

MATTER DECIDED BY THE TRIBUNAL

Tribunal Sitting, Case Number and Date	Case Ref	Network Operator	Level 1 Provider	Level 2 Provider	Service Title and Type	Case Type	Procedure
No. 123 Case 4/04/13	14211	Mobile Network operators	txtNation Limited	Global Media Management	Online chat service	Level 2 Provider	Track 2

Between 2 April 2012 and 5 March 2013 the Executive received 32 complaints in relation to “FlirtyMob.com”, a subscription based online chat service (the “**Service**”) operated by the Level 2 provider, Global Media Management. The Service operated on shortcode 85028 and cost £3.00 per week.

The Service was promoted using affiliate marketing. One such promotion involved the display of a ‘messages’ icon on some users’ smartphones, which appeared to show that there was a new message waiting for the consumer. When selected, a message purporting to be from “Stephanie” appeared inviting the consumer to chat. If the consumer accepted the invitation to chat to “Stephanie” they were directed to the landing page of the Service website.

All consumers who viewed the Service landing page were invited to provide their mobile phone number. Consumers who provided their mobile phone number were sent a text message containing a PIN number. Entering the PIN number on the Service website resulted in consumers being subscribed to the Service and incurring premium rate charges.

Complainants generally stated that they had received charged messages without being aware that they were subscribed to the Service.

The Executive raised the following potential breaches of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

- Rule 2.3.2 – Misleading
- Rule 2.2.2 – Transparency
- Rule 2.2.5 – Pricing information
- Rule 2.3.12(d) – Subscription reminder

The Tribunal upheld all of the breaches. The Level 2 provider’s revenue in relation to the Service was within the range of Band 1 (£500,000+). The Tribunal considered the case to be **serious** and issued a formal reprimand, a fine of £65,000 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 Awarded:100%

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 4 April 2013
TRIBUNAL SITTING No. 123
CASE REFERENCE: 14211**

Level 2 provider: Global Media Management
Level 1 provider: txtNation Limited
Type of service: Subscription based on-line chat service
Network operator: Mobile Network operators

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

BACKGROUND

Between 2 April 2012 and 5 March 2013 the Executive received 32 complaints in relation to “FlirtyMob.com”, a subscription based online chat service (the “**Service**”) operated by the Level 2 provider, Global Media Management. The Service operated on shortcode 85028 and cost £3.00 per week.

The Service was promoted using affiliate marketing. One such promotion involved the display of a ‘messages’ icon on some users’ smartphones, which appeared to show that there was a new message waiting for the consumer. When selected, a message purporting to be from “Stephanie” appeared inviting the consumer to chat. If the consumer accepted the invitation to chat to “Stephanie” they were directed to the landing page of the Service.

All consumers who viewed the Service landing pages were invited to provide their mobile phone number. Consumers who provided their mobile phone number were sent a text message containing a PIN number. Entering the PIN number on the Service website resulted in consumers being subscribed to the Service and incurring premium rate charges.

Complainants generally stated that they had received charged messages without being aware that they were subscribed to the Service. Monitoring of the Service conducted by PhonepayPlus supported the complainants’ accounts.

The Investigation

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

The Executive sent a breach letter to the Level 2 provider on 12 March 2013. The Executive raised the following potential breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.2 – Transparency
- Rule 2.2.5 – Pricing information
- Rule 2.3.12(d) – Subscription reminder

The Level 2 provider responded to the breach letter on 20 March 2013. The Tribunal sat to consider the potential breaches on 4 April 2013 and heard informal representations from a consultant acting on behalf of the Level 2 provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.2

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

1. The Executive submitted that the Level 2 provider had breached rule 2.3.2 as a result of a specific promotion, which had misled or was likely to have misled consumers into entering the Service.

The Executive raised this breach in relation to one particular promotion for the Service, which involved a request to chat online from a woman identified to consumers as “Stephanie” (the “**Stephanie Campaign**”).

The Stephanie Campaign operated by displaying a ‘messages’ icon on some users’ smartphones which suggested that they had a new message. Upon opening the message (**Appendix A**), consumers were presented with the statement, “You’ve got 1 chat request”. Beneath this was a photograph of a woman, and the text:

“Stephanie Online Now!
2.8 miles from you
Want to meet me?”

Beneath the text were buttons labelled “Confirm” and “Ignore”. Upon selecting the “Confirm” option, the consumer was directed to the landing page of the Service website, which displayed the Service brand name (**Appendix B**). The landing page presented consumers with text stating, “FlirtyMob Photo Club” and “World’s largest mobile chatroom!”. Consumers were provided with a field to enter their mobile phone number, and a “Next” button to select. Upon entering their phone number and clicking “Next”, the consumer was sent a free text message which contained a PIN number and instructions to enter the PIN number on the Service website to register for the Service (**Appendix B**). On entering the PIN number on the Service website, consumers were subscribed to the Service and subsequently received a chargeable message together with a free text message confirming their subscription.

