



Tribunal Sitting Number 128 / Case 2

Case Reference: 15316

Level 2 provider	Zooborang Ltd
Type of service	Adult virtual chat service
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 7 November and 14 May 2013, PhonepayPlus received 53 complaints from members of the public regarding an adult virtual chat service, which operated under the brand names "Flirt UK", "The Chat Club" and "Naughty Flirting", and was operated by the Level 2 provider Zooborang Ltd (**"the Service"**). The Level 1 provider was Velti DR Limited.

The Service operated on the premium rate shortcode 83737 and cost £1.50 per message received from the operator and 25 pence per message sent by the consumer. The terms and conditions indicated that a consumer could receive up to five messages for every message s/he sent.

The Service was promoted online using banners.

The majority of the complainants stated that the messages received were unsolicited. Consumers who accepted that they had used the Service stated that they were under the impression that the Service was free.

The Tribunal upheld all of the breaches. The Level 2 provider's revenue in relation to the Service was within the range of Band 3 (£100,000- £250,000). The Tribunal considered the case to be **very serious** and imposed a formal reprimand, a fine of £60,000, a requirement that access is barred to the Service until compliance advice has been implemented to the satisfaction of PhonepayPlus 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.

The Investigation

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

The Executive sent a breach letter to the Level 2 provider on 4 June 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.12(c) – Spend reminder messages
- Rule 2.3.11 – Method of exit
- Rule 2.3.8 – Age verification



Rule 3.9.2 – Appropriate use of number ranges
Rule 3.4.12(a) – Registration of numbers

The Level 2 provider responded on 19 June 2013. On 27 June 2013, and after hearing informal representations made on the Level 2 provider's behalf, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

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 the Level 2 provider had failed to ensure that every consumer who used the Service was sent spend reminder messages in accordance with the Code.

The Executive noted that it had received the following account from a complainant.

"Appears to be a virtual chat service - I did not interact with it so I can't confirm more about the type of service I received 2 £1.50 billing messages from 83737 on 20/3/2013 after having done nothing (as far as I am aware) to initiate the service. Furthermore I received no free messages containing terms for the service and no instructions on how to stop. After the 2nd billed message I replied stop and received a free message confirming that I had been stopped and with a company name (Zooborang) and a helpline number. I rang the helpline number to complain and was told someone would contact me within 48 hours. I received a text immediately instructing me to write to them to dispute charges. Total amount billed £3."

In addition, the Executive noted the following information from the complainant message logs supplied by the Level 2 provider:

Consumer 1: The message log for this user showed that between 07/01/2013 and 08/01/2013, this user sent 47 messages at a cost of 25 pence each (total £11.75) and received nine messages from the operator at a cost of £1.50 each (total £13.50). In total, this user spent £25.25 before they received two free spend reminder messages.

Consumer 2: The message log for this user showed that on 07/01/2013, the user sent 34 messages at a cost of 25 pence each (total £8.50) and received six messages from the operator at a cost of £1.50 each (total £9.00). In total, this user spent £217.50 before s/he received two free spend reminder messages.

Consumer 3: The message log for this user demonstrated that s/he entered the Service on 08/02/2013 at 17:51. On 08/02/2013 at 23:31 hours, the message log demonstrates that a free spend reminder message was sent. Between

08/02/2013 from 23:35 hours to 09/02/2013 at 14:29 hours, the user sent 34 messages at a cost of 25 pence each (total cost £8.50) and received 19 messages from the operator at a cost of £1.50 each (total cost £28.50). During this period, the user incurred a total cost of £37.00 without receiving the free spend reminder message. This user then received five free spend reminder messages at the same time. The Executive further notes that all 19 operator messages on 09/02/2013 between 00:21 and 14:05 hours were sent without any interaction from the end user.

In addition, between 09/02/2013 at 22:12 hours to 10/02/2013 at 22:26 hours, s/he sent 17 messages at a cost of 25 pence per message (total cost £4.25) and received 47 messages at a cost of £1.50 per message (total cost £73.50). During this period, the user incurred a total cost of £77.75. The Executive further noted that the 47 operators messages were all sent without any further interaction by the user. The user did not receive a free spend reminder message until s/he had spent £77.75.

The Executive also noted from the message log for this user that on 10/02/2013 s/he sent 76 messages at a cost of 25 pence for each message (total cost £19.00) and received three messages from the operator at a cost of £1.50 each (£4.50) and therefore incurred a total cost of £23.50 in three minutes. The user did not receive any free spend reminder messages until s/he had spent £23.50.

On 11/02/2013, between 10:05 and 21:55 hours, the user sent 17 messages at a cost of 25 pence per message (total cost £4.25) and received 24 messages from the operator at a cost of £1.50 per message and therefore incurred a total cost of £40.25. The Executive noted that the 24 operator's messages were sent without any interaction by the user in approximately ten minutes. The user did not receive any free spend reminder messages until s/he had spent £40.25.

Consumer 4: The message log for this user showed that on 26/06/2012, the trigger word 'chat' was sent to shortcode 83737 and on the same day, the user received two free messages. Four months later (12/10/2012), the user sent another MO which said 'hi'. The cost of this MO was 25 pence. Between 12/10/2012 and 14/12/2012, the end user sent 385 messages at a cost of 25 pence each (a total cost of £96.25). No free spend reminder messages were sent in response to these messages from any of the Service operator(s).

The Executive submitted that, contrary to rule 2.3.12(c) of the Code, subscription reminder messages were not sent as soon as reasonably possible after the user had spent £8.52 plus VAT. Users were not therefore informed at prompt intervals that they had spent this amount, and in some cases (as demonstrated above) users continued to interact, thereby incurring additional costs.

In relation to virtual chat services, one of the purposes of a spend reminder is to inform end users that they have spent £8.52 plus VAT. Rule 2.3.12(c) is intended to ensure that end users will not incur any further costs should they, having been reminded of the costs they

have already incurred, decide to cease to interact further with a virtual chat service. The Executive asserted that spend reminders must be received by users as soon as they spend £8.52 plus VAT. Any delay in the receipt of these messages (whether as a result of technical errors or otherwise) defeats the purpose of rule 2.3.12(c).

For the reasons set out above, the Executive submitted that a breach of rule 2.3.12(c) had occurred and outcome 2.3 has not been achieved.

2. The Level 2 provider stated that spend reminders were triggered when users had spent £10. It added that the submission of the spend reminder is based on the receipt of a delivery receipt from the Level 1 provider after which an internal spend counter is updated. The receipt of such delivery receipts is asynchronous to the chargeable message submission and this can result in some cases for the spend reminder to be delayed. The Level 2 provider asserted that, "Due to the nature of message receipt, submission and receipt of confirmation of charge it is very difficult to implement a bulletproof solution."

Further, the Level 2 provider commented that it is not unusual for users to engage in multiple conversations with multiple operators at the same time. The Level 2 provider stated that where this occurs, "The application batches the messages for submission and sends them in sequence waiting for the corresponding delivery receipt to be received before attempting the next submission. As such the flow of messages is maintained and the corresponding message logs are in sequence."

During informal representations, the Level 2 provider's representative stated that there were technical difficulties in ensuring compliance with the rule and that in some cases reminders were sent prior to £8.52+ VAT being spent. This was especially true as, due to the individual cost of the Service, the total spend never totalled exactly to £8.52+ VAT. The Level 2 provider provided a detailed account in relation to how the messages were sent and the reliance on delivery receipts. The Level 2 provider asserted that all the complainant logs showed that spend reminders were sent, albeit that in some instances they should have been sent earlier. The Level 2 provider added that it had checked that spend reminders had been sent and that it had a spreadsheet.

The Level 2 provider accepted that its compliance with the rule was not perfect, but that spend reminders were sent before they were required or on time in most instances.

3. The Tribunal considered the evidence, including the Level 2 provider's written and oral submissions and the complainant message logs. The Tribunal noted that the complainant message logs clearly showed that, in some instances, spend reminders were not sent in compliance with rule 2.3.12(c) as they were not sent, "as soon as reasonably possible after the user had spent £8.52+ VAT and after £8.52+ VAT of spend thereafter". The Tribunal noted that rule 2.3.12(c) is only applicable to 'virtual chat services', as a result it is not acceptable for a provider to state that its technical platform is not capable of full compliance with the rule as a result of the nature of the service. Therefore, for the reasons given by the Executive, the Level 2 provider's admissions and the content of the complainants' logs, the Tribunal concluded that rule 2.3.12(c) had been breached. The Tribunal noted that the Level 2 provider appeared to have been reckless in its approach to compliance with the rule and that it was not adequate to have systems that only work some or most of the time. Accordingly, the Tribunal upheld a breach of rule 2.3.12(c) of the Code.



Decision: UPHELD

ALLEGED BREACH 2

Rule 2.3.11

Where the means of termination is not controlled by the consumer there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charge to the consumer after exit except where those charges have been legitimately incurred prior to exit.

1. The Executive submitted that the Level 2 provider acted in breach of rule 2.3.11 of the Code on the basis that:
 - i. Some complainants indicated that they incurred charges after sending a STOP command.
 - ii. During monitoring, PhonepayPlus incurred charges after sending a STOP command.
 - iii. Some complainant logs showed the receipt of chargeable messages after the receipt of a STOP command.

The Executive relied upon the content of PhonepayPlus Guidance concerning Method of exit from a service, which states:

Use of the 'STOP' command

- 2.1 The most common and easily implemented system for consumers to exit a service is through the use of the 'STOP' command. This command should be recognised through both the capitals variation of 'STOP' and the lower case variation of 'stop', and any combination thereof.
- 2.2 With regard to how the 'STOP' command should work in practice, we consider it best practice that consumers should be able to text 'STOP' to the mobile shortcode the service was initially requested from, or from which it is receiving (chargeable) messages, in order to stop the service. For example, if a consumer enters a service on 89XXX, they should be able to text 'STOP' to that same shortcode to opt out.
- 2.3 We accept that this may not always be possible – either for technical reasons, or because of the cost to a provider of doing so. However, where we discover that separate shortcodes for requesting a service and opting out from it are being used, then consideration will be given to a provider's motive for doing so as part of any investigation. Any actions which are likely to confuse consumers may be considered unacceptable by a PhonepayPlus Tribunal.
- 2.4 For the avoidance of doubt, we would always expect the consumer to be able to text 'STOP' to the same shortcode from which they are being billed.
- 2.5 While there is a good understanding that texting 'STOP' to a service will result in the service stopping, there will be occasions where a consumer may not be aware of the 'STOP' command. In such circumstances, consumers may text 'please stop', 'stop texting me' or other variations containing the word 'stop'.



- 2.6 We accept it is not always possible to recognise these variations immediately when a consumer wishes to exit. However where a consumer has legitimately tried to cancel a service and failed (either because they have mis-typed 'STOP', or because they have texted some other variation), then once this becomes clear to the provider, best practice would be for consumers to be retrospectively refunded for any charges subsequent to their first clear attempt to opt out, and immediately removed from the service.
- 2.7 Some providers use 'STOP' and a keyword (for example, 'STOP tones'). While there is no problem with using this method, 'STOP' on its own must also work.
- 2.8 While this document recognises that there are certain forms of technology that make a 'STOP' command difficult or impossible to put into effect (e.g. MMS-based texting, voice shortcodes), PhonepayPlus recommends in the strongest possible terms that providers continue to use the 'STOP' command as a method of exit, where it is technically possible and practical (i.e. it does not add extra cost to the consumer) to do so.
- 2.9 Where providers would like to use an alternative to 'STOP' in promotional material, then they are strongly advised to contact PhonepayPlus before beginning promotion or operation. In these circumstances, we would consider representations on a case-by-case basis. Providers should be aware that, even if PhonepayPlus advised that the use of a command other than 'STOP' was acceptable in promotions, the shortcode itself would still have to respond to the 'STOP' command in addition to any other exit words.
- 2.10 Where it is technically possible and practical for a service to be exited through use of the 'STOP' command, providers are strongly advised to seek advice from PhonepayPlus before using any alternative means for method of exit from a service. Providers are advised that a PhonepayPlus Tribunal may take the view that the method of exit is not simple, where the method of exit is through a different mechanic than that used to deliver the service. For example, it would not be appropriate to require consumers to use the web, or a telephone call, to exit a text-based service. Exceptions to this advice are set out below.
- 2.11 Providers of text marketing or other forms of electronic marketing should note that this document does not reference opting out from marketing. Providers should refer to the General Guidance Note on 'Privacy and consent to charge' for further information.

Complainant accounts

The Executive submitted that seven of the complainants had experienced difficulty exiting the Service as the STOP command did not appear to function correctly. The Executive noted that some complainants stated that they had texted STOP to the Service, however they continued to receive chargeable text messages.

The complainants reported the following:

"The text messages are introductions from woman sent from a premium rate text service number 83737. The first time I received one on the 16/10/12 it was 15.35 and I replied Stop. A further text at 15.39 and I replied Stop. Then 18.40 and I replied Stop and 20.07 and I replied Stop and the following day 17/10/12 I received a text which I didn't reply to. I didn't receive any more text messages and didn't think anything of it until the bill came in and I had been charged 25p to send the stop messages and 150p to receive the text messages. The total amount of money charged was 400p. I paid the bill and still have the paper bill on file. I have not received any texts until today 17/12/12 when I received 3 separate text messages as listed above. I am unaware as to whether I have been charged I have however contacted Orange customer services this evening and they assured me I will not receive anymore texts from this service again and informed me they are listed as 'Interactive Services' and their number is 0870 2480277. I will be contacting them tomorrow to find out who they are and how they got my number. Orange informed me to reply STOP ALL if they send another text or if this fails to change my phone number. I feel this is un-solicited spam texting. [sic]"

"Unsolicited sms from 83737

Consumer sent unsolicited sms with URL to website to register with 'Flirt UK' - consumer completed registration however was unaware of charges.

Consumer has been billed £45 via premium sms from 83737.

Consumer cannot recall URL and has deleted received sms.

Consumer advises he has text STOP to shortcode but sms continue.

Texts began 14/02. [sic]"

"Consumer's 15 year old son is being charged for a service which he only went once on the site but then the mother is not sure because she keeps changing her mind and since then he has been receiving messages which he can't stop. Consumer saying they just want the service to stop. Consumer saying he does not know which web site he went on. Consumer saying the bill shows messages being received but no messages being sent out. Consumer not sure when the last message came to her phone. Consumer has changed son's mobile number. Consumer did not have much information to give. Consumer saying the son has sent stops a few times but he has continued to receive charges."

"They send me first message on 14/02/2013, It appeared as a valentines messages, I opened it and find out that is sex -chat message. Straightaway I send STOP message but did not work, they send to me huge wave of that kind messages. I tried to contact to them but not response. Also I had asked my mobile provider to block this number, but they said that they can not. I did not subscribe for that service, do not know how they get i.e. am non working mother with small baby. The amount from 14/02/2013-14/03/2013 is 200 pounds, and do not know how much is going to be the next bill. Vodafone recharge the billing on the third party's behalf, monthly contract. Flirt UK Vodafone told me the company name is MIC. [sic]"

In addition to complainants reporting the failure of the STOP command, the Executive also monitored the Service. "STOP ALL" was sent to the shortcode 83737, however a further ten messages at a cost of £1.50 each were received (total cost of £15.00 after sending "STOP ALL").

Furthermore, the complainant message logs showed that a number of complainants had

received messages after sending a STOP command.

Complainant A

The message log for this user demonstrated that s/he sent the trigger word 'chat' to shortcode 83737 on 10/02/2013 and engaged in conversation with the operator(s). On 21/02/2013 at 09:21 hours, the user sent the command "Stop all" to shortcode 83737 and then again at 17:23 hours. At 17:23 hours, the user received a message stating "FreeMag: Flirt UK – Service ended. IP. Zooborang. For help call 02033222935." The Executive noted that the message log demonstrated that the user did not receive a termination message when they initially sent the "STOP ALL" command at 09:21 hours. On 21/02/2013, following receipt of the confirmation of termination message, the user sent the following MO:

"Please could you not send me any more flirt etc text anymore thank you"

The Executive noted that in previous free spend reminder messages, the wording of the text was as follows:

"Freemsg: You have spent another £10. Reply with any message to continue 25/msg sent & £1.50/msg received. For support call: 02033222935"

The Executive noted that this message indicated that in order to demonstrate interaction with this Service, a user could send any MO and would receive message(s) from the operator. The message log further demonstrated that the user received a message from the operator at a cost of £1.50 stating, "can you send me a photo babe". To this, the user resent the trigger word "STOP ALL" and received a confirmation message that the service had ended. The user again reacted to this message and sent "STOP ALL" and received a further free confirmation message of service termination. The user reacted to this by sending "STOP ALL" a further three times.

Complainant B

The Executive noted from the message log that the user engaged with the Service for two days. Additionally, the user also sent the STOP command to shortcode 83737 on 18/12/2012. The Executive noted that the user did not receive a confirmation message regarding the termination of the Service.

The Executive noted that the Level 2 provider gave the following account in relation to the failure of the STOP command:

"Zooborang migrated its infrastructure from Rackspace to Digital Ocean during February and completed in March. During migration the backend data was replicated across the data centres to ensure continuity of service while both centres were operating. After migration was complete a sanity check of the database was performed and some inconsistencies found in some tables. One table in particular is used to track the state of any given user. The state changes as the user registers, verify its age, reaches a network daily spend limit, reaches the £10 limit before a reminder is sent or ends up in a stopped state. The stop state is reached on receipt of a STOP or STOP ALL MO or manually



processed by the customer care team or the chat operators.

“The corruption of the user status meant that some users previously in the stop state ended up being made available to chat again. Any pending responses were then processed and dispatched. Please note that at the most the users would have received £10 worth of responses until their status was stopped again and a reminder sent.

“The issue was resolved promptly and the database state was only inconsistent for a short time. It is however impossible to give an exact figure of the users affected as the content of the table was rectified as replication and migration completed.

“Zooborang notified the customer care team and the L1 provider immediately and all complainants were offered a full refund for their total usage of the service.”

The Executive noted that the Level 2 provider, in their response dated 9 May 2013, provided correspondence concerning the method of exit from the Service. The correspondence contained a chain of correspondence between the Level 1 provider and the Level 2 provider in relation to the use of the shortcode 83737 for the STOP command in promotional material. The Level 2 provider was advised that as responding to this shortcode cost 25 pence, consumers would be charged for sending STOP in breach of the Code. For this reason, the Level 2 provider promoted an 077 long number for the purpose of terminating the Service.

The Executive further noted that as the Service was carried out by live ‘Operators’, where a user sent the STOP command to shortcode 83737, the Service should have been terminated. The Executive referred to paragraph 2.2 of the Guidance, which states that it is best practice that the consumer should be able to text STOP from the shortcode they received the message from.

The Executive asserted that using an 077 long number was not an easy or simple method of exit from a text-based virtual chat service in breach of rule 2.3.11.

The Executive asserted that the Level 2 provider acted in breach of rule 2.3.11 as:

- i. It failed to provide a simple method of permanent exit from the Service;
- ii. Where a consumer texted STOP to the Service shortcode a charge was incurred; and/or
- iii. In some instances users incurred charges after sending a STOP command to the Service shortcode.

2. The Level 2 provider stated that it had migrated its infrastructure during February 2013. The migration was completed in March 2013. During migration the backend database was replicated across the data centres to ensure continuity of service while both centres were operating. After migration was complete a sanity check of the database was performed and some inconsistencies were found in some tables. One table in particular was used to track the state of any given user. The state changed as the user registered, verified his/her age, reached a network daily spend limit, reached the £10 limit before a reminder is sent or ends up in a stopped state. The STOP state is reached on receipt of a STOP or STOP ALL MO or manually processed by the customer care team or the chat operators. The corruption of the user status meant that some users previously in the STOP state ended up being made available to chat again. Any pending responses were then processed and dispatched. The Level 2 provider asserted that, at most, the users would have received £10 worth of responses



until their status was stopped again and a reminder sent.

The Level 2 provider submitted that the issue was resolved promptly and the database state was only inconsistent for a short time. However it added that it was impossible to give an exact figure of the users affected as the content of the table was rectified as replication and migration completed. It added that it had notified its customer care team and the Level 1 provider immediately and that all complainants were offered a full refund for their total usage of the Service.

During informal representations, the Level 2 provider's representative stated that the issues experienced in relation to the STOP command were an unfortunate side effect of the migration. The Level 2 provider reiterated that it had informed all effected consumers and that it had put additional measures in place, including conducting a technical review, to ensure that there were no further issues.

3. The Tribunal considered the evidence, including the Level 2 provider's written and oral submissions in full. In particular, the Tribunal noted that the Level 2 provider had made admissions in relation to failures that occurred as a result of a database migration in February 2013. However, the Tribunal noted that at least one complainant experienced difficulties prior to February 2013. Having considered all the evidence before it, the Tribunal concluded that the Level 2 provider had acted in breach of rule 2.3.11 for the three reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.11.

Decision: UPHELD

ALLEGED BREACH 3

Rule 2.3.8

Level 2 providers of virtual chat services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age. However, non-sexual entertainment text and picture-based virtual chat services may be used by those aged 16-17 provided that no advertising for the service has occurred in media where the target audience is below 16 years of age.

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.3.8 of the Code as it had failed to take reasonable steps to discourage use by non-bill payers and to prevent the use of the Service by those under the age of 18.

The Executive noted that PhonepayPlus' Guidance concerning Virtual chat services specifically states:

Age verification

- 1.1 Providers should take all reasonable steps to ensure that no one under the age of 18 uses any virtual chat service which contains adult content, or is adult in nature. Initial age verification should take place prior to the consumer incurring a charge. Promotional material should clearly state that the service is only for individuals aged 18 and over. For virtual chat services delivered on mobile phones, it will usually be expected that the consumer is sent an initial text asking for their date of birth (which must be checked to ensure the consumer is over 18) before each individual service commences.



- "1.2 Alternatively, where a provider seeks to use a system for initial age verification of a mobile MSISDN (mobile number), which can then be applied across all its 18+ services once an initial check is made, providers will need to prove to PhonepayPlus upon request that the system is robust, auditable and tamper-proof. In addition, providers should ensure that they re-check age verification on MSISDNs every three months.
- "1.3 No consumer under the age of 16 is permitted to use any virtual chat services, whether the services contain adult content or not, and providers should take all reasonable steps to ensure that this is the case.
- "1.4 Operators determining a consumer's age should not use leading questions (e.g. "You are over 18, aren't you?"). Age verification methods should require the user to state their date of birth. Age verification is an ongoing duty and, if during the course of the service, the user gives any indication that they are under 18 (or under 16, in the case of non-adult virtual chat services), then the service should be immediately terminated. We would consider it best practice for providers to also place a bar on that consumer's number, or blacklist it, for six months to a year
- "1.5 Providers should also take all reasonable steps to ensure that sexually explicit chat does not take place on non-adult virtual chat services. A failure to do so could likely result in a breach of paragraph 2.3.8 of PhonepayPlus' Code of Practice. Where non-adult virtual chat services are promoted, such promotions should only take place in media where the target readership is those 16 years of age and over."

Reasonable steps

- "1.6 What we mean by 'reasonable steps' is an expectation that all providers that are engaged in a virtual chat service should take a proactive stance in the way their staff are trained and moderated to ensure compliance with the PhonepayPlus' Code of Practice.
- "1.7 In practical terms, the extent and level of moderation will depend on the size and available resource an individual provider has at its disposal. However, as a starting point, we would expect to see evidence (see below) of how individual operators are being trained in practice.
- "1.8 Some of the mitigating steps that may help providers to achieve consistent standards of compliance include:
- Signing up to PhonepayPlus' News Alerts to ensure they are being kept updated with adjudications and any new policy developments that might impact upon their business model.
 - Contacting PhonepayPlus to receive further guidance on the compliance of their service model with PhonepayPlus' Code of Practice.
 - Having a training manual available, which is regularly updated and sets out some of the key 'triggers' and steps that individual operators are expected to take where underage activity is suspected.
 - We would consider it best practice that, where a provider successfully identifies 'underage use', the infringing MSISDN be forwarded to the appropriate Mobile Network Operator for further consideration.



"1.9 No person employed as an operator for virtual chat services may be aged under 18. All such employees should be adequately trained to operate according to these and any other relevant conditions, and all relevant rules of the Code, before commencing operation.

"1.10 Virtual chat services that are sexual entertainment services and require the user to be over 18 to participate should only operate on mobile shortcodes beginning with 69, 79 or 89, which are the prefixes designated by UK Mobile Network Operators for adult services; for fixed-line services, they should only operate on 0909, 0908 or 098 prefixed numbers. For more information on the appropriate number ranges, please see the General Guidance Note on 'The appropriate use of number ranges'."

The Executive noted from the message logs supplied by the Level 2 provider that:

Consumer A:

The message log showed that the user sent a trigger word 'chat' to the shortcode 83737 on 19/07/2012 and received two free messages on the same day. There was no further interaction until 18/03/2013, 19/03/2013 and twice on 22/03/2013, when the user received messages from an operator at a cost of £1.50 each. The total cost incurred was £7.50. The user then sent 'STOP' and the Service was terminated. No age verification procedure took place as the end user was never asked to confirm his/her date of birth.

Consumer B

The message log showed that the user sent a trigger word 'chat' to the shortcode 83737 on 11/03/2013 and received two free messages on the same day. There was no further interaction until 18/03/2013, 20/03/2013, 21/03/2013, 23/03/2013, 24/03/2013 and 25/03/2013, when the user received messages from an operator at a cost of £1.50 each – total cost incurred £9.00. The user then sent 'STOP'. There was no age verification.

Consumer C

The message log for this user showed that s/he sent his/her date of birth 15 times and each one differed.

Consumer D

The complainant was a mother complaining on behalf of her 15 year old son. The message log showed that the user sent the trigger word 'chat' to shortcode 83737 and received two free messages requiring the user to send their date of birth. This user sent 12 messages with a variety of different dates of birth to which the operator responded with, "o babe how are you," followed by, "o babe I send you a photo babe"

The complainant's account was:

"Consumer's 15 year old son is being charged for a service which he only went once on the site but then the mother is not sure because she keeps changing her mind and since

then he has been receiving messages which he can't stop. Consumer saying they just want the service to stop. Consumer saying he does not know which web site he went on. Consumer saying the bill shows messages being received but no messages being sent out. Consumer not sure when the last message came to her phone. Consumer has changed son's mobile number. Consumer did not have much information to give. Consumer saying the son has sent stops a few times but he has continued to receive charges."

Consumer E

The message log for this user showed that the Service was triggered by sending 'chat' to shortcode 83737. The user then received two free messages, one of which requested a date of birth. Three days later, the user sent 24 messages containing a variety of different dates of birth to which the operator responded with, "o babe how are you," followed by, "o babe I send you a photo babe," followed by, "you still there babe," at a cost of £1.50 per message.

On 16 April 2013, the Executive asked the Level 2 provider to supply information regarding any training that is offered to its operators in relation to verifying a user's age. The Level 2 provider responded with the following:

"The Zooborang platform handles age verification after which the user is available to chat to operators. The operator can block a user should the conversation lead them to believe that the user might be under age...There is a flaw in that users can indeed attempt to register their age multiple times and the relevant changes are being made to the platform to block any further attempts."

The Executive noted that the message logs for two of the complainants demonstrated that some users received premium rate messages from this Service without ever providing their date of birth and therefore, the operators failed to verify that the users were over the age of 18. In these two instances, there was no age verification.

For three other complainants, the Executive noted that the users sent a variety of different dates of birth in a very short period of time and yet were still able to engage in dialogue with the operator and incur premium rate costs. The Executive further noted from the message logs that the operator(s) did not question the age of these users. The Executive asserted that a reasonable step for the operator(s) would have been to question the user's date of birth as the information given was inconsistent.

Furthermore, the Executive noted that the Guidance concerning virtual chat services states that:

"Promotional material should clearly state that the service is only for individuals aged 18 and over."

The Executive noted that the promotional material for the Service did not state that the Service was only intended for individuals aged over the age of 18.

In light of the above, the Executive asserted that the Level 2 provider's operators failed to take reasonable steps to verify the age of some end users as no age verification queries were

made. In addition, operator(s) failed to take action when they received multiple dates of birth in various text messages. The Executive asserted that this ought to have raised the suspicion that the users were under 18. Finally the Executive asserted that, contrary to Guidance, some of the Service's promotional material failed to clearly state that the Service was intended for use by those who were over 18 years of age. The Executive accordingly submitted that a breach of rule 2.3.8 has occurred.

2. The Level 2 provider denied the breach and/or that it was responsible for any breach. Specifically, the Level 2 provider stated that a detailed investigation of the platform had failed to replicate the ability to start the Service without age verification. It stated that it could only speculate that this was related to the platform migration and records being inconsistent for a period of time. It added that it had taken the following steps:
 - Presence of age verification is checked before any MT can be sent.
 - All user records have been checked and their status updated according to the message activity.
 - Multiple registration of age ranges will result in the user being stopped automatically.
 - Users sending stop will not be allowed to join the Service at a later date.

During informal representations, the Level 2 provider's representative reiterated that it had experienced problems as a result of the database migration and that it had not foreseen the issues in relation to the multiple registration of dates of birth. It added that it had taken advice from the Level 1 provider regarding method of exit and provided a number of refunds.

3. The Tribunal considered the evidence, including the Level 2 provider's written and oral submissions. The Tribunal noted that the Level 2 provider had accepted that there had been instances where no age verification had occurred or where it should have been on notice that further age verification enquiries were required. As a result, and for the reasons given by the Executive, the Tribunal concluded that the Level 2 provider had acted in breach of rule 2.3.8 of the Code.

In addition, the Tribunal commented that the Service appeared to give consumers the impression that they could meet the operators (as opposed to it being purely a fantasy chat service). As this had not been raised by the Executive, the Tribunal did not afford any weight to this in determining breach severity or sanctions.

Decision: UPHELD

ALLEGED BREACH 4

Rule 3.9.2

Where certain premium rate number ranges, shortcodes or other means of access to services 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 premium rate number ranges, shortcodes or other means of access to services from being used for particular purposes or for the provision of particular categories of service, those number ranges, shortcodes or means of access 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 asserted that the Level 2 provider had acted in breach of paragraph 3.9.2 of the Code as the Service was a sexual entertainment service but operated on a non-adult shortcode when the Service

Guidance concerning the appropriate use of number ranges specifically states:

“2.2 Mobile shortcode service use (as designated by the Mobile Network Operators):

- 69x/79x/89x – these shortcode ranges are reserved for SES (adult services which require consumer age verification prior to use). They can be charged at either between 10p and £10 per text message received by a consumer, or at between 10p and £5 per minute when operating as a SES voice shortcode (i.e. a consumer dials the shortcode from a mobile phone to receive a voice-based SES, as opposed to texting the shortcode to receive a text-based SES).”

The Executive noted that the Service operated on the dedicated shortcode 83737 (a non-adult shortcode). The Executive asserted that the Service was a sexual entertainment service and therefore should have operated on a mobile shortcodes beginning with 69x, 79x or 89x due to the nature of the conversations in the message logs between the operator(s) and users.

The Executive gave the following example of messages sent from operators to consumers to illustrate that the Service was of an adult nature:

Consumer A (edited to show the messages received from the operator only):

“will you send me a pic of your cock
...and i will show you where i want it putting
...i havent stopped rubbing my pussy all morning
...oh my god
...maybe we could chat on kik n have some fun or find somewhere to go for a drink ;)
...yeah i like the sound of that or how about been naughty outside
...fuck yeah i need i know
...oh yeah i give an amazing tit wank
...you would not believe just how horny and wet i am right now lol
...and i would love you to cum all over my face
...oh yeah its not a good session unless you have fucked both holes and my mouth
...dont know about u but i need it now
...have you ever had a threesome
...two girls or two guys i like both
...would you like to lick it all off me
...or is that not your thing
...here check this out
...hey sexy
...here you go[sic]”

Consumer B (edited to show the messages received from the operator only):

“wanna see something something wet and hot”
...did u like that pic Make u hard Show me”
...yeah I love group sex

...The more cock the better
...Im so dirty
...and I love fucking
...and rubbing [sic]"

On 16 April 2013, the Executive questioned the Level 2 provider as to whether the Service should be operating on an adult prefix due to the language used by not just the end users but also the operator(s). The Level 2 provider responded on 9 May 2013 with the following:

"Zooborang's understanding is that an adult range shortcode should be used when visual content of an adult nature (as classified by the IMCB) is provided to the end user. For message based services this requirement does not apply...Following the original information request in the 15th of February, Zooborang has however requested the provision of an adult shortcode should this requirement be made compulsory for the continuation of the service."

The Executive noted that paragraph 5.3.31 of the Code defines "Sexual entertainment services" as:

"'Sexual entertainment service' means an entertainment service of a clearly sexual nature or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly or implies that the service is of a sexual nature. Pay-for-product services where the product is of a clearly sexual nature are sexual entertainment services."

The Executive acknowledged that the promotional material and free initial subscription message(s) do not indicate that the Service is of an adult nature. The Executive asserted that the language used by both the operator(s) and users was of a sexual nature, making the Service an adult sexual entertainment Service and therefore should be on an adult prefix.

In light of the above, the Executive submitted that the Level 2 provider failed to comply with the guidelines in relation to designated number ranges and that a breach of paragraph 3.9.2 of the Code had occurred.

2. The Level 2 provider denied that it had acted in breach of paragraph 3.9.2 of the Code. Generally, the provider submitted that it was its understanding that an adult range shortcode should be used where visual content of an adult nature (as classified by the IMCB) is provided to the end user and that for message based services this requirement does not apply.

However, the Level 2 provider added that, following the original information request on the 15 February, it had requested the provision of an adult shortcode, should this requirement be made compulsory for the continuation of the Service.

During informal representations, the Level 2 provider accepted that the Service was adult in nature. It reiterated its belief that only services classified as being of an adult nature by the IMCB were required to operate on an adult shortcode. The Level 2 provider added that it was happy to move the Service to an adult shortcode. In addition, the Level 2 provider stated that promotional material did not state that the Service was for those aged over 18 as, due to age verification requirements, those aged under 18 could not use the Service.

Further, the Level 2 provider added that it could add a statement in relation to the age requirements to future promotional material. It also stated that the Level 1 provider had checked promotional material for the Service, but had not raised any concerns regarding the lack of information in relation to age requirements.

3. The Tribunal considered the Level 2 provider's oral and written submissions, including its admission that the Service was adult in nature, and the Executive's written submissions. The Tribunal noted that the IMCB's remit does not extend to virtual chat services. The Tribunal stated that the Service was clearly a sexual entertainment service and as a result should have operated on an adult designated shortcode. The Tribunal commented that the Level 2 provider should have been aware that the Service could only operate on an adult shortcode. In addition, the Tribunal held that promotional material for the Service should have contained a statement in relation to the Service age requirements. Accordingly, the Tribunal upheld a breach of paragraph 3.9.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 5

Rule 3.4.12(a)

Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service

1. The Executive submitted that the Level 2 provider acted in breach of paragraph 3.4.12(a) of the Code as the Level 2 provider failed to register the shortcode that the Service operated on with PhonepayPlus in a timely manner.

The Executive noted that the Service began operation in August 2012, but was not registered until 11 January 2013.

The Executive noted that the Level 2 provider stated, "The registration of the shortcode was overlooked at first and promptly rectified when Zooborang was made aware of the situation."

The Executive noted that an extensive list of PhonepayPlus notifications were published prior to registration requirements coming into force.

In light of the above, the Executive asserted that the Level 2 provider failed to register the shortcode on which the Service operated in breach of paragraph 3.4.12(a) of the Code.

2. The Level 2 provider accepted that there had been a delay in registration of the Service shortcode. The Level 2 provider explained that this was a clerical error and that it had registered the shortcode immediately on receiving a reminder from PhonepayPlus.
3. The Tribunal considered the evidence, including the Executive's submissions and the Level 2 provider's submissions. The Tribunal noted that the Level 2 provider accepted that it had not registered the numbers in a timely fashion. The Tribunal concluded that there is an obligation on Level 2 providers to register services within a reasonable period having regard to paragraph 3.4.12(a) and (c) of the Code and the "Notice[s] to Industry". The Tribunal found that the period of delay was excessive and concluded that paragraph 3.4.12(a) had been

breached. Accordingly, the Tribunal upheld a breach of paragraph 3.4.12(a) of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.12(c)- Spend reminder message

The initial assessment of rule 2.3.12(c) of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The cost incurred was likely to have been material to consumers, with the breach likely to have generated considerably inflated revenues for the Service.
- The Service, which in some instances failed to supply adequate details regarding the amount consumers spent in a timely manner, was such that the legitimacy of the Service as a whole was put in doubt.

Rule 2.3.11- Method of exit

The initial assessment of rule 2.3.11 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The obligation in relation to ensuring that a consumer can simply and effectively stop premium rate charges is amongst the most fundamental of all the Code provisions.
- In some circumstances, the STOP command appeared to have been ignored.
- In some instances, there were significant barriers to the termination of the Service.
- The Service operated in a way that demonstrated a degree of reckless non-compliance with the Code.

Rule 2.3.8- Age verification

The initial assessment of rule 2.3.8 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- A breach of rule 2.3.8 is inherently serious given the nature of the consumer harm that the rule exists to prevent.
- The Service operated in a way that demonstrated a degree of reckless non-compliance with the Code.

Paragraph 3.9.2- Appropriate use of number ranges

The initial assessment of paragraph 3.9.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service operated in a way that demonstrated a degree of reckless non-compliance with the Code.

Paragraph 3.4.12(a)- Registration of numbers

The initial assessment of paragraph 3.4.12(a) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service operated in a way that demonstrated a degree of reckless non-compliance with the Code.

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

Final Overall Assessment

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

- The Level 2 provider had failed to follow Guidance on Method of exit from a service, Virtual chat services and The appropriate use of number ranges. The Tribunal also noted that the Level 2 provider had failed to follow Guidance on Promotions and promotional material.
- There was evidence that the failures in relation to the STOP command continued after the date on which the Level 2 provider became aware that there was a problem.

In determining the final overall assessment for the case, the Tribunal took into account the following two mitigating factors:

- The Level 2 provider stated that it had provided refunds to four users. One of which was PhonepayPlus. The Tribunal commented that it would have expected a higher number of refunds.
- The Level 2 provider stated that it had put the following measures in place:
 - i. Presence of age verification is checked prior to sending any MT message.
 - ii. All user records have been checked and their status updated according to the message activity.
 - iii. Registration of multiple different dates of birth will result in the user being automatically stopped.
 - iv. Once a user has sent STOP, they will be unable to join the Service at a later date.

The Tribunal noted that the Level 2 provider:

- i. Had registered the numbers on which the Service operated when told to do so.
- ii. Asserted that it had experienced issues as a result of a data migration. However, the Tribunal noted that no safeguards had been put in place to ensure compliance during the migration.
- iii. Had co-operated with PhonepayPlus in a manner that met the general expectation. The Tribunal noted that, generally, the Level 2 provider had provided limited evidence to support its assertions.

The Level 2 provider's revenue in relation to the Service was within the range of Band 3 (£100,000-£250,000).

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

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 £60,000;
- a requirement that access is barred to the Service until compliance advice has been implemented to the satisfaction of PhonepayPlus; 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.