

## THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 16 August 2012  
TRIBUNAL SITTING No. 106 / CASE 1  
CASE REFERENCE:

Level 2 provider:      ООО Коннект (translated as Connect Ltd trading as SMSBill)

Type of service:      In-app billing

Level 1 provider:      Tribecton Trading Limited, NTH AG, txtNation Limited and  
                                  OpenMarket Limited

Network operator:     All mobile Network operators

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

#### BACKGROUND

From 9 February 2012 to 17 April 2012, the Executive received ten complaints from members of the public in respect of a service (the “**Service**”) operated by ООО Коннект (Connect Ltd trading as SMSBill). Enquiries made by the Executive revealed that there were four Level 1 providers, Tribecton Trading Limited, NTH AG, txtNation Limited and OpenMarket Limited. Tribecton Trading Limited confirmed that Connect Ltd was the Level 2 provider.

The Service, which was accessed via downloading an app (the “**App**”), enabled users to access popular games. Before installation of the App, consumers were presented with a screen titled “Downloader” (**Appendix A**). On selecting “install” the consumer was presented with a screen which stated, “Do you agree with the rules of downloading” and had two buttons, one marked “OK” and a second marked “Rules” (**Appendix B**). Where a consumer selected “OK”, a text message was sent to shortcode 80079, which prompted the Service to charge the user £10 by automatically sending a message from shortcode 79555 to the handset. Where a consumer selected “Rules”, s/he was presented with eight pages of terms and conditions (**Appendix C**). Pricing information for UK users was located on the sixth page. Consumers were given the opportunity to select buttons marked “Agree” or “Disagree”. Where “Agree” was selected, a text message was sent to shortcode 80079, which prompted the Service to charge the user £10 by automatically sending a message from shortcode 79555 to the handset. The Executive took the view that consumers were not notified in advance of the charges.

After being charged, the consumer was redirected to the 7mobi.net “GamePortal”, where s/he could play popular games.

The complainants raised a number of concerns including lack of pricing information and charging without consent. In addition, Executive monitoring revealed that Connect Ltd was not registered with PhonepayPlus.

#### 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 (12<sup>th</sup> Edition) (the “Code”).

The Executive sent a breach letter to the Level 2 provider on 20 July 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.2.5- Pricing
- Rule 2.3.2- Misleading
- Rule 2.3.3- Charges without consent
- Paragraph 3.4.1- Registration

The Level 2 provider responded on 6 August 2012. On 16 August 2012, the Tribunal reached a decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **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 noted that pricing information relating to the Service was limited to the following information contained in the terms and conditions (**Appendix C**).

“...Services are provided for a fee... the service phones in the UK: 80 079 (about 5 GBP); All prices are including VAT. This service is available to subscribers of all national GSM operators the UK.”

The Executive made the following four submissions.

- i) Pricing information was not proximate to the means of accessing the Service because it was possible to incur charges without viewing pricing information.
- ii) The pricing information contained in the terms and conditions of “about 5 GBP” was incorrect as the charge was £10.
- iii) Pricing information was not prominent as the first reference to a charge in the terms and conditions simply stated, “*services are provided for a fee*”. The second and final reference to pricing was on the sixth page of the terms and conditions and simply stated, “The service phones in the UK: 80 079 (about 5 GBP); All prices are including VAT”.
- iv) Pricing information was not clearly legible as, contrary to PhonepayPlus Guidance, it used “GBP” instead of “£”.

The Executive accordingly submitted that for the four reasons outlined above rule 2.2.5 of the Code had been breached.

2. The Level 2 provider denied the breach. The provider stated that all users were presented with all necessary information about the terms and conditions and that the price was shown correctly.
3. The Tribunal considered the evidence, including comments made by the complainants, and noted the Level 2 provider’s response. The Tribunal found, on the balance of probabilities, that not all consumers were notified of any pricing

information before they were charged as some would have clicked “OK” without seeing the pricing information on the sixth page of the terms and conditions. Further, the pricing information supplied in the terms and conditions was inadequate as it was incorrect and not prominent, proximate or clear. Accordingly, the Tribunal upheld a breach of rule 2.2.5 of the Code for the four reasons advanced by the Executive.