The Executive asserted that the use of the ‘messages’ icon was likely to mislead consumers into believing that there was a genuine message from someone waiting for them, thereby enticing them into the promotional Stephanie Campaign. The Executive also asserted that the Stephanie Campaign was likely to have misled consumers into believing that they had received a genuine request to chat online, which was directed at them personally from a real individual called Stephanie. Consequently, consumers who confirmed the request to chat were likely to have been misled into entering their mobile phone number on the Service website, and subsequently to subscribe to the Service, in the expectation that this would enable them to accept Stephanie’s invitation and to chat online with Stephanie.

In light of the above, the Executive submitted that the Service breached rule 2.3.2 of the Code.

2. The Level 2 provider accepted that the Stephanie Campaign was misleading. The Level 2 provider made the following points which it asked the Tribunal to take into account as mitigating factors.

The Level 2 provider emphasised that the Stephanie Campaign was operated by an affiliate marketer and was only one amongst a number of promotions for the Service. The Level 2 provider explained that the affiliate marketing companies that it contracts with often purchase bulk marketing content from third party publishers. The Level 2

provider explained that in many cases it is not possible for it, or the affiliate marketing companies it contracts with, to review the marketing content that is being provided by third party publishers and other affiliates. The Level 2 provider stated that it has to rely on contracting with well-established affiliate marketers, and that it is reasonable to rely on such companies to procure marketing content from third parties that complies with the Code. It provided a document that set out its policy on due diligence and risk control of affiliate marketing. The Level 2 provider stated that the Stephanie Campaign and other similar promotions have now been banned by the relevant third party publishers, and should no longer be in use.

The Level 2 provider also explained that because of the nature of the payments it makes to affiliate marketing companies, it has no interest in attracting consumers who cancel their subscription soon after joining, and that it suffers a financial loss when this occurs. It therefore asserted that it had no interest in attracting consumers using a misleading promotion that would most likely result in consumers cancelling their subscriptions soon after joining.

The Level 2 provider added that the Stephanie Campaign had not been detected by its normal monitoring procedures as there had been no spike in traffic or other indication that there was any cause for concern. The Level 2 provider submitted that this suggested that few consumers had actually been misled into considering that a particular woman called Stephanie had sent a request to chat to them, and was waiting to chat to the consumer through the Service. The Level 2 provider submitted evidence which it stated demonstrated that only five consumers who had subscribed to the Service had accessed the Service via the Stephanie Campaign. It therefore suggested that the level of consumer harm caused by the Stephanie Campaign was very low.

3. The Tribunal considered the evidence, including the written submissions made by, and the oral submissions made on behalf of, the Level 2 provider. The Tribunal noted that the Level 2 provider admitted the breach. The Tribunal also noted the comments of the Level 2 provider put forward in mitigation but found that Level 2 providers are responsible under the Code for promotions produced or procured on their instruction. The Tribunal did not accept that the fact that the Stephanie Campaign was not produced by the Level 2 provider itself amounted to a mitigating factor. In terms of the extent of the consumer harm caused by the breach, the Tribunal noted the Level 2 provider's submission in mitigation that only five consumers had subscribed to the Service as a result of the Stephanie Campaign. However, the Tribunal observed that the only evidence produced in support of this assertion was a spreadsheet generated by the Level 2 provider which did not appear to correspond to other evidence before the Tribunal. As a result, the Tribunal did not find the spreadsheet to be conclusive evidence. In light of the above, the Tribunal concluded that the Service was misleading and/or likely to have misled consumers and accordingly upheld a breach of rule 2.3.2 of the Code for the reasons advanced by the Executive.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.2.2

"All written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Spoken information must be easily audible and discernible."

1. The Executive alleged that the Level 2 provider was in breach of rule 2.2.2 of the Code as a result of pricing for the Service being described using the unclear term "GBP" and not the clear "£" symbol.

In support of its submission the Executive noted paragraphs 2.2 - 2.4 of PhonepayPlus Guidance on “Promotions and promotional material (including pricing information)”, which states:

“How should pricing information be generally presented?”

2.2 As a starting point, pricing information will need to be easy to locate within a promotion

(i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).

