

**Tribunal Sitting Number 133 / Case 1**

**Case Reference:** 27290  
**Level 2 provider:** Cellcast UK Limited  
**Type of Service:** Entertainment - Adult  
**Level 1 provider:** Velti DR Limited  
**Network operator:** All Mobile Network operators

**THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE**

**BACKGROUND**

Between 28 February 2012 and 23 July 2013, PhonepayPlus received 22 complaints from consumers, in relation to a glamour/adult picture and virtual chat service (the “**Service**”). The Service is operated by the Level 2 provider Cellcast UK Limited on a number of premium rate shortcodes including 69222, 69444, 69633 and 80090. The Level 1 provider is Velti DR Limited. The Service commenced operation on 21 November 2011 and is currently operational.

The Service is currently advertised using on-screen promotions on various television channels. Consumers enter the Service by sending a keyword to one of the premium rate shortcodes. Consumers are charged £3 per picture received via two messages charged at £1.50 each. Where a keyword is not recognised, the Service automatically switches consumers to the virtual chat element of the Service. For the virtual chat element of the Service, consumers are charged £1.50 per text chat message received from an operator

**Complaints**

The majority of complaints were from family members regarding under 18 year olds interacting with the Service and accessing inappropriate adult content. In addition, many complainants reported bill shock. The maximum cost incurred by a complainant was £3,029.47 over the course of one week.

The Executive noted the content of the following complainant's accounts:

“13 year old son has run up this bill, I am not fully aware of the promotion description for the service.”

“on 20th and 21st april our 13 year old son incurred £850 charges [sic].”

“I don't really know what this service is. This came to my attention on receiving a colossal bill recently (£900+). I would like to get some refund. This was in error of a 12 year old boy.”

“Consumers [sic] 14 year old son has accessed adult premium rate text service – consumers [sic] son admitted using service and entering a fake D.O.B”

During the Executive's investigation, complainant message logs were obtained from the Level 2 provider. The Executive submitted that they consistently showed complainants had initially interacted with the picture element of the Service but inadvertently or unknowingly engaged with the chat element of the Service at a later stage.

**Monitoring**

Between 5 and 12 July 2013, the Executive monitored the Service. The Service was promoted on a Babestation television channel, which provided a keyword to text to the premium rate shortcode 80090 (**Appendix A**). The Executive sent a SMS to engage with the Service and received two SMS', one of which contained a link to an adult picture. The SMS messages read:

"Please click here to view your picture: <http://07j.me/p.php?id=654b5&p=e01332b91>"

"Mmm I?m so horny right now. Wanna see me getting even dirtier? Reply ZOHRA to get another filthy pic of me. (£3 per pic)"

The Executive requested and received two pictures, via four SMS' and then deviated from the keyword by sending the following SMS:

"I'd luv 2c what's under that dress"

The Executive received a SMS containing a request for the consumer's full name and date of birth. The SMS ended by stating:

"Can't wait to chat"

The Executive submitted that as it had deviated from the keyword, it appeared as if it had engaged the chat element of the Service. The Executive responded with a name and date of birth and received the following response which was charged at £1.50:

"there you go Gaz. hehehehe caroline here. Do you fancy another pic of yoru [sic] favourite babe?"

After receiving a further two SMS', one of which included a picture, the Executive received a free spend reminder SMS stating:

"FreeMsg:Uve now spent £10 with us. Hope u've been enjoying urself!Msgs charged at £1.50.PROMO:Chat to a very diff typ [sic] of girl!Simplytxt GIRLS to 80371"

## **The Investigation**

The Executive conducted the matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider on 8 August 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.2.5 – Pricing prominence and proximity
- Rule 2.2.6 – Provision of free messages
- Rule 2.3.12(c) – Spend reminder messages
- Rule 2.3.2 – Misleading

The Level 2 provider responded on 27 August 2013. On 5 September 2013, and after hearing informal representations made on behalf of the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **PRELIMINARY ISSUE**

## **The Service**

In its written and oral submissions the Level 2 provider strongly asserted that it operated two wholly independent services; a virtual chat service and an automated picture service. In particular, the Level 2 provider asserted that the two services were technically separate services and that the virtual chat service had been running for over ten years, whilst the automated picture service began operation in November 2011.

The Tribunal commented that multiple services can operate separately and in a compliant manner on the same shortcode and that the Level 2 provider may have designed the two elements of the Service as separate services. However, the Tribunal concluded that where a consumer engaged with the automated picture element of the Service but either sent in an unrecognised keyword or responded to the “chatty” commentary which accompanied the pictures, and received virtual chat messages, s/he would have no way of distinguishing between the “two” services. The Tribunal commented that the nature of the commentary that accompanied the picture messages appeared to invite a written chat response. This was demonstrated by the following text, which accompanied a picture message:

“I want to feel you deep inside me? Mmm I?m so horny right now. Wanna see me getting even dirtier? Reply ZOHRA to get another filthy pic of me.”

The Tribunal noted that a number of consumers crossed into the chat element of the Service as a result of the “chatty” nature of the messages, and not from misspelling key words.

The Tribunal accepted that some consumers would have only engaged with only one element of the Service but that there was potential for confusion. The Tribunal commented that where there is a risk of confusion between two services that are intended to operate separately, a provider must take steps to ensure that it is clear that the services are separate. This could be done by operating the services on separate shortcodes and/or ensuring consumers are fully informed that they have moved between services by sending free service initiation messages.

Accordingly, the Tribunal rejected that Level 2 provider’s submissions and concluded that practically speaking (and for the purpose of the adjudication) the Level 2 provider operated one service across a number of shortcodes which offered consumers pictures of a glamour and/or adult nature and virtual chat.

## **Procedural error**

The Tribunal noted that the Level 2 provider submitted that a procedural breach had occurred as, in the covering letter to the breach letter sent to the Level 2 provider on 8 August 2013, it was stated that the basis for the investigation was as a result of a, “failure to respond to the formal direction issued on 14 July 2013.” The Tribunal noted that the actual basis for the investigation was abundantly clear from the substantive content of the breach letter. Further, when the error was brought to the attention of the Executive on 16 August 2013, the Executive confirmed the basis of the investigation both orally and in writing. The Tribunal considered the evidence including the Level 2 provider’s written and oral representations and determined that the error did not materially affect the Level 2 provider’s ability to understand the nature of the alleged breaches or the ability of the Level 2 provider to respond to the substantive breaches. The Tribunal noted that the Level 2 provider did not identify any prejudice caused as a result of the error and that the Tribunal had failed to identify any prejudice. As a result, the Tribunal noted the error but continued with its determination of the breaches.

## **ALLEGED BREACH 1**

### **Rule 2.2.5**

In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.

1. The Executive submitted that the Level 2 provider had breached rule 2.2.5 of the Code because full pricing information was not included prior to purchase. The Executive asserted that the Level 2 provider had acted in breach of rule 2.2.5 for the following reasons:
  - i) A number of promotions did not include the price of the chat element of the Service;
  - ii) The chat element of the Service began immediately after consumers entered their date of birth. However, pricing information was only provided in the spend reminder messages;
  - iii) Messages re-promoting the Service did not include pricing information.

The Executive relied on the content of the Guidance on “Promotions and promotional material” and “Virtual chat services”, (the “**Guidance**”). The Guidance states:

#### **Promotions and promotional material**

##### Paragraph 2.1

“Pricing information is one of the fundamental pieces of information that promotional material for PRS must display. This is to ensure that consumers are fully and clearly informed of how much the premium rate service is likely to cost them, before they commit to purchase. The principle rule around transparency of pricing in the PhonepayPlus Code of Practice is Rule 2.2.5...”

##### Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).”

