

CODE COMPLIANCE PANEL

TRIBUNAL DECISION

Tribunal Meeting No: No. 94

Tribunal Hearing Date: 1 March 2012

Tribunal Members: David Cockburn (Chair)
David Jessel
Robert Chilton

Tribunal Clerk: Nicola Tysoe

Others present: Dinah Tuck
Alisha O'Mahoney (Part)
Arpan Boyall (Part)
David Levitt (Part)

MATTERS CONSIDERED BY THE TRIBUNAL

Standard procedure

1. Case Ref: 02225
Case Type: Service Provider

Emergency procedure

2. Case Ref: 01251
Case Type: Level 2 Provider

MATTERS DECIDED BY THE TRIBUNAL

Case for Adjudication

Tribunal Sitting, Case Number and Date	Case Ref	Service Provider	Information Provider	Service Name	Case Type	Procedure	Code
No. 94 Case 1 01/03/2012	02225	Ericsson (IPX) AB, Sweden	Tanla Solutions (UK) Limited UK	Sms.date.co/ Fantasy chat	SP	Standard	11
Decision Headnote							
<p>The Executive received 12 complaints regarding a virtual chat service (www.smsdate.co) operating on shortcode 62345 and promoted as a, “Fantasy chat Service where no real relationships can be formed”. All complainants had interacted with the service after receiving an unsolicited promotional message along the lines of:</p> <p><i>“FREE SMS: Hi Michael, Mikaela wants a private chat with U! reply YES2start chatting! Smsdate.co help?08081891419meg3A£endreplySTOP”</i></p> <p>The Executive alleged that the service contravened the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) and raised the following breaches of the Code:</p> <ul style="list-style-type: none"> • Paragraph 3.3.1 (Designated number range); • Paragraph 5.2 (Legality); • Paragraph 5.4.1(a) (Misleading); • Paragraph 5.7.1 (pricing); • Paragraph 5.8 (Contact information); and • Paragraph 7.3.3(b) (informing user of cost after £10, requiring positive response to continue). <p>The Tribunal upheld the breaches raised. The revenue generated by the service fell within the range of Band 4 (£50,000 - £100,000). The Tribunal considered the breaches to be very serious and issued a Formal Reprimand, a fine sanction of £95,000, and an order that the Service Provider pay all claims for refunds made by users in the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.</p>							
Administrative Charge Awarded						100%	

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 1 March 2012
TRIBUNAL SITTING No. 94 / CASE 1
CASE REFERENCE: 02225**

Network operator: All mobile Network operators
Service Provider: Ericsson (IPX) AB, Sweden
Information Provider: Tanla Solutions (UK) Limited UK

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER
PARAGRAPH 8.5 OF THE 11th CODE**

BACKGROUND

By 7 November 2011 the Executive had received 14 complaints regarding a virtual chat service (smsdate.co) operating on shortcode 62345. 12 of the complaints (which are the subject of this case) related to the period prior to 1 September 2011. All 12 complainants reported receipt of an unsolicited promotional message and having been misled into responding to it. The format of the message was as follows:

“FREE SMS”: Hi Michael, Mikaela wants a private chat with U! reply YES2start chatting! smsdate.co help?0808189141meg3A£endreplySTOP”.

In each case, the message was personalised, so that it was addressed to the actual name of the person to whom it was sent (i.e. Michael). Furthermore, in most cases, the name of the person requesting the private chat (e.g. Mikaela) was the actual name of someone who the recipient believed they knew.

Of the 12 complaints:

- it appeared that ten complainants received this unsolicited message which appeared to them to be from a named person they had previously communicated with online. Their previous online communication had arisen as a result of the complainant seeing the other person’s profile on a dating/social networking website, and then chatting online through that website during which they had given the other person their mobile phone number;
- two other complainants had received this unsolicited message after posting their own mobile phone number on a website, but without having had any prior online communication with the person named in the message. One complainant who thought he may have posted his number on a website for friends to contact him became suspicious immediately upon receipt of the message and terminated the service. Another complainant seeking companionship online responded to the unsolicited message in the belief it was from a potential client seeking his services.

The 11 complainants who responded to the promotional message and interacted with the service stated that they did so in the belief that they were communicating with a genuine person. They also stated that they believed the chat messages they engaged in were free as the initial message stated “FREE SMS” and that they believed they had not been informed of any pricing thereafter. With no reason to suspect otherwise, complainants continued to

interact with the service and unknowingly incurred premium rate charges of £3 for every message received.

The Executive noted that this service is promoted as a, “*Fantasy chat Service where no real relationships can be formed*”, and that the smsdate.co website did not have an online chat capability. Below is an example of the message complainants received after each £10 spend:

“FREE MSG: Tip never give your number to a stranger, for help call 08081891419 smsdate.co remember always be safe ! gbp10 spent”

THE INVESTIGATION

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the Code. The Executive submitted a breach letter to the Service Provider on 25 January 2012. Within the breach letter the Executive informed the Service Provider that it believed the service contravened the following paragraphs of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 (the “**Code**”):

- Paragraph 3.3.1 (Designated number range);
- Paragraph 5.2 (Legality);
- Paragraph 5.4.1 (a) (Fairness (misleading));
- Paragraph 5.7.1 (General pricing provision);
- Paragraph 5.8 (Contact information); and
- Paragraph 7.3.3 (b) (Informing user of cost after £10 (require positive response to continue)).

The Service Provider responded on 10 February 2012 and the Tribunal made a decision on the breaches raised by the Executive on 1 March 2012.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

DESIGNATED NUMBER RANGES (Paragraph 3.3.1)

“Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a network operator has restricted certain codes or number ranges from being used for particular purposes or for the provision of particular categories of service, those codes or number ranges must not be used in contravention of these restrictions. Ofcom’s designations will have precedence over any issued by a network operator”.

1. The Executive noted that the, “Code of Practice for Service Delivery of Common Mobile Shortcodes in the UK for all Communications Media” designated shortcodes 69000-69999 and 89000-89999 for services that were aimed at an adult (18 years and over) audience including PhonepayPlus defined Sexual Entertainment Services. Paragraph 7.11.1 of the Code defines sexual entertainment services as:

“Sexual entertainment services are services of a clearly sexual nature or any service for which the associated promotional material indicates, or implies, that the service is of a sexual nature”

The Executive asserted that although the Service Provider described the service as a “fantasy chat service”, but the manner in which it operated appeared to suggest that the service was sexual (adult) in nature and, as such, was operating on an incorrectly designated shortcode prefix. The Executive made this allegation for the following three reasons:

Reason 1:

A number of the complainants’ message logs showed ‘operators’ and complainants using sexually-explicit words, and engaging in sexually explicit chat. The Executive provided a number of extracts of complainant logs, including the following:

Extract 1

Consumer: Humm ok when your in bed & feeling a little horny & wet do you like a toy or are you a finger girl...?? Lol x”

Operator: well, i more like a finger in it, ill feel it alot than using a toy..LOL am i right yes? Ok my turn!! :D”

Consumer: Good girl... Yes go a head babe....x”

Operator: your favourite possition that u want to do with me babe?