Loose or unclear descriptions of price are not acceptable, as they are unlikely to provide a sufficient understanding to consumers of how much they are being charged. Examples of unclear descriptions would include the following:

- ‘premium rate charges apply’,
- ‘10 0 ppm’,
- ‘1.50 GBP’
- 50p/min

“2.3 PhonepayPlus strongly recommends the price should be expressed in conventional terms, such as ‘50p per minute’, ‘£1.50/msg’ or ‘£1.50 per text’. PhonepayPlus accepts there may be different conventions, based upon the amount of space available (for example, in a small print ad, or a single SMS promotion); however, pricing should remain clear. Variations on this, such as charges being presented in per second formats, or without reference to a ‘£’ sign (where the rate is above 99p), may breach the PhonepayPlus Code of Practice

“What about SMS promotions where the handset or Mobile Network Operator cannot technically provide a ‘£’ sign?”

PhonepayPlus accepts that there are still a proportion of older handsets in use, which are not technically capable of displaying a ‘£’ sign. Given this number gets smaller with each passing year as people upgrade their handsets for new ones, we do not see this as a standalone reason to allow ‘GBP’ in SMS advertising. However, where an SMS promotion containing a ‘£’ sign has failed to display properly, and led to consumer confusion and/or financial detriment, we would look to resolve such cases informally with the provider, and arrange a refund for the consumer without recourse to raising a breach.”

The Executive noted that in order for a consumer to subscribe to the Service they were required to enter their mobile phone number on the Service website (**Appendix B**). In response to submitting their mobile number, consumers were sent a free message containing the term “GBP”, which stated:

“FreeMsg: FreeMsg Enter PIN [PIN NUMBER] into the website to register to FlirtyMob. Subscription service GBP3.00/7days. Help 02032391589”

The Executive noted that this was the first point in the subscription process that the consumer was provided with pricing information.

The Executive also noted that upon entering the PIN number on the Service website, and thereby subscribing to the Service, consumers were sent a charged message without pricing information, and a second message stating:

“FlirtyMob: FreeMsg You are subscribed to FlirtyMob Photo Club for £3.00 per week until you send STOP to 85028. Help? 02032391589.”

The Executive submitted that this second message demonstrated that it was technically possible for the Level 2 provider to issue messages to consumers which contained the “£” symbol. The Executive further noted that this second message was the first occasion on which clear pricing information containing the “£” symbol was

provided to consumers, and that this was only provided once the consumer had subscribed to the Service and had already incurred premium rate charges.

2. The Level 2 provider accepted the breach. The Level 2 provider made the following points which it asked the Tribunal to take into account as mitigating factors.

The Level 2 provider explained that it used different third parties to send the pre-subscription text message which contained the pricing information expressed as “GBP3.00”, and the subsequent message sent to new subscribers to the Service which contained the pricing information expressed as “£3.00”. In the case of the first message, the Level 2 provider explained that it had proactively identified that the message did not display the “£” symbol, and had used the term “GBP” as an alternative solution.

The Level 2 provider stated that it had subsequently explored the issue further and had now implemented a solution to ensure that the “£” symbol is displayed in pre-subscription messages.

3. The Tribunal considered the evidence, including the written submissions made by, and the oral submissions made on behalf of, the Level 2 provider. The Tribunal noted that the Level 2 provider's had admitted the breach. In relation to the mitigation put forward by the Level 2 provider, the Tribunal did not consider that it was satisfactory for the Level 2 provider to have continued to use a third party to send messages on its behalf which could not send messages displaying the “£” symbol. In light of the above the Tribunal concluded that the description of pricing contained in the pre-subscription text message was presented in a way which made understanding difficult and accordingly upheld a breach of rule 2.2.2 of the Code for the reasons advanced by the Executive.

Decision: UPHELD

ALLEGED BREACH THREE

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 submitted that the Service landing page which invited consumers to enter their mobile phone number (**Appendix B**), was a promotion within the meaning of the Code, and was a “means of access to the Service” for the purpose of rule 2.2.5. The Executive noted that the Service landing page did not contain any pricing information, and that therefore consumers had not been presented with pricing information within the promotion. The Executive accordingly submitted that the Service was in breach of rule 2.2.5 of the Code.
2. The Level 2 provider accepted the Breach. The Level 2 provider made the following points which it asked the Tribunal to take into account as mitigating factors.

The Level 2 provider stated that the lack of pricing information as identified by the Executive had resulted from what it described as a “misconfiguration issue”. It stated during informal representations that the issue had been first identified on 29 November 2012 and resolved the following day. The Level 2 provider also pointed out that consumers could not access the Service merely by providing their mobile number on the landing page, but also had to enter the PIN number provided. It observed that the message sending the PIN number contained pricing information.

