

**IN THE PHONEPAYPLUS TRIBUNAL**

**CASE REF: 74817**

**BETWEEN:**

**PHONEPAYPLUS LIMITED**

**Executive**

**-and-**

**PARTNER TELECOM LIMITED**

**Respondent**

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

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ON the matter being considered under PhonepayPlus case reference 74817

AND ON the parties having agreed breaches of the PhonepayPlus Code of Practice (“the Code”) as set out in the Warning Notice produced in the Schedule to this order, and appropriate sanctions and administrative costs to be imposed on the Respondent, in order to dispose of the matter

**By consent it is ordered that**

1. The alleged breaches of the Code set out in the Warning Notice dated 19 September 2016 and produced (as amended) in the Schedule shall be upheld.
2. The following sanctions shall be imposed in respect of those upheld breaches:
  - a. a formal reprimand;
  - b. a fine of £120,000;
  - c. a requirement that the Respondent remedy the breach by ensuring that it has robust verification of each consumer’s consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service; 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 provide evidence to PhonepayPlus that such refunds have been made.

3. The Respondent shall pay legal and administrative charges incurred by PhonepayPlus in relation to this case in the sum of £3,681.58 within 28 days of this order.

Robin Callender Smith (Chair)  
On behalf of the PhonepayPlus Tribunal  
19 October 2016

## Schedule

### 1. Background to the Investigation

#### **The parties**

*The case concerns a subscription text chat service operating under the brand names 'Luv Guru UK', 'Text4chat', 'SexTimeChat' and 'u-txtuk'on shared shortcodes 69002, 79900 and 85222 (the "Service").*

*The Level 2 provider for the Service is Partner Telecom Limited (the "Level 2 provider"). The Level 2 provider has been registered with PhonepayPlus since 31 August 2011.*

*The Level 1 provider for shortcodes 69002 and 79900 is TxtNation Limited ("TxtNation"). TxtNation in turn contract with MGage Europe Limited ("Mgage") (the top Level 1 provider) for shortcode 79900. The Level 1 provider for shortcode 85222 was Bulletin.Net (UK) Limited ("Bulletin"). Bulletin in turn contracted with Tap2Bill Limited ("Tap2Bill") (the top Level 1 provider).*

#### **The Service**

*The Service is stated to be a subscription text chat service charged at £4.50 per month. The Executive understands that consumers enter the Service via the Service websites.*

The Level 2 provider confirmed that the Service commenced in 2008 and Tap2Bill has stated that the Service commenced in August 2008.

Prior to the Level 2 provider's involvement in the provision of the Service, the Level 2 provider for the Service was a third party company ("The Previous Service Provider"). The Level 2 provider has confirmed that it took over the operation of the Service from The Previous Service Provider in February 2015. The Executive notes that subsequently The Previous Service Provider dissolved on 16 June 2015.

The Executive notes from complainant message logs supplied by the Level 2 provider that the Service initially commenced on Bulletin shortcode 85222. Service users were then in turn migrated to TxtNation shortcode 79900 in February 2015. TxtNation has confirmed that Vodafone Limited ("Vodafone") Service users were migrated to shortcode 69002 on 5 June 2015.

The Level 2 provider has stated that it suspended the Service on 1 August 2016.

The Level 2 provider has provided the following information on the consumer journey into the Service and Service website screen shots in response to requests for information ("RFIs") from the Executive:

*"Luguru.net was the site used for our service and webboptin until 2012/2013. At this point PPP advised us this method was no longer acceptable and that we needed to update our site, At this time we created a new site txtuk.com as a landing page for the facility for existing*

customers to chat , This was accepted by ppp on understanding no new customers would be entered through old method .terms and conditions etc on new site were there purely for compliance ,not to entice new sign ups ,

In 2015 we built the site textchat.com which is a fully operational chat site . This was built using New Media Services NZ 'S API . This is a far more functional and modern interactive chat site.. This was done in accordance with ppp compliance. The only short code that we currently use is 79900 texnation we no longer have any facility to use 85222 imi . On advise from txt nation we sent out the text below to inform our customers that we were changing to a different short code

Chat at <http://www.text4chat.com> or text Kay to 79900 £1.50 per msg. To cancel replyStop c/s 01727221316. Code migrated from 85222

At present we no longer actively market our site for any new sign ups.”