Consumer: Hummm there’s so Many i want to do with you babe but be for that i’ed love to lick your pussy & make you cum in my mouth babes...what do you like the most...?”

Operator: wow baby youll do that for me? i like that so much Your turning me on baby!! what else baby? awwso hot now”

Extract 2

Complainant: Wud u let me cum inside?

Operator: Anything you want baby :)

*Complainant: No im askin wud u like 2 feel me deep inside ur pussy an then
. cumin inside u?*

Operator: I wanna feel u baby :)

Complainant: U wana feel my hard cock deep inside?

Operator: How deep can u go? :D

Complainant: Really deep babe id get my hole cock inside u.

Operator: I like the sound of that baby :)

Extract 3

Complainant: I wud love 2 gals 2 suck my cock at the same time, then as I'm fucking 1 gal, the other is licking her clitoris n my balls at the same time. Now tell me yours

Operator: Hmmm cant think of any :D

Complainant: Av u been fucked up the ass?

Operator: Nope

Complainant: Wud u ever try it?

Operator: I dont know yet why babe :)

Complainant: Just asking, you said b4 that u can handle everything so I'm just curious lol. Do u like sucking cock?

Operator: Yeah i do :)

Extract 4

Complainant: Nice use your cum as lube to fuck me

Operator: sure, it would be great,.

Complainant: Nakf here hard wot u got on

Operator: just boxer shorts...

Complainant: Nice smooth ball ass

Operator: lol.. what about you?

Complainant: Same so nice hole to fuc tite fo ya how bigs ur one

Operator: 9 and u ?

Complainant: 8so u a top

Operator: versatile,...what about you?

Complainant: Same as u bb

Operator: cool,...

Complainant: Hope u like being rimmed [*a sexual act]*

Operator: yeah I like it,..

The Executive classified the above conversations as being of a clearly sexual nature and that as a consequence, the service fell within the definition of a sexual entertainment service under the Code. The Executive accordingly asserted that this service operated on an incorrectly designated prefix and that a breach of paragraph 3.3.1 of the Code had occurred.

Reason 2:

One complainant's message logs recorded the 'operator' sending the complainant a sexually explicit picture, namely a nude frontal picture of male genitalia. The Executive asserted that this was demonstrated by the following extracts from the message logs of one of the complainants:

26 May 2011 (14.55 -14.57)

Complainant: Do u really want to know? Lol you would have to meet me for me to explain as not easy but will only work if you do safesex with clients only and have th [continued] e goods which you have but not sure about your cock as you never replied on your size lol

Operator: oh sorry 10.. wait so has anything ever bad happend to you?

Complainant: Is that 10 inches

Complainant: Wow

26 May 2011 (18.14 – 18.40)

Complainant: can u send me some pics of you

Operator: whats [sic] your email address? Ill send you a pics when I get my hands free

Complainant: it's jjking75

Operator: at what?? Yahoo??

Complainant: No hotmail

Operator: ok ill send you one please check

Complainant: Ok ☐

Operator: did you get it?

Complainant: Love the pics your one fine man any more ☐

Complainant: Wow

Complainant: More!!~!:)

Operator: hahaha ill seve it for another day that will keep you coming back lol im so mean

27 May 2011 at (15.37)

Complainant: I won't to see u to show u how much I love you as one pic of u is not enough to occupy my love for u tell me when please

Operator: I still have to dig one up babe.. :) I love the way you love me... xxx

27 May 2011 (17.02 – 15.09)

Operator: yea I sent you the pics did you get them?

Complainant: Wow I love you more got any more please

30 May 2011 (at 11.25)

Complainant: When gonna meet no excuses and you cock is not 10 as it looks . . . like only 7 and tiny by the way your holding it it's looks tiny so I don't believe you but

30 May 2011 (at 14.57)

Complainant: And your cock is not 10inches as it looks too small I'n the pics you sure your not lying! Send more with dick next to redbull can or next to ruler so I c [continued in next message] and see your real and not telling stories

Operator: when i get online ill send some of my pics ok..

Complainant: Prove your love is as strong for me as mine is for u and I will send some back for you Why can't u now where are u and who u with

Complainant: I'm online now send me and how big really is your cock as it do not look like 8 inches

The Executive asserted that the sending of sexually explicit pictures was clearly of a sexual nature and the service therefore fell within the definition of a sexual entertainment service under the Code. The Executive accordingly asserted that the service operated on an incorrectly designated prefix and that a breach of paragraph 3.3.1 had occurred.

Reason 3

The Executive noted that the complainant evidence in a number of cases clearly suggested these complainants received an unsolicited promotional message purporting to be from the same “person” who had a profile posted on a social website on which the complainant also had a profile posted and with whom the complainant had been chatting online. Some of these websites where such profiles appeared were adult sex websites such as gayromeo.com. The Executive also found a profile from the smsdate.co website promoted directly on an adult website (www.eroticsoul.com) with the caption, “Looking for someone to fcuk”. The Executive noted that the disclaimer on this website stated:

“This website contains adult material, all members and persons appearing on this site have contractually represented to us that they are 18 years of age or older. eroticsouls.com does not conduct criminal background screening of its members. Learn about Internet Dating Safety. Explore sex dating, casual hookups, meet swingers, find local sex near you on the best online adult dating site on the web”.

The Executive asserted that evidence regarding eroticsoul.com (as outlined above) appeared consistent with the complainant evidence of receiving a promotion for the sms.date service from someone with whom they believed they had chatted online via an adult dating site. The Executive further asserted that posting profiles directly onto third party websites where the intent or effect, either directly or indirectly, was to encourage the use of a premium rate service, would be deemed as, ‘promotional material’ under paragraph 11.3.27 of the Code. Therefore, the act of posting the profiles on adult sex websites, aimed at consumers who wished to explore sex dating, casual hookups, meeting swingers and finding local sex, indicated and/or implied, that the service was of a sexual nature falling within the definition of a sexual entertainment service. The Executive accordingly asserted that this service was operating on an incorrectly designated prefix and that a breach of paragraph 3.3.1 of the Code had occurred.

2. The Service Provider stated that the short code 62345 was used by Belfort Communications (formerly known as Cellservices) (the “**Content Provider**”). It obtained this shortcode on 4 January 2011 through the Information Provider, Tanla Solutions (UK) Ltd, which acted in effect as a secondary service provider. The service provider argued that Belfort obtained this shortcode by representing that the service would be a non adult chat service and would operate as such. The original account-request outlined that this service would be non adult chat. The Information Provider agreed with the Executive’s assertions that certain user cases outlined in reason 1 and 2 above clearly raised issues about how the Content Provider had run the service on shortcode 62345 through the Information Provider. The Service Provider asserted that its early monitoring of the service had not highlighted any content issues that would contravene paragraph 3.3.1 of the Code. No consumer complaints were recorded and, even after the first log requests from the Executive, the Service Provider had no reason to believe that paragraph 3.3.1 of the Code had been contravened. In respect of reason 3 above, the Service Provider stated that promotion of the service and subsequent material at the account set up-stage did not highlight that the service

would be promoted through sites that were deemed to be of an adult nature. This would have been clear to any service provider and was made clear to and was understood by the Content Provider. The Service Provider further stated that the Content Provider sought the correct designated prefix from the outset and any account set up information was based on running the service as non-adult chat. Any such promotion on sites deemed to be of an adult nature would have been prohibited and restricted to those sites appropriate for the designated prefix. In light of this, it was clear to the Service Provider that the Content Provider had operated outside of the original account set up and information and guidelines given at both the account and service launch stages.

The Service Provider further stated that the decision of one operator to send content of an adult nature (as described in relation to Reason 2 above) happened outside of the operation of shortcode 62345. The Service Provider stated that the service made no provision for sending or receiving content in regard to pictures. However the point that the Executive was making, and that the Information Provider was clear about, was that content of an adult nature was sent during the chat. The Information Provider had made it clear to the Content Provider that this type of communication was not permissible.

During informal representations, the Service Provider accordingly admitted that it was in breach of paragraph 3.3.1 of the Code.

3. The Tribunal considered the evidence and acknowledged that the Service Provider admitted that the service was in breach of paragraph 3.3.1 of the Code. The Tribunal further concluded, on the basis of the three reasons cited by the Executive that the service mechanic and content of the service was of a nature that fell within the definition of sexual entertainment services under paragraph 7.11.1 of the Code.

The Service was accordingly in breach of paragraph 3.3.1 of the Code.

Decision: UPHELD on Reasons 1, 2 and 3

ALLEGED BREACH TWO LEGALITY (Paragraph 5.2)

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

1. Under Section 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the “**2003 Regulations**”), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless either the recipient has specifically consented to receiving such promotions (sometimes referred to as, “hard opt-in”) or where the recipient’s details were obtained while purchasing a similar or related product or service to that being promoted and the recipient was given the opportunity when his details were collected, to opt-out (without charge) of receiving further communications, and was given the

same opportunity in each subsequent communication (sometimes referred to as “soft opt-in”).

All complainants received the following promotional message (in each case personalised with relevant names):

“FREE SMS”: Hi [complainants name], [operators name] wants a private chat with U! reply YES 2start chatting! smsdate.co help?08081891419meg3A£endreplySTOP”.

None of the complainants appeared to have entered the service through the website directly or via banner (or any other form of) advertising. On the contrary, ten complainants reported having received the unsolicited promotional message from the service after giving their mobile phone number to a ‘person’ on a third party dating and/or social networking site with whom they had chatted online via the third party website. The above message appeared to come from this person. Online communication was a facility not available on smsdate.co. Two other complainants reported receipt of the unsolicited promotional message as a direct result of their mobile phone number being available on a third party website.

On 16 November 2011, the Executive issued complainants with a questionnaire to ascertain further details about how each of them had accessed the service. Responses were received from four of the twelve complainants.

The response received from one of the four complainants stated:

“I was on the website www.tagged.com and saw a profile of Jane29 whose profile stated that she lived in the Northwest. She messaged me and chatted with her for a while and then she asked me for my mobile phone number as she said she preferred to text. I gave my mobile number to her and didn’t hear anything for a day or so went back to her profile and found her profile had been deleted. I then received this message and it said it was from Jane, I recognised the name and text her back”

The questionnaire response received from a second complainant stated:

“One day I was online on planetromeo.com, and sent a few messages back and forth to a profile and was asked for my mobile phone number so we could chat then got a message, i but didn’t know what 62345 meant i had absolutely no idea and asked for a UK mobile phone number. I have the username and nickname but later found the profile had been deleted”

The questionnaire response received from a third complainant stated:

“Billed £564. Contacted me unsolicited. They sent me first text. Lied about the number being a free text number. Pretended to book a service from me. Never seen or used a service like this before. I do not use personal chatlines ever. Never opted in as i understand now you do....the first message received was unsolicited and from a con man”

The Executive noted the Service Provider’s assertion that the service was promoted via banner advertising on various other websites and that consumers had entered the

service via the website smsdate.co.. The Executive noted, however, that the Service Provider failed to provide the Executive with any satisfactory evidence of their purported banner advertising in the UK despite the numerous websites on which they claimed to promote and their statement that they could provide UK banners and flash advertising if required. Four screenshots supplied by the Service Provider on 22 November 2011, provided no evidence that those banners were live, that they were associated with this service or where they led the consumer (Appendix A).

The Executive further stated that the Service Provider had also failed to provide any reliable evidence of opt-in for any of the complainants:

- The evidence provided for those complainants whose 'database' records purported to show they had opted in via the website (those records showing a mobile number added and a reference to smsdate.co) contradicted the complainants' own evidence, particularly the evidence provided by the four respondents to the questionnaire who confirmed that they had not accessed the smsdate website.
- The database records provided in relation to the other complainants showed no purported evidence of any opt-in.
- The database record provided for the monitoring phone appeared to show this number had not entered through the website. However, this was incorrect as the monitoring phone had opted-in through the website.

Accordingly, the Executive asserted that all of the complainants received an unsolicited promotional message for which there was no opt-in, in breach of paragraph 22 of the 2003 Regulations. Accordingly, the Executive submitted that a breach of paragraph 5.2 had occurred.

2. The Service Provider stated that the originating service set up via the account request process reported that any promotional activity indeed receiving a free promotional message from the service would be operating via www.smsdate.co. By the consumer entering their details through www.smsdate.co this would provide the necessary opt-in to receive a promotional message to start the service. The Service Provider stated that it saw no reason to challenge this with the Content Provider as this was how the original testing of the service played out before the service went live. With the consumer testimony's, as shown above, gained through the questionnaire it was clear that the operation deviated from the originating account set up provided to the Service Provider by the Content Provider. With regard to the marketing information, the service website was purported to have been advertised by banner ads (supplied as evidence to the Executive) which were supplied with the originating account set up. However, the testimonies of some consumers were clear in regards to receiving a free promotional message outside of the purported service operation. In this regard, the Service Provider stated that no further opt-ins to receive a free promotional message outside of those gained via the website were permissible.

During informal representations the Service Provider accordingly admitted that it was in breach of paragraph 3.3.1 of the Code.

3. The Tribunal considered the evidence and acknowledged that the Service Provider admitted that it was in breach of paragraph 5.2 of the Code. The Tribunal accepted, on a balance of probabilities, the evidence of the complainants concerning their statements that they had not provided consent.

Decision: UPHELD

**ALLEGED BREACH THREE
FAIRNESS (MISLEADING) (Paragraph 5.4.1(a))**

*“Services and promotional material must not:
a. Mislead or be likely to mislead, in any way,”*

1. The Executive asserted that the service as a whole was operated in such a manner that consumers were misled or likely to be misled to participate and unknowingly enter themselves into a premium rate service costing £3 per message. The Executive made this assertion in the following respects:
 - the way in which the service drew consumers into it by ‘profiles’ posted on third party websites;
 - the manner in which consumers’ mobile phone numbers were obtained; and
 - the promotional text message subsequently sent.

The Executive further asserted that the service and promotional material further mislead, or was likely to mislead consumers entering the service in the same way as the complainants in the following respects:

- as to the nature of the service; and
- with regards to the £10 spend reminder (which was sent simultaneously with a chat message from the ‘operator’ in such a manner that it was likely not to be noticed by the consumer engaging in chat with the operator). As a result, consumers in some cases incurred huge mobile charges.

The Executive further asserted that there was no reliable evidence of any consumers having entered, or likely to have entered, the service via the smsdate website.

Reason 1: Operator profiles and obtaining consumers mobile phone numbers:

The Executive stated that the Service Provider claimed that the only method of opt-in to the service was through its website, either directly, or through its banner advertising for the website. Contrary to this, it appeared that, ‘profiles’ were created and directly posted on a number of third party (adult and non-adult) dating and social networking websites.

Such. ‘profiles’ had (in some cases) initiated and/or responded to communication with the consumer online through the third party website (features not available to consumers on the smsdate website). In some cases, this had resulted in some

consumers forwarding their mobile number to the 'profile', in the belief that they were corresponding with a genuine person (and not a service) for the purpose of getting to know the 'profile' better or to meet up with them through that third party website.

The Executive asserted that in such circumstances, consumers were misled or were likely to have been misled into giving their mobile phone number for use in the present service.

Below are some of the complainant accounts:

Complainant ref 02247 stated:

"...The consumer thinks he may have been on a site called my year book and he may have given his number there..."

Complainant ref 02458 stated:

"It didn't say anything about premium rate. She text me from that number. I met somebody she took my number and she text me through this number and then I text back I didn't know I was being charged premium rate at £3.... Meet a girl through tagged.com"

A text note for Complainant ref 02229 stated:

"...He has internet on his phone The consumer said he was chatting online using his iphone. The person who he was specking to online asked for his mobile number which he sent"

A text note for complainant ref 03014 stated:

"The consumer claims to have been misled, because he believes the service contacted him in the guise of a friend he knew in canada"

Reason 2: The promotional message:

After the unsuspecting consumers had provided their mobile numbers to a 'profile' online, or after otherwise posting their mobile phone number, on a third party website, they received the following promotional message (in each case personalised with relevant names):

"FREE SMS": Hi Michael, Mikaela wants a private chat with U! reply YES 2start chatting! smsdate.co help?08081891419meg3A£endreplySTOP"

The Executive noted the following detail in the message in each case:

- the consumer's real (or profile) name (making personal reference);
- the actual name of the 'operator' (which in some cases complainants confirmed as the name of the 'profile' they had previously been chatting to online via dating or social networking sites); and

- The words 'FREE SMS' as the first words in the text and in capital letters.

The Executive asserted that this promotional message had been constructed in such a manner that it was misleading or likely to mislead consumers into believing that it had been sent by the same person with whom they had been corresponding via their own dating website, and to whom they had already provided their mobile number (or by a person who had seen their mobile number posted on a website), prompting them to text back 'YES' to continue the correspondence with that person and believing it to be by standard (free) text, but actually unknowingly entering themselves into a premium rate fantasy chat service at £3 per message.

Complainant ref 02458 stated:

"Basically, a girl called Kate on tagged messaged me and we spoke for about two weeks. She told me she lived in Leeds and was in the dating section of the website so wanted to meet up. She asked me for my number and two days later I got a message from her and replied to it because I knew her. I noticed that as soon as she started texting me her profile on tagged disappeared. I can provide you with copies of her profile from tagged which said... Kate S 27 and will send them to you. I can't believe I fell for it."

Complainant ref 02097 stated:

"Father calling in after his 18 year old son received a £200+ bill for using a chat service which he insists appeared to be a normal person not a service".

Complainant 01979 stated:

"...pretended to book a service from me..."

Reason 3: The nature of the service

The Service Provider stated that the service was a, *"fantasy chat where no actual relationships can be developed by the service"*. This suggested that there could never be a possibility of developing a relationship (sexual or otherwise) or meeting the 'operator'.

Notwithstanding this, the Executive asserted that in light of the evidence, consumers were misled or likely to be misled into thinking that by participating in the service it may have led to a meeting or a real relationship. Moreover that such a relationship may have been of a sexual nature. The Executive believed that, with respect to the promotional message, the manner in which the website address was presented within the promotional message, coupled with the fact that there was no indication that this was a fantasy chat service, manipulated the context of the message which read as:

"... wants a private chat! smsdate.co"

The Executive noted that the combination of the above words alluded to three things; (i) a private chat (away from the website), (ii) texting ('sms') and (iii) dating ('date'), but at the same time retained the company website address within the message body.

The Executive asserted that, apart from the website (that the complainants did not visit) there was no indication that this was a fantasy service, and this was aggravated by the circumstances in which consumers received this message. The Executive further provided an example of one complainant who had advertised his services along with his mobile phone number (for clients to contact him). After receipt of the promotional message, this complainant responded in the belief that the message had been received from a potential client seeking to book a service from him. The complainant stated:

“They were trying to book companionship service from me. I am advertised in many places and my phone number is easy to get. Also they know what I do so approached me pretending to be a customer”.

The Executive asserted that the act of sending a promotional message with this content to a consumer who had posted their mobile phone on their profiles for the purpose of advertising his service/business which would require meeting up in person, did mislead this consumer into responding to the promotional message.

The message logs:

The Executive noted that a number of message logs indicated a circumstance where the ‘operator’ had suggested meeting up or encouraged this possibility. The Executive cited the following examples of this occurring:

Example 1 message logs:

These message logs demonstrated the complainant engaging in conversation about meeting on a number of occasions. The Executive noted that at no point during the requests did the operator decline any request to meet up, but actively engaged in conversation about meeting up in a hotel in Birmingham and having drinks with the complainant:

26 July 2011 at 15:12:

Complainant: Do you think we could ever meet up?

Operator: yeah ,, but now yet now babe,, hoep u understand.. so do u sell . those??

27 July 2011 at 19:39:

Complainant: Do you wanna meet up though?

Operator: Yeah of course when the time is right babe.

27 July 2011 20:18 – 21.48:

Operator: Oh wish i was there so i can accompany u.

Complainant: when we meet up, how would you like to meet up?

Operator: *Its up to u how do u want it? what do u like to do?*

Complainant: *Do think we could meet half way and book a hotel for the one weekend?*

Operator: *Yeah i think so :) u know some good place in ur area?*

Complainant: *I can find a nice place*

Complainant: *But I do know some nice places*

Operator: *Really? like where?*

Complainant: *Out in the country somewhere like Kent*

Operator: *what do you think ?*

Complainant: *Yeah kent is a nice place. ive been there before.q*

Complainant: *Ok*

Complainant: *Maybe I can come to leeds*

Complainant: *I have thought about how we are gonna meet? or when*

Complainant: *I have thought about how we are gonna meet? or when*

Complainant: *Have you thought about it?*

Operator: *Yep whre would u like to go?*

Complainant: *How are we gonna do this ?*

Complainant: *where should we meet*

Complainant: *Have you decided?*

Operator: *I dont know where is the best place there?*

Complainant: *Would you like to meet up somewhere and book a hotel*

Complainant: *Is that ok!*

Complainant: *?*

Complainant: *Here a few suggestions*

Complainant: *You can come to London and meet there*

Complainant: *Or meet half way*

Complainant: *if I came to leeds*

Complainant: *But meeting half way would we would meet somewhere like Birmingham*

Complainant: *What do you Think tell me*

Operator: *Yeah do u know any good places in Bham?*

Complainant: *Yes I do*

Complainant: *Birmingham is a city*

Complainant: *Some decent places*

Operator: *Hmm yeah like what babe?*

Complainant: *I don't know bham that welll*

Complainant: *But its a good place to meet up though*

Complainant: *We can meet in the city*

Complainant: *What do you think?*

Complainant: *Spend some together there*

Complainant: *I mean spend some time together there*

Operator: *Where babe?*

Complainant: *Meet you outside Birmingham city station*

Operator: *I mean where r we going to stay?*

Complainant: *In a Hotel*

Complainant: *That won't be. Problem*

Complainant: *Before we meet we can look in the internet and book a hotel*

Complainant: *I willl look in the internet to check which hotel*

Operator: *Lol is that one of a decet places for u? :)*

Complainant: *What do you mean?*

Complainant: *I will find a decent place on the internet*

Complainant: *So you wanna do it then?*

Operator: *Yeah sounds good :) then we have a couple of booze then*

Complainant: Yeah that's riight

Complainant: Can I talk you on the phone?

Complainant: Could I have your number?

Complainant: Is that ok ?

Operator: Were talking right now babe arent we?

Complainant: If we are gonna meet we should on the phone

Operator: Yeah but are not having fun talking to me this way? :(

Complainant: We have been dioing it for 4days

The Executive asserted that the active encouragement and discussion of the prospect of meeting up with a consumer by an employee of a service promoted as a 'fantasy chat service that cannot generate any 'real' relationships' is misleading or likely to mislead that consumer.

Example 2 message logs

These logs showed that the first chargeable message sent to this complainant by the 'operator' stated:

"Hey how have you been Graham ? I was thinking of going for a drink, do you know of any good places? Please reply. Jane I hope I hear back"

The Executive asserted that the above message was misleading or likely to mislead the consumer that this 'person' was looking to meet up with them for a drink.

Reason 4: The £10 spend reminder

Following receipt of three message terminating messages costing £3.00 each, complainants' received the £10 spend reminder which was sent on the handset simultaneously with a chat message from the 'operator' and appeared seconds before the fourth chat message from the 'operator'. This message started with the words "FREE MSG" and ended with "gbp10spent" (the spend reminder).

The Executive noted that sending the spend reminder seconds before the fourth chat message left consumers with little or no time to read the message. It was therefore likely that consumers would only be able to view the reminder message (before receipt of the fourth chat message seconds later) in their inbox as a partial message stating "FREE MSG".

The Executive believed that if complainants had seen, read and understood this message, this would at least have alerted them to their £10 spend. However, despite receiving numerous spend reminders the majority of the complainants reported they had not been made aware of the pricing.

This Executive asserted that by sending the spend reminder message (as outlined above) it was not likely to be noticed by the consumer engaging in chat with the operator) and was therefore misleading or was likely to have misled consumers into continuing to interact with the service, unknowingly incurring further charges.

In light of the above, the Executive believed that for all or any of the reasons outlined above, a breach of paragraph 5.4.1(a) of the Code had occurred.

2. The Service Provider stated that both it and Tanla (the Information Provider) could only maintain that the only method of opt-in to the service was through its website (either directly or through the banner advertising for the website). This was certainly, based on the information supplied by the Content Provider during the account set up process and indeed testing, the route for the opt-in to receive a promotional message. As highlighted by the Executive was clear that some consumers' details were obtained outside the original operation of the service. Although the Information Provider should not be highlighted as being complicit, the Service Provider conceded that service operation should have been monitored more closely in order to highlight these irregularities in how the service and promotion operated for some consumers.

With regard to the promotional message received by the complainants, although the Service Provider did not dispute the way that some consumers had been misled into opting-in to the service having corresponded with a specific profile, the Service Provider felt that there was at least enough information in the promotional message for the consumer to make a judgement to proceed and send a response - the "yes" in this case. However the Service Provider conceded that the construct of the entire message in regard to pricing, which was brought up in a different breach, could be viewed as misleading but this was down to a technical error which was rectified during September 2011.

The Service Provider also conceded that the nature of the service had, with the evidence provided within the message logs, deviated away for some consumers from what has been purported on the website. This was also not disputed by the Information Provider. As previously highlighted early log requests supplied by the Information Provider highlighted the nature of the content of the service and reported that it was the responsibility of the Content Provider to make sure that the operators kept within the remit of the website that was being promoted and indeed the designated number range being used. The Service Provider stated that many consumers would have received quite a few spend reminders and the Information Provider did feel that in many cases that this would have been seen and read adequately in order to understand the charges accrued by the consumer. However the Service Provider conceded that the case was clear and for some consumers it was also clear that they had difficulty understanding that they had been sent a spend reminder. The Service Provider stated that if the service operated by the Content Provider was to resume the spend reminder would be changed to accommodate a clearer spend reminder, thereby allowing time for the consumer to be informed of the what they had spent during a segment of chat.

3. The Tribunal considered the evidence and acknowledged that the Service Provider had admitted that it was in breach of paragraph 5.4.1(a) of the Code. The Tribunal concluded that, with respect to reasons 1, 2 and 3, consumers had been misled into believing that messages received were from a friend and that this was evidenced by the user mechanic in which the name of the friend had been obtained. Therefore, although the service purported to be a chat service, service operators engaged in dialogue with consumers and that consumers were encouraged to meet up. The Tribunal concluded that, with respect to reason 4, this issue was better dealt with in relation to breach six below. Accordingly, the Tribunal concluded that the Service Provider was in breach of paragraph 5.4.1(a) of the Code.

Decision: UPHELD on reasons 1, 2 and 3.

ALLEGED BREACH FOUR PRICING (Paragraph 5.7.1)

“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge”.

1. The Executive noted that all complainants had received the following promotional message from the service (in each case personalised with relevant names):

“FREE SMS”: Hi Michael, Mikaela wants a private chat with U! reply YES 2start chatting! smsdate.co help?08081891419meg3A£endreplySTOP”

Some complainants specifically indicated that they were unaware of the pricing and that they were going to be charged £3 per message. For example:

Complainant ref 02469 stated:

“...at no stage was I informed that I was being charged £2.50 (plus VAT) per text....and on receiving my phone bill today I discovered a charge of £65 + VAT for these texts (26 of them)....”

Complainant ref 02458 stated:

“It didn’t say anything about premium rate....I didn’t know I was being charged premium rate at £3....”

A text note for complainant ref 02885 stated:

“The consumer claims to being billed by what appeared to be a chat service. The consumer denies ever being advised of a charge for using the service”

A text note for complainant ref 01993 stated:

“The consumer’s 16 year has been billed by what appears to be a dating service. The user wasn’t made aware of the cost of using the service....”

The Executive asserted that, as was the view of the complainants set out above, presenting the pricing as ‘meg3A£’, did not clearly and straightforwardly inform

consumers of the cost of using the service. The abbreviation, “meg” may have referred to “message”; however the Executive asserted that this would be unclear to the average consumer. The pricing was made even less clear by “burying” it in a long line of characters, without any spacing, and given the emphasis on the words “FREE SMS” at the beginning of the message, and particularly in circumstances where consumers (such as the complainants in this case) were unaware that they were entering a premium rate service. In the circumstances of the complainants in this case, and any other consumer entering the service other than via the smsdate website the Executive asserted that consumers were not fully informed, clearly and straightforwardly, of the cost of using the service prior to incurring a charge. The Executive further asserted that there was no, or no reliable evidence of any consumer having entered or likely to enter the service via the website.

In light of the above, the Executive believed that a breach of paragraph 5.7.1 had occurred.

2. The Service Provider stated that the promotional message sent to consumers as shown in the breach raised by the Executive, was rectified during September 2011 to make the message clearer in regard to the pricing. However the Service Provider admitted that the changes took too long place after the Information Provider reported the issue to the Content Provider. Although the Executive asserted that it did not believe that the consumers reported in this case opted-in to receive a promotional message via the www.smsdate.co site, pricing of the messages was clear on that site. The Information Provider did however understand that for the some of the consumers pricing was not clear on the promotional message and accepted that some consumers would have found it difficult to understand the charges prior to opting-in to start chatting. In response to the assertion that there was no reliable evidence of any of the consumers having entered the service via the website, the early operation of the service pointed to consumers signing up via the website but the promotional message as established and duly noted by the Executive was not clear and for this reason was in breach of paragraph 5.7.1 of the Code.
3. The Tribunal considered the evidence and acknowledged that the Service Provider had admitted that it was in breach of paragraph 5.7.1 of the Code. The Tribunal concluded that those consumers who had received the unsolicited free text message had received pricing information that was not clear and straightforward. Accordingly, the Tribunal concluded that the Service Provider was in breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

**ALLEGED BREACH FIVE
CONTACT INFORMATION (Paragraph 5.8)**

“For any promotion the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated, The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or its is otherwise obvious and easily available to the user”.

1. The Executive has raised this breach for the following 2 reasons:

Reason 1: The promotional message

The promotional message that complainants received stated the following:

“FREE SMS”: Hi Michael, Mikaela wants a private chat with U! reply YES 2start chatting! smsdate.co help?08081891419meg3A£endreplySTOP”

For the complainants in this case this message was the only promotional material available to them. The Executive asserted that this promotional message did not contain the identity of either the Service Provider or the Information Provider (or any contact details for either of them). Although this message provided a link to www.smsdate.co, this website failed to provide users with any details of the identity (or contact details) of either the Service Provider, or Information Provider. As such, these details were also not otherwise obvious.

The Executive also asserted that although a customer service ‘help’ number was provided within the promotional message, when it was called the caller received a recorded message stating, *“The number you have dialled has now been cancelled”*. Therefore, the requirement under paragraph 3.3.5 of the Code, which was to clearly state the customer service number in the promotion, was not met, and no reasonable steps been taken previously to bring the customer service phone number to the attention of users, nor was it otherwise obvious and easily available to users. Furthermore, the number stated on the website (www.smsdate.co.) was the same number as stated in the message and was not active.

In light of the above, the Executive asserted that in the case of the complainants and all other consumers entering the service other than via the [smsdate](http://www.smsdate.co) website (and the Executive further asserted that there is no reliable evidence of any consumer having entered or likely to enter the service via the website), the Executive asserted that a breach of paragraph 5.8 had occurred.

Reason 2: The website

The Executive noted in its monitoring that the website stated the identity of the Information provider as:

‘Information Provider = xyz Telecom Ltd’

The Executive asserted that ‘xyz Telecom Ltd’ was not the Service or Information Provider of this service. Furthermore, a Companies House check undertaken by the Executive revealed that this company did not exist. Accordingly, neither the identity, nor the contact details of either provider were stated on the website promotion, neither were they otherwise obvious to any consumer entering the service via the website. The Executive also asserted that although a customer service ‘help’ number was provided on the website, when called this resulted in the caller receiving a recorded message stating: *“The number you have dialled has now been cancelled”*. Therefore, the requirement (under paragraph 3.3.5 of the Code) to clearly state the customer service number in the promotion was not met and no reasonable steps been taken previously to bring the customer service phone number to the attention of users

entering the service via the website, nor was it otherwise obvious and easily available to those users. In light of the above, the Executive asserted that in respect of any consumer entering via the website (notwithstanding that there was no reliable evidence of any consumer entering, or being likely to enter the service via the website), that a breach of paragraph 5.8 of the Code had occurred.