3. The Tribunal considered the evidence, including the written submissions made by, and the oral submissions made on behalf of, the Level 2 provider. The Tribunal noted that the Level 2 provider had admitted the breach. The Tribunal found that both the landing page on which consumers were invited to provide their mobile phone number and the subsequent Service webpage on which consumers were invited to enter the PIN number they had been sent, comprised means of access to the Service for the purpose of rule 2.2.5. The Tribunal considered that although the text message which provided the PIN number did form part of 'the course of the promotion', the pricing information contained in the text message was not proximate to the means of access to the Service, that is, the Service landing webpage and PIN entry web page. The Tribunal consequently concluded that the pricing information provided was not proximate to the means of access to the Service, and accordingly upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

Rule 2.3.12(d)

"For all subscription services, once a month, or every time a user has spent £17.04 plus VAT if that occurs in less than a month, the following information must be sent free to subscribers:

- (i) the name of the service;
- (ii) confirmation that the service is subscription-based;
- (iii) what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent;
- (iv) the charges for the service and how they will or can arise;
- (v) how to leave the service; and
- (vi) Level 2 provider contact details."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.12(d) of the Code because monthly subscription reminder messages had not been sent to subscribers to the Service. The Executive submitted that the breach was evident from reviewing the message logs for individual subscribers to the Service provided by the Level 2 provider. The Executive observed that the message logs did not show any evidence of the required subscription reminder messages being sent to subscribers at any time.

The Executive noted that the Level 2 provider had stated in earlier correspondence that subscription reminder messages were sent to consumers but not recorded, and hence did not appear on the message logs. However the Executive asserted that providers have a responsibility to demonstrate that they have complied with the Code and that this includes providing evidence that compliant subscription reminder messages have been sent. The Executive noted that, had subscription reminder messages been sent, they may have prompted consumers to unsubscribe from the Services, especially where they had incurred high costs.

In light of the above, the Executive submitted that a breach of rule 2.3.12 (d) of the Code had occurred.

2. In the informal representations, the Level 2 provider's representative accepted the breach in relation to a significant number of subscribers to the Service in November 2012 and for all subscribers in February 2013. The representative explained that

subscription reminder messages were sent to all subscribers on the 28th day of each month, but were not recorded by them. In November 2012 there had been a technical problem which resulted in reminders only being sent to some subscribers. In February 2013 a further technical problem had caused all subscription reminders to be sent late (early in the following month). The Level 2 provider stated that it was in the process of implementing an action plan to ensure that that all future subscription reminder messages will be sent on time and recorded.

3. The Tribunal considered the evidence, including the written submissions made by, and the oral submissions made on behalf of, the Level 2 provider. The Tribunal noted that the Level 2 provider's representative had accepted the breach in part during the informal representations, namely in relation to a significant number of subscribers in November 2012 and all subscribers in February 2013. In respect of the remainder of the period in which the Service had been operating from March 2012, the Tribunal found on the balance of probabilities that there was insufficient evidence to establish that subscription reminder messages had been sent to consumers as required. Accordingly, the Tribunal upheld a breach of rule 2.3.12(d) of the Code in respect of a significant number of subscribers in November 2012 and all subscribers in February 2013. In respect of the other periods since March 2012, the Tribunal found that there was insufficient evidence to establish that subscription reminders had been sent.

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 criterion:

- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.

Rule 2.2.2 – Transparency

The initial assessment of rule 2.2.2 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider used an abbreviation, "GBP", as opposed to "£", to describe the cost of a service which had the effect that information material to a consumer's decision to use the Service was difficult to understand.

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 criterion:

- The Service failed to provide adequate pricing information prior to consumers subscribing to the Service.

Rule 2.3.12(d) – Subscription reminder

The initial assessment of rule 2.3.12(d) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The cost incurred by consumers was likely to have been higher, and/or the Service had the potential to generate higher revenues, as a result of the breach.

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

Final Overall Assessment

The Tribunal took into consideration the following aggravating factors:

- The Level 2 provider failed to follow Guidance on "Promotions and promotional material".
- PhonepayPlus published a Compliance Update concerning the use of affiliate marketing, which is an area that has also been the subject of a number of prior adjudications.

The Tribunal took into consideration the following mitigating factors:

- The Level 2 provider accepted the breaches and had taken steps to remedy those breaches.
- The Level 2 provider stated that it had offered refunds to the consumers that it had identified as having entered the Service through the misleading promotion.

The Level 2 provider's revenue in relation to the Service was within the range of **Band 1 (£500,000+)**.

Having taken into account all the circumstances of the case, including the aggravating and mitigating factors, 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 £65,000; 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.

Appendices

Appendix A: Screenshot of the chat request message used in the Stephanie Campaign promotion:



Image



Appendix B: Screenshot of the Level 2 Provider's website:

