-operate with the PhonepayPlus investigation.

(iv) The past record of the party in breach for breaches of this nature.

(v) The past record of the party in breach in relation to breaches of the Code.

(vi) The fact that the breaches occurred after the publication of sanctions warnings on similar services (for example, diallers or concealed subscription services).

145. As to (i), complaints continued to be made after June 2009 and continued into September 2009. As the Tribunal has found, this was indicative of a wholesale technical failure and non-existent attitude to compliance.

146. As to (ii), incomplete, inaccurate and false information was supplied to the Executive. The Tribunal has made its findings of fact in relation to the same above. However, the more serious deceit was the website information supplied by Mr Peak. This was obviously false as demonstrated by the evidence of Mr Szemelka.

This was a serious attempt to manipulate and mislead the Executive and this Tribunal.

147. As to (iii), the Tribunal is of the opinion that Transact has only nominally co-operated with the investigation. It has provided inadequate opt-in information. It provided incorrect call logs. It only disclosed the fact there was a defective gateway in Hong Kong very late in the day. It has not called evidence from anyone (expert or lay witness) who has had the opportunity to scrutinise Transact's source code. It has not served copy of its accounts, or disclosed any of the raw material from which it produced the figures that it has asserted represented its revenue.

148. As to (iv) and (v) the Tribunal considers that it is relevant that Transact Group Limited suffered sanctions for near identical breaches in 2008. From the evidence seen by the Tribunal, these companies were identical in everything but legal title. They had the same address, same systems, and the same employees and had the same directors. If the Tribunal is wrong in its assessment, it is only because Transact have again been opaque in disclosing the true nature of the relationship between these companies. The Tribunal however will bear in mind that these are 2 separate legal entities.

149. As to (vi) concealed subscriptions services have been a recognised problem for some time, and PhonepayPlus has issued express sanctions warnings relating to it. The fact that this case involved a concealed subscription service is an aggravating factor.

Mitigation

150. Mitigating factors which may reduce the severity of the sanction are:

(i) The extent to which any breach was caused, or contributed to, by circumstances beyond the control of the party in breach

(ii) The extent to which the party in breach has taken steps in advance to identify and mitigate external factors and risks that might result in the breach

(iii) The extent and timeliness of any steps taken to end the breach in question and to remedy the consequences of the breach

(iv) The steps taken, or planned, by the party in breach to prevent future breaches of the Code

(v) The extent to which the party in breach has co-operated with, and supported the purpose of, the PhonepayPlus investigation.

151. As to (i) and (ii) the Tribunal accepts that, if a breach takes place despite a service provider taking all possible measures to try to prevent it, then this would be significant mitigation. It accepts that Mr S was solely responsible for changing the coding within Transact. However the Tribunal does not accept that Mr S was a third party completely beyond the control of Transact since he was an employee.

152. The Tribunal also does not accept that Transact was completely blameless in allowing Mr S to do the things he did. The Tribunal has no doubt whatsoever that the breaches have arisen in this case because of the complacent attitude to compliance that was prevalent within Transact, and amply demonstrated at the oral hearing as set out above. There was little, if any, control of the technical systems within Transact and, at best, only lip service was paid to compliance.

153. It is patently clear that Mr S's actions went unchecked after the 2008 fines were levied. Mr Peak and Mr Swayne seem to have simply accepted that things can go wrong, and do not appear to have independently checked Mr S's coding. The Tribunal considers that a thorough risk assessment and due diligence process should have been carried out after the 2008 fines. To make matters worse, Transact did nothing when complaints continued to be received in January 2009.

154. Mr Swayne's and Mr Peak's evidence that they simply relied on Mr S was naïve at best and reckless at worst. Mr S was a man who had, on their evidence, caused them to be in breach of the Code in 2008. Mr Swayne claimed to be mortified by the breaches. It is a pity he was not equally mortified by the previous breaches or that he did not do something about them. There is no evidence that Transact instigated any disciplinary measures against Mr S in 2008, or conducted any kind of internal investigation which uncovered Mr S's coding transgressions. The Tribunal find the relaxed attitude of Mr Swayne indicative of the lax compliance regime within Transact.

155. As to (iii) and (iv), Transact has asserted that it has taken steps to remedy the breaches. The Tribunal regard these as no more than assertion. Transact has again

chosen not to adduce any actual evidence to prove that it has complied into the future. The Tribunal has seen no evidence that Transact's due diligence procedures had been improved. However it will assume this in Transact's favour in arriving at its sanctions.