2. The Service Provider stated that the failure to provide adequate Service and Information Provider details was duly noted with the Content Provider during testing and before the service went live. Nonetheless the service went live with assurances that the Service Provider contact details would be added to the site and indeed the promotional messages sent to consumers (as highlighted above). The Service Provider confirmed that the customer service number as shown in the promotional message and the website was operational during testing and early monitoring of the service. However, the Service Provider also accepted that the customer service number did not replicate the recorded message that the Executive highlighted in conjunction with this specific breach. The Service Provider confirmed that the service had been taken out of service and by default so had the promotional message sent out to consumers. The service would also remain out of operation until changes to the website and promotional messages had taken place so that they would include the Service Provider's details.
3. The Tribunal considered the evidence and acknowledged the Service Provider's admission that the service was in breach of paragraph 5.8 of the Code. The Tribunal concluded that the service contained no contact information within either the website or the promotional message. The Tribunal also concluded that, while a customer service number was provided, it did not work and, as a consequence, there was no customer service number for the purposes of paragraph 5.8 of the Code. Accordingly the Tribunal concluded that the service was in breach of paragraph 5.8 of the Code.

Decision: UPHELD

**ALLEGED BREACH SIX
INFORMING USER OF COST AFTER £10 (REQUIREMENT OF POSITIVE RESPONSE
TO CONTINUE) (Paragraph 7.3.3)**

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

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

1. The Executive noted that the service did not require users to provide a positive response to confirm that they wished to continue after spending £10, therefore, consumers were not able to provide a confirmatory response. Accordingly, the service should have terminated as soon as was reasonably possible after the user had spent £10. As evidence, the message logs for all of the complainants and the monitoring phone (excluding the complainant who did not interact with the service) showed that they received spend reminder messages stating:

“FREE MSG: TIP never give your number to a stranger, for help call 08081891419 smsdate.co remember always be safe! gbp10 spent”

The Executive noted that this message did not require users to provide a positive response to confirm that they wished to continue. The only messages between each spend reminder thereafter, were chat messages between the consumer and the ‘operator’. The Executive asserted that the service should have terminated at the same time as the spend reminder. In light of the above, the Executive asserted that a breach of paragraph 7.3.3(b) of the Code had occurred.

2. The Service Provider stated that the Information Provider had accepted that the spend reminder message operated by the Content Provider did not adequately provide the opportunity for the consumers to provide a confirmatory response. The Service Provider confirmed that the spend reminder message and indeed the service was no longer in operation until changes to provide a compliant spend reminder message had been made.
3. The Tribunal considered the evidence and acknowledged the Service Provider’s admission that the service was in breach of paragraph 7.3.3(b) of the Code. The Tribunal further concluded that the spend reminder that was issued did not require a response before the service was continued. The Tribunal further noted that the service was continued immediately following receipt of the spend reminder. Accordingly, the Tribunal concluded that the service was in breach of paragraph 7.3.3(b) of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal’s initial assessment was that, overall, the breaches taken together were **very serious**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The service was valueless for consumers who were misled into entering the service.
- The Executive believed that the behaviour of those responsible for the operation of the service was wilful, deliberate and reckless by the fact that they had collected the names and numbers of persons from other websites and deliberately sent them an unsolicited promotion.
- The cost paid by individual consumers was high as one consumer had incurred charges of £3,000 and numerous other consumers had incurred charges of over £200.

In determining the sanctions appropriate for the case the Tribunal took into account the fact that the Information Provider had taken some steps by way of due diligence in accepting the service of the Content Provider but these steps had been insufficient and inadequate and were not therefore considered to be a mitigating factor in this case.

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

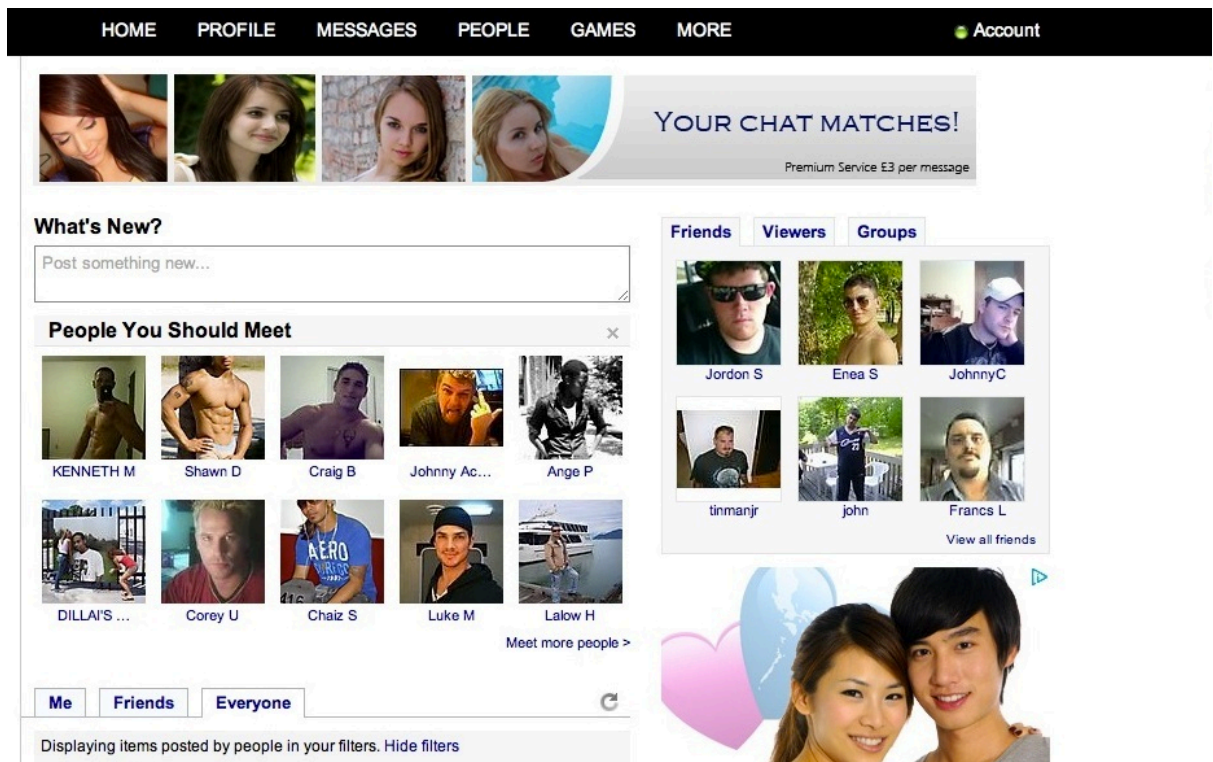
Having taken into account the aggravating factors the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

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

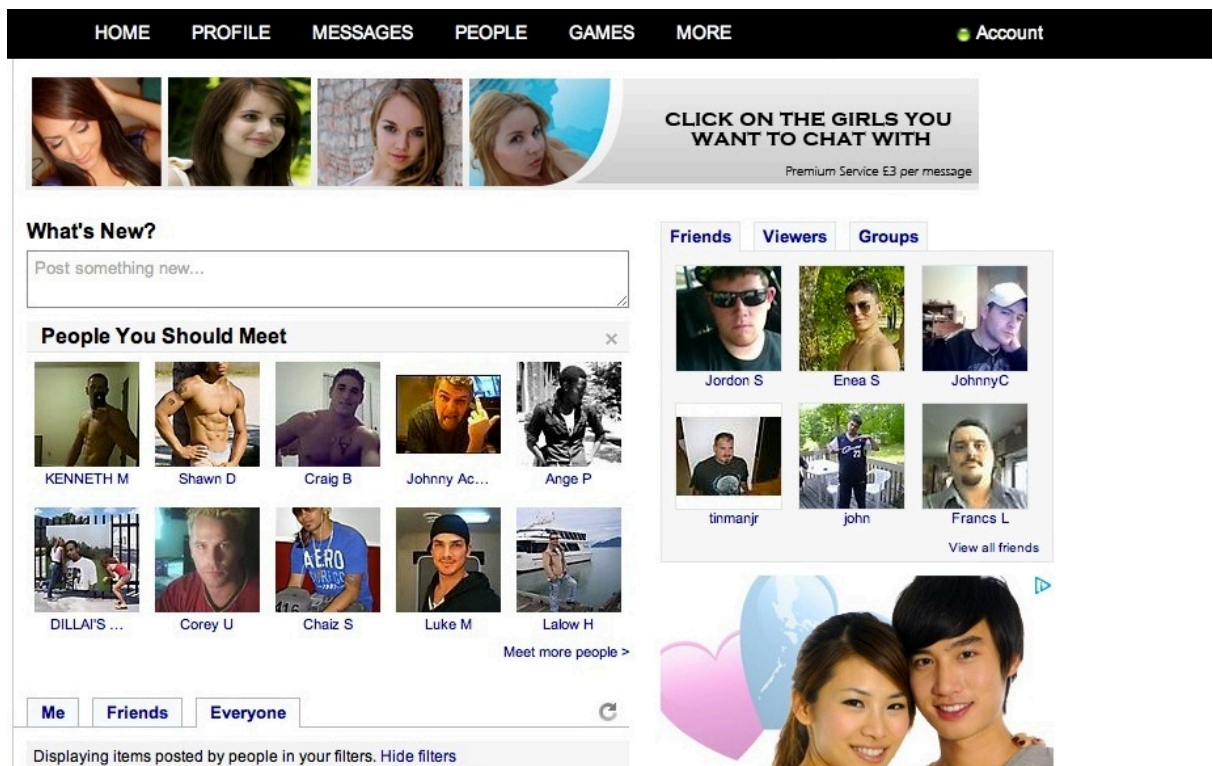
- A Formal Reprimand;
- A Fine of £95,000; and
- An order that the Service Provider pay all claims made by users for refunds of the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.

Appendix A – Four screenshots supplied by the Service Provider on 22 November 2011,

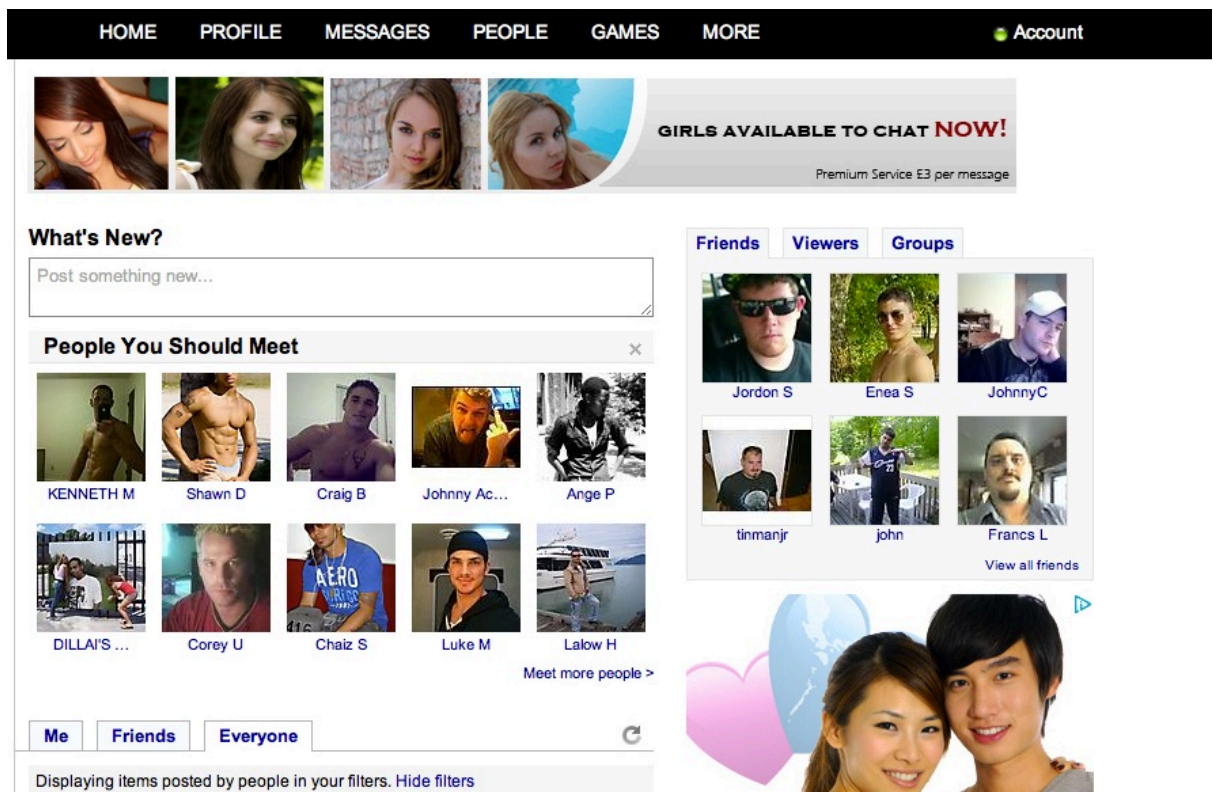
Screenshot 1 of 4:



Screenshot 2 of 4:



Screenshot 3 of 4:



Screenshot 4 of 4:

