

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

DIGITAUN LIMITED

Respondent

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**ADJUDICATION BY CONSENT (“CONSENT ORDER”)**

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**Introduction**

1. This Consent Order shall relate to the matter under PhonepayPlus case reference 71966, and the oral hearing listed for 24 October 2016, requested by the Respondent.
2. This Consent Order is made following admissions of liability by the Respondent for the breaches set out in the schedule to this Consent Order.
3. This Consent Order further sets out the agreement of the parties in respect of the sanctions to be imposed on the Respondent and the administrative charges to be paid by the Respondent.
4. The agreed sanctions and administrative charges have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 3 to the PhonepayPlus Code of Practice (thirteenth edition) (“the Code”).

**Agreed sanctions**

5. The sanctions hereby agreed by the parties are:
  - a. a fine in the sum of £250,000;
  - b. a formal warning that if the Level 2 provider is found to have charged consumers after the date of this adjudication in circumstances where it does not hold robustly verifiable evidence of their consent to be charged (including existing subscribers for whom no such evidence is held after the adjudication date, unless the Level 2 provider can provide robust evidence to PhonepayPlus’s

satisfaction that such existing subscribers received the agreed reminder message as set out in 5c below, notwithstanding that receipt of a reminder message is not a substitute for obtaining consent to charge), it should expect a Tribunal to impose penalties of the utmost severity;

- c. a requirement that in respect of its existing subscriber base the Respondent remedies the breach of failure to hold evidence of consent to charge. The Respondent is to ensure that all existing subscribers also receive an additional subscription reminder message in the following wording: "*We are required to remind you that you are subscribed to CelltaunBabes at a cost of £3 per week until you text STOP to 85878.*"; and
- d. a requirement that the Respondent 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 for the Respondent to provide evidence to PhonepayPlus that such refunds have been made.

#### **Administrative and legal charges**

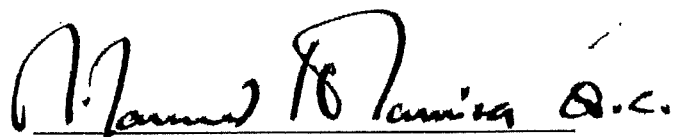
6. The Respondent shall pay legal and administrative charges incurred by PhonepayPlus in relation to this case in the sum of £30,000.

#### **Payment of fine and administrative charges**

7. The fine and administrative charges are to be paid within 21 days of the date of this Consent Order, subject to any alternative payment arrangements which may be agreed between the parties.

#### **Oral hearing date**

8. The Oral hearing date of 24 October 2016 shall be vacated.



Mohammed Khamisa QC (Chair)  
On behalf of the Oral Hearing Tribunal

14th Sept [ ] 2016

**Schedule**

**IN THE PHONEPAYPLUS TRIBUNAL**

**CASE REF: 71966**

**BETWEEN:**

**PHONEPAYPLUS LIMITED**

**Executive**

**-and-**

**DIGITAUN LIMITED**

**Respondent**

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**SUMMARY OF SERVICE AND ADMITTED BREACHES OF THE CODE**

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**The Service**

1. The Service is a premium rate glamour video subscription service called 'CelltaunBabes' which operates on shared shortcodes 85878 and 81321. The Service previously also operated on dedicated shortcode 67891 and shared shortcode 84459.
2. The Respondent is the Level 2 provider of the Service and has been registered with PhonepayPlus since 11 April 2013.
3. The Service is charged at £3 a week, with customers being charged via chargeable messages sent to their mobile. The Respondent has indicated that it promotes the Service via banner adverts which, when potential customers click through, takes them to a landing page where they can see full details of the Service on offer which the Respondent says includes clear and concise details of the cost of the Service as well as full terms and conditions. The Respondent has indicated that consumers opt into the Service via wireless application protocol (WAP).

### **Previous investigation**

4. From November 2013 to January 2015 the Executive conducted a Track 1 investigation (Case ref: 34099) in relation to complaints from customers that they were being charged for the Service when they had not opted-in to receive chargeable messages. The Executive wrote to the Respondent on 7 January 2015, indicating that there was evidence that the Respondent did not hold robust evidence verifying customer consent to charge, had not treated customers fairly and equitably, and had not made pricing information sufficiently prominent to prospective customers.
5. The Respondent replied on 14 January 2015, accepting that it was in breach of the Code, and confirming that, in order to prevent the breach from occurring again, it had implemented the required actions and had engaged a third party to provide robust evidence of consent to charge through a PIN verification service. On that basis, the Track 1 investigation was closed.

### **Current investigation**

6. The Service was subsequently the subject of 257 complaints between 13 April 2015 and 1 September 2016 from members of the public alleging that they had received chargeable messages from the Service without having opted-in to it.
7. As part of its investigation, the Executive requested information from the Respondent, relevant Level 1 providers and the Verifier for the Mobile Network Operator Vodafone. In its Statement of Case, the Executive focussed on message logs in respect of 22 of these complaints.
8. Message logs provided by the Respondent suggested that the complainants opted-in to the Service in 2014, but that attempts to send chargeable and non-chargeable service messages routinely failed in respect of these complainants from the date of opt-in until at least January 2015.
9. Message logs supplied by the Level 1 providers and the Verifier did not indicate that complainants opted in to the Service prior to the closure of the previous Track 1 investigation; the first chargeable and non-chargeable Service messages in the Level 1 provider and Verifier logs dated from January 2015. In addition, information provided by the Level 1 providers and the Verifier during the course of the investigation indicated that some of the failed

chargeable service messages contained in the logs provided by the Respondent (but which did not have a corresponding entry in the Level 1 provider of Verifier logs) would have appeared in the Level 1 provider logs if they had in fact been sent by the Respondent.

10. In light of (i) the credibility of the complaints, (ii) the substantial discrepancies between the Respondent's message logs and those of the Level 1 providers and the Verifier for the complainants, (iii) the fact that the Respondent provided no verifiable evidence to show that issue(s) had occurred which explained why messages for the complainants had consistently failed to reach the Level 1 providers or customers, and (iv) the fact that the Respondent provided no evidence, other than its message logs, of the complainants' consent to charge, the Executive considered that there was sufficient evidence to allege the breaches of the Code set out below.
11. On 16 March 2016, the Executive sent a Breach Letter to the Respondent. On 15 April 2016 the Respondent submitted a notice of a requirement for an oral hearing of this matter, which denied the alleged breaches, and suggested that unanticipated changes occasioned by the Respondent's firewall may have contributed to the routine message failures which the Respondent suggested had occurred in respect of the complainants. The Respondent has not provided substantive evidence of such issues actually occurring.

### **The Admitted Breaches**

12. Breaches of Paragraph 4.2.4 and Rule 2.3.3 of the Code are admitted by the Respondent in respect of the Service.

#### **Paragraph 4.2.4 of the Code provides:**

**""A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission)."**

13. The message logs provided by the Respondent suggested that the complainants opted-in to the Service in 2014, prior to the closure of the previous Track 1 investigation. The Respondent submitted a variety of potential reasons why messages might fail to reach Level 1 providers or for messages failing to reach customers when they had been received by Level 1 providers. However, the Respondent did not provide substantive evidence to support the contention that

these reasons actually occurred and did explain the entirety of the pattern of discrepancies shown in the logs, and this contention was not supported by any other available evidence. Had the Executive accepted that the message logs provided by the Respondent were accurate, the Respondent may have submitted that the Executive should take no action in relation to the complaints received from April 2015 onwards, since this would have suggested that any underlying issues were historic in origin and had been dealt with by the required actions referred to at paragraph 5 of this Schedule.

14. The Respondent accepts that it could not adequately dispute the Executive's case that the message logs it provided to the Executive as part of the Executive's investigation contained false information and that it has acted in breach of paragraph 4.2.4 of the Code.

**Outcome 2.3 provides:**

**"Fairness**

**That customers of premium rate Services are treated fairly and equitably."**

**Rule 2.3.3 of the Code provides:**

**"Customers must not be charged for premium rate Services without their consent. Level 2 providers must be able to provide evidence which establishes that consent."**

15. The complaints received by the Executive all state that the complainants have been charged without their consent. The Respondent did not provide evidence which establishes that the complainants consented (for example, through independent third party PIN verification establishing customer opt-in to the Service).
16. The Respondent accepts that it has breached Rule 2.3.3 of the Code.

### **Aggravating Factors**

17. The Executive noted the following aggravating factors which are accepted by the Respondent:
  - (a) Previous adjudications have made clear to the industry the importance of ensuring that customers' consent to charge is obtained and that evidence of this is held and supplied to the Executive on request;

- (b) The Respondent had already been subject to a Track 1 procedure which had included requirements regarding consent to charge; and
- (c) The Respondent's failure to ensure that consumers received free Service messages (including spend reminder messages) increased the likelihood of customers remaining unaware that they were being charged.

### **Mitigating factors**

- 18. The Respondent noted the following mitigating factors which are accepted by the Executive:
  - (a) Although the Executive has not verified the provision of refunds to complainants, the Executive notes that in two of the customer questionnaire responses the complainants in question confirmed that they had received refunds in relation to their complaints.

### **Seriousness**

- 19. The breaches are each individually regarded as **very serious** and collectively, after final assessment, the case is regarded as **very serious** and it is agreed that appropriate sanctions should be imposed accordingly.

