

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 20 JANUARY 2011 TRIBUNAL SITTING No. 69/ CASE 1
CASE REFERENCE: 845393

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| Service provider: | Stealthnet Limited, Norfolk |
| Information provider: | Mr Nicholas Moore, trading as 'TLMC', Birmingham |
| Type of service: | Fixed-line – recorded motivation advice service |
| Service title: | 'Relaxation line' |
| Service number: | 09065173009, 09077860042, 09116991801 and all other PRN's in relation to this service |
| Cost: | £1.50 per minute |
| Network operator: | Oxygen 8 Communications UK Limited |
| Number of complainants: | 11 |

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

PhonepayPlus received 11 complaints in relation to the service operating on a number of premium rate numbers. On calling any of these numbers, consumers were presented with a recorded motivation advice service.

All complainants stated that they were unaware of how call charges had been incurred. In addition, a number of complainants expressed the concern that the service promotional material appeared in iPhone applications that were attractive to children.

Upon investigating the consumer complaints further, the Executive was concerned that pricing information within the iPhone banner advertisement had not been prominent, legible and required close examination. Furthermore, the Executive was of the view that the promotion of this premium rate service via banner advertisements in iPhone applications had been inappropriate.

Banner applications

Consumers who downloaded applications onto their iPhone may have experienced pop-up/pop-down banner advertisements (i.e. the banner advertisement appeared at the top or bottom of the handset screen) when using the iPhone applications. When clicking on a banner advertisement, the iPhone handset was either directed to the advertiser's website, or the handset was directed to call the advertiser's telephone number. It is possible for a handset to be prompted to call a premium rate telephone number when clicking on a banner advertisement (a 'click-to-call' advertisement).

Monitoring

The Executive monitored the service by calling some of the premium rate numbers. It recorded the voice of a motivational speaker. The Executive also made a copy of the banner advertisement that had been provided, along with a video clip of the 'Talking Tom Cat' iPhone application that had been referenced by complainants.

The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code. The Executive issued a breach letter to the Service Provider dated 24 November 2010. The Service Provider responded to the Executive's submissions in correspondence received on 7 December 2010.

The Service Provider provided signed Information Provider undertaking forms which were received by the Executive on 16 December 2010. The Executive subsequently advised the Service Provider that it took the view that, in this case, it was not appropriate to deal directly with the Information Provider and indicated that it would continue to deal directly with the Service Provider.

In an email dated 12 January 2011, the Service Provider stated that it did not agree with the Executive's decision to deal directly with it and not the Information Provider.

The Executive referred the matter to the Tribunal in order to seek its view in accordance with the Help Note dated February 2009. The Tribunal was also of the view that an Information Provider pass-through was not appropriate in this case. The Tribunal made a decision on the breaches raised by the Executive on 20 January 2011.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

PRICING INFORMATION (PROMINENCE) (Paragraph 5.7.2)

"Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible."

1. The Executive submitted that complainants had been unaware how they had made calls to the premium rate numbers in question and/or how they had incurred premium rate charges. It also submitted that two of the complainants had expressed concern that the 'click-to-call' banner advertisements had been promoted in iPhone applications that were attractive to children, including an application known as 'Talking Tom Cat' which consists of an animated cat which can be petted, fed and repeats the words said into the handset.

The Executive submitted that the small font size on the banner advertisements (see Appendix A) placed on the various iPhone applications had resulted in the service pricing information not being easily legible or prominent and requiring close examination. Furthermore, it submitted that, in respect of those banner advertisements that were not 'click-to-call', the pricing information had not been displayed on the call confirmation screen that appeared after the banner had been clicked by the user (see Appendix B).

2. The Service Provider stated that the font size was not too small and that it was perfectly legible. It stated that users of the mobile web and/or applications were used to reading text on a smaller screen than they would have on a desktop PC. It also stated that the text size was large in percentage terms relative to the overall advertisement and that the pricing information had been repeated in the audio recording at the start of the call.

3. The Tribunal considered the evidence, including the screenshots of the advertisement banner (Appendix A). It concluded that the banner advertisement was a promotion and that the written pricing information on it required close examination on the part of the user. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO INAPPROPRIATE PROMOTION (Paragraph 5.12)

*“Service Providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. **Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.**”*

1. The Executive submitted that complainants had been unaware how they had made calls to the premium rate numbers in question and/or how they had incurred premium rate charges. It also submitted that a number of the complainants had expressed concern that the ‘click-to-call’ banner advertisements had been promoted in iPhone applications had been attractive to children, such as the ‘Talking Tom Cat’ application.

The Executive submitted that the ‘Talking Tom Cat’ application had been particularly attractive to children and that this form of promotion appeared to be prone to misdials. It invited the Tribunal to conclude that the promotion of the premium rate service had been inappropriate, having regard to the apparent ease in which consumers could make an inadvertent call to the premium rate number by clicking on a banner advertisement.

2. The Service Provider stated that the Information Provider had used all reasonable endeavours to ensure that the promotion was properly targeted and stated as follows:
 - It had appointed a professional advertising agency to ensure advertising compliance and market knowledge.
 - It had ensured that the promotion was run only by Google/Admob (a Google subsidiary) as their rules and general targeting appeared to be of the highest standard along with their reputation.
 - It had requested its agency to ensure that the service was targeted exclusively at 18+ users as the product would not have been of interest to younger users.

The Service Provider made reference to email and other documentary evidence that it stated demonstrated that there had been a targeting error in relation to a small percentage of the advertisements displayed and that this had been an error on the part of a third party and had not been at the request of the Information Provider.

3. The Tribunal considered that the use of ‘click-to-call’ banner advertisements of this nature which appear in iPhone applications that appeal to children, such as the ‘Talking Tom Cat’, are inappropriate. However, it accepted the Service Provider’s submission that the Information Provider had required its advertising agency not to target under-18s and that there had been a targeting error by Google/Admob in relation to a small proportion of the banners advertisements that had been placed. The Tribunal concluded that ‘all reasonable endeavours’ had been used to ensure

that the service was not promoted in an inappropriate manner. The Tribunal did not uphold a breach of paragraph 5.12 of the Code.

Decision: NOT UPHELD

SANCTIONS

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

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- The size of the pricing information on the advertisement banner was a deliberate choice.
- The cost paid by individual consumers was high – one person had been charged £23.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with PhonepayPlus.
- The Service Provider asserted that it had made refunds to complainants.

The revenue in relation to this service was in the low range of Band 5 (£5,000-£50,000).

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **moderate**.

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Fine of £7,500;
- The Tribunal stated its expectation for refunds to continue being paid by the Service Provider for the full amount spend by complainants, except where there is a good cause to believe that such claims are not valid.

Appendix A

Representation of the 'click-to-call' banner advertisement as it appeared on the iPhone (not to exact scale)



Enlarged version of the 'click-to-call' banner advertisement



Appendix B

Example of the call confirmation screen viewed after clicking the 'click-to-call' advertisement banner