The Executive notes the Level 2 provider's reference to establishing a more functional and modern interactive chat site in 2015 in compliance with PhonepayPlus' Code, however the Executive cannot locate a record of The Previous Service Provider or the Level 2 provider approaching PhonepayPlus for compliance advice in 2015. Advice in relation to consent to charge was provided to The Previous Service Provider during two Track 1 procedures, further information on the Track 1 procedures is given below.

## Promotion 1

**Flirt and swap pictures with naughty single girls tonight!**  
Text **HOTTY** to **85222**

18+ only. Additional standard network rates apply. You will be opted in to receive 2 billed messages at £1.50 each per month from code 85222. All photos sent/received are charged at standard network rates. This is not a contact or dating service. We may contact you with promotional information. Text STOP to 85222 to end all services. Service provider: LDZ CONSORTIUM, Building 3904, Prestwick Airport, Prestwick, KA9 2PL. Customer service number: 01727221316

To chat with Debbie text: 07624802969  
\*Standard network charges apply

To chat with Kim text: 07624802970  
\*Standard network charges apply

To chat with Anne text: 07624803745  
\*Standard network charges apply

Chat to all UK girls tonight, and find lonely housewives, cute college girls, and naughty singles looking to chat...

**Text HOTTY to 85222**  
**Text CHAT to 85222**

This service costs £3 per month

Swap pictures, chat, flirt...  
This is hot stuff -- 18+ only!

18+ only. Additional standard network rates apply. You will be opted in to receive 2 billed messages at £1.50 each per month from code 85222. All photos sent/received are charged at standard network rates. This is not a contact or dating service. We may contact you with promotional information. Text STOP to 85222 to end all services. Service provider: LDZ CONSORTIUM, Building 3904, Prestwick Airport, Prestwick, KA9 2PL. Customer service number: 01727221316

It's easy and you could be flirting in seconds...

## Promotion 2

All models shown on this site were over 18 at the time.

LIVE CHAT at porttextchat.com, real live hardcore chatting service.

**Text:**  
**KAY, JOE, MEL, KIM or ASH**  
**to: 79900**

**:: Live chat with real girls at text4chat.com ::**

Text now to chat live with any of these very open minded, real girls, the best live hardcore chat.

If you have been sexting elsewhere you have been missing out! These very hot girls will get you going with the very best hardcore live chat service that you are ever likely to find.

Users must be 18+ to access this service

**Text the name of the babe you fancy to 79900 to chat with a hot sexy lady now**

:: Get the hottest texts ever ::  
**From these real gorgeous babes.**

**→TEXT KAY to 79900**  
**Contact me now to see my private video**

texts cost £1.50 each, by texting you are subscribing to a text service costing £4.50 a month, customer services number 01727221316

**→TEXT JOE to 79900**  
**Contact me now to see my private video**

texts cost £1.50 each, by texting you are subscribing to a text service costing £4.50 a month, customer services number 01727221316

**→TEXT MEL to 79900**  
**Contact me now to see my private video**

texts cost £1.50 each, by texting you are subscribing to a text service costing £4.50 a month, customer services number 01727221316

**→TEXT KIM to 79900**  
**Contact me now to see my private video**

texts cost £1.50 each, by texting you are subscribing to a text service costing £4.50 a month, customer services number 01727221316

**→TEXT ASH to 79900**  
**Contact me now to see my private video**

texts cost £1.50 each, by texting you are subscribing to a text service costing £4.50 a month, customer services number 01727221316

:: How SMS Sex Chat works ::

Text: KAY, JOE, MEL, KIM or ASH to 79900

Send STOP to 79900 to exit anytime.

This is an adult chat subscription service charged at £1.50 per message received, and £4.50 per month. Messages sent at usual network rate

Users must have bill payers permission and be 18+ to access this service  
By opting in you consent to receive free promotional text messages until you opt out  
Exit the service by sending "STOP" to 79900

This is a Virtual Chat Service only  
Dates/meets are not possible  
Helpline: 01727221316

Service provider: text4chat LDZ - Tudor House Green Close Lane Loughborough, LE11 5AS United Kingdom  
Customer services number 01727221316

## Summary of complaints

The Executive has received 32 complaints concerning the Service since 17 April 2015..

Complainants variously allege that the Service charges are unsolicited.

A sample of complainant accounts have been provided below:

*chat service*

*I recieved this a a spam message back in March and added it to my spam as I assumed I wasn't being charged, as I had not signed up to any service, after checking my bills I have been charged a total of £18 for these messages I have received since March a total of 3 each month to date, all containing the same message as above, I find the legality of this questionable, even if I wanted a chat service to be charged for a message that is basically advertising seems very strange indeed.*

*Summary of Enquiry: have received a couple of 'adult service' texts in the last month or so and just deleted them. However, I noticed that my top up credit was going down and on following this up with giffgaff, was give the above number and told that I was being charged 1.50 per txt. I have not signed up for these txts and want to find out how I can get a refund and stop them.*

*I have never signed up for any service that involves paying to receive premium text messages. I ignored them because I just thought they were spam messages, it is only recently that I have checked my bills and realised that I have been charged for receiving these messages. They have been sent about 3 times a month and the total amount charged for this number is £12.50*

*Charging me £1.50 per txt for service I didn't subscribe to. Had no knowledge of this charging me £1.50. Total is over £30.*

*Company is mGage. They said it they are just a 3rd party, and it was txtNation. TxtNation say they are only a 3rd party also, and will only give me a yahoo e-mail address for the "provider" - no real company details.*

*So, I have nobody (other than a yahoo e-mail address, which I can't trust) to ask for a refund. I don't want to sent my personal details for a refund to a yahoo e-mail with no company attached. Either Three, mGage or TxtNation should sort this out properly for me.*

*I have been advised by my airtime provider that I have been charged £44.00 since November 2015 for RECEIVING premium rate SMS from the company Txt Nation, for the service Adult Chat, from 69002.*

*I have never in my life signed up to/texted/ agreed to receive any such texts.*

*I have spoken to an agent from Txt Nation via their live chat service, and they were extremely unhelpful, borderline rude/obnoxious, and only persisted in asking for my account details, or trying to sell me an account.*

*I would like my money back.*

## **Track 1 procedures conducted in respected of the Service operated by The Previous Service Provider**

On 2 November 2012 the Executive issued a set of required actions (the “**First Action Plan**”) under the Track 1 procedure to The Previous Service Provider. Within the First Action Plan the Executive alleged a breach of rule 2.3.3 of the PhonepayPlus Code of Practice (the “**Code**”) as monitoring of Service website <http://luvguruuk.net> found that it was possible to enter someone else’s mobile number onto the Service website and subscribe them to the Service. It was noted in the First Action Plan that The Previous Service Provider has proactively removed this method of opt-in to the Service.

On 13 June 2014 the Executive issued a set of required actions (the “**Second Action Plan**”) under the Track 1 procedure to The Previous Service Provider. Within the Second Action Plan the Executive alleged a breach of rule 2.3.3 of the Code in relation to Service website <http://vixenchat.com> as evidence could not be supplied by The Previous Service Provider that consumers had consent to receive chargeable Service messages. On 13 June 2016 The Previous Service Provider responded to the Second Action Plan to confirm that the Service website would be taken down.

### **Interim measures in place**

On 18 August 2016 the Tribunal considered an Interim Consent Order agreed between the Executive and the Level 2 provider and imposed a withhold of Service revenue. Details of the outcome of that adjudication can be found at Annex 1 to this Schedule.



## **Apparent breaches of the Code**

The Executive believes that this service contravenes the PhonepayPlus Code of Practice, 12<sup>th</sup> Edition and PhonepayPlus Code of Practice 13<sup>th</sup> Edition (the “**Code**”) and in particular the following Code provisions:

- Rule 2.3.3 – Consent to charge (12<sup>th</sup> and 13<sup>th</sup> Edition)
- Paragraph 4.2.4 – Provision of false and / or misleading information to PhonepayPlus (12<sup>th</sup> and 13<sup>th</sup> Edition)

## **Chronology**

<b>Date</b>	<b>Chronology</b>	
2 November 2012	First Action Plan issued to The Previous Service Provider	
13 June 2014	Second Action Plan issued to The Previous Service Provider	
February 2015	The Service novated to the Level 2 provider	
17 April 2015	First complaint received for the purposes of this investigation	
18 August 2016	Interim measures agreed by Tribunal	
19 September 2016	Warning Notice issued to Level 2 provider	

## 2. Details of apparent breaches of the Code

### Part two – Outcomes and Rules

<b>Code Outcome</b>	<p><b>Outcome 2.3 Fairness</b></p> <p>“That consumers of premium rate services are treated fairly and equitably”</p>
<b>Code Rule</b>	<p><b>Rule 2.3.3 of the Code states</b></p> <p>“Consumers must not be charged for premium rate services [PRS] without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”</p>
<b>The Executive believes that this Rule has been breached for the following reason(s):</b>	<p>The Executive asserts that the Level 2 provider has breached rule 2.3.3 of the Code as consumers have been charged without their consent for the following reasons:</p> <ol style="list-style-type: none"> <li>1. Robust, verifiable evidence of consent to charge was not held for complainants; and</li> <li>2. Explicit consent to the increase in the Service charge from £3 per month to £4.50 per month was not obtained.</li> </ol> <p>The Executive notes that the Service charges shown in the Level 2 provider’s message logs occurred in the period that the PhonepayPlus Code of Practice, 12<sup>th</sup> Edition was in force, and in the time period after the PhonepayPlus Code of Practice, 13<sup>th</sup> Edition came into force. Given that rule 2.3.3 is effectively identical in the two versions of the Code that where in force when complainants incurred Service charges, the Executive has raised an alleged breach of rule 2.3.3 of the PhonepayPlus Code of Practice, 12<sup>th</sup> Edition and the PhonepayPlus Code of Practice, 13<sup>th</sup> Edition.</p> <p>The Executive relies on correspondence exchanged with the Level 2 provider, complainant accounts, (which are referenced in the ‘Background’ section of this document), PhonepayPlus General Guidance Note ‘Privacy and consent to charge’ in support of the PhonepayPlus Code of Practice, 12<sup>th</sup> Edition (the “<b>Code 12 Guidance</b>”), PhonepayPlus General Guidance Note ‘Consent to Charge’ in support of the PhonepayPlus Code of Practice, 13<sup>th</sup> Edition (the “<b>Code 13 Guidance</b>”) and text message logs.</p> <p>Code 12 Guidance states:</p> <p><b>“2. What is robust verification of consent to charge?”</b></p> <p><b>2.1</b> Robust verification of consent to charge means that the right of the provider to generate a charge to the consumer’s communication bill is properly verifiable (see section 5 below). By ‘properly verifiable’, we mean a clear audit trail that categorically cannot have been interfered with since the record, either of consent to purchase or simply of consent to future marketing (see Part Two for guidance around consent to marketing), was created.</p>

**For charges generated by entering a mobile number on a website**

*For the avoidance of doubt, this section applies to the consent evidence required for services initiated from a web page and where premium SMS is the chosen billing mechanic. This section does not apply to 'web' Payforit.*

**2.5** Some services are initiated by a consumer entering a mobile number on a website, or a mobile website (i.e. a website browsed on the mobile handset). In recent years, consumers have not appreciated that doing so can result in a charge being generated to their mobile device, or that the entry of their number can be taken as being consent to future marketing by the provider concerned.

**2.6** As a result, some consumers have entered a mobile number belonging to someone else (either by mistake or deliberately) and this has generated a charge to a second – unwitting – consumer. Even if there are no chargeable messages, just free marketing messages, the unwitting consumer often feels that their privacy has been invaded (see Part Two for further information around marketing).

**2.7** For this reason, we recommend that consumers should always be encouraged to initiate services, or future marketing, with an MO. Failing that:

- All costs should be clearly stated and be proximate and prominent to the field where the consumer is to enter their number;
- After entering the number, a Mobile Terminating message ('MT') should be sent to the consumer. As an example this should state:

*"FreeMsg: Your PIN is [e.g. 0911], please delete if received in error"*

**2.8** An MT message, in these circumstances, should not promote the service itself (e.g. use its name), or give the consumer the option to reply YES to initiate the service. In addition, this method would require robust systems for verifying any PIN once entered (see paragraph 2.12 below for further details).

**2.9** It is more difficult to verify where a charge is generated by a consumer browsing the mobile web, or by using software downloaded to their device. In these circumstances, where the consumer may only have to click on an icon to accept a charge, the MNO has no record of an agreement to purchase, and so robust verification is not possible through an MNO record alone.

**2.10** In both of the instances set out above, we would expect providers to be able to robustly verify consent to charge (or to marketing, see Part Two of this General Guidance Note). Factors which can contribute to robustness are:

- An opt-in is PIN-protected (e.g. the consumer must enter their number to receive a unique PIN to their phone, which is then re-entered into a website);
- A record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);

- Records are taken and maintained by a third-party company which does not derive income from any PRS. We may consider representations that allow a third-party company which receives no direct share of PRS revenue from the transaction, but does make revenue from other PRS, to take and maintain records. It will have to be proven to PhonepayPlus' satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;

- PhonepayPlus is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed), and real-time access to this opt-in data upon request. This may take the form of giving PhonepayPlus password-protected access to a system of opt-in records;

- Any other evidence which demonstrates that the opt-in cannot be interfered with.

**2.11** Providers who are considering using a method of verifying consent to charge, which employs a method that does not involve independent Network operator records of consent, are advised to contact PhonepayPlus before they begin to operate it.

**2.12** While it is not a requirement of compliance with the PhonepayPlus Code of Practice, we would recommend that providers using PIN-based opt-in to verify purchases of PRS, or an opt-in to marketing, consider whether opt-ins can also be linked to the web-based advertising which the consumer will have seen, prior to giving consent to be charged. This provides certainty, where there is a complaint that not only has the consumer opted into charging, but also that they could not have been misled by any advertising when they did so.”

Reason 1 – Robust, verifiable evidence of consent to charge was not held for complainants

On 2 June 2016 the Executive directed the Level 2 provider to provide evidence of when and how 28 complainant mobile numbers were opted in to receive the Service (and thereby consented to the Service charges). On 8 June 2016 in response to the Executive's direction the Level 2 provider provided the following statement in relation to the 28 mobile numbers supplied by the Executive:

“My understanding is you have our logs and response to each complaint ,everyone of which had been resolved,our policy was to refund any PPP compaints even if the customer agreed they had been using our site , We thought this a prudent option ,We have noted a few numbers recycled by networks although no stop command had ever been issued .(we did seek advise on this ,) We also noted a few complaints from cross over time from 85222 to 79900 ,where we had been sending out monthly billed texts,that had not been delivered,and were only being delivered on txt nation platform”  
[sic]

The Executive noted from the Level 2 provider's response that it appeared to be relying on the message logs contained in Excel spreadsheets that it had supplied to the Executive in response to RFIs at an earlier stage in the investigation. Further the Executive noted that Code 12 Guidance and Code 13 Guidance was clear that this form of evidence was unlikely to be sufficient to robustly verify that complainants had consented to the Service charges where the method of opt-in did not use an MO opt-in

mechanism (i.e. a requirement for Service user to send a keyword via text message to a Service shortcode) in respect of the complaints.

On 22 July 2016 the Executive wrote to the Level 2 provider and raised its concerns that the evidence supplied by the Level 2 provider to date did not robustly verify that complainants had consented to the Service charges, and that therefore an apparent breach of rule 2.3.3 of the Code had occurred.

On 26 July 2016 the Level 2 provider responded to the Executive's direction, in which it stated:

"We have always understood all our services to be fully Phone pay plus compliant ,we have has several reviews on our process over the years both by yourselves and aggregators ,our last review by phone pay plus in 2012 made several changes and we were then given the green light to continue ,an new opt in process was put in place ,however it was made clear our original web opt ins could remain on our data base ,At no time were we told this was incorrect, we had ran this process for several years with no problems

The process was as follows

- 1, customer entered number into box on website
- 2, customer received a free message confirming their subscription

This process continued until 2012 when phone pay plus reviewed and required changes.

We were told by phone pay plus that we were no longer able to use this opt in method as the rules had changed to double opt in.It was agreed that we would make changes to the website so there was no opt in and that we would continue with this service. We have not opted any new customer since 2012. We made the decision to purely maintain the customer base we had.

This has been the only method we have used to collect data.

We have previously explained why we believe we had a small group of complaints grouped around our change period over from bulletin to txtnation, small number of recycled numbers (we did ask for advice on these from PPP ] and some numbers that had remained on our data base ,never having sent a stop command ,however for some reason although we were sending out both our billed messages and free reminder, the bulletin /Immobile platform was not picking up .hence only being billed when txtnation took over

To summarise we would ask PPP to look at our overall performance .we have had very few complaints all of which have been resolved, every single of of which admitted to being on our chat site once reminded of times and dates, Every single one of which is male, and would also point out, it would be impossible to merely make up phone numbers and bill them over several years without causing mayhem. We were Fully compliant in 2012 and therefore still believe we are compliant in 2016" [sic]

The Executive notes the Level 2 provider's response, however notwithstanding its assertion that it believes that it is compliant, it is apparent that data relating to the opt-in for individual complainants has not been held by a third party, nor is there any evidence that data was held by the Level 2 provider in a way which meant it categorically could not have been tampered with since creation. Further, the importance of ensuring that evidence of consent to charge was held was raised with the director of The Previous Service Provider during the Track 1 procedures brought against The Previous Service Provider. The Executive notes that the director of The Previous Service Provider contacted during the course of the Track 1 procedures is also a director of the Level 2 provider.

In addition, the Executive notes the Level 2 provider's statement that "We have not opted any new customer since 2012" [sic], however message logs supplied by the Level 2 provider demonstrate this statement to be incorrect. Message logs for mobile numbers \*\*\*\*\*271, \*\*\*\*\*142 and \*\*\*\*\*068 show opt-in dates of 6 June 2013, 11 November 2013, and 23 March 2014 respectively.

The Executive notes that the Code 12 Guidance and Code 13 Guidance make it clear that all charges must be robustly verifiable. However, it appears that the Level 2 provider in the relevant period did not utilise a Third Party Verifier's robust verification process. Although Guidance is not binding on providers, where a provider fails to follow Guidance there is an expectation that it will take equivalent alternative steps to ensure that it fulfils PhonepayPlus' expectations (and compliance with the Code). The Executive therefore submits that the Level 2 provider did not have sufficiently robust systems in place to provide evidence of consent to charge, and so asserts that it has breached rule 2.3.3 of the Code.

Reason 2 – Explicit consent from consumers to the increase in the Service charge from £3 per month to £4.50 per month was not obtained

The Executive noted that 'Promotion 1' supplied by the Level 2 provider in response to RFIs stated that the Service cost was £3 per month. In addition message logs supplied by the Level 2 provider show that from the date of opt-in to the Service until February 2015 the Service cost was £3 per month. Further, the Executive noted that the following message was issued to subscribers on at least three occasions in February 2015:

"U have subscribed for Video chat alerts for £4.50/per month until U send stop. c/s 01727221316 Code migrated from 85222"

The Executive noted that after the above message was issued to consumers, three £1.50 chargeable Service messages were issued monthly from March 2015.

Notwithstanding the sending of the above message, the Executive was concerned to note that explicit consent to the increase in the Service cost did not appear to have been obtained from consumers.

On 22 July 2016 the Executive wrote to the Level 2 provider to enquire what steps the Level 2 provider had taken to obtain consumers consent to the increased Service charges.

On 26 July 2016 the Level 2 provider responded to the Executive's direction stating:

**"In 2015 we upgraded to a more modern interactive chat service, we sent out a bulk text to customer base informing of price changes"**

The Executive notes the Level 2 provider's response that a bulk text was issued to the customer base advising that the Service cost was changing. However, the Executive notes that the bulk message did not state that the Service cost was changing, as asserted by the Level 2 provider, but merely that the cost was £4.50 per month. Given the importance of obtaining consent to every Service charge, as made clear in Code 12 Guidance and Code 13 Guidance, the Executive asserts that it was insufficient for the Level 2 provider to merely notify its customer base that the Service cost was £4.50 per month (with no explanation in the bulk message that the Service cost had increased). The Executive further asserts that the Level 2 provider should have sought and obtained explicit consent from consumers to the increase in Service charges i.e. required consumers to actively respond agreeing to the increase in Service charges. The Executive therefore submits that the Level 2 provider did not have consent to charge in place as it did not make clear that the Service cost was increasing and that it did not obtain explicit consent from consumers to the increase in Service charges.

For the reasons set out above the Executive asserts that the Level 2 provider has been unable to provide sufficient evidence which establishes consent to change complainants and that the Level 2 provider did not obtain consent from consumers to the increase in Service charges. Accordingly, the Executive asserts that the Level 2 provider has acted in breach of rule 2.3.3 of the Code.



**Part four – Investigations, Procedures and Sanctions**

<p><b>Code Paragraph</b></p>	<p><b>Paragraph 4.2.4 of the Code states</b></p> <p>“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus.”</p>
<p><b>The Executive believes that this Rule has been breached for the following reason(s):</b></p>	<p>The Executive asserts that the Level 2 provider has breached paragraph 4.2.4 of the Code as the Level 2 provider has provided false information to PhonepayPlus in response to RFIs.</p> <p>The Executive relies on the Level 2 provider’s responses to RFIs, the Level 2 provider’s responses to directions for information, complainant accounts (which are referenced in the ‘Background’ section of this document ), and text message logs.</p> <p>In response to complaints received about the Service, RFIs were issued to the Level 2 provider requesting information on the complainants interaction with the Service, including a message log showing the date and time of each message sent. The Executive received the following RFI responses:</p> <p><u>RFI response for mobile number *****359</u></p> <p>On 19 May 2015 the Level 2 provider provided the following information in its response:</p> <p>“...Opt in date goes back to 2011 ,and i can see he [the complainant] was a user at that time ,i can also see this number phoning in to “chat”...”</p> <p><u>RFI response for mobile number *****888</u></p> <p>On 10 June 2015 the Level 2 provider provided the following information in its response:</p> <p>“...We gave him [the complainant] all details we held on this number ,opt in dates and also informed him of times his number had called in for a “chat”...”</p> <p><u>RFI response for mobile number *****566</u></p> <p>On 11 June 2015 the Level 2 provider provided the following information in its response:</p> <p>“...I gave him [the complainant] opt in date and times and the dates of calls he made “chatting ” to girls, this prompted his memory that he was at university at time and his friends may have done this as a joke,”</p> <p><u>RFI response for mobile number *****062</u></p> <p>On 10 June 2015 the Level 2 provider provided the following information in its response:</p> <p>“...I can see his [the complainant] number actively using our chat service back in 2011 early 2012,at which time number was calling in for “chats” with girls...”</p> <p><u>RFI response for mobile number *****728</u></p> <p>On 19 June 2015 the Level 2 provider provided the following information in its response:</p>

“...I can clearly see customers number calling our chat site to speak to girls back in early 2012...”

RFI response for mobile number \*\*\*\*\*202

On 3 December 2015 the Level 2 provider provided the following information in its response:

“We have spoken to customer and are happy he was interacting with our platform , however as a sign of good faith we have refunded him anyway !”

In addition to the above information, message logs were supplied by the Level 2 provider for the complainants.

The Executive noted that the message logs supplied by the Level 2 provider contained chargeable Service messages and free to receive spend reminder messages. Examples of the chargeable and free to receive messages are listed below:

Example chargeable Service message content

“Chat at <http://www.text4chat.com> or text Kay to 79900 £1.50 per msg. To cancel replyStop c/s 01727221316.”

Example spend reminder message content

“U have subscribed for Video chat alerts for £4.50/per month until U send stop. c/s 01727221316 Code migrated from 85222”

In addition, the Executive noted that the message logs supplied for complainants did not contain entries demonstrating any interaction between the complainants and the operators.

Given the apparent assertions made by the Level 2 provider that some complainants had actively interacted with the operators, on 22 July 2016 the Executive directed the Level 2 provider to provide text message logs showing the full interaction between the complainants’ mobile numbers and the Service chat operators

On 26 July 2016 the Executive received a response from the Level 2 provider which did not contain the requested message logs.

On 27 July 2016 the Executive contacted the Level 2 provider and advised that the requested message logs remained outstanding and that the Executive still required the Level 2 provider to supply the message logs.

On 27 July 2016 the Level 2 provider responded stating:

“Although we can see by our logs the complainants did enter our website and enter their numbers ,we can see they did not wish to “chat” with operators ,which of course is their prerogative...” [Emphasis added by the Executive]

In light of the above response, the Executive asserts that the Level 2 provider’s responses to the RFIs were false because:

- i. The Level 2 provider stated that the complainants had interacted with operators; and

ii. The Level 2 provider stated that it was in possession of logs which corroborated that complainants had indeed interacted with operators.

Further, the Executive asserts that the Level 2 provider repeatedly provided false and misleading information in response to RFIs in an attempt to convince the Executive that the complainants' accounts were without basis and that the complainants had in fact interacted with operators (when they had not) in an attempt persuade the Executive that an investigation into the complaints was not warranted.

For the reasons set out above, the Executive asserts that the Level 2 provider has repeatedly provided false and misleading information to PhonepayPlus. Accordingly the Executive asserts that the Level 2 provider has acted in breach of paragraph 4.2.4 of the Code.

