

Tribunal meeting number 175 / Case 1

**Case reference:** 64290  
**Level 2 provider:** Olmera Group Ltd (Belize)  
**Type of service:** Virtual text chat service  
**Level 1 provider:** Mobivate Limited (Guernsey)  
**Network operator:** All Mobile Network operators

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

## BACKGROUND

Between 20 October 2014 and 21 September 2015 PhonepayPlus received 54 complaints from consumers in relation to a virtual text chat service which was operated on the dedicated shortcode 88006 (the "**Service**"). The Level 2 provider for the Service was Olmera Group Ltd (the "**Level 2 provider**"). The Level 1 providers for the Service were Oxygen8 Communications UK Limited ("**Oxygen8**") and Mobivate Limited ("**Mobivate**"). Mobivate contracted with Oxygen8 for Service shortcode 88006, which it in turn supplied to the Level 2 provider.

Complainants variously stated that they were misled into the Service, they did not know what the Service was, that they were unable to leave the Service or that they had not entered the Service and consented to the charges.

After analysing other Service material including promotional material and message logs, the Executive also identified concerns with the use of the selected shortcode for the Service, provider registration, and the omission from promotional material of information likely to influence a consumer's decision to purchase.

## The Service

The Service was a virtual text chat service charged at £1.50 per text message received. Oxygen8 confirmed that the Service shortcode was activated on 17 August 2014. Mobivate and the Level 2 provider both confirmed that the Service commenced operation in August 2015. As at 21 September 2015, the Service was currently operational.

The Service was promoted on various third party contact and dating websites (the "**Websites**"). The Level 2 provider had confirmed that the Websites were operated by another company. Mobivate confirmed that the main websites generating traffic to the Service were:

- Loveaholics.com
- BeNaughty.com
- Naughtydate.com
- CheekyLovers.com
- Onenightfriend.com
- Flirt.com
- QuickFlirt.com
- Wildbuddies.com

The Level 2 provider also confirmed that the above Websites were the main websites that the Service operated on. In addition, the Level 2 provider confirmed that low user traffic volumes to the Service were generated from a further 278 websites.



In response to requests for information (“**RFIs**”) from the Executive, Mobivate supplied Service user flows with text message logs and Service promotional material. In addition to the user flows, the Level 2 provider supplied the following information about the Service user flow:

“All our sites following the same flows for promotion of the SMS Chats service. Below are examples of our current promotional material that is used exclusively on the above mentioned sites.

Places with anchors for starting SMS Chats:

- 3.1. A registered site user who has not previously used SMS Chats will see the below pop-up screen on their 1<sup>st</sup> or 2<sup>nd</sup> login to the site (**Appendix A**)
- 3.2. A promotional banner for SMS Chats can sometimes be included on the search results page. Clicking on this banner will result in the same popup as in point 3.1
- 3.3. A registered site user can see a pop-up promotion to use the SMS Chat service once they have made a payment for full membership to the site.”

### Service monitoring

The Executive monitored the Service on 18 February 2015 and 21 September 2015. A summary of the monitoring performed by the Executive is provided below.

The Executive visited the loveaholics.com website and submitted a monitoring mobile number via the small box labelled “Try SMS Chat now” on the homepage.

Following the entry of the monitoring mobile number, a text message stating “FreeMsg: 1 new message received on your profile. Reply “YES” to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. SMS Chat” was received on the monitoring handset from Service shortcode 88006.

The Executive did not respond with the keyword ‘YES’ to the above message, however had the Executive done so the Executive understood that it would have entered into the Service at a cost of £1.50 per message received.

At a later stage in the monitoring session the Executive selected the SMS Chat menu icon and selected the SMS Chat option under the icon (both circled in red) (**Appendix B**).

After selecting the SMS Chat option, the dialogue box opened on loveaholics.com which invited the Executive to “Start SMS with sian717 from London now” (**Appendix C**).

The Executive noted that the terms and conditions beneath the “CHAT NOW” button stated: “SMS Chat is a new service for one-on-one mobile chatting. You must be 18+ and have the account holder’s permission. This service is available for the price of £1.50 per chat message received plus standard network rates to reply. These standard network rates will vary depending on the user’s network provider and users are advised to check with their mobile network provider for its standard network rates. By providing your mobile phone number you also agree to receive free marketing messages and chat requests. To stop the service send STOP to 88006”

The Executive entered a monitoring mobile number into the appropriate field and selected “CHAT NOW”.

The Executive then received a text message which stated “FreeMsg: 1 new messages received on your profile. Reply “YES” to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. SMS Chat”

The Executive responded to the text message with the keyword “Yes” and received the following chargeable text message:



"I want to have a great connection with you. Can we be friends?"

At approximately the same time as the above SMS exchange, the Executive was presented with the on screen confirmation below, which advised that "Your SMS chat request has been successfully sent to sian717".

The Executive monitored the Service again on 21 September 2015. The Executive submitted a monitoring mobile number in the "Try SMS Chat now" entry field on one of the Websites (**Appendix D**). As a result, the Executive received a text message which stated "FreeMsg: 1 new message received on your profile. Reply "YES" to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. SMS Chat." The Executive did not view any pop-up dialogue box containing terms and conditions on this journey, as it had in the previous monitoring journey.

### Summary of complaints

The Executive received 54 complaints concerning the Service from 20 October 2014. Complainants variously stated that they had not entered the service and consented to the charges, did not know what the Service was, that they were unable to leave the Service or that they were misled into entering the Service.

A sample of complainant accounts can be found below:

"Freemsg - you have 1 message awaiting you in your inbox from sms chat' was on 'naughty dates' thought he had joined a free membership feels misled into accepting charge."

"Consumers 13yr old son is the main phone user Consumer has been charged £500 or more and it started on 23/04/2015 @£1.50 Consumer says son has not subscribed into any service or requested it Consumers son has sent stop to the number several times but it has not worked."

"Service Type: Entertainment - non-adult  
Service Description: I was texted by this 88006 I don't know this number. I was sent a bill of £338 because of this number please can you help.  
Transcript of Text: The content I don't remember fully but it was not nice. It was sounding as if it was from lady or woman.  
Trigger Word:  
Date of first charge: 01/05/2015  
Summary of Complaint: The reason for my complaint is because this is the highest bill I have ever had since being a Vodafone customer. The bill total is £338. Not sure what the website address is but the number that was used to text was 88006."

### The investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (13<sup>th</sup> Edition).

The Executive sent a breach letter to the Level 2 provider on 21 September 2015. Within the breach letter the Executive raised the following breaches of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the "**Code**"):

- Rule 2.3.2 – Misleading
- Paragraph 3.9.2 – Appropriate use of a number range



- Paragraph 3.4.1 – Registration of the Level 2 provider
- Rule 2.4.2 – Consent to market
- Rule 2.2.1(a) – Provision of the Level 2 provider's identity and contact details
- Rule 2.2.5 – Pricing information

The Level 2 provider responded on 12 October 2015. On 29 October 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;
- Message logs for the complainants;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses including supporting documentation);
- Correspondence between the Executive and the Level 1 providers;
- The Executive's monitoring dated 18 February 2015 and 21 September 2015;
- PhonepayPlus Guidance on "Promotions and promotional Material," "Privacy and consent to charge", "Virtual chat services" and "The appropriate use of number ranges";
- The breach letter of 21 September 2015 and the Level 2 provider's response of 9 October 2015; and
- The informal representations made by and on behalf of the Level 2 provider.

## 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 for the following two reasons:
  - i. The Service is a consumer to operator chat service but promotions for the Service misled, or were likely to have misled, consumers into believing that they were interacting with other genuine users; and
  - ii. The conduct of paid operators misled consumers into believing that they were interacting with other genuine users of the Service, when consumers were in fact interacting with paid operators.

The Executive relied on the content of PhonepayPlus Guidance on "Virtual chat services" (the "**Guidance**"), complainant text message logs, correspondence with the Level 2 provider and the Executive's monitoring.

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.”

#### Reason 1

As referenced in the “Background” section above, the Service was promoted on 286 Websites. The Executive noted that the names of many of the Websites strongly implied that the Websites offered a contact and dating service, for example:

- naughtydate.com
- localsgodating.com
- lonestardating.com
- couplesmeet.com
- dating.private.com
- datestation.com

In addition, when the Executive monitored a sample of the Websites the Executive noted the language on the Websites also implied and/or explicitly stated that the Websites offered a contact and dating service. The Executive noted the following phrases used on the Websites and during the email sign up process to register with the Websites:

- “Meet love-addicted mates for naughty dates!”
- “Activate your account and start looking for new dates”
- “Share more info about you!” [the Executive stated that it was then prompted to enter details of the individuals that it wished to be matched with, for example the age range of other users and the distance of other users from the Executive]

In addition to the above language, the Executive noted that the Websites featured a link to a “Safe Dating” section. The Executive noted that the “Safe Dating” section header stated:

- “17 Great Date Tips”
- The fourth “Great Date Tip” stated:

“4. Keep chatting on the go

You can use our SMS chat feature to have conversations with users without giving your own phone number. All messages will be sent directly to your mobile phone. To use this option you’ll also have to save a phone number of yours, which will be used for chatting...”

Following a review of complainant message logs, the Executive had contacted the Level 2 provider with concerns regarding the conduct of the other Service users shown in some of the complainant message logs. In response to the Executive’s enquiries, the Level 2 provider confirmed on 19 August 2015 the following:

“The service is NOT promoted as a contact and dating service. The service is promoted as an SMS chat service. Our current terms and conditions state “SMS chat is for entertainment purposes only. This service is operator based”. Live operators wrote the responses sent to the mobile numbers listed. This ensures someone is always available to



have a live conversation with a registered site user. The SMS Chats service is simply for conversational chat and entertainment purposes only. It does not provide dating, any opportunity to meet, or any other services.”

The Level 2 provider provided a screen shot of the referenced terms and conditions as displayed on the Websites. **(Appendix A)**

In light of the above, the Executive submitted that consumers who interacted with operators were likely to have been misled into doing so for the following reasons:

- i. The language used on the Websites clearly indicated and/or strongly implied that the Service offered was a facility to exchange messages with other members of the public with the potential to meet. However given the use of paid operators, there was in fact no opportunity to meet other users through the Service. The Executive recognised that the Websites are operated by a third party and not the Level 2 provider, however as the Service was promoted on these Websites (that operate a similar but significantly different service), more should have been done to ensure that consumers were aware of the true nature of the Service;

and

- ii. Notwithstanding the Level 2 provider’s assertion that the Service terms and conditions stated that the Service was an operator based service, at the time the Service was monitored by the Executive, the Service terms and conditions did not state that the Service employed paid operators (the terms and conditions viewed in the Service monitoring can be seen at **Appendix C**). Furthermore, given that it was possible to use the Service without viewing and accepting the terms and conditions, the Executive submitted that the terms and conditions supplied by the Level 2 provider did not mitigate the misleading nature of the Service promotion.

## Reason 2

Following receipt of complaints, the Executive had requested message logs from Mobivate showing the full interaction between the complainants and the Service. The Executive noted from message logs that when some consumers attempted to exchange contact details and/or arrange to meet, the paid operators did not act in accordance with paragraph 3.2 of the Guidance and explain to consumers that the Service was a ‘fantasy chat’ Service only. In addition, some operators stated or implied that they were also incurring charges. The Executive provided examples of messages sent by paid operators to consumers as follows:

Message log for mobile number \*\*\*\*\*016

“Let keep it here since I don’t give out my number just about. I need to establish trust before I exchange numbers”

“I’m close to tears now. You’re making it appear like you’re the only one being charged for this.”

Message log for mobile number \*\*\*\*\*993

“Im about to get in the dating scene again, maybe you can give me some pointers. My name is Nesh, you?”

I can’t see your number, I think theyre blocking it anyways I like to know you first before meeting up”

Message log for mobile number \*\*\*\*\*010



"I got your number on a site. I hope you don't mind if I did use it to contact you right now."  
*[message sent in response to the consumer's query as to how the operator obtained his mobile number]*

Message log for mobile number \*\*\*\*\*180

"Yeah, I would really love that. But as for now since I don't have my free time, we can just chat first [sic]" *[message sent in response to the consumer's request to meet]*

Message log for mobile number \*\*\*\*\*966

*The below responses were sent in response to multiple requests from the consumer to meet:*

"Well who knows. let's just see what would happen. we really can't tell."

"Why don't we make each other comfy and secured first?"

"Well, it's nice to just reserve the sex thing when we will be together."

"I would also love to meet you someday. It's just that I have so many things to do and I don't have an exact time."

"I'll let you know if I am available, I really have a tight schedule now."

"Yeah I know it's better but I have a tight schedule now. How huge is that?"

"Well, I will think about that, cause that's not in my mind for now."

"I am sure that you won't waste your time talking to me 'cause I am not that kind of girl you think."

Message log for mobile number \*\*\*\*\*340

*The below responses were sent in response to multiple requests from the consumer to exchange contact details:*

"I'm also paying for it because I really want to talk to you. Don't worry, I will make this conversation worth it."

"What do you mean by that?! *[in response to the consumer stating that it was too expensive to continue using the Service]* I am buying my credits too."

*The responses below were sent in response to multiple requests from the consumer to meet:*

"Sound like a lot of fun but there are things that we still need to consider"

"Just need to figure something out but let's just keep going anyway, and see where it goes."

"I'm sorry but I can't do that. I still need to finish some things."

"Well I know 'cause we are just the same. But for now a lady like me needs to be secured. I want to know who I am talking to in here before we meet."

"Yes you are right [name] and I am looking forward to that but I wanna know you more for now before meeting you up."

The Executive submitted that the conduct of the paid operators amounted to misleading behaviour as paid operators were not incurring charges for using the Service as was stated in several of the above examples. The Executive submitted that paid operators would not exchange personal contact details or agree to meet consumers who interacted with them. The Executive submitted that operators also gave the impression that meeting the consumer in the future was possible, as long as the consumer continued to chat via SMS (and incur further charges). The Executive submitted that this behaviour was also misleading as there was never going to be an opportunity to meet in person.



When questioned by the Tribunal, the Executive clarified that its understanding was that the Level 2 provider did not control the Websites' presentation but had control over the steps after the "SMS chat" button was pressed. The Executive confirmed that in its view its monitoring had not given any indication that the Service was not live chat with genuine consumers. Whilst the Level 2 provider had stated that it had revised its terms and conditions in April 2015, the Executive noted that its monitoring in September 2015 showed there was at least one journey which allowed a consumer to engage with the Service without seeing those terms and conditions. The Executive stated that its view was that if an operator-based chat service was promoted on a dating website it needed to be made very clear that it was an operator-based service.

In light of the above, the Executive submitted that operators misled some consumers into the belief that they were engaging with other genuine Service users rather than a paid operator, by failing to confirm that the Service was a "fantasy chat" Service when consumers attempted to exchange contact details and / or arrange to meet, which was clearly not possible. The Executive asserted that consumers were misled, or were likely to have been misled into the belief that they were exchanging messages with other consumers, when they were in fact corresponding with a paid text chat 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 admitted the breach in part.

In relation to Reason 1, the Level 2 provider submitted that the Websites were owned by a third party. They were dating sites which allowed users to join, and pay a fee to meet other users. Such fees were paid through credit cards. The SMS chat service was an additional product run by the Level 2 provider which had been integrated and promoted within the third party website. The Level 2 provider stated that it had control over the pages in relation to the SMS chat service, but did not have control over the functionality or business of the websites themselves (similar to how newspaper adverts work). The Level 2 provider felt that during the very early stages of post-service launch the Service might not have been appropriately distinguished as an operator service. The Level 2 provider stated that it did actively review the Service in light of customer feedback and Code requirements to improve the experience for consumers. The Level 2 provider stated that one of the results of this was that it included in the Terms and Conditions the wording: "SMS Chat is for entertainment purposes only. This service is operator based". The Terms and Conditions also now stated that "SMS chat is not a dating service".

The Level 2 provider stated that it would welcome the opportunity to work with the PhonepayPlus Compliance Department to come to a position where PhonepayPlus believe the site to be more compliant. The Level 2 provider stated that Mobivate had requested that it work with PhonepayPlus to get a compliance review, but had been told that this was not possible because a preliminary investigation had been initiated.

In relation to the Service terms and conditions, the Level 2 provider noted that the Service was monitored on two separate occasions (18 February 2015 and 21 September 2015). The Level 2 provider submitted that changes to the terms and conditions were made in April 2015 to better communicate that the Service was operator based. Unfortunately this change was not seen in the monitoring that was performed on the 21 September. The Level 2 provider stated that the opt in path monitored by the Executive on the 21 September was no longer current or valid, and currently there was only one mechanism to opt in to SMS chat, which was through the page shown at **Appendix A**.





In relation to Reason 2, the Level 2 provider stated that it outsourced the operator function to a third party who responded to these messages. The Level 2 provider stated that the third party employed hundreds of operators, some of which were employed on a long term basis and others who had recently started. The Level 2 provider did employ a process of reviewing conversations and making sure that the majority of messages were not misleading. Since June, the Level 2 provider stated that it had become more rigorous in the training of operators and its examination of messages to reduce the number of misleading messages. The Level 2 provider stated that operators have been trained not to advise a user that there is an opportunity to meet. The Level 2 provider stated that in keeping with the nature of the fantasy chat service operators will regularly deflect the date/meet question, change the topic or simply state they are too busy or that it doesn't work with their schedule. The Level 2 provider believed that this type of response didn't break the fantasy conversation but also did not give any user the impression that they were about to meet the person they are speaking with. The Level 2 provider submitted some real examples to the meet/date question raised by users of the Service below:

**User:** Its costing me a lot of money this texting can't we just meet up and go for a drink

**Operator:** Don't you think that i am worth it of what you are spending. Do think about that.

**User:** So do you want to meet up and start off the fun

**Operator:** Lol! Not that easy, you must gain my trust first. How about getting to know each other first?

**User:** Always like to text you wish we could meet

**Operator:** I need you to be patient with me. I'm really not into hook ups or one night stand.

**User:** It means a lot to me do you drive a car if you have when will you be able to come to wrexhan i would like to meet you would you put a white shirt on and a tight v type puloves on and a loose short skirt 2sizes small around your waist

**Operator:** I don't know how to drive but I am sure I can absolutely drive you crazy baby.

The Level 2 provider acknowledged that some operators were more experienced in handling this question effectively than others. Through monitoring and regular feedback, the Level 2 provider endeavoured to provide an entertaining and compliant experience for its SMS chat users.

The Level 2 provider submitted that there was no evidence of consumers saying they felt misled. The Level 2 provider accepted in part the assertion of consumers being misled, however reiterated that there was not one consumer who had complained to PhonepayPlus that the Service had misled them in any way.

The Level 2 provider submitted that the latest terms and conditions explicitly stated that the Service was not a dating service, and there were explicit references to it being an entertainment and operator based service.

In informal representations, the Level 2 provider explained its relationship with Mobivate and Mobivate's experience with premium rate services, and explained that Enarpee was the regulatory consultant engaged by Mobivate for both itself and the Level 2 provider.

The Level 2 provider reiterated that the text chat service provided was completely separate from the Websites. The chat function was provided by the Level 2 provider to the Websites via a commercial relationship. Any content on the Websites was solely the responsibility of the website owner. The Level 2 provider did not have control over the Websites. The Level 2 provider clarified it was allowed to control the SMS chat function of the Websites only.



The Level 2 provider explained that since launch the Service had been gradually improved over time. The terms and conditions had been developed to make them clearer and to reduce the complaints coming in. The terms and conditions had always required Service users to be over 18. The terms and conditions now specifically stated that the Service is operator chat, and the Level 2 provider had removed any terminology that might create a grey area for a user of the Website. It had changed the consent box so it was not pre-ticked. It had removed any reference to other members or suggestion that a consumer would be talking to a specific person. Reference was made to an orange link on the dialogue box behind which there were further terms and conditions, although the Level 2 provider confirmed that these related to the dating site, and the terms and conditions for the Service were those seen by a consumer in the journeys shown in evidence.

The Level 2 provider reiterated that no complainants had said they felt misled. The Level 2 provider noted that any service would attract a certain level of complainants, and to reduce this it wanted to ensure that consumers understood the nature of the Service, and its pricing.

The Level 2 provider stated that the nature of the Service was fantasy role play, so consumers would understand that the person chatting with them may be role-playing. The Level 2 provider stated that any mention of dating by a consumer is always deflected; this keeps the text-based fantasy going. The Level 2 provider asserted that operators never agreed to meet or gave the impression a user could meet.

In response to a question about why the Service name was "SMS Chat" (and not for instance a name which distinguished the Service from the dating Website), the Level 2 provider stated that its Service was an added feature of the dating website, giving consumers the opportunity to chat to someone immediately rather than perhaps having to wait a long time for a response from another Website user.

The Level 2 provider clarified that the example journey showed in the September monitoring was not active anymore. The Level 2 provider stated that it was challenging to ensure that all its numerous upstream providers were only allowing the correct journeys across all sites and all devices. The Level 2 provider and Mobivate did conduct monitoring on the Service.

The Level 2 provider accepted that in the early stages of the Service it may have been misleading, but submitted that the issues had been fixed as soon as possible, and that the Service was much more compliant from April 2015.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's partial admission.

The Tribunal referred to the definition of a premium rate service in the Code which included "all aspects of a service including content, promotion and marketing..." Whilst the Tribunal acknowledged that the Level 2 provider did not have direct control over the Websites, the Level 2 provider had chosen to market its Service in the context of dating websites. Accordingly it had a responsibility to distinguish its Service from the context of a dating service in order to avoid misleading consumers. The Tribunal noted that the Service had been intended to work as a feature of the Websites.

The Tribunal noted that there was in fact at least one complainant who had stated they were misled by the Service, and in addition, having examined the logs, the Tribunal found that consumers had been misled as it was clear that they had understood there was a possibility of meeting the person with whom they were chatting.



In respect of Reason 1, the Level 2 provider had relied on its terms and conditions which appeared in a dialogue box to avoid misleading consumers. The Tribunal found that prior to these terms and conditions being amended in April 2015, there was nothing to inform users that this was not simply an aspect of the dating service. The Tribunal made no finding that the amended presentation was sufficient to avoid misleading consumers.

In respect of Reason 2, the Tribunal acknowledged that operators responding to requests for meetings were attempting to maintain the fantasy roleplay element of the Service. However the Tribunal's view was that, especially where users had not clearly understood at the outset that it was an operator-based fantasy service, a deflection increased the risk of consumer harm. Whilst an operator did not need to be brutally truthful, they must correct a consumer who may have understood that there was a possibility of a meeting. The Tribunal found that the conduct of operators in the way they had sought to deflect questions about a meeting had misled consumers.

The Tribunal noted that the Level 2 provider had stated it would have rectified these matters if the Executive had given them advice at an earlier stage. The Tribunal remarked that it was a provider's responsibility to take pro-active steps to ensure that a service was compliant from the outset, rather than waiting for the Executive to discover and point out non-compliance. The Tribunal also noted that the Executive's monitoring showed that the Level 2 provider had not taken thorough action to rectify this issue in April, and there remained at least one non-compliant route into the Service, in respect of which consumers did not see the Service terms and conditions beforehand, as late as September 2015.

Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code for both reasons stated by the Executive.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 2**

##### **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 a non-adult shortcode, when the Service was a sexual entertainment service.

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

Paragraph 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 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.”

**Paragraph 5.3.31** of the Code defines a sexual entertainment service as:

“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 88006, which had not been designated as an appropriate shortcode 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 conversations contained in the following complainant text message logs 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. The below extracts from complainant text message logs contained sexually explicit language used by the both operators and consumers.

Message log for mobile number \*\*\*\*\*286

[consumer] “No I don’t mind at all any thing you say turns me on I would also like to hold you close and feel your wet pussy dripping”

[operator] “But baby, my pussy isn’t that wet yet. It’s your job to make it soaked. Now tell me how you intend to do that.”

[consumer] “I would play with your clit and suck on it babe”

[operator] “Use your tongue with that [name]. I want to explore every inch of my pussy with that.”

Message log for mobile number \*\*\*\*\*016

[consumer] “Bby I want your pussy so much” [sic]

[operator] “And I want your cock so bad. I want you to fuck me hard that I’ll be calling sick for work..”

[operator] “I couldn’t care less if you do that. Just promise me my pussy will be sore after.”

[consumer] “Oh it will”

[consumer] “U won’t feel your pussy for another year that’s how hard I will fuck I”

Message log for mobile number \*\*\*\*\*993

[consumer] “well first il undress you then lick your pussy while you scream then slide my big cock in your mouth how does that sound”

[operator] “I want you to nibble my clit till its reddish and swollen.”

[consumer] “ok come round please im ganna make you come in my mouth anf fuck you senseless”

The Executive asserted that the language used by both Service users and operators was of a clearly sexual nature, and therefore the Service was clearly an adult sexual entertainment



service which should have been operated on an adult prefix shortcode and not on a shortcode beginning with 88, which was designated for the operation of any service type other than a sexual entertainment service.

In light of the above, the Executive 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 admitted the breach in part. The Level 2 provider stated that it promoted a "Virtual SMS chat service". The Service was not promoted as a sexual entertainment service and was therefore not in breach for this reason but rather as a direct result of some of the content in the messages.

The Level 2 provider agreed that the example conversations were sexual in nature. The Level 2 provider submitted that very few conversations were sexual in nature, and that sexual conversations were initiated by the consumer rather than the operator.

When the Level 2 provider requested the shortcode in August 2014 from Mobivate who in turn requested a shortcode from Oxygen8, it requested a shortcode for SMS chat services. At that time the Level 2 provider did not anticipate operating adult related services. Age Verification was considered and implemented on all the sites as verified and noted by the Executive in its monitoring.

The Level 2 provider believed that there was no evidence that this alleged breach caused any consumer harm as:

- Age Verification was provided.
- Consumers simply responded to the messages rather than noting the shortcode. The Level 2 provider did not believe that consumers would send any more or less messages if the number was 89006 (part of the adult range) rather than 88006 (not part of the adult range).
- There had been no consumer complaints to the effect of inappropriate 'adult' conversations or of an incorrect short-code (or at least there had been no evidence provided by the Executive of any consumer harm).

The Level 2 provider stated that the Service was actively launched on 23 September 2014. The Level 2 provider noted the dates when complaints were received by PhonepayPlus, and stated that for each of the 54 complaints Mobivate had provided all the logs. The Level 2 provider stated that the use of a shortcode in the incorrect number range had never been communicated to either Mobivate, the Level 2 provider or Oxygen8, and if it had they would have taken corrective action immediately.

In informal representations, the Level 2 provider stated that operators were trained to stop a conversation immediately if they had any belief a user was under 18. The Level 2 provider stated that the Service was never promoted as an adult service. The Level 2 provider said the majority of logs would show non-adult conversations. As with other popular texting apps, there were no rules to prevent users talking about what they wished. However the chats of a sexual nature identified had been initiated by users (though the Level 2 provider accepted that there was one example where an operator had initiated a risqué chat). The Level 2 provider stated that it was difficult to manage all the markets in which the Level 2 provider operated as there were different rules, but they had now made changes to the UK services so operators knew that there was to be no sexual chat even if initiated by a consumer. Some operators were better than others at shutting down such chats.



The Level 2 provider was first made aware of the inappropriate use of the number range on 13 August 2015 by the Executive. The Level 2 provider stated that since then it had advised all operators that no sexually explicit conversations were permissible, and had provisioned a new shortcode from Mobivate and Oxygen8 that was within the adult number range (89262).

The Level 2 provider submitted that this alleged breach was certainly not intentional. The Level 2 provider submitted that it had taken steps to transition the Service onto a shortcode within the adult number range. The Level 2 provider submitted that this alleged breach did not cause any harm to consumers, and as such no penalties should be imposed.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's partial admission.

The Tribunal acknowledged the Level 2 provider's statement that it had not intended to promote a sexual entertainment service. The Tribunal noted that the applicable Guidance on "Virtual Chat Services" stated that "providers should... take all reasonable steps to ensure that sexually explicit chat does not take place on non-adult virtual chat services... what we means by "reasonable steps" is an expectation that all providers that are engaged in a virtual chat service should take a pro-active stance in the way their staff are trained and moderated to ensure compliance with the Code." Whilst the Tribunal noted the submission of the Level 2 provider that sexual chat was generally initiated by the consumer, the Tribunal found that in some instances sexual chat had been initiated by the operator (as shown in logs for \*\*\*\*\*558, \*\*\*\*\*340, and others). In any event, the Tribunal found that the operators had reciprocated, rather than acting in the way expected, when sexual chat was initiated on a non-adult service.

The Tribunal noted that there were no complaints specifically related to this issue, but formed the view that, for this type of issue, this did not mean that consumer harm had not occurred. The Tribunal noted that a number of complaints had been received on behalf of minors, who may have been technically prevented from accessing the Service if it had been running on an adult shortcode.

The Tribunal found that a sexual entertainment service had been operated on a non-adult shortcode. Accordingly, the Tribunal upheld a breach of paragraph 3.9.2 of the Code.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 3**

##### Paragraph 3.4.1

"Before providing any premium rate service all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus subject only to paragraph 3.4.3 below."

1. The Executive asserted that the Level 2 provider had breached paragraph 3.4.1 of the Code because the Level 2 provider was not registered with PhonepayPlus for a period of time when the Service was operational.

The Executive noted that:

- i. From 1 September 2011, all Level 2 providers were required to register (or re-register if they had previously been "registered" under Code 11) with PhonepayPlus prior to providing any premium rate services;
- ii. Code 12 registration must be renewed annually (paragraph 3.4.6 of the Code); and
- iii. PhonepayPlus fully publicised Code 12 registration requirements, both to individual Network operators and providers and industry wide, prior to September 2011 and on an



on-going basis since that time. The current requirements were clearly outlined on the PhonepayPlus website.

The Executive noted that the Level 2 provider operated the Service, at the earliest, from 17 August 2014 (the date on which the Service shortcode was activated as confirmed by Oxygen8) or at the latest from the end of August 2014 (the month in which Mobivate and the Level 2 provider confirmed the Service commenced operation). The Registration Scheme database showed that the Level 2 provider registered with PhonepayPlus on 1 October 2014.

The Executive submitted that for between four weeks and three days, and six weeks and two days (depending on the exact date of Service commencement), the Level 2 provider was not registered on the Registration Scheme as required in the Code. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of paragraph 3.4.1 of the Code.

2. The Level 2 provider admitted the breach. The Level 2 provider stated that Mobivate obtained the shortcode from Oxygen8 on the 17 August 2014. The Level 2 provider stated that it took some time to configure and test the shortcode. The Level 2 provider noted that limited internal testing was done in August and September. The Service went live on 23 September 2014. The Level 2 provider supplied an extract of the message statistics for all messages in and out of the gateway for the months of August and September, which showed that bulk traffic on the shortcode did not commence until after 22 September. PhonepayPlus registration was obtained one week later on the 1 October 2014.

In informal representations, the Level 2 provider stated that this was an oversight and usage before registration was minimal (compared to average usage of approximately 10,000 messages per day).

The Level 2 provider admitted that this was an oversight and apologised. The Level 2 provider submitted that the breach was not intentional, and was purely administrative. The Level 2 provider submitted that the breach was corrected, it did not cause any harm to consumers, and as such no penalties should be given.