#### **Virtual chat services**

##### Paragraph 2.1

“Consumers should be made fully aware of the total cost of using any virtual chat service prior to entering. This includes making the consumer aware of the number of messages that they are likely to receive in response to the messages they send.”

##### Paragraph 2.2

“For example, if for every one message the consumer sends, three are received, promotional material should clearly state either:

- The total cost of all messages (e.g. Total cost per one message sent = £4.50);
- or
- The cost of each text message and the number of messages the consumer will receive (e.g. You will receive 3 replies at £1.50 per message for every 1 message sent).”

#### **Reason one**

The Executive submitted that a number of promotions did not include the price of both the picture and the chat element of the Service. The Executive monitored the Service and obtained a screenshot of a television promotion (**Appendix A**). The promotion only included the pricing (£3 per picture) for the picture element of the Service.

During the course of the investigation, the Level 2 provider submitted a number of promotions for the Service. The Executive noted that the promotions either contained pricing information for the picture element or the virtual chat element of the Service but never for both (**Appendix B**).

### **Reason two**

The Executive asserted that the chat element of the Service began immediately after consumers entered their date of birth. However, the first time pricing information for the virtual chat element of the Service was provided to the consumers was in the spend reminder SMS.

In correspondence between the Executive and the Level 2 provider, the Level 2 provider stated that the picture sender service and the virtual chat service were entirely separate services that operate on the same shared shortcodes. It further stated that if a consumer initially engaged with the picture sender service and, during the course of its use, entered a keyword that was not recognised, the service switched to chat to try and establish what the consumer was requesting. It added that a consumer must be 18 years old or over to engage with the chat Service therefore, unless the consumer is registered, a date of birth request will be sent.

The Executive asserted that consumers should be informed of the cost of the chat element of the Service prior to being billed for the first chat message. In addition, the Executive relied on the complainant message logs that demonstrated that some complainants had engaged with the picture element of the Service and, after deviating from the keyword, received a date of birth request. From this point on, the consumer was charged at £1.50 per message for the virtual chat element of the Service.

### **Reason three**

At various stages during a consumer's interaction with the Service, promotional SMS' were sent that did not include pricing information for the virtual chat and/or the picture element of the Service.

The Executive relied on the definition of the term "promotion" in the Code:

Paragraph 5.3.29

"'Promotion' means anything where the intent or effect is, either directly or indirectly, to encourage the use of premium rate services, and the term 'promotional material' shall be construed accordingly."

The Executive submitted that the text contained in the SMS, which accompanied the picture messages and encouraged consumers to engage further with the Service, was promotional material.

The Executive relied on an extract from a complainant's message log which stated:

"Did you enjoy your picture hun? Wanna see more? They get a lot dirtier you know!  
Reply PREETI now for another pic x"

The Executive noted that the text which accompanied the picture messages encouraged further use of the Service and therefore was promotional material that should have included pricing information.

The Executive submitted that a breach of rule 2.2.5 of the Code had occurred for the three reasons advanced above. The pricing information was not communicated prior to consumers incurring charges.

2. The Level 2 provider generally denied the breach and stated that it believed that the cost of the two separate services was made clear to consumers before any purchase was made.

The Level 2 provider strongly asserted that it had a picture sender service and a virtual chat service which were separate and distinct services. It explained that it is common practice for multiple services to operate on the same shortcode and for consumers to interact simultaneously with two services on the same shortcode. The Level 2 provider submitted that the complainant message logs showed the whole message thread for the shared shortcode. It disputed that there was any link between the automated picture sender service and the virtual chat service. The Level 2 provider stated that the fact that both services operated on the same shortcode did not mean that the services were linked or constituted two elements of the same service.

The Level 2 provider gave a detailed description of the mechanics of the two services. It explained that the picture sender service was automated, non-operator led and had no virtual chat element. The charge on the picture sender service could only ever be £3 per picture or video via two £1.50 SMS'. The television promotion directed the consumer to enter a keyword to engage with the automated picture service. The automated picture service had been programmed to recognise common spelling errors so it should be able to determine the consumer's request. However, if the pre-configured parameters were not met, then an operator would be required to send a message.

The Level 2 provider acknowledged that, in conjunction with the Level 1 provider, it had identified a system error where operators had used the pre-configured age verification message to determine the consumer's request, as such the platform erroneously assumed that it was a virtual chat message and the consumer was billed. Once the problem had been identified, all operators were told that it was imperative to use the pre-configured (free) messages. Further, changes to the platform were made to make it impossible to charge for age verification messages.

In relation to the chat service, the Level 2 provider stated SMS' were sent to an operator led system and that the service could also incorporate picture requests. The pricing for this service was £1.50 per message with a maximum of three messages sent per message received. It stated that the promotions for the chat service included pricing. For example:

“Chat messages – you will be charged for up to max 3 replies per sms sent”.

In addition it stated that the full terms and conditions clearly inform consumers of the costs of engaging with the chat service. It asserted that the terms and conditions states:

“Text messages to 69222 billed at £1.50 per message received. Picture and video messages to 69222 billed 2 x £1.50 per picture/video sent/received. Subsequent

chat messages £1.50 each. Chat messages – you will be charged for up to max 3 replies per sms sent. Wap enabled phone required”.

The Level 2 provider submitted that once a consumer engages with the (virtual chat) service, they are sent pre-configured messages, all of which contain pricing information.

The Level 2 provider stated that it took age verification very seriously. Other than in a very limited number of cases, the age verification SMS was free. The Level 2 provider explained that it trained its operators to a high standard and ensured they used the correct pricing information. The Level 2 provider stated it placed a high importance on the fair and equitable treatment of consumers and it provided the Tribunal with a copy of its operator training manual to demonstrate its efforts to achieve the objective. In addition, the Level 2 provider stated that its system was highly effective in preventing consumers under the age of 18 receiving inappropriate content, yet also being fair to the adult consumer in ensuring that spelling errors or requests that are not recognised were passed to an operator.

In relation to spend reminders, the Level 2 provider asserted that it complied with the Code in respect of the virtual chat service but highlighted that there was no such Code requirement for the picture sender service.

The Level 2 provider submitted that the Executive had erroneously grouped its shortcodes together. It drew attention to the fact that the Code requires each shortcode and service to be registered separately with PhonepayPlus. Therefore the Level 2 provider took issue with the Executive’s assertion that there were 22 complaints, because when the complaints were distributed across the individual shortcodes and services it created an entirely different impression.

The Level 2 provider highlighted that the Executive had not initially included the shortcode 80090 as part of its investigation and that it was only incorporated at a later date. It also submitted that some of the screenshots initially relied on by the Executive related to a competitors service [these screenshots were redacted from the case bundle prior to the Tribunal’s deliberations].

The Level 2 provider submitted that the automated picture sender service was a stand-alone service and not one and the same as the virtual chat service. Therefore there was no pre-conceived intention to mislead consumers by having them enter the Service on one basis (for the picture sender) and then switching them without their prior knowledge to an entirely different service (the virtual chat service).

Specifically in relation to Reason three, the Level 2 provider accepted that some promotional SMS messages had been sent to consumers which omitted pricing information. It explained that it was alerted to the issue by the Level 1 provider in December 2012. It believed it had corrected the issue but, as a high volume of content required alteration, it had failed to correct the omission on a limited number of pre-configured messages. It explained that message content was regularly tested by the Level 1 provider and, as a result of testing in early 2013, it was discovered that a number of pre-configured messages still omitted pricing information. Since then, the Level 2 provider stated that in conjunction with the Level 1 provider, it reviewed the messages and replaced any that omitted pricing information. The Level 2 provider provided email correspondence with the Level 1 provider which confirmed changes were made to the promotional messages on 8 July 2013.

During informal representations, the Level 2 provider clarified its submissions regarding the alleged procedural error and the services being technologically and operationally separate.

The Level 2 provider clarified its written submissions regarding the platform error where consumers were charged for age verification messages.

The Level 2 provider made detailed representations about the low number of complaints and specifically addressed the nature of each complaint. It stated the number of complaints demonstrated that the Service had operated compliantly for some time and that the complaints generally regarded minors using the services without permission. It was also keen to impress on the Tribunal that it should not be naive to fabricated complaints, as it had experienced a number of occasions when consumers had tried to obtain a refund by falsely claiming a minor had used the Service without permission. For this reason, the Level 2 provider had a stringent refund policy. The Level 2 provider stated it was usually able to detect a false claim by examining the content of a consumer's response and checking usage limitations with the Mobile Network operator. The Level 2 provider made reference to a specific complaint and explained it had not accepted that the Service had been used by minor due to the explicit language in the message responses. The Level 2 provider urged the Tribunal to distinguish between genuine and fabricated complaints.

Specifically, in relation to Reason two, the Level 2 provider asserted that all consumers engaging with the virtual chat service received a free service initiation message (a "welcome" message), which contained full pricing information. The Level 2 provider was given additional time to provide evidence from the complainant message logs of the initiation message that it asserted contained pricing information. Later, the Level 2 provider provided extracts from complainant's message logs, which included the following highlighted message:

"Please reply with your name and FULL date of birth. We cannot answer without this. You must be over 18 to use this service. Can't wait to play;)x"

The Level 2 provider also provided a consumer log with a highlighted SMS, which it stated showed that consumers had understood that they were switching between the picture sender service and the virtual chat service. The message stated:

"Yes babes let's chat xxx"

3. The Tribunal considered the evidence and submissions before it. The Tribunal noted the admissions made by the Level 2 provider in relation to the omission of pricing information from some promotional messages. It also noted the Level 2 provider's explanation in relation to the charge for the age verification messages, which it stated was due to a platform error. The Tribunal noted the Level 2 provider's comments in relation to the exclusion of the 80090 shortcode from the Executive's original breach letter. However, the Tribunal commented that it was clear that the Executive was investigating the Level 2 provider's automated picture and virtual chat services and that it did not appear that the Level 2 provider had actively assisted at an early stage to clarify the position. The Tribunal noted the Level 2 provider's comments in relation to the separate shortcodes and the day and night services, but the Tribunal found that consumers could view the day and evening shortcodes as being part of the same Service.

The Tribunal considered the evidence provided to support the Level 2 provider's assertion that consumers were informed of the cost of the virtual chat element of the



Service in a service initiation message but did not accept that the messages provided supported the assertions made.

The Tribunal concluded that, for the three reasons advanced by the Executive, the cost of the Service was not sufficiently clear or prominent in breach of rule 2.2.5 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH 2**

**Rule 2.2.6**

Any messages that are necessary for a consumer to access, use or engage with a service but are provided separately from the service itself must be free of charge.

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.2.6 of the Code as a number of consumers were charged for age verification messages, which were necessary for a consumer to engage with the chat element of the Service.

The Executive relied on complainant message logs that indicated that a free age verification message was sent to some consumers which used the following standard wording:

“You must be over 18 to use this service. Can’t wait to play;-) x”

However the Executive further noted that operators often used variations of the age verification message, which were billed. The Executive provided examples of four complainants who had been sent variations of the age verification message, more than once and, had been charged for them.

The Executive asserted that a breach of rule 2.2.6 of the Code had occurred as some consumers were charged for messages necessary for them to engage with the Service.

2. The Level 2 provider accepted that some consumers incurred charges for messages that should have been free as a result of operator error. Further to the submissions outlined above in response to the alleged breach of rule 2.2.5, the Level 2 provider explained that where a consumer had engaged with the picture service but had failed to enter the correct keyword spelling within the pre-set parameters, the operator could, instead of sending a pre-configured free automated age verification message, send a bespoke message asking for the date of birth. Since this message was written by the operator, the platform erroneously assumed that it was a virtual chat message and billed the consumer. The Level 2 provider asserted this was an assumption made by the system, having regard to the action taken by the operator. The Level 2 provider stated it had rectified the issue on 22 July 2013 following communication with the Level 1 provider. As a result, it was no longer possible for a consumer to be charged for age verification messages.

In addition, the Level 2 provider stated that the Executive was incorrect in the assertion that the age verification messages were “necessary in order to engage the chat element of the Service”, as it asserted that there was no chat element to the picture sender service. It, again, stated that there was no link between the two services.

3. The Tribunal considered the evidence and the admissions made by the Level 2 provider. The Tribunal noted that the Level 1 provider had been made aware of issues in December 2012 yet the Level 2 provider did not make the necessary technical

changes to ensure that all age verification messages were free until July 2013. Accordingly, for the reasons advanced by the Executive and in light of the admissions made by the Level 2 provider, the Tribunal concluded that a breach of rule 2.2.6 of the Code had occurred.

## **Decision: UPHELD**

### **ALLEGED BREACH 3**

#### **Rule 2.3.12(c)**

All virtual chat services must, as soon as is reasonably possible after the user has spent £8.52 plus VAT, and after £8.52 plus VAT of spend thereafter: inform the user separately from the service or any promotion that £8.52 plus VAT has been spent;

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.3.12(c) of the Code as consumers were not informed as soon as they had spent £8.52 plus VAT (spend reminders).

The Executive relied on PhonepayPlus Guidance on “Virtual chat services”. The Guidance states:

#### Paragraph 2.4

“All virtual chat services should, as soon as is reasonably possible after a consumer has spent £10, and after each £10 spend thereafter:

- Inform the consumer separately from the service, or any promotion, that they have spent £10; and
- Inform the consumer of the cost per minute, or per message, of continuing to use the service.”

The Executive noted that the Level 2 provider sent spend reminder messages in relation to the chat element of the Service only.

The Executive relied on an extract from a complainant’s message log, which demonstrated that a consumer had initially interacted with the picture sender element of the Service but responded with an unrecognised keyword. As a result, a billable age verification message was sent to the consumer. It appeared that the consumer had inadvertently interacted with the virtual chat element of the Service. The message log showed that a spend reminder was only sent after the consumer had spent a total of £28.50 (19 messages billed at £1.50). The Executive noted that the spend reminders seemed to relate only to the chat element of the Service.

The Executive submitted that the purpose of spend reminders is to ensure that a consumer is aware of how much they are spending on a service. By only including part of the service, consumers were misled into believing that they had spent considerably less than they had actually spent. In light of the above, the Executive asserted that a breach of rule 2.3.12(c) of the Code had occurred.

2. The Level 2 provider denied the breach and stated that it is not required to send spend reminder messages for the picture messaging service. As set out in the Level 2 provider’s response to rules 2.2.5 and 2.2.6, detailed informal representations were made on the Level 2 provider’s behalf in relation to the issue of the Service being two separate services. The Level 2 provider added that it had sent spend reminders to all chat service users in compliance with the Code.
3. The Tribunal considered all the evidence, including the detailed written and oral representations made on behalf of the Level 2 provider. The Tribunal found that

consumers who initially engaged with the picture sender element of the Service and inadvertently crossed over to the virtual chat element of the Service, were not sent spend reminders for their total spend on the Service. Therefore, such a consumer was likely to have been under the impression that s/he had spent considerably less than they had (as evidenced by the complainants who had informed PhonepayPlus of experiencing bill shock). The Tribunal commented that even if it had accepted that the picture and chat elements of the Service constituted separate services, at times, the receipt of spend reminders in relation to the virtual chat element of the Service appeared to be random and that the information provided by the Level 2 provider in relation to the breach of rule 2.3.12(c) did not provide the clarification expected. As a result the Tribunal commented that, at times, there appeared to have been little consistency, which was likely to have caused consumer confusion. According, on the basis of the logs supplied to the Tribunal and for the reason given by the Executive, the Tribunal concluded that spend reminders were not sent in compliance with rule 2.3.12(c) of the Code.

## **Decision: UPHELD**

### **ALLEGED BREACH 4**

#### **Rule 2.3.2**

Premium rate services must not mislead or be likely to mislead in any way.

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.3.2 as consumers were misled into using the chat element of the Service and thereby incurred additional premium rate charges.

The Executive relied on the PhonepayPlus Guidance on “Promotions and promotional material”. The Guidance states:

#### Paragraph 3.1

“If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, an important term or condition likely to affect their decision to use the service.”

#### Paragraph 3.2

“PhonepayPlus expects that all promotions must be prepared with a due sense of responsibility to consumers, and promotions should not make any factual claims that cannot be supported with evidence, if later requested by PhonepayPlus to do so.”

The Executive relied on the complainant message logs, which demonstrated that some consumers had initially engaged with the picture element of the Service but later inadvertently engaged with the virtual chat element of the Service. The Executive specifically referred to two instances where consumers had spelt the keyword incorrectly, and had then received an age verification SMS message. It was not made clear to consumers why they were being asked to verify their age nor that they were entering the chat element of the Service.

The Executive relied on its monitoring (summarised in the Background section) and noted that during the television promotions, it was only informed about the picture element of the Service. The monitoring also demonstrated that by deviating from the keyword the Executive became engaged with the chat element of the Service.

The Executive submitted that consumers were misled by omission, as they were not informed at the outset that the Service included both picture and virtual chat. Consequently, the Executive submitted that a breach of rule 2.3.2 of the Code had occurred as consumers were likely to have been misled into engaging with the chat element of the Service without realising that they would incur further premium rate charges.

2. The Level 2 provider denied that consumers would have been misled. As set out in the Level 2 provider's responses in relation to the alleged breaches of rule 2.2.5, 2.2.6 and 2.3.12(c), the Level 2 provider stated that the automated picture sender service was a stand-alone service separate from the virtual chat service. The Level 2 provider submitted that there had never been a pre-planned intention to deceive consumers by having them enter the Service on one basis (for pictures) and then switching them without their prior knowledge to an entirely different service (the virtual chat service). It stated that the chat element of the Service was designed to be an integral feature of the picture sender service in order to prevent inappropriate content being received by those under the age of 18 years. The Level 2 provider made detailed representations in relation to unrecognised misspelling of keywords which results in consumers being automatically diverted to an operator in order to identify what the consumer is requesting. The Level 2 provider added that the operator would try to send a picture if they are able to determine the request (where the text entered is similar to a keyword) but that in some circumstances that may not be possible.
3. The Tribunal considered all the evidence and submissions before it. The Tribunal noted that it had concluded that the two elements of the Service should be treated as one service for the purpose of the adjudication. The Tribunal commented that the grounds advanced by the Executive for the alleged breach of rule 2.3.2 appeared to have been advanced in the alternative to the other three breaches raised. The Tribunal noted that it had found some aspects of the Service misleading (and provided comment on this elsewhere), but not for the reason raised by the Executive. Accordingly, the Tribunal did not uphold a breach of rule 2.3.2 of the Code.

## **Decision: NOT UPHELD**

### **SANCTIONS**

#### **Initial Overall Assessment**

The Tribunal's initial assessment of the Code was as follows:

#### **Rule 2.2.5 – Pricing prominence and proximity**

The initial assessment of rule 2.2.5 of the Code was **serious**. In determining the initial assessment for the breach of the Code the Tribunal applied the following criteria:

- The nature of the breach means that the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers was higher, and/or the Service had the potential to generate high revenue, as a result of the breach.

#### **Rule 2.2.6 – Provision of free messages**

The initial assessment of rule 2.2.6 of the Code was **serious**. In determining the initial assessment for the breach of the Code the Tribunal applied the following criteria:

- The nature of the breach means that the Service would have damaged consumer confidence in premium rate services.

- The cost incurred by consumers was higher, and/or the Service had the potential to generate high revenue, as a result of the breach.

### **Rule 2.3.12(c) – Spend reminder messages**

The initial assessment of rule 2.2.6 of the Code was **serious**. In determining the initial assessment for the breach of the Code the Tribunal applied the following criteria:

- The nature of the breach means that the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers was higher, and/or the Service had the potential to generate high revenue, as a result of the breach.

The Tribunal's initial assessment was that, overall, the breaches were **serious**.

### **Final Overall Assessment**

In determining the final overall assessment for the case, the Tribunal took into account the following aggravating factor:

- The Level 2 provider became aware of deficiencies in relation to the provision of pricing information within the promotional messages, through the Level 1 provider in December 2012, but the breaches continued until it was again noted by the Level 1 provider in June 2013 and finally addressed by the Level 2 provider in July 2013.

The Level 2 provider had no breach history.

The Tribunal found no mitigating factors. The Tribunal noted that the Level 2 provider stated that it had made technical changes to ensure that all future age verification messages were non-chargeable on 22 July 2013 and addressed concerns regarding pricing in promotional SMS message on 8 July 2013. However, the Tribunal commented this action should have occurred much sooner and that the current content of free messages was not sufficient to ensure that consumers were fully aware of the charges they would incur (as set out in relation to the breach of rule 2.2.5).

The Tribunal also noted that the Level 2 provider had stated that it had not provided any refunds to complainants as it did not accept that the majority of complainants had valid claims (although it was currently processing one application for a refund). The Tribunal commented that it did not accept the Level 2 provider's assertion that some of the language used by consumers meant that the consumer could not have been a minor.

The Tribunal noted that the Level 2 provider's revenue for the Service was within the range of Band 1 (£500,000+).

### **Sanctions Imposed**

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

- a formal reprimand;
- a fine of £100,000;
- a requirement that the Level 2 provider seeks compliance advice for all current virtual chat and/or picture sender services within 2 weeks of the date of publication of this decision and thereafter implement the advice within 2 weeks; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim,

save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

## Appendices

Appendix A: Screenshot from the Executive's monitoring of a television promotion for the Service:

**DOWNLOAD HOT PICS OF THIS MASTI BABE!**

**TEXT: ZOHRA TO 80090**  
£3 PER PIC

**CALL THE MASTICHAT GIRLS! £3.00 PER MIN**

**0906 782 5555 85188** FROM MOBILES: £1.50 PER MIN + £3.00 CONK. CHARGE

**UK CREDIT CARD: 0844 448 9962** (local rate)

Want to be a Mastichat girl?  
Email: [Jobs@mastichat.tv](mailto:Jobs@mastichat.tv)

0 min

all terms and conditions can be found at [www.theblack-dog.com/terms](http://www.theblack-dog.com/terms) [PHOTOS to 88101: 18+ sub:]

Appendix B: Screenshot provided by the Level 2 provider of a television promotion for the Service:

[www.babestation.tv](http://www.babestation.tv)

**TEXT TORI to 69444**  
£3 per pic

**TEXT: TORI TO: 69444**  
£3 per pic

**SEXY TORI IS WAITING FOR YOUR CALL**

**CALL THE GIRLS! £3.00 PER MIN**      **MOBILES: CALL! (£1.50 PER MIN + £3.00 CONK. CHARGE)**

**0982 873 0906 69444**

**PAY BY CREDIT CARD 0208 114 5445** STANDARD RATE

**CALL THE NUMBER ON SCREEN AND PRESS OPTION 1**

calls connected only to onscreen presenters or eavesdrop. 09826710055 costs 61p per minute + network extras and is