**3. Service Revenue (based on information held by Executive as at the date of this Notice)**

<b>Period in which revenue was generated:</b>	February 2015 – present
<b>Level 2 Provider's revenue band:</b>	Revenue Band 3 (£250,000 - £499,999)

**4. Executive's Initial Assessment of Severity**

This section is presented to assist providers to understand why the Executive proposes the sanctions set out below. It is based on the information held by the Executive to date. It is not binding on any Tribunal, who may take a different view on the severity of any breaches, and the overall case.

<b>Rule:</b>	<b>Brief Description:</b>	<b>Level of severity:</b>
Rule 2.3.3	Consent to charge	Very serious
Paragraph 4.2.4	Provision of false and / or misleading information to PhonepayPlus	Very serious

## 5. Aggravating factors

Potential Aggravating Factors: Question	Executive's Comments	Provider's Comments
Did the provider fail to follow Guidance or take alternative steps which, had it been followed, would have avoided breaches occurring? <sup>1</sup>	The failure to follow Guidance is outlined in the apparent breach of rule 2.3.3 of the Code.	
Did Notice to Industry give relevant Notice to Industry, such as publication of a 'Compliance Update' or an adjudication, prior to these breaches occurring?	Numerous previous adjudications have been made clear the importance of ensuring that consumers' consent to charge is obtained and that robustly verifiable evidence is held and supplied upon request.	
Did PhonepayPlus give relevant compliance advice to this provider and has it failed to implement that advice?	Advice was provided to The Previous Service Provider during the previous Track 1 procedures regarding consent to charge. The Executive notes that the advice was given to a director of The Previous Service Provider who is also a director of the Level 2 provider.	
Did the breaches continue after the provider became aware of them?	The Level 2 provider has stated that it suspended the Service on 1 August 2016.	
Any other aggravating factors requiring consideration in relation to this service or investigation?	No.	
Breach History	None	

<sup>1</sup> Paragraph 4.8.1 of the Code states: *A Tribunal will generally consider failure to comply with Guidance combined with failure to consider alternative methods to comply with the Code to be a serious aggravating factor.*

<b>Potential Aggravating Factors: Question</b>	<b>Executive's Comments</b>	<b>Provider's Comments</b>

## 6. Mitigating factors

Potential Mitigating Factors: Question	Executive's Comments	Provider's Comments
Were some or all the breaches caused or contributed to by circumstances beyond the reasonable control of the provider?	No.	
Did the provider take steps in advance to identify and mitigate against the impact of external factors and risks that might result in breach and notify PhonepayPlus of this action? <sup>2</sup>	No.	
Did the provider take steps to end the breach and remedy the consequences in a timely fashion, potentially reducing the level of consumer harm?	As noted above, the Level 2 provider suspended the Service on 1 August 2016.	
Did the provider proactively refund consumers in an effort to relieve consumer harm caused?	The Level 2 provider has stated that it has offered refunds to complainants.	
Has the provider engaged with PhonepayPlus in a manner that goes beyond the level of co-operation that is generally expected?	The Executive does not consider that the Level 2 provider has gone beyond the level of co-operation that is generally expected.	
Has the provider taken action to ensure the risks of any breaches	Unknown.	

<sup>2</sup> Paragraph 4.8.1 of the Code states: *Following Guidance will be considered a mitigating factor.*

Potential Mitigating Factors: Question	Executive's Comments	Provider's Comments
reoccurring are minimised, and any detriment remedied?		
Any other mitigating factors requiring consideration in relation to this service or investigation?	No.	



**ANNEX 1**

**IN THE PHONEPAYPLUS TRIBUNAL**

**CASE REF: 74817**

**BETWEEN:**

**PHONEPAYPLUS LIMITED**

**Executive**

**-and-**

**PARTNER TELECOM LIMITED**

**Respondent**

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**INTERIM CONSENT ORDER**

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UPON the matter being considered under PhonepayPlus case reference 74817.

AND UPON the parties having agreed interim measures to be imposed in respect of the service pending resolution of the matter and in accordance with paragraphs 4.1 and 4.2 of Annex 3 of the PhonepayPlus Code of Practice

**By consent it is ordered that**

1. The Executive may direct a withhold of up to £136,000.
2. The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum permitted by this order.
3. The Executive may vary the total directed to be withheld downwards in the event that it is provided with alternative security which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a Tribunal may impose in due course are paid.
4. Such interim measures are to be revoked upon the case being re-allocated to Track 1 or otherwise discontinued without sanction.

Robin Callender Smith (Chair)  
On behalf of the PhonepayPlus Tribunal  
18 August 2016