3. The Tribunal considered the Code and all the evidence before it, including the Level 2 provider's admission. The Tribunal noted that the Service had operated for at least a week without being registered and consequently the Tribunal upheld a breach of paragraph 3.4.1 of the Code. The Tribunal acknowledged that this breach was limited to a short period of time and had been remedied by the Level 2 provider on its own initiative.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 4**

##### **Rule 2.4.2**

"...Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the Level 2 provider of that service must be able to provide evidence which establishes that consent."

1. The Executive asserted that that the Level 2 provider breached rule 2.4.2 of the Code for the following reasons:
  - i. A complainant continued to receive marketing messages despite the sending of STOP ALL; and



- ii. Service marketing messages sent to a complainant failed to provide an opportunity to withdraw consent.

The Executive relied on the content of the PhonepayPlus Guidance on “Privacy and consent to charge”. The Guidance states:

**Paragraph 6.1**

“When marketing via SMS, providers should follow this format to minimise any risk of invading privacy. The message should begin ‘FreeMsg’.”

**Paragraph 6.2**

“The message should state contact information of the initiator of the message (not any affiliate or publisher). This can be in the metadata of the SMS (so, if consumers can text back to the shortcode on which the communication was sent, then this is likely to be sufficient). The message should also include a means of refusing future marketing. A best practice example of a message compliant with these guidelines would be: *“FreeMsg: to receive more guidance on privacy contact us on 0845 026 1060, to end marketing reply STOP”.*”

**Paragraph 8.1**

“When a consumer sends ‘STOP’, or other word as notified to the consumer as a valid marketing opt-out contained in the marketing message, then all marketing must cease....”

**Paragraph 8.2**

“When a consumer texts ‘STOP’ in connection with an ongoing paying commitment – be it for a subscription, or as an element in a virtual chat service – the consumer must not receive any further charge....”

**Paragraph 8.3**

“However, in this circumstance, the provider may still send marketing messages. If, at this point, the consumer then sends ‘STOP’ (again), then all marketing must cease. If a consumer sends ‘STOP ALL’ at any point, then consent for all contact has been removed. At this point, the mobile number should be suppressed. Suppressing a number does not mean deleting it – it means recording the fact that no further messages should be sent. If a number is deleted, it could be received from a third party, then marketed to again, which would be in breach of the rules. For this reason, providers should store the date of suppression, as well as the number.”

**Reason 1 - A complainant continued to receive Service marketing messages despite the sending of STOP ALL**

The Executive noted from the message log for mobile number \*\*\*\*\*365 that the complainant sent "STOP ALL" on eight separate occasions. Further, the Executive noted that despite sending "STOP ALL" further marketing messages continued to be sent to the complainant after six of the "STOP ALL" requests.

The Executive noted the following entries in the message log for mobile number \*\*\*\*\*365. The complainant sent "STOP ALL" twice on 9 March 2015. On 10 March 2015 the complainant received the following free message:

“I just came out from shower, but reading your text makes me want to get dirty again!”



On 13 March 2015 the complainant received the further following free message:

“I dreamt last night that you’re going to text me back once I initiate. I wish it comes true.”

On 16 March 2015 the complainant responded, sending the following three messages:

“Hj”

“Hi”

“Are you ok”

The Executive noted that after sending the above messages, the complainant received the following chargeable Service message:

“Hi there. How are you doing? Looking for someone to have fun with?”

The Executive further noted that free messages with similar content were sent by the operator after the issuing of a “STOP ALL” instruction on 18 March, 20 March, 22 March and 25 March 2015.

The Executive noted that during the preliminary investigation, the Level 2 provider had on 19 November advised that the Service experienced a technical problem with the “STOP ALL” command, resulting in “STOP ALL” instructions being shortened to “STOPALL” and not being carried out.

The Executive asserted that, notwithstanding the technical issue, consumers who sent “STOP ALL” to the Service were withdrawing consent to being contacted by the Service. Operators who received “STOP ALL” (whether in the format ‘STOP ALL’ or ‘STOPALL’) from consumers would have known that the consumer was withdrawing consent to being contacted by the Service and should have ceased sending any further messages to consumers. The Executive submitted that operators appeared to have identified that the complainant for mobile number \*\*\*\*\*365 did wish to withdraw consent to being contacted as Service messages sent to the complainant after ‘STOP ALL’ were sent free of charge (until the complainant responded to those free Service messages).

#### **Reason 2 - Service marketing messages sent to a complainant failed to provide an opportunity to withdraw consent**

The Executive noted that messages sent to the complainant for mobile number \*\*\*\*\*365, after the issuing of “STOP ALL”, failed to explain the opportunity to withdraw consent to being contacted. The Executive also noted that this failure was in contrast to the marketing messages received earlier in the message log for mobile number \*\*\*\*\*365 which did provide an opportunity to withdraw consent, for example:

“FreeMsg: 1 new message received on your profile. Reply “YES” to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. SMS Chat”

The Executive submitted that the Level 2 provider appeared to be aware of the requirement to provide an opportunity to withdraw consent, however it did not provide an opportunity in the marketing messages sent after the complainant sent “STOP ALL” to withdraw consent.

Accordingly, for the reasons set out above, the Executive submitted that there had been a breach of rule 2.4.2 of the Code.

2. The Level 2 provider admitted the breach.

In relation to reason 1, the Level 2 provider agreed that in some instances the "STOP ALL" command did not work. The Level 2 provider explained that the reason for this breach was that Mobivate had experienced a technical issue, as follows:

"Mobivate, our technology supplier, manages this part of the Service. Mobivate noticed that when a customer sent the word "STOP ALL" the command was shortened to "STOPALL" which was not an unsubscribe trigger. This problem was fixed as soon as the issue was discovered. It should be noted that this is a NON-subscription service and will only be charged when a user continues to chat/reply to the service. This only happened in a small number of instances and was not a widespread issue. If a user sends in "STOP" he will not receive any premium SMS messages. He will however receive a FREEMSG if he tries to initiate another chat session on the site."

The technical issue was identified on 31 March 2015 and fixed on 1 April 2015. The Level 2 provider submitted that the STOP command had always worked, however the STOP ALL command did not work as a result of the technical issue Mobivate experienced.

The Level 2 provider also noted that customers who sent in STOP were unsubscribed and did not receive any further marketing or billed messages unless they activated the service again by initiating a chat session. The Level 2 provider submitted that the "STOP ALL" issue was not significant. The Level 2 provider stated that it had established that, between 25 September 2014 and 1 April 2015 there were 57 customers that sent in the word "STOP ALL" to the shortcode, and that only five of those customers were subsequently billed after sending in the "STOP ALL" command (and only because the consumers initiated chat again). The total billing across these customers was £171, as they continued to chat.

The Level 2 provider contested the Executive's submission that operators were aware that the consumer had declined consent to receive marketing. The messages sent on the 9 and 10 March were free of charge automated messages, not messages from operators. The Level 2 provider submitted that if operators had responded, the response would have been sent on the same day, within minutes of the consumer's message. The Level 2 provider submitted that in this instance the operators did not respond because of the STOP ALL message, however because of the technical issue, the automated marketing messages were still sent on 10 and 13 March.

In relation to reason 2, the Level 2 provider was aware that all Double Opt In ("DOI") messages need to start with "FreeMsg" and contain the relevant opt out, as noted by the Executive. The Level 2 provider stated that this was a DOI message and not a marketing message. The Level 2 provider conceded that the marketing / teaser messages did not provide an opportunity to withdraw consent.

The Level 2 provider stated that it had changed the structure of the messages from "I just came out from shower, but reading your text makes me think of you again!" to "FreeMsg: I just came out from shower, but reading your text makes me again! To OptOut sms STOP to 88006. £1.50/msg rcd."

In informal representations, Mobivate admitted the technical issue was its fault. The fault arose as a result of an attempt to distinguish the use of "stop" in ordinary conversation from a termination of Service request. Once noticed it had been raised with their technical team and resolved within 24 hours. The Level 2 provider stated that as this was not a subscription service, the harm was less than it would have been in such a case.



The Level 2 provider clarified that the “chat initiation message “ was sent after they received a “ping” form a Website to say a consumer had clicked the relevant button there and consented. The messages might be sent multiple times if a consumer did this multiple times. However the Service only started after a consumer responded “YES” to the text message, and after they had STOPPED the Service they would need to respond “YES” again to this message to restart the Service. The Level 2 provider confirmed that all the chat users would be users of a Website, and most were long term users of dating sites.

The Level 2 provider submitted that this was not a deliberate attempt to cause any concern or consumer harm, and harm to consumers was limited. The Level 2 provider submitted that it had ensured its processes now check ‘STOP ALL’ functions correctly prior to any future full service launches.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider’s admission.

In respect of Reason 1, the Tribunal noted the Guidance stated “if a consumer sends ‘STOP ALL’ at any point, then consent for all contact has been removed. At this point, the mobile number should be suppressed.” The Tribunal found that, for a period, promotion for the Service had not been stopped when consumers had sent “STOP ALL”, and accordingly consumers had been marketed to after they had withdrawn their consent. The Tribunal accepted this was inadvertent, and was for the technical reason advanced by the Level 2 provider, and that this had been rectified swiftly once identified.

In respect of Reason 2, the Tribunal noted the Guidance stated “[a promotional] message should also include a means of refusing future marketing.” The Tribunal found that the identified promotional messages for the Service had not contained any explanation of how to opt out of future marketing, and accordingly consumers had not properly been provided with an opportunity to withdraw consent.

Accordingly, the Tribunal upheld a breach of rule 2.4.2 of the Code for both reasons advanced by the Executive.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 5**

##### **Rule 2.2.1(a)**

“...Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.... 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 asserted that the Level 2 provider had breached rule 2.2.1(a) of the Code because Service promotional material did not contain the identity of the Level 2 provider or the Level 2 provider’s contact details. The Executive relied on complainant message logs supplied by Mobivate.

The Executive noted that the first entry in all the complainant message logs was a promotional text message requiring the consumer to send the keyword ‘Yes’ to Service shortcode 88006. The promotional message stated:

“FreeMsg: 1 new message received on your profile. Reply “yes” to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. SMS Chat”



The Executive noted that the above promotional message did not contain the identity of the Level 2 provider, nor did it contain the Level 2 provider's contact details. In addition, the promotional messages referenced in the alleged breach of rule 2.4.2 also did not contain the identity of the Level 2 provider, nor did they contain the Level 2 provider's contact details. The Executive also noted that the Service terms and conditions supplied by the Level 2 provider, and the terms and conditions viewed by the Executive during the Service monitoring (both located in the 'Background' section above) failed to contain the identity of the Level 2 provider or the Level 2 provider's contact details. It therefore appeared that consumers who visited the Websites and interacted with the Service were not provided with the identity of the Level 2 provider or the Level 2 provider's contact details and were therefore not fully and clearly informed of all information likely to influence the decision to purchase.

The Executive accordingly submitted that a breach of rule 2.2.1(a) had occurred because promotional material for the Service did not contain the name of the Level 2 provider of the relevant premium rate service and nor was the information otherwise available to consumers.

2. The Level 2 provider admitted the breach. The Level 2 provider stated that this was an unintentional oversight and they had now corrected this by including the Service provider name and helpline on the opt in page, and including the Service provider's helpline on the DOI message. The message now read as follows:-

"FreeMsg: 1 new message received on your profile. Reply "yes" to read it. To OptOut sms STOP to 88006. £1.50/msg rcd. Help 08000885420. SMS Chat"

The Level 2 provider stated that on the 16 April 2015, all the spend reminders had been changed to include the helpline number. All spend reminders read as follows:-

"FreeMsg: You spent £10.50 on this chat service, £1.50/msg received. Please reply to continue. To end send STOP to 88006. Help 08000885420"

In informal representations, the Level 2 provider stated that the provision of information in its terms and conditions had recently been improved to add the Level 2 provider's identity. The helpline had also been added previously.

The Level 2 provider noted that the first complaint was received by the Executive in October 2014. For each complaint Mobivate provided all the logs for the complainants. The Level 2 provider noted that this breach had never been communicated to them or Mobivate previously. The Level 2 provider stated that if this had been done corrective action would have been taken immediately. The Level 2 provider accepted that there had been a breach of the Code but also submitted that the breach would not have caused significant harm to consumers.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's admission. The Tribunal accepted that the helpline had been inserted into the text message in April, but noted that the name of the provider did not appear to have been inserted. The Tribunal noted that the name of the provider had been inserted into the terms and conditions.  
The Tribunal concluded that at least until April 2015, the Level 2 provider had failed to ensure that the promotional material for the Service contained its name and a non-premium rate UK contact telephone number (and this information was not otherwise obvious). Accordingly, the Tribunal upheld a breach of rule 2.2.1.(a) of the Code.

**Decision: UPHELD**

**ALLEGED BREACH 6****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 the Level 2 provider had breached rule 2.2.5 of the Code because Service promotional messages did not contain the cost of the Service.

The Executive relied on the complainant message log for mobile number \*\*\*\*\*365 and the PhonepayPlus Guidance on “Promotions and Promotional material”. 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 principle rule around transparency of pricing in the PhonepayPlus Code of Practice is Rule 2.2.5...”

As referenced in the alleged breach of rule 2.4.2, the Executive noted that marketing text messages were issued to the complainant for mobile number \*\*\*\*\*365 after the complainant sent “STOP ALL”. The Executive noted that these messages did not contain pricing information for the Service. As noted within the alleged breach of rule 2.4.2, the nature of the messages issued after the sending of “STOP ALL” were clearly intended to encourage further interaction with the Service. Given the clear intention to promote further interaction with the Service, the Executive asserted that these promotional messages should have contained the cost of the Service.

In response to questioning by the Tribunal, the Executive clarified that it was not its position that pricing had never been given to the consumer, but that the pricing was not included in messages which were sent to encourage the consumer to engage again with the Service, meaning pricing was not prominent and proximate as required by rule 2.2.5. The Executive confirmed that its view was that there was no requirement to put pricing in messages which were not promotional.

The Executive accordingly submitted that in breach of rule 2.2.5, this promotional material for the Service did not contain the cost of the Service.

2. The Level 2 provider denied the breach. The Level 2 provider believed that the price of the Service was fully conveyed to all consumers because pricing was shown on the website, and shown on the DOI message. The Level 2 provider noted that the customer needed to respond “YES” to the DOI message for the Service to commence.

The Level 2 provider stated that it also sent out spend reminders every £10, including to this consumer. The Level 2 provider submitted that the Executive had failed to prove that the complainant using \*\*\*\*\*365 did not receive any pricing information. The Level 2 provider stated that the Executive’s evidence showed that this consumer had received pricing information, had received price warnings, and had also consented to all of the above by sending an MO Message ‘Yes’.

Further, the Level 2 provider submitted that the evidence supplied by the Executive of the messages to and from \*\*\*\*\*365 was inadmissible.



The Level 2 provider submitted that the Executive had failed to prove beyond any reasonable doubt that the consumer was unaware what they were entering into. The Level 2 provider submitted that the consumer was fully aware of all pricing information.

In informal representations, the Level 2 provider stated that when a consumer sent STOP they may receive a new initiation message if for instance they requested a new chat via a Website. That message contained pricing information, and they'd need to reply only with the keyword "YES" to enter the Service. It stated that it was clear on pricing and wished to be so to avoid potential complaints. It issued £10 spend reminders.

The Level 2 provider noted that the Service was actively launched on 23 September 2014, and PhonepayPlus received 54 complaints starting in October 2014. Mobivate had provided the Executive with logs in respect of the complainants. The Level 2 provider noted that concerns about a lack of transparency on pricing were never previously communicated to either the Level 2 provider or Mobivate.

Notwithstanding the Level 2 provider's view that consumers were fully and clearly informed of the cost of the Service before any purchase is made, the Level 2 provider had decided to be as transparent as possible by adding pricing onto marketing messages as noted in its response to the alleged breach of rule 2.4.2.

3. The Tribunal considered the Code, Guidance and all the evidence before it.

The Tribunal noted that "promotion" was defined at paragraph 5.3.29 of the Code as "anything where the intent or effect is, either directly or indirectly, to encourage the use of premium rate services, and "promotional material" shall be construed accordingly". The Tribunal noted that the messages identified by the Executive had been described by the Level 2 provider as being messages sent "free of charge.... these messages are in fact automated messages [marketing/ teaser messages] and not messages from operators..." The Tribunal understood that such messages helped to generate revenue for the Service because (as described by the Level 2 provider) "the chat is non-subscription... if [consumers] simply stop sending messages they will receive no further billed chat replies." Consequently, the Tribunal concluded that the messages were intended to encourage use of the Service.

The Tribunal noted that all consumers receiving this type of message would have received pricing information for the Service at some point in the past. However the Tribunal found that there could be a significant gap between this pricing information being sent, and the further promotional message being sent. The Tribunal noted that, in the case highlighted by the Executive, the Service pricing information had only been received prior to the consumer sending "STOP ALL" to terminate the Service. The Tribunal noted that in this case, chargeable text messages started again after the consumer had responded to the promotional messages.

Consequently, the Tribunal concluded that the promotional messages did not include information on the cost of the Service, meaning that the cost was not prominent and proximate to the means of access to the Service. Accordingly, the Tribunal upheld a breach of rule 2.2.5. 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 Service generated substantial revenues through a recklessly non-compliant promotion that misled consumers.
- The case had a clear detrimental impact on consumers and the breach had a clear and damaging impact on consumers.
- The nature of the breach meant the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers was 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 as to compliance with the Code.

#### **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 Service contained no effective mechanism for age verification.
- The nature of the breach meant the Service would have damaged consumer confidence in premium rate services.
- The Service had been operated in a way that demonstrated a degree of recklessness as to compliance with the Code.

#### **Paragraph 3.4.1 – Registration of the Level 2 provider**

The initial assessment of paragraph 3.4.1 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider failed to register as an organisation operating premium rate services, but had sought to rectify this at the earliest opportunity when put on notice of the non-compliance.
- The breach, if continued, may have been capable of having a slight impact on consumer confidence in premium rate services.

#### **Rule 2.4.2 – Consent to market**

The initial assessment of rule 2.4.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider contacted consumers after they had withdrawn their consent.
- Promotional material omitted key information regarding how to opt out of marketing for the Service.
- The nature of the breaches meant the service would have damaged consumer confidence in premium rate services.

#### **Rule 2.2.1(a) – Provision of the Level 2 provider's identity and contact details**



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 criteria:

- The Service failed to supply adequate details relating to the provider of the Service, including non-premium rate contact details.
- The nature of the breach had the potential to cause a drop in consumer confidence in premium rate services.

#### Rule 2.2.5 – 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:

- Pricing information within a message which encouraged consumers to again use the Service was not present, and thereby demonstrated some harm to consumers.
- The nature of the breach had the potential to cause a drop in consumer confidence in premium rate services.

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 the following two aggravating factors:

- The Level 2 provider failed to follow published Guidance on “Virtual chat services” regarding misleading consumers into believing that they would have an opportunity to meet other users, and failed to pay regard to two previous adjudications of PhonepayPlus on the same issue; and
- The Level 2 provider had failed to take sufficient steps to ensure its Service was compliant when it became aware of apparent breaches, meaning that the breach continued until September 2015 at the least.

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

- The Level 2 provider had admitted a number of the breaches; and
- The Level 2 provider had provided evidence that it had proactively refunded consumers in an effort to relieve the harm caused.

The Level 2 provider's evidenced revenue in relation to the Service was in the range of Band 3 (£250,000 - £499,999).

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 £75,000;





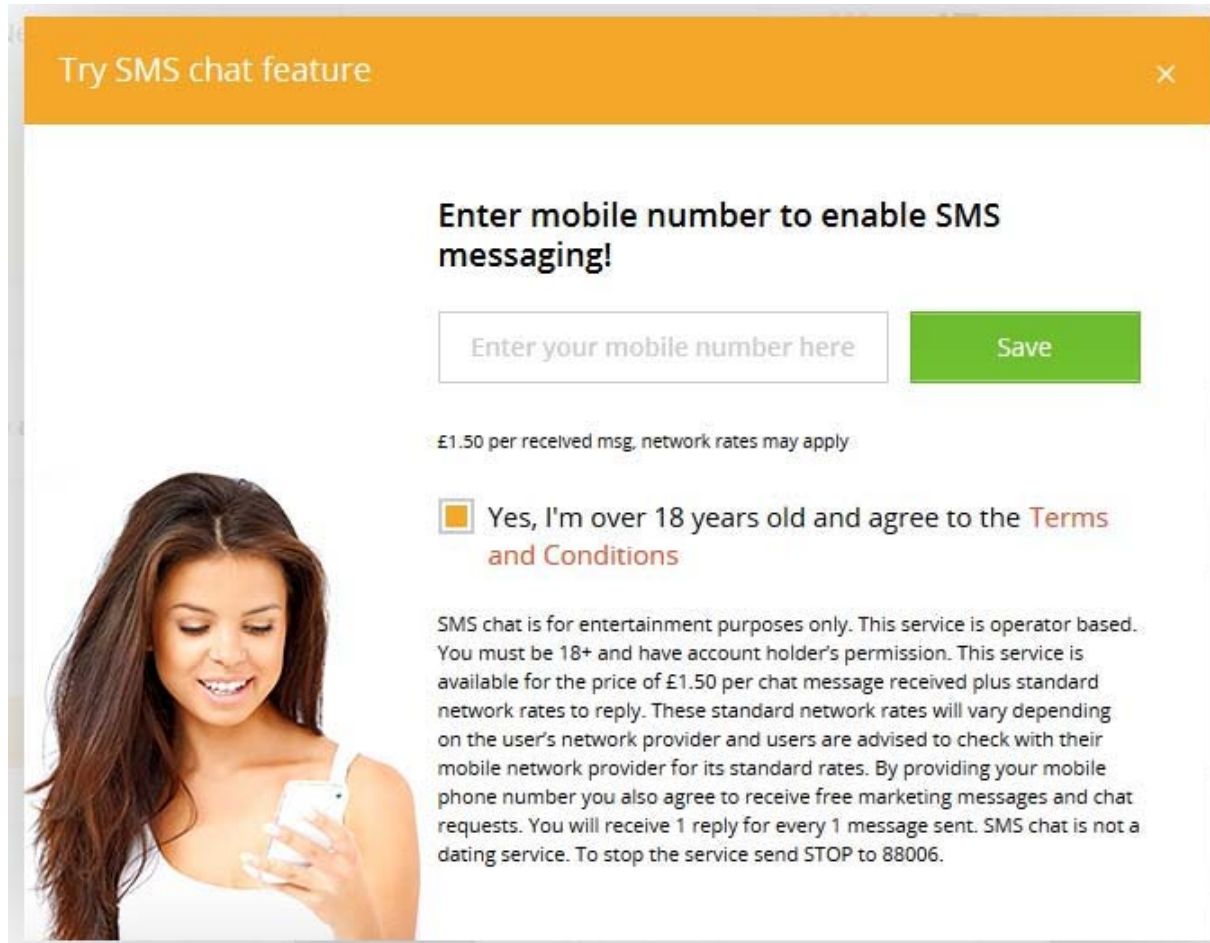
- a requirement to remedy the breaches of the Code (insofar as the Level 2 provider had not already done so), specifically the failure to use a designated adult shortcode for a sexual entertainment service, the failure to hold valid consent for marketing purposes, the failure to include the Level 2 provider's name and contact details in promotional material, the failure to include pricing information prominently and proximate to the means of access to the Service, and promoting and conducting the Service in a way which was likely to mislead consumers;
- a requirement that the Level 2 provider submit all Service promotional material that is intended for publication to PhonepayPlus for compliance advice for a period of one month from the date of this decision. Such advice is to be sought within two weeks of the date of publication of this decision and thereafter implemented by the Level 2 provider within two weeks of such advice being provided (subject to any extension of time agreed with PhonepayPlus) 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.