156. The Tribunal further notes the other mitigation forwarded in Transact's closing submissions. It accepts that prior to Mr S's joining there had been no other breaches for failure to comply.

157. It notes that Mr Swayne has had some adverse publicity because of the original decision, but it does not accept this to be a mitigating factor. It regards the adverse publicity as being generated because of the fact of the initial breaches with which this Tribunal has agreed. Furthermore, the Tribunal has expressed its dissatisfaction with some of the conduct of Transact and has expressly found that it was deliberately misled by Mr Peak.

Sanctions

158. Based on all the above, the Tribunal regards this breach as **very serious**.

159. During its deliberations the Tribunal concluded that it was minded to impose a prohibition on Transact being involved in any premium rate text chat services for a specified period and also a suspended bar on the shortcodes in question. Since the possibility of a prohibition or bar sanction had not been addressed by either of the parties during the hearing, the Tribunal invited written submissions from the parties on the proposed sanctions.

160. In response, Transact requested a further oral hearing at which it wished to address both the question of sanctions and a number of other matters. The Tribunal refused that application.

161. Both parties made written submissions on sanctions. Transact asserted that text chat services accounted for approximately 64% of the revenue on the shortcodes in question and provided figures to show that its total revenue (across all its shortcodes) in the period January 2009 to July 2009 was approximately £1.3m, of which 61% was accounted for by text chat services. The Tribunal noted that Transact had put forward figures for this limited period only because it asserted that the revenue mix from this period was "more closely reflective of the revenue mix as it stands today". The Tribunal also noted that, according to these figures, the

revenue for the first seven months of 2009 appeared to be substantially lower, even on a pro-rata basis, than the annual revenue figures of £6.5 to £8.5m for each year since 2007 which had been put forward by Transact during the proceedings[7]. However, taking into account these representations, the Tribunal decided that although a prohibition and a suspended bar was still appropriate, the proposed length of the sanctions should be reduced.

162. Taking into account all the circumstances of the case, including the seriousness of the breaches and the revenue generated by the service, and all of the aggravating and mitigating factors above, as well as those submitted by the parties at the hearing, and the written submissions of the parties on sanctions following the hearing, the Tribunal has decided to impose the following sanctions upon Transact:

(i) Formal reprimand.

(ii) A Fine of £167,959.

(iii) Refunds for the full amount spent by complainants who claim them, unless there is good cause to believe that such claims are not valid.

(iv) A 6 month prohibition on Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, being involved in or contracting for any premium rate text chat services with or without an element of dating.

(v) If Transact intends to resume text chat services following expiry of the prohibition it must, no earlier than 8 weeks and no later than 4 weeks before the end of the prohibition, take further compliance advice from the Executive on (a) the validity of the opt-ins it holds in relation to such services and (b) the promotion of such services, and implement that advice to the satisfaction of the Executive prior to commencing those services.

(vi) A 6 month bar on all premium rate services operated or promoted by Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, on shortcodes **80988, 80877, 80848 and 69991** suspended for 3 months to allow Transact to promptly seek compliance

[7] See paragraph 121.

advice on (a) the use of opt-ins for the services operating on those shortcodes and (b) the promotion of those services. Unless such advice is implemented to the satisfaction of the Executive within 3 months of the date of this Decision, the bar will take immediate effect.

163. The Tribunal seriously considered making a recommendation that the Executive initiates proceedings to name as associated individuals Mr Peak, in light of his deception, and Mr Swayne and Mr Peak because of Transact's general and repeated failings of compliance as set out above. However, on a narrow balance, it has determined not to do so on this occasion. Instead the Tribunal has prohibited Transact from involvement in and contracting for the provision of any text chat services for a 6 month period, imposed a suspended prohibition on the shortcodes and requires Transact to seek compliance advice. This Decision should be regarded as a final warning for Mr Peak and Mr Swayne. Any future Tribunal may take an exceptionally dim view if, under a different legal guise, the same errors are perpetuated. If that were to be the case then a personal sanction may be inevitable.

Costs

164. The Tribunal has determined, and recommends, that Transact be required to pay the following administrative charge in relation to the oral hearing under paragraph 8.12 of the Code:

(i) The costs of the Tribunal.

(ii) 50% of the costs of the Executive.

165. The Tribunal's view is that Transact should pay only 50% of the costs of the Executive to reflect (i) the very high level of costs incurred by the Executive; and (ii) the fact that a lot of time and money was spent dealing with Mr S's evidence, and there was no good reason why he was not ultimately called to give oral testimony.

Michelle Peters

Chair of the Oral Hearing Tribunal

Dated this **16th** day of July 2010