

Tribunal meeting number 167 / Case 1

Case reference: 37563
Level 2 provider: No Goats Limited (UK)
Type of service: SMS Dating and chat service
Level 1 provider: Fonix Mobile Limited (UK) and Oxygen8 Communications UK Limited (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

Between 13 May 2014 and 23 February 2015, PhonepayPlus received nine complaints from consumers in relation to a SMS dating and chat service (the "**Service**") operated by No Goats Limited (the "**Level 2 provider**") on the dedicated premium rate shortcodes 63222, 80098 and 89990.

The Service is an SMS dating and chat service charged at £1.50 per SMS message received. The Service was promoted in local and regional newspapers in the format of classified dating adverts. The Service was also promoted by SMS message to consumers who had previously interacted with the Service or with other services.

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 16 April 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.3.11 – Method of exit
- Rule 2.2.5 – Lack of pricing information
- Rule 2.2.1(a) – Identity of the Level 2 provider
- Paragraph 3.9.2 – Appropriate use of a number range

The Level 2 provider responded on 12 May 2015. On 28 May 2015, after hearing informal representations on behalf of the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses including supporting documentation);
- A previous complaint resolution procedure against the Level 2 provider;
- PhonepayPlus Guidance on 'Virtual chat services', 'Method of exit from a service' 'Promotions and promotional material' and 'The appropriate use of number ranges';



- The breach letter of 16 April 2015 and the Level 2 provider's response of 12 May 2015 (including supporting documentation and Interactive Voice Response ("IVRs") recordings); and
- Correspondence between the Executive and the Level 2 provider's solicitors from 27 May 2015 to 28 May 2015.

The Service

The Service is an SMS dating and chat service charged at £1.50 per text message received. Whilst the Level 2 provider had disputed that it was a "virtual chat service" and instead described the Service as a "dating service", it was noted that the definition of "virtual chat services" was "those premium rate services which, while not being live conversation services, enable two or more people to exchange separate messages by recorded voice, text or pictures." The Service was promoted in local and regional newspapers in the format of classified dating adverts. The Level 2 provider supplied a list of 195 local and regional newspapers in which the Service was promoted. An example of a newspaper promotion supplied by the Level 2 provider which contains a promotion for the Service has been provided at **Appendix A**.

To interact with a personalised classified dating advertisement listed within the newspaper promotion, consumers are advised to take the following steps:

"...**Text.. REPLY2** (Leave a space) the six-digit box number (leave a space) and then enter your message & send to **80098** eg: **REPLY2 123456 hi get in touch...** then send to 80098 Successfully forwarded messages cost £1.50 per message (Max 160 characters). You must exchange 7 messages each before you can swap contact details. Messages may be moderated for your safety and security."

Below is an example advertisement for the Service from a newspaper promotion:

"SARAH attractive 25yr old single female, slim, feminine with long hair and big eyes, enjoys being fit and healthy, socialising, WLTM male 18-35 for fun times. tel no: 0905 515 4200. Box No: 413423"

The Service was also promoted by text message to consumers who had previously interacted with the Service (or with other services). The Level 2 provider, in respect of two users, stated:

"The user originally joined the 80098 Mailbox dating service ... He responded to a marketing message to join the 63333 service by texting SIX and receiving six free messages..."

"The user joined 63222 via a text promotional offer he received from another service he was registered with..."

The Level 2 provider stated that there were in fact three ways in which to join the dating service, which was clearly stated on the newspaper page:

1) By calling a "place an advert" number free of charge on an 0800 number, or on an 0844 number. The caller is then asked a series of questions and provided with service details, terms and conditions etc. A caller is asked to:

- Leave their given name
- Leave a short advert to appear in print (20 words)
- Date of Birth
- Leave their local dialling code or full landline number
- Leave a longer voice message (IVR) which callers hear if they respond to the advert by phone



- Leave a mobile number if they wish to receive replies by text as well as replies by phone
- Asked if they wish the advert to appear locally or nationally
- Asked to leave an e-mail address for on-line offers.

They are also made aware of how to collect replies.

2) If the user only wishes to receive SMS message replies and not leave a voice message they simply join by texting their given name, DOB and wording for a print advert and send to 80098.

3) If the user wishes to join the online internet dating service, they follow the published link. This incurs no PRS cost and is chargeable by credit card only. Online only members were not promoted individually in print but were all available on a dating web site. These members were contacted on a regular basis via newsletters, and were actively invited to join the "PDC app" (the "App"), which the Level 2 provider described as a free to use mobile application targeted at female users. The Level 2 provider stated that the App had been running for over a year and was now an integral part of the full dating offering.

The Level 2 provider however noted that it did not run the IVR element of the service, nor the local date sites; these services were provided by third parties.

The Level 2 provider stated that all of the 'sign-up' information is transcribed and collated, and is then sent in files to a production team who set the adverts onto the relevant newspaper pages. Each printed advertisement on the page states how the readers should respond to the adverts. Once the advertisement in whichever format had been approved for print, it would go live onto the IVR database which is run on C3 servers. There is an API link between the C3 database into the third party technical platform used by the Level 2 provider, which sends details of all advertisers who wish to take part in the SMS service. All adverts are allocated a box number. If the advertiser just has an 09 number, the interaction would be by phone only. If they have an 09 number and a mobile phone icon they can be contacted by phone and SMS. If they only have a box number they can be contacted by SMS only.

Complaints

The Executive had received nine complaints concerning the Service since 13 May 2014.

Complainants variously alleged that they were misled by the Service as it is promoted as a dating service but they believed that SMS messages received through the Service were not from genuine users, that the STOP command did not work, that the Service was incorrectly promoted as free or that the Service was not requested.

A sample of complainant accounts can be found below:

"Local newspaper advertisement for dating
thought it was a genuine person from the singles section
didn't receive genuine messages
has fear if he had been elderly or younger it may have been more dangerous
doesn't believe the websties given to mbe genuine website" [sic]

"...Service called date locally - Newspaper called [XXXXXX]
Consumer saying he joined the service is august 2014
Consumer saying he has had no genuine response
Consumer saying he put a advert in a newspaper and he gets messages saying he has a voice
message in his mail box
When he checks there are no messages
Consumer saying he has started to get random text messages and he is being charged



consumer saying he has a bill for over £1000
Consumer saying he follows there process, but he gets no response
consumer saying he gets messages from women that don't exist
consumer saying he has sent stop afew times, but he keeps getting messages
Consumer feels this is a scam - He feels the messages he is getting are not from real women because he is saying that when he text his mobile number to the women so they cant contact him, they make excuses that they want to get to know him, they dont want to give there mobile number..." [sic]

"[XXXXXX] - dating section
consumer saying he only once sent a message to a advert (did not have the short code)
consumer saying he started getting random text messages
consumer was shocked to have a high bill for over £60.00
consumer thought it was a one of message you send and then you get a reply from the person you are interested in
consumers complaint was not that clear - i have asked consumer to send in the advert
consumers complaint was very general
consumer feels that the people that tried contacting him were not genuine" [sic]

"Consumer used this service for dating
Consumer was not aware of the charges as the service was advertising a free offer
Consumer thinks this is a scam and that the matches you are given are automated" [sic]

The Executive's monitoring of the Service

The Executive monitored the Service between 1 August 2014 and 21 August 2014 ("**Monitoring period one**"), and between 5 March 2015 and 14 March 2015 ("**Monitoring period two**").

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.2

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.2 of the Code as the Service was promoted as a consumer to consumer dating service, however, the Executive asserted that some consumers who used the Service were in fact interacting with paid operators and were therefore misled about the nature of the Service.

The Executive noted that the Level 2 provider had repeatedly stated that the Service is a peer-to-peer dating service and that paid operators are not used in the provision of the Service. In addition, the Executive noted that the promotional material for the Service stated that the Service is a dating service where consumers have an opportunity to date, "real people in your area".

The Executive submitted that the following elements of the SMS chat conversations, and information obtained during the course of its investigation, suggested that the Service used paid operators. The Executive submitted that this was a non-exhaustive list of factors that together contributed to evidencing non-compliance with the letter and spirit of rule 2.3.2 of the Code:

1. The refusal of the other Service users to exchange personal contact information and meet up;
2. The Executive's monitoring of the Service;



3. Implying that the other Service user is also incurring premium rate charges to use the Service;
4. The refusal of the Level 2 provider to provide registered details of all other Service users; and
5. The promoted Service terms and conditions made reference to (or alluded to) the use of paid operators.

The Executive relied on the content of PhonepayPlus Guidance on 'Virtual chat services' (the "**Guidance**"). The Guidance states:

Paragraph 3.1

"Promotions for virtual chat services should not lead consumers to believe that they will be exchanging messages with other consumers, or that they may be able to meet other consumers by using the service, unless that is the case."

Paragraph 3.2

"Use of words such as 'meet' and 'date' may be deemed misleading if the consumer does not, in fact, have the opportunity to meet any other users or operators of the service. Operators should not indicate to consumers that a meeting can take place, where this is not a function of the service. Where a consumer does request a meeting, expectations should be managed correctly and operators should inform the consumer that the purpose of the service is for 'fantasy chat' only."

The Executive also relied on the complainant accounts including those in the "Background" section above. Four of the nine complainants stated that they were misled regarding the nature of the Service as it was promoted as a dating service, but they suspected that the SMS messages received were not from genuine users.

Reason 1: The refusal of the other Service users to exchange personal contact information and meet up

During the investigation the Executive obtained SMS message logs for the complainants. The Executive submitted that six of the nine message logs demonstrated that the other user repeatedly refused to exchange personal information and/or to meet up with the complainant. The Executive relied on the full message logs and noted the following examples:

Replier: Just wondering what you think of my 36DD's. Not that am super proud of them or anything. lol. What you up to today then [complainant] ? Anything exciting? ;) x

Complainant: Not really working can we move this to sms costs to much just to have a flirt cant see. Your pic to clear either

Replier: Hey [complainant], what are you up to there right now? are you getting my messages at all? cos if you arent, I will just have to reach out and grab you, wont I? lol xx

Complainant: Yeah but your ignoring my requests i wanna chat you up an flirt not spend my wages on this pants number got pics i like to send you as well. Wanna know what you think

...



Replier: Well maybe you need to see a couple more piccies of me then? I have just sent you through another one, hopefully that will be a little better for you, ok?"

Replier: what time do you think you will be heading to the gym then? do you get to spend much time down there? I dont these days way too busy lol

Complainant: Prob at 9pm. Email me on *****@gmail.com this costs £2 per text. Thanks [complainant]

Replier: That sounds like an important job [complainant]. I am from Belfast [complainant], and I moved to Willingham when I was 20 but I do really love it here you?

Replier: I know and I'm sorry that it costs I just think that it's best to chat like this for right now since we need to get used to each other ok?

The Executive noted one message log contained an apparent exchange of personal contact information. Notwithstanding this the Executive asserted that elements of the SMS chat conversations in the complainant message logs, including the refusal to meet the complainant and/or the refusal to exchange personal contact information, were indicative of behaviour that an operator would adopt given that it is implausible for an operator to agree to ever exchange personal contact information and/or meet other Service users.

Reason two: The Executive's monitoring of the Service

The Executive noted from the Service monitoring it conducted during Monitoring period one and Monitoring period two (detailed in the "Background" section) that all other Service users that it engaged with refused to exchange personal information, or ignored the request for an exchange of personal information, in generally the same manner as that experienced by the complainants. Examples included the following:

Executive: I like the sound of you. Whats your number? This is rubbish paying to text.

Replier: Yeah it might be rubbish but I am feeling more comfortable doing it this way, as it means I can get to know someone safely you know what I mean

Executive: You can block contacts these days. Texts are free. Let's get to know each other properly. [number]

Replier: I don't know how you would block contacts and still be able to text to them so I'm not really sure about all that right now so I'd rather not.

Executive: Ok if your not comfortable. Whats your email address? That's safe.

Replier: It's okay, as I said this is the way I'm most comfortable with and that's why I'm here....

The Executive noted from promotional material viewed that there was a discrepancy between the user's location in the advertised promotion and the location given by the user who replied. The Executive asserted that repeated refusals to provide personal contact information was indicative of an operator rather than another consumer for the same reason given under reason one.

In addition, the Executive noted from one interaction that the user was claiming to be in the same area as the Executive (Kent), despite the Service promotion featuring in a newspaper local to Hull. That promotion contained the words, "YOUR local dating service...REAL people in YOUR area...". A further example of a user providing her location as Hawkhurst



(Kent) occurred during the monitoring, despite that user's classified dating profile also appearing in a newspaper local to Hull. The Executive asserted that this behaviour was also indicative of an operator attempting to maintain the interest of the Executive, thereby encouraging further interaction with the Service, which the Executive asserted was behaviour expected from paid operators.

Reason three: Implying that the other Service user was also incurring premium rate charges to use the Service

In response to a direction for information on 24 March 2015, the Level 2 provider had advised the Executive that the Service users that had interacted with the complainants did so through an Application (the "App"). The Level 2 provider stated that the App was not used to bill subscribers.

The Executive noted from the SMS message logs for two complainants that the other users incorrectly stated that they were also incurring premium rate charges to use the Service. The Executive asserted that a consumer who was interacting with the complainant via the free to use App would have no reason to lie about incurring Service charges. The Executive asserted that a more probable explanation was that operators wrongly stated that they were also incurring premium rate charges in an attempt to encourage further engagement with the consumer.

Reason four: Refusal of the Level 2 provider to provide registered details of all other Service users

The Executive directed the Level 2 provider on 13 March 2015 to provide the identity of the Service users that had been interacting with eight of the complainants. On 24 March 2015, the Level 2 provider responded stating:

"The users responding to these particular complainants have done so using our PDC app*. As such, they do not come under the remit of PhonePayPlus, as they are not subscribed to a shortcode. On receipt of your RFI we approached the users involved to ask permission to release their details in accordance with the Data Protection Act (1998). To date we have managed to make contact with 5 of the respondents, 3 of whom did not wish to have their number released. Of the 2 users who were happy for us to release their mobile number, please note that one of them has requested that, in the interests of discretion, should you need to make contact with her you should do so only by email (details listed below). We trust that you will respect her wishes. We have left messages for the remaining users and will contact you with their details should they respond favourably to our request."

The Executive noted that for six out of the eight Service users no identity was provided, as the Level 2 provider specified that it had not obtained explicit consent, or that consent had been withheld from the Service users. Further, the Executive noted that out of the two remaining Service users the Level 2 provider had only provided an identity for one of the Service users.

The Executive again directed the Level 2 provider to provide the identity of the Service users who had interacted with the complainants. The Executive noted that the Data Protection Act 1998 enabled a company to process personal data without data subject consent where "the processing is necessary for compliance with any legal obligation to which the data controller is subject". The Executive also cited the Service terms and conditions, which stated:

"We may pass your details onto this newspaper for marketing or PhonepayPlus for regulatory purposes."

On 2 April 2015 the Level 2 provider responded stating:

"You are correct in that users that interact via SMS do so under those terms and conditions and their data, as our terms state, may be released to PhonePayPlus. We have released that information to you, as required. PDC is not, nor will it ever be, used to bill subscribers. We believe that using websites or apps to subscribe users to a premium rate shortcode is unethical and open to abuse. The service is completely free for PDC users and they do not receive premium rate charges nor do they subscribe to a shortcode (billed or otherwise). As such they have completely different terms and conditions."

As part of the Level 2 provider's response, it also provided the App terms and conditions. The Executive noted that the terms and conditions for the App varied considerably in respect of the privacy statement on data use, despite the only apparent difference between the services being that users who interacted with the Service through newspaper promotions incur premium rate charges, and those who interacted through the App did not.

The Executive considered that the Level 2 provider was able to release the personal information of other Service users for the reasons expressed in the Executive's direction. The Executive submitted that the failure to supply this information reinforced its submission that paid operators were used in the provision of the Service.

Reason five: The promoted Service terms and conditions made reference to (or alluded to) the use of paid operators

During the course of the investigation, the Level 2 provider supplied nine newspaper promotions for the Service. The Executive noted that every Service newspaper promotion supplied by the Level 2 provider stated "For full T&Cs go to [website one]".

The Executive viewed website one and noted that at the end of those terms and conditions it stated:

"n.b. **Chat services are for entertainment purposes only, you will be interacting with paid operators.** 80098 costs £1.50 per SMS received. To STOP text stop to 80098. Service provided by No Goats Ltd. Help: 0207 720 7130" [emphasis added by the Executive]

Further, in SMS message logs supplied by the Level 2 provider the Executive noted that a separate third party website was promoted. An example of an SMS message promotion stated:

"FreeMsg> Â£10 Spend Reminder: Â£1.50 per message received. Join us online for FREE at [website two] . Txt STOP to exit"

The Executive visited website two and took a screenshot of the terms and conditions located on that site. The Executive noted that within the Service terms and conditions on website two it stated:

"**The Site is an entertainment service.** Your use of this Service is entirely at your own risk. You should exercise caution in evaluating what you see when involved in internet communication with people who are unknown to you (such as when you are using message services) and be aware that people may not necessarily be who they say they are and that people may provide information or behave in a way that is unreliable,



misleading or illegal. **By using this Service you accept that any member profiles, messages and communication may not be genuine** and you agree to take reasonable precautions in all interactions with other members or users of the Site or Service, particularly if you decide to meet offline or in person. You are solely responsible for your interactions with other members or users of the Site or the Service. You should not provide your personal or financial information (for example, your credit card, national insurance number or bank account information) to other members or users of our Site.” [emphasis added by the Executive]

The Executive directed the Level 2 provider to comment on the apparent references to the use of paid operators within the promoted Service terms and conditions and the Level 2 provider stated:

“Embarrassingly we have no idea where you have found these terms and conditions. They are woefully out of date. Our sole external advertising for these shortcodes is in print media and confined to the list of local papers that we sent you last week. We have, in the past, advertised chat services alongside the peer-to-peer service, but following direction from yourselves in the spring/summer of 2014 where you pointed out that putting operator chat on a page that featured dating was liable to mislead we ceased all advertising of the operator-led chat and changed our 'global' welcome message on 80098 to the DateLocally one. In addition, you pointed out that the old terms and conditions were confusing at best, so the terms and conditions were changed to the version we currently use”

The Level 2 provider also supplied the text of the current version of its terms and conditions that did not refer to paid operators.

The Executive noted the Level 2 provider’s admission that it had “no idea where you have found these terms and conditions”. However, it also noted that, as at 16 April 2015, the same terms and conditions were still listed on the two websites and on 2 April 2015, the Level 2 provider had referred to website one and had stated that it formed part of its current terms and conditions for the Service.

The Executive submitted that the Service’s promoted terms and conditions, taken collectively with reasons one to four identified above, amounted to evidence of the use of paid operators in the provision of the Service.

Upon questioning by the Tribunal, the Executive confirmed that in its investigation it had only come across one occasion when contact information was exchanged, which was included in the evidence before the Tribunal. It had not come across examples of exchange of details in any other logs or in submissions in the breach letter response.

The Executive submitted that it would not expect this type of issue to engender a large number of consumer complaints as people who did not get a date were unlikely to make a complaint to a regulator on this basis.

The Executive acknowledged that in response to the breach letter the Level 2 provider had provided identities and contact details in respect of the persons that the complainants had interacted with. In relation to the attempts made by the Executive to contact four of these persons, the Executive stated that it had selected a random sample of four persons to call. Upon connection, the Executive had received three messages stating “We’re sorry your call could not be connected at this time, please hang up and try again later”, and had only been able to leave a voicemail message for one of the persons, to which it had not had a response. One of the person’s numbers had been tried for a second time and again the above message was heard by the Executive.



The Executive accepted that the average complainant spend was £30.66.

In summary, the Executive asserted that consumers were misled, or were likely to have been misled, into believing that they were exchanging messages with other consumers, when they were in fact corresponding with a paid SMS operator. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.2 of the Code.

2. The Level 2 provider strongly refuted the allegations and denied that it was in breach of rule 2.3.2 of the Code. The Level 2 provider stated that the Service provided on the three shortcodes was a peer to peer dating service and operators were not used in the provision of the Service. The Level 2 provider submitted that the Guidance did not therefore apply.

The Level 2 provider submitted that the Executive appeared to have solely concentrated its investigation on the “reply by text” element of the service and had ignored the various other ways (as set out in the “Background” section) in which users can join the service and interact with one another.

The Level 2 provider submitted it was disappointed that the Executive did not test the App to better understand the message flow and how the whole service operated. The Level 2 provider submitted that, had the Executive also engaged with the service by phone (and not just SMS), it would have had the opportunity to hear any voice recordings left by the individuals who had placed adverts and would therefore have had solid evidence that the advertisements were placed by ordinary individuals.

The Level 2 provider had supplied IVR recordings (a .wav file containing users’ original voice registration to the service) for some of the users that had interacted with the complainants and the Executive. The Level 2 provider stated that it did not have IVRs for those users who had joined the Service via the App, or for users who had since left the Service as their details had been erased. However, the Level 2 provider stated it was prepared to provide this information for any existing member upon request.

The Level 2 provider stated that its terms and conditions clearly stated that advertisers, “may come from our national database and not from the newspaper in question”, which explained why users who were advertised in a local newspaper for Hull stated that they lived in Kent. The Level 2 provider submitted that there was no reason why a person living in Kent should not have their advertisement published in Hull if they had requested this. However, the Level 2 provider stated that in future it was happy, if the Executive wished, to identify under each member’s mailbox where they come from if they were not local.

The Level 2 provider stated that it had also recently added that members may be interacting with the Service via the App. The Level 2 provider stated that App users did not join directly from the dating pages but were targeted by marketing methods. The Level 2 provider stated that it believed the Executive was confused about the App so it suggested that the Level 2 provider would identify all members on its newspaper promotions who may be using the Service via the App. It provided a mock promotion and invited the Executive to comment on it.

The Level 2 provider submitted that the nine complaints accounted for only 0.008% of the Service usage, and only four out of these nine complaints stated that the Service was misleading. The Level 2 provider stated that it had over 150,000 active members. It supplied an analysis of each of the nine complaints relied upon by the Executive, including details of where the logs were inconsistent with the complainant’s accounts. The Level 2 provider supplied a full list of details for the members who originally joined the service via a free phone number in a local newspaper. The Level 2 provider had further checked if these members had joined the online dating service or App and had supplied these details.



The Level 2 provider submitted in each case that the users were genuine users who had signed up via an IVR or the App. The Level 2 provider submitted that it could not be held responsible if a user declined to meet or share personal contact information. The Level 2 provider submitted that some users of the Service may be “catfishing”, which is where a user is evasive, adopts a fake persona or is hiding something and/or has no intention of meeting in person. The Level 2 provider submitted that at least one of the complainants appeared to be hiding something, as it had noted that she was incredibly evasive and not using the service in the spirit that it is designed for. The Level 2 provider submitted that it did not encourage or condone such practices but these instances are out of its control and not indicative of the majority of its traffic.

The Level 2 provider submitted that various complaints referring to adult content might have arose as a result of a suspected data leak to a third party company who it suspected had gained access to some of its users and had been sending out promotional adult SMS messages. It stated that this had been reported to the Executive.

The Level 2 provider noted that the Executive had provided examples that it had selected whereby users had declined to swap contact numbers and some users did not respond. The Level 2 provider submitted that it was unfair to conclude that the Service was misleading based on three logs selected by the Executive that showed users had declined to swap contact numbers. The Level 2 provider stated that it had provided the Executive with a message log which showed users had genuinely exchanged contact numbers.

The Level 2 provider submitted the Executive’s case officer who had conducted the monitoring could be seen as “leading on” the user with phrases such as, “This is Rubbish Paying to Text” and “its expensive isn’t it”

In respect of reason three, the Level 2 provider submitted that the users had made no mention of premium rate charges, as they had stated “I PAY FOR EACH TEXT I SEND”, “I’m paying to chat with you here too”, appearing to have no knowledge of how reverse billed SMS messages work, which would be a natural assumption for someone using the App. The Level 2 provider submitted that a user might equally be referring to the cost of their standard network charge or a dating subscription.

In respect of reason four, the Level 2 provider submitted that it had been under the impression that by providing its details it could be contravening the Data Protection Act. The Level 2 provider stated that it had since taken legal advice, contacted the IVR service provider, and had released this information to the Executive. The Level 2 provider questioned why the Executive had not made contact with the two users whose personal details it had released to the Executive.

In respect of reason five, the Level 2 provider stated that prior to 2014 the dating pages where it currently advertises the three shortcodes promoted a “text chat for fun” service which used operators. That service was run with a third party company using shortcode 78850. The Level 2 provider stated that the Executive was aware of this and had at the time conducted various meetings with the personnel concerned and gave advice as to how such a service should be advertised, which included advice that a “text chat” service could be advertised on a dating page, if it was clear to the consumer that this was the case. The Level 2 provider stated that in 2014 the decision was made not to advertise “text chat” alongside dating, or indeed to run it full stop. The Level 2 provider stated that dealings with that provider then ceased and the shortcode was changed. The Level 2 provider stated that only the shortcodes were changed and not the full terms and conditions. The Level 2 provider submitted that the terms and conditions were generic ones used on all major dating websites to guard against the common issue of “catfishing” and similar practices.



The Level 2 provider asserted that it had no control over these terms and conditions as it did not operate these linked websites. However the Level 2 provider submitted that it had identified that the terms and conditions on website one were incorrect, and it had arranged for the terms and conditions to be changed to make it clear that it does not use operator-led chat on the Service and that it is a peer-to-peer service only. The Level 2 provider submitted that website two is not an SMS service; it is a white labelled site from one of the UK's largest dating brands and an on-line dating site only.

The Level 2 provider complained that the Executive had caused it great harm by referring to the Service as a "virtual chat service" in correspondence with Level 1 providers. The Level 2 provider submitted that the figures show that it is not a virtual chat service. The Level 2 provider submitted that on average, each user that interacts via the newspaper page receives less than one billed message for each message they send in. The Level 2 provider submitted that many advertisers receive no replies at all. The Level 2 provider submitted that, had it been using operator-led chat then it would follow that each user would have received at least one reply, and sensibly speaking, the full four messages that its terms and conditions state. The Level 2 provider submitted that this would give it a 400%+ increase in revenues and save it thousands of pounds in advertising spend. The Level 2 provider submitted that if this was an operator-led service then its revenues would be significantly larger and all users would be responded to at least once. The Level 2 provider submitted that this supported its assertion that the Service is a peer-to-peer dating service.

The Level 2 provider submitted that the Executive's case was based on evidence from users who were aggrieved that they were unable to secure a date within a handful of messages, and who came across as pushy, aggressive or evasive. The Level 2 provider submitted that the industry standard for users who chat online and who then go on to take it further is just 17%. The Level 2 provider submitted that it was likely that one, possibly two, of the nine complainants went on to exchange numbers and presumably kept in contact after leaving the Service.

The Level 2 provider submitted that the service was complicated, with users interacting via web, IVR and SMS messages. The Level 2 provider was concerned that, given the Executive's failure to understand the service, the Executive had declined the offer to test the App, or the voicemail service, or make contact with the users that had stated that they were happy to come forward in the investigation.

The Level 2 provider submitted that the Executive had decided that this was a virtual chat service based on a "vague hunch", some generic terms and conditions on a website not operated by the Level 2 provider, and a "catfish" style conversation, and it was being demonised for not wanting to fall foul of the Data Protection Act. The Level 2 provider questioned why it had taken 12 months from the date of the first complaint and nine months from the date of the first monitoring session for the Executive to raise this investigation, and why formal action was considered necessary when there had only been nine complaints in a full calendar year.

The Level 2 provider submitted that it was a small, family owned business which had been providing services for over ten years without, to date, having undergone any investigations by PhonepayPlus. The Level 2 provider submitted that the previous Track 1 investigation related to a service operating on 69500 (called "virtual friend", which used paid operators) which ceased some time ago and was irrelevant to this investigation, as all issues with that service had been dealt with to the full satisfaction of the Executive. The Level 2 provider stated that when requested, it had always been forthcoming and proactive in its responses and general approach to running the Service.

The Level 2 provider submitted that it had made the following adjustments to the Service in response to the Executive's concerns to ensure that any consumer harm was not ongoing:



1. It had changed the terms and conditions to make it clearer that the Service is a peer-to-peer dating service;
2. Offered refunds to any users who were affected by an incorrectly set-up keyword; and
3. Suggested an update to the advertisements to indicate if a user was an App user.

During informal representations, the Level 2 provider submitted that it did not think the Executive had understood how the various elements of the service fitted together, and provided further explanation of how the service operated. It submitted that most members interacted with the service through the premium rate numbers. It submitted that there were very few members who had texted in their advertisement and did not have a voice message recorded, although the Level 2 provider would not have voice files for users that had come through the App.

The Level 2 provider confirmed that it and the provider of the IVR element of the service, J Media UK Ltd, were unconnected companies save that they were providing different elements of the service advertised in the newspapers. The Level 2 provider was responsible for the SMS message aspect.

The Level 2 provider submitted that it had over 100,000 members, although it did not know how many were current, and not all of these would come via J Media UK Ltd. Users may migrate online having initially joined via phone. On the voice side, some users stayed in the service for years. On the SMS side, the Level 2 provider stated that the average number of messages is seven per user. After that, users are allowed to exchange their numbers and may not come back, although some users do. The Level 2 provider submitted that they get some people who do not reply because by the time the newspaper is printed they have lost interest or changed their minds. The Level 2 provider stated that about 1.8 million messages per year are sent.

The Level 2 provider stated that it felt that the attempts made by the Executive to contact the four repliers validated its earlier submission that it had been difficult to make contact with those users when the Level 2 provider had tried.

The Level 2 provider explained how their separate "Match" service (as promoted on the same page as the Service) operated. The Match service matched users who were active and local to each other.

In all the circumstances, the Level 2 provider denied the allegations that a breach of rule 2.3.2 (misleading) of the Code had occurred. The Level 2 provider submitted that there is no operator element to the Service, no issue of consumer harm, and the Executive's evidence was flawed and incomplete.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written response and submissions, and including the IVR recordings submitted.

The Tribunal noted that it was not alleged that the Service was provided entirely by paid operators, but only that some consumers might have been exchanging SMS messages with paid operators.

The Tribunal considered the Executive's reasons three, four and five, and the Level 2 provider's submissions on these reasons. The Tribunal did not consider that any of these reasons, on the balance of probabilities, evidenced use of paid operators in the provision of



the Service, although it noted that the terms and conditions did refer to the Level 2 provider on the final line.

The Tribunal considered reasons one and two. The Tribunal considered the different interpretations which may be placed on the actions and language of the persons using the Service as evidenced in the complainant logs and the monitoring, and having regard to the Level 2 provider's submissions. The Tribunal considered whether it was plausible that the actions of the persons using the Service as evidenced in the complainant logs and the monitoring were actions of genuine users as opposed to paid operators. The Tribunal found that, on the balance of probabilities, the complainant who had complained on 27 June 2014 and had exchanged sexually explicit messages in April 2014 had done so with a paid operator. The Tribunal considered the evidence that three of the advertisers contacted by the Executive claimed to live in the same area as the Executive (Kent), despite those advertisements featuring in a local newspaper for Hull, was highly suspicious.

The Tribunal did not find that the Level 2 provider had used paid operators in the Service throughout the period covered by the investigation. The Tribunal did not feel that it had been presented with sufficient evidence to find that the use of operators was widespread over a prolonged period. The Tribunal found, on the balance of probabilities, that some paid operators had been used to provide the Service. Accordingly the Tribunal found that the description of the Service in promotions for the Service was likely to have misled some consumers into believing that they were exchanging messages with other members whom they might have had the opportunity to meet, when some consumers were corresponding with paid operators. Consequently, the Tribunal concluded that some consumers were likely to have been misled about the operation of the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Separately, although the Tribunal did not make any finding on this issue, the Tribunal expressed concern that promoting a service with the wording "REAL people in YOUR area" or similar, when consumers may in fact be responding to or matched with users who were drawn from a national database and therefore not necessarily local, or promoting a service which claimed to match users' interests when this did not occur, was misleading and therefore potentially would evidence a breach of rule 2.3.2 of the Code. The Tribunal encouraged the Level 2 provider to seek compliance advice from the Executive in this regard.

Decision: UPHELD

ALLEGED BREACH 2

Rule 2.3.1

"Consumers of premium rate services must be treated fairly and equitably."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.1 of the Code as during the course of the provision of the Service, the Level 2 provider promoted the option of obtaining £6 free Service credit upon receipt of a specified keyword. However SMS message logs supplied by the Level 2 provider showed that despite the sending of the specified keyword, Service users failed to receive the promoted £6 free Service credit.

The Executive relied on the text message logs for two complainants and the Level 2 provider's correspondence with the Executive dated 2 April 2015.

On 12 January 2015 at 13:25, a complainant received the following promotional SMS message from Service shortcode 63222:



“FreeMsg> Congrats! we've given you £6 FREE credit! Just text JANUARY to 63222 to upload it to your phone! Enjoy! Txt STOP 2 exit.”

On 12 January 2015 at 13:38 the complainant sent the keyword “January” to Service shortcode 63222. The Executive noted that after sending the promoted keyword to the Service as instructed, the consumer received further Service messages, however the Service messages were chargeable and not free to receive.

On 12 January 2015 at 13:25 another complainant received the same promotional SMS message from Service shortcode 63222. On 12 January at 13:34 the consumer sent the phrase “January stop 2”. Despite the sending of the keyword (albeit with additional text), the consumer continued to receive chargeable Service messages. The Executive concluded from the two text message logs that neither complainant had received the promoted £6 free Service credit.

The Executive queried the apparent failure to provide the promoted £6 free Service credit with the Level 2 provider. On 2 April 2015, the Level 2 provider stated:

“We have looked at this and it appears that keyword JANUARY was set up incorrectly as a result of human error. Our processes have failed on this occasion. In our defence it was down to human error and not an intent to mislead but we understand that this is unacceptable and will contact all users that have used this keyword and offer them a refund.”

The Executive understood from the Level 2 provider’s response that all Service users who received the above Service promotional message would have been unable to claim the offer given that the keyword had been set up incorrectly. The Executive submitted that all consumers who chose to respond to the promotional Service message were not treated fairly and equitably as the Service promotional message encouraged consumers to engage further with the Service on the promise of receiving £6 worth of Service engagement; however the £6 worth of Service engagement was not forthcoming.

For the reasons set out above, the Executive asserted that consumers were not treated fairly and equitably as all consumers who responded to this Service promotional message would not have received the promoted £6 free Service content. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code.

2. The Level 2 provider admitted the breach of rule 2.3.1 of the Code in part. The Level 2 provider submitted that this was a technical breach, which was unintentional and an isolated incident. The breach was as a result of a human error and full refunds had been made to affected complainants. The Level 2 provider had not meant to mislead users. The Level 2 provider submitted that it ran regular promotions of this type and that this incident was a 'one-off'. The Level 2 provider submitted that there was no advantage in attempting to mislead customers as it was in its interests to ensure that consumers who used the Service remained active and happy with a high degree of trust in the brand. The Level 2 provider apologised and asked that the Tribunal consider this issue with all due regard to balance and proportionality. The Level 2 provider submitted that ordinarily such matters would not attract formal enforcement action on the basis that the Executive was required to weigh the burden of pursuing such action against the perceived benefit. The Level 2 provider submitted that it conceded the error at an early stage, the issue was fully rectified, and there was no ongoing consumer harm.
3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider’s written response. For the reasons set out by the Executive, and noting the Level 2 provider’s partial admission, the Tribunal concluded that the Level 2 provider



had not treated consumers fairly and equitably as they had been promised free credits which they had not received, in breach of rule 2.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH 3

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 asserted that the Level 2 provider had breached rule 2.3.11 of the Code as a complainant SMS message log provided by the Level 2 provider showed that the complainant used the promoted method of exit from the Service, however the complainant continued to receive chargeable Service messages.

The Executive relied on the content of PhonepayPlus Guidance on “Method of exit from a service” (the “**Guidance**”). The Guidance states:

Paragraph 1.1

“The definition of method of exit from a service is set out at paragraph 2.3.11 of the Code, which states the following:

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.”

Paragraph 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 lowercase variation of ‘stop’, and any combination thereof.”

Paragraph 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.”

Paragraph 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.”

Paragraph 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.”

Paragraph 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’.”

Paragraph 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.”

The Executive noted that a complainant account included a number of allegations about the Service, including the following complaint: “consumer saying he sent stop a few times, but he keeps getting messages” [sic]. On 15 October 2014, the Level 2 provider supplied an SMS message log showing the interaction between the complainant and the Service.

The Executive noted that at various points within the SMS message log the complainant was advised of the following regarding the method of exit from the Service:

“FreeMsg> £10 Spend Reminder: £1.50 per message received. **To opt out reply STOP to 63222**. Join us online at bigredkiss.com” [emphasis added by the Executive]

The Executive noted from the message log that on 9 October 2014 at 16:43 the complainant sent “STOP” to Service shortcode 63222. The complainant then immediately received the following acknowledgement:

“FreeMsg> Stop request processed. You can rejoin at any time. Text SWAP to get thru to a new match. Text SIX to get £6 FREE chat credit.”

The Executive also noted that on 9 October 2014 at 17:13 the complainant received two chargeable Service messages despite the complainant using the promoted method of exit from the Service. The Executive queried this apparent failure of the promoted method of exit from the Service with the Level 2 provider. The Level 2 provider stated:

“We have double checked this with our technology provider and it appears to have been some sort of glitch that delayed the sending of these outgoing messages resulting in the user texting STOP yet the delayed messages reaching him slightly later. Once he had successfully been unsubscribed from the service he sent in the words ‘DATING STOP’ which opted him back into the service (‘DATING STOP’ is not on our list of automatic exit codes) but at this point we manually ‘STOPPED’ him and he received no further billed messages. We have checked the other complainants on the list and found the STOP



command working as it should. In addition we have spot checked a further 30 numbers on the service and feel satisfied that this is no longer an issue.”

The Executive noted the Level 2 provider’s response that there was a glitch with the Service that resulted in a delay in the Service messages received by the complainant on 9 October 2014. The Executive contacted the Level 1 providers regarding this matter following receipt of the Level 2 provider’s response. The Level 1 provider Fonix Mobile Limited indicated that it was unaware of a technical issue with the STOP command and Oxygen8 Communications UK Limited (the Level 1 provider for Service shortcode 63222) stated that the STOP command sent by the complainant had been successfully passed to the Level 2 provider.

Notwithstanding the Level 2 provider’s response, the Executive noted that prior to the sending of STOP, the last interaction between the complainant and the other Service user was three days earlier on 6 October 2014. The Executive considered it implausible that the other Service user sent two messages to the complainant immediately before he used the promoted method of exit from the Service.

In light of the above, and given that no evidence had been supplied of the Service “glitch”, and that the Level 1 providers appeared to have no knowledge of the technical issues, the Executive considered it unlikely that there was a delay in the transmission of the two Service messages, and further, that the Service messages were transmitted after the Level 2 provider was in receipt of the complainant’s STOP request, as confirmed by Oxygen8 Communications UK Limited.

For the reasons set out above, the Executive asserted that the complainant had followed the promoted instructions for exiting the Service, however, despite doing so received further chargeable Service messages. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.11 of the Code.

2. The Level 2 provider admitted the breach of rule 2.3.11 of the Code in part. The Level 2 provider submitted that it did not knowingly set out to mislead this consumer. The Level 2 provider submitted that it was a technical error which took part on a third party platform (not that of either Level 1 provider), which resulted in the consumer sending STOP and experiencing a delay. The Level 2 provider submitted an email from its SMS message platform provider who confirmed this to be the case. The Level 2 provider explained that this arose from messages which, in the case of this consumer, were not received until after their inbox was linked back to the SMS Service, which was after STOP had been sent. The Level 2 provider apologised for the error and stated that if this did affect any other users it would make a full refund to them. The Level 2 provider submitted that on being alerted to this problem, it spot checked over 30 other users, plus the other complainants, and found the STOP command had worked as it should.

The Level 2 provider submitted that the logs showed that following the failure of the STOP command, the user accidentally opted back in using the words “DATING STOP” that were not set up as an exit code, and was promptly manually STOPPED by a service manager, as per its standard practice. The Level 2 provider submitted that these were not the actions of a company which had set out to mislead consumers.

The Level 2 provider submitted that it had no interest in misleading or attempting to retain a customer who wished to leave the Service. The Level 2 provider submitted that its spend reminders go over and above the required minimum, stating the cost per message, information that a consumer has spent £10, a helpline number plus the information that a consumer needs to text STOP to exit.



The Level 2 provider submitted that it was disappointed that this issue had been raised formally. The Level 2 provider submitted that it had not been treated consistently and proportionately by the Executive in relation to this technical issue. The Level 2 provider submitted that this issue would not have been pursued by the Executive but for the allegation of a breach of rule 2.3.2 of the Code, and it was not provided with the opportunity to confirm the relevant provider which would have immediately clarified matters.

The Level 2 provider submitted that it had conceded the error straight away, the issue was fully rectified, and there was no ongoing consumer harm. The Level 2 provider asked that the Tribunal consider this issue with all due regard to balance and proportionality.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written response. For the reasons set out by the Executive, and noting the Level 2 provider's partial admission, the Tribunal concluded that the Level 2 provider had breached rule 2.3.11 of the Code, as the method of exit had not taken immediate effect upon a consumer using it and there was a further charge to the consumer after s/he had exited the Service.

Decision: UPHELD

ALLEGED BREACH 4

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 asserted that that the Level 2 provider had breached rule 2.2.5 of the Code as SMS message promotions for the Service failed to contain Service pricing information. The Executive relied on the content of the PhonepayPlus Guidance on "Promotions and promotional material" (the "**Guidance**"). The Guidance states:

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 Executive noted that, in addition to newspaper promotions for the Service, the Service was also promoted by SMS message. The Executive noted the following Service promotions that were identified in complainant SMS message logs:

"FreeMsg: Â£10 Spend Reminder: Â£1.50 per message received. Opt-out reply STOP to 80098. Get Â£6 FREE CHAT CREDIT; Txt SIX to 63222. Help 08448001188"

"FreeMsg: Â£10 Spend Reminder: Â£1.50 per message received. Opt-out reply STOP to 80098. Get Â£6 FREE CHAT CREDIT; Txt SIX to 63222. Help 0207 720 7130"

Further, the Executive was supplied with a list of SMS message Service promotions by the Level 2 provider on 24 March 2015, an example of which is listed below:

"FreeMsg> We are feeling FESTIVE! And we've given you £6 FREE credit! Just text XMAS to 63222 to upload it to your phone! Enjoy! Txt STOP 2 exit"



The Executive queried the lack of pricing information in the SMS message promotions for the Service with the Level 2 provider. The Level 2 provider responded on 2 April 2015 stating:

“Most of our promotions include the words 'Txt STOP 2 exit; msgs usually £1.50' - on the rare occasion where the 'msgs usually £1.50' is not included in the text of the message, this is because it is targeted at an active user who is already aware of the cost, having received multiple spend reminders etc. We will ensure that this is amended immediately. As you have seen, our usual practice is to include wording listing both the price and the way to exit. It was not our intention to mislead.”

The Executive considered the explanation from the Level 2 provider to be insufficient to justify omitting pricing information from SMS message promotions for the Service, especially for those Service users who had been promoted an alternative Service shortcode, as was the case in the two complainant examples listed above.

The Executive considered that it was reasonable to assume that a Service user who received such SMS message promotions would not necessarily be aware that sending a keyword to a different shortcode would result in premium rate charges from that new shortcode given that consumers were not explicitly told that such premium rate charges would arise. The Executive submitted that the prominent stating of a “FREE” offer within all of the example SMS message promotions listed above made it even more important that clear pricing information must be included within the text message promotions for the Service.

For the reasons set out above, the Executive asserted that Service users who received SMS promotions for the Service which omitted premium rate pricing information were not clearly informed of the premium rate charge (or further premium rate charges) that would result from sending the keyword to the promoted Service shortcode. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.5 of the Code.

2. The Level 2 provider admitted the breach in part. The Level 2 provider submitted that its usual practice was to include full details on every promotional message. The Level 2 provider submitted that all its SMS promotions were internal, marketed to active users who were fully aware of the price, having received multiple spend reminders etc, and it never marketed to outside databases. The Level 2 provider submitted that on the very rare occasion that the cost per message was not explicitly stated, it was because as an active member, the user would be already fully aware of the charges.

The Level 2 provider submitted that it felt that service members (initially joining the service via the newspaper advertisements) were fully aware of the costing due to their continued use. The Level 2 provider had considered the Executive's comments and taken its advice with regard to changing the wording and had updated the messages accordingly so that all future promotional texts will contain full information. The Level 2 provider submitted that it was not aware that this was a requirement in this context, and it would have happily rectified this earlier when first identified as an issue, had it known it was a concern.

The Level 2 provider submitted that it was confused as to why the Executive had an issue with the advertising on the spend reminders. They clearly and prominently stated that messages are £1.50 so the Level 2 provider considered that naturally a user would be aware of the cost of the messages.

The Level 2 provider submitted that the spend reminders were an excellent example that it did not seek to mislead customers, going over and above what is demanded by the Code, including prominent per message pricing, and the fact that the user has spent £10.



3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written response. For the reasons set out by the Executive, and noting the Level 2 provider's partial admission, the Tribunal concluded that the Level 2 provider had breached rule 2.2.5 of the Code, as the cost of the Service had not been included in the promotion before any purchase was made.

Decision: UPHELD**ALLEGED BREACH 5****Rule 2.2.1(a)**

"Promotional material must contain the name (or brand if part of the name), and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious."

1. The Executive submitted that the Level 2 provider had breached rule 2.2.1(a) of the Code as SMS message promotions for the Service failed to contain the identity of the Level 2 provider.

The Executive referenced the SMS message promotions listed under the alleged breach of rule 2.2.5 of the Code, and the list of SMS message promotions supplied by the Level 2 provider on 24 March 2015. The Executive noted that those SMS promotions did not state the identity of the Level 2 provider. Further, for the reasons given in the potential breach of rule 2.2.5, the Executive submitted that it would be unlikely to be obvious to a Service user that the SMS message promotions related to the same premium rate Service, therefore the Executive considered that the identity of the Level 2 provider must be stated within the SMS message promotions for the Service, as required under rule 2.2.1(a) of the Code.

For the reason set out above the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.1(a) of the Code.

2. The Level 2 provider admitted the breach of rule 2.2.1(a) of the Code in part. It stated that it had taken the Executive's advice with regards to changing the wording and had updated the messages accordingly so that all future promotional SMS messages would contain the name of the Level 2 provider.

The Level 2 provider submitted that in all print advertisements, the relevant details were included, and it was only when it was marketing to existing active consumers via SMS that full details were not included. The Level 2 provider stated that it did not promote to any consumers who had not first interacted with the Service via SMS so it was confident that a current consumer of the Service was already aware of these details and that it would be obvious to them.

The Level 2 provider stated that it was disappointed that this issue was raised formally, and that it was not provided with the opportunity to simply rectify the matter. The Level 2 provider submitted that this issue would not have been pursued by the Executive but for the allegation of breach of rule 2.3.2. The Level 2 provider submitted that the Executive had been heavy-handed, inconsistent and disproportionate.

The Level 2 provider submitted that the entire case and associated cost could have been avoided had a more cooperative and guiding role been adopted by Phonepayplus. The Level 2 provider submitted that its response demonstrated that it was a compliant provider with good intentions, an open and cooperative attitude and a willingness to comply. It asked the Tribunal to consider the issue in this context.



3. The Tribunal considered the Code and all the evidence before it, including the Level 2 provider's written response and partial admission. The Tribunal noted that the referenced SMS promotions for the Service failed to contain the identity of the Level 2 provider, and that this was required by the Code. The Tribunal did not consider that the identity of the Level 2 provider would have been otherwise obvious. Accordingly, the Tribunal upheld a breach of rule 2.2.1(a) of the Code, as the promotional material did not contain the name of the Level 2 provider.

Decision: UPHELD**ALLEGED BREACH 6****Paragraph 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 acted in breach of paragraph 3.9.2 of the Code as the Service operated on non-adult shortcodes when in fact the Service was a sexual entertainment service.

The Executive relied on the following PhonepayPlus Guidance on "The appropriate use of number ranges" which states:

Paragraph 2.2:

"• **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 also relied on the content of PhonepayPlus Guidance on "Virtual chat services" which states:

Paragraph 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 the definition of a sexual entertainment service at paragraph 5.3.31 of the Code which states:

"Sexual entertainment service means an entertainment service of a clearly sexual nature or any service for which the associated promotional material is clearly of a 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 noted that the Service operated on shortcode 89990, which the Executive accepted was a shortcode designated as appropriate for operating sexual entertainment services by the UK Mobile Network operators. The Executive noted that the Service also operated on shortcodes 63222 and 80098, which had not been designated as appropriate shortcodes on which to operate sexual entertainment services.

The Executive asserted that although the Service was not promoted as a sexual entertainment service, the nature of the conversation contained in a complainant SMS message log clearly indicated that at times the Service was sexual and/or adult in nature, and should have been operated on mobile shortcodes beginning with 69, 79 or 89. Below are extracts from the message log for the complainant interacting with the Service on shortcode 80098.

Replier: OMG yes! Can't decide what's more impressive your fab abs or your cock. Every time I look at that pic I get instant damp panties. How big is your cock then?”

Complainant: Didn't you get my message 8 inches babes erreect not soft lol i would how big did you say your breasts were babe's. X”

Complainant: Id love to cover them in baby oil a slide my throbbing dick between them while your tease my head with your tounge”

Complainant: All your picks going in the wank bank for when i get home but mastibation an scaffolding are not to things you can really mix lol

The Executive asserted that the language used by both persons was of a sexual nature, making the Service an adult sexual entertainment service which should have been operated on an adult prefix shortcode and not on a shortcode beginning with 80x.

The Executive accordingly submitted that the Level 2 provider failed to comply with the UK Mobile Network operators' 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 the breach of paragraph 3.9.2 of the Code. The Level 2 provider submitted that all of its advertising material, both in print and via SMS, which appeared in the public domain was non-adult. The Level 2 provider submitted that its service users were generally an older audience (age 45 upwards) who were more cautious in their choice of conversation and usually the subject matter was very “day-to-day” with the “odd saucy pun”. However, the Level 2 provider agreed that a small proportion of the private messages sent from peer-to-peer could be construed as “adult”; however, these were private and all parties conducting these conversations appeared satisfied, and the conversation caused no offence despite the flirty nature. The Level 2 provider stated that the example that the Executive listed was from when it first took over the Service and it was previously advertised as “saucy chat”. The Level 2 provider stated that it no longer advertised that service (and had not done so for over 10 months) plus it had since removed the ability to send pictures as this was one particular way that the consumers could undermine the Service with unpleasant or offensive material.

The Level 2 provider stated that its Service managers were highly trained to identify problems such as: (i) messages that contained hateful, racist or abusive content; (ii) users who typed an incorrect exit code and would need to be manually stopped; and (iii) potential abuse of the Service by outside agencies (e.g. fake users who access the service to



promote other services, beg for money, or promote their own dating sites). The Level 2 provider stated that in general it would allow vaguely raunchy content to be exchanged between two private individuals (both over 18) as long as it was in context and unlikely to offend. The Level 2 provider stated that this was not something it encountered very often as most users shared a few details about themselves before exchanging contacts (if they liked each other), or moved on to speak to someone else (if they did not).

The Level 2 provider submitted that it had notified the Executive of a company who appeared “to be targeting its users with XXX style adverts”.

It submitted that its actions clearly demonstrated that it does not want this type of content on its Service.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider’s written response. The Tribunal considered that the Service provided as evidenced by the language used in a complainant message log and referred to by the Executive was an entertainment service which was clearly of a sexual nature. In light of this, the Tribunal concluded that the Level 2 provider had breached paragraph 3.9.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.3.2 – Misleading

The initial assessment of rule 2.3.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of the breach means the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers may be higher, and the Service had the potential to generate higher revenues as a result of the breach.
- The Service had been operated in a way that demonstrated a degree of recklessness or intentional non-compliance with the Code.
- Promotional material for the Service had omitted key information regarding the Service.

Rule 2.3.1 – Fair and equitable treatment

The initial assessment of rule 2.3.1. of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The breach had a clear detrimental and damaging impact and potential impact on consumers.
- The nature of breach meant that the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers may be higher, and the Service had the potential to generate higher revenues as a result of the breach.
- The Service generated revenue through a recklessly non-compliant promotion that did not treat consumers fairly.

Rule 2.3.11 – Method of exit

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

- The nature of the breach meant that the service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers may be higher, and the Service had the potential to generate higher revenues as a result of the breach.

Rule 2.2.5 – Lack of pricing information

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

- The nature of the breach was likely to have caused, or had the potential to cause, a drop in consumer confidence in premium rate services.
- Pricing information was not included in promotions sent to existing Service users.

Rule 2.2.1(a) – Identity of the Level 2 provider

The initial assessment of rule 2.2.1(a) of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- Promotions for the Service failed to supply adequate details relating to the Level 2 provider's identity.

Paragraph 3.9.2 - Appropriate use of a number range

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 criteria:

- The breach had a clear and damaging potential impact on consumers.
- The nature of the breach meant that the service would have damaged consumer confidence in premium rate services.
- By using a non-adult shortcode, the Service undermined an effective mechanism to prevent underage use.

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 found no aggravating factors. The Tribunal noted that the Executive had dealt with potential breaches of the Code relating to a different virtual text chat service operated by the Level 2 provider on shortcode 69500 on 30 April 2014 under the Track 1 procedure. Whilst issues were identified on that date regarding compliance with rule 2.3.2 and rule 2.3.11 of the Code, in the circumstances of its findings, the Tribunal did not consider that this Track 1 procedure amounted to aggravation in this case.

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



- The Level 2 provider stated that it would amend SMS message promotions for the Service to ensure that pricing is included in every SMS message promotion.
- The Level 2 provider stated that it had offered refunds to the complainants and those affected by the failure of the keyword “January” and the breach of rule 2.3.1 of the Code.
- The Level 2 provider took corrective action in respect of the breaches of rule 2.2.5, rule 2.2.1(a) and rule 2.3.11 when they became aware of them.

The Level 2 provider’s evidenced revenue in relation to the Service was in the range of Band 2 (£500,000 - £999,999).

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **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 £40,000;
- a direction to remedy the breaches of the Code (insofar as the Level 2 provider remained in breach of the Code) and produce evidence of this to the satisfaction of PhonepayPlus, within 28 days from the date of publication of this decision,
- 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.

Administrative charge recommendation:

100%