**Administrative charge recommendation:**

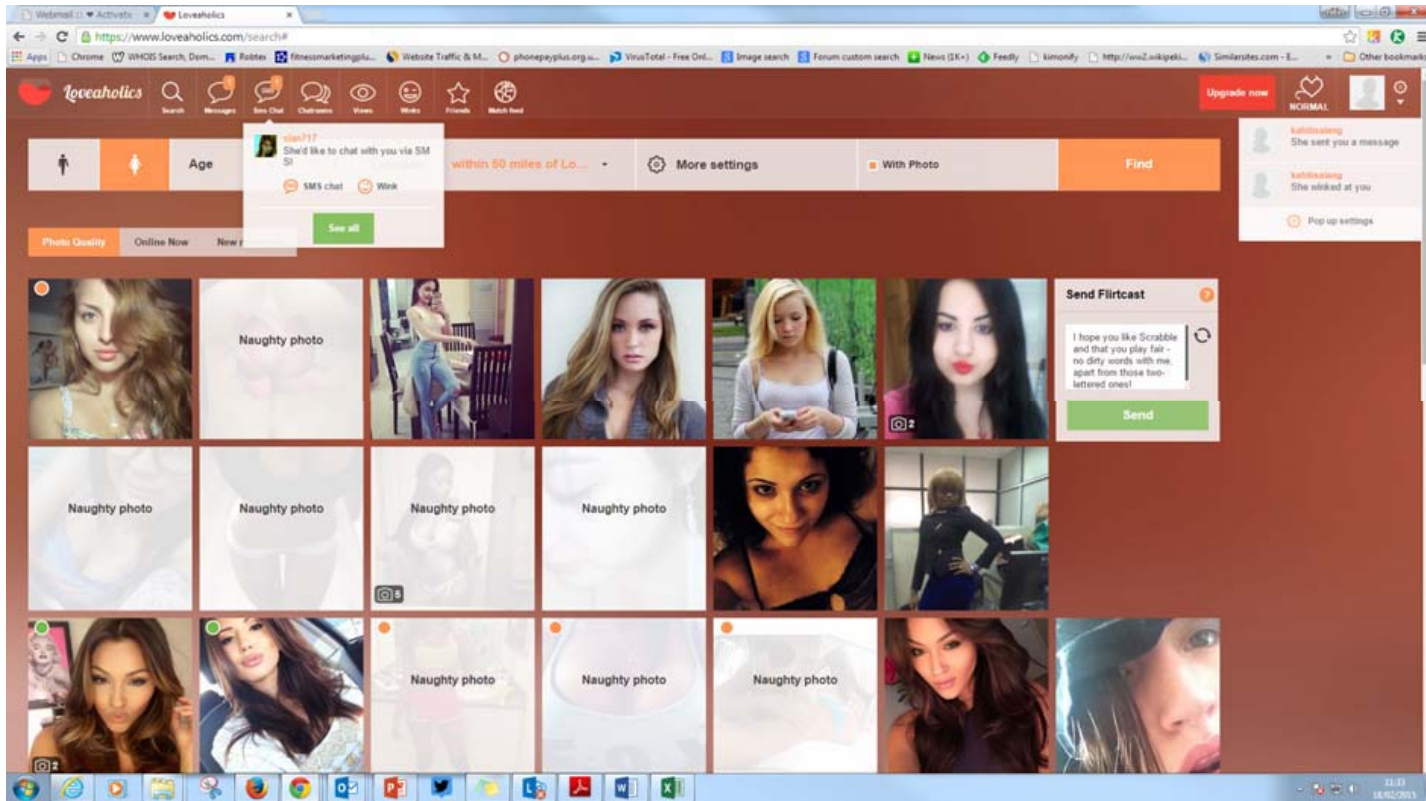
**100%**

Appendices

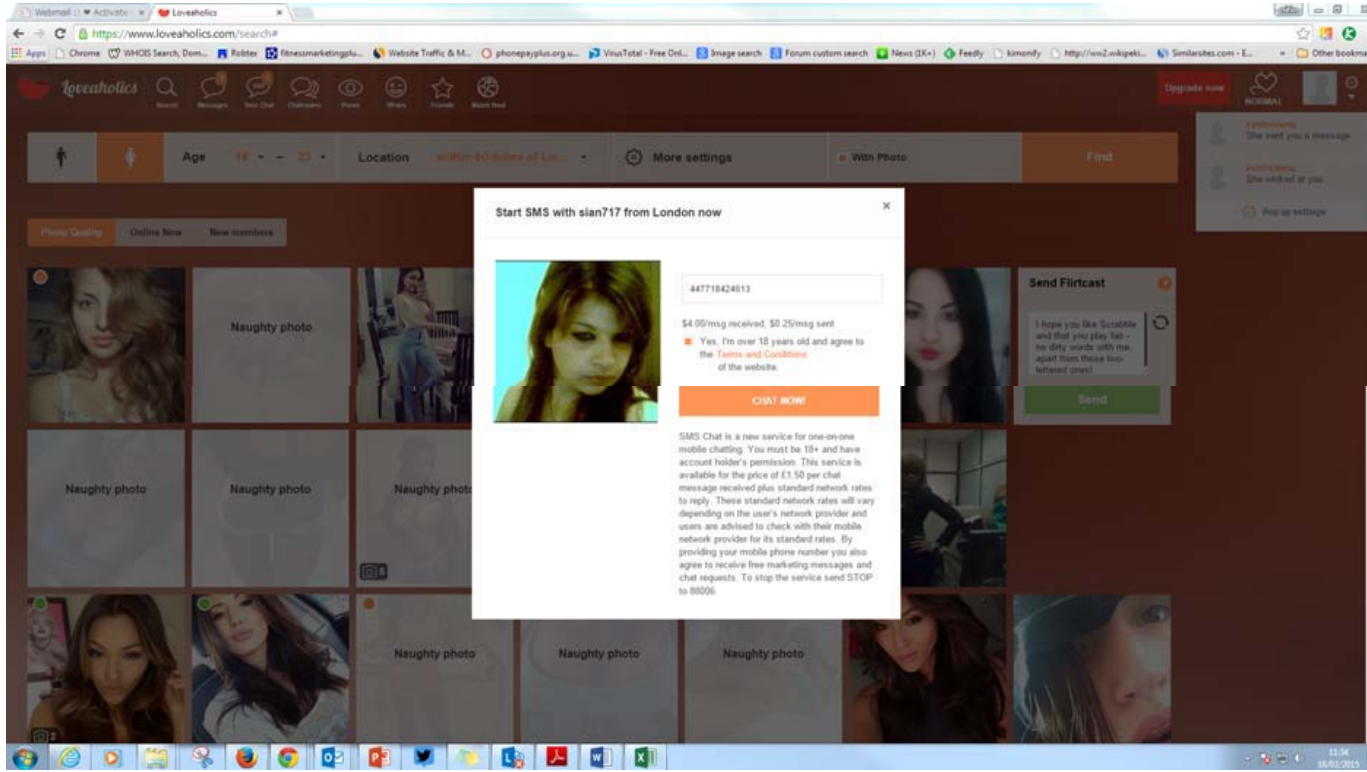
Appendix A – A screenshot of the current promotional material for the Service presented on the Websites submitted by Level 2 provider on 19 August 2015



Appendix B – A screenshot from the Executive’s monitoring evidence



Appendix C – A screenshot from the Executive’s monitoring evidence





Appendix D – A screenshot from the Executive’s monitoring evidence (September 2015)