**Decision: UPHELD**

**ALLEGED BREACH TWO**

**Rule 2.3.2**

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

1. The Executive noted that the terms and conditions contained the following statements.

“4. Services are provided for a fee...4. The first time you start an application, there is always a request for permission for the possibility of transferring the information and paying, using a short number...The service phones in the UK: 80 079 (about 5 GBP); All prices are including VAT. This service is available to subscribers of all national GSM operators the UK.”

Where a consumer selected that s/he “understood the rules of downloading” or that s/he “Agreed” to the terms and conditions, the Service automatically sent a message which triggered a £10 charge.

The Executive submitted that the statement that the Service cost “about 5 GBP” was wholly misleading as consumers were charged £10. In addition, the Executive maintained that consumers who did not read the terms and conditions were misled as they were not notified that they would incur charges. Finally, the Executive submitted that consumers who did read the terms and conditions were misled into believing that they would be notified before incurring any charges.

As a result of the above, the Executive submitted that rule 2.3.2 of the Code had been breached.

2. The Level 2 provider denied the breach.
3. The Tribunal considered the evidence and noted the Level 2 provider’s response and found that consumers were misled as they were either not notified of any charges or misled into the belief that they would receive notification before any charges were incurred. The Tribunal upheld a breach of rule 2.3.2 on this basis. The Tribunal noted that the reference to pricing of “about 5GBP” was misleading; however it felt this had already been covered by the breach of rule 2.3.2 and therefore decided to attribute no weight to this aspect of the breach.

**Decision: UPHELD**

**ALLEGED BREACH THREE**

**Rule 2.3.3**

“Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”

1. The Executive noted that consumers who did not select the “Rules” option after installation of the App were not notified of charges in advance of being charged (**Appendix B**). Where a consumer selected the “Rules” option and read the lengthy terms and conditions, the Executive submitted that a consumer would have been aware of the possibility of being charged at some point in the future (**Appendix C**). However, the consumer would have had the expectation that s/he would be given notification in advance and expect the charge to be £5. In reality the cost of the Service was £10 and no advance notification of charges was given.

In light of the above, the Executive submitted that either consumers did not know that they would be charged or consumers did not know when and how much they would be charged. As a result, the Executive maintained that consumers could not have consented to be charged. Accordingly, the Executive submitted that there had been a breach of rule 2.3.3.

2. The Level 2 provider denied the breach. Specifically, the provider submitted that, “Outcome 2.2 and Outcome 2.3 are mostly describing the same things, pretending to enlarge the list of potential breaches of the code in order to put heavier responsibility on the provider”.
3. The Tribunal considered the evidence and noted the Level 2 provider’s response. The Tribunal noted that consumers were notified that the App provided access to “Services that cost you money” on the Android installation page (**Appendix A**). However, the Tribunal found that, contrary to what was stated in the terms and conditions, consumers were not separately notified of charges before incurring them. In addition, the Tribunal noted that even where a consumer read the full terms and conditions, s/he would not know how and when s/he would be charged. In these circumstances, the Tribunal found since consumers were unaware of charges or the amount of a charge, they could not have provided their consent to be charged. Accordingly, the Tribunal upheld a breach of rule 2.3.3.

## **Decision: UPHELD**

### **ALLEGED BREACH FOUR**

#### **Paragraph 3.4.1**

“Before providing any premium rate service all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus...”

1. The Executive noted that in January and February 2012 the Level 2 provider provided premium rate services but was not registered with PhonepayPlus. In correspondence dated 27 June 2012, the Level 2 provider stated, “We do not have a PhonepayPlus registration number”. Accordingly, the Executive submitted that paragraph 3.4.1 of the Code had been breached.
2. The Level 2 provider stated, “Since the service wasn’t officially launched in the UK and no contracts were signed for this, no request for registration was made to PP+”.
3. The Tribunal considered the evidence and the Level 2 provider’s submissions and found that the Level 2 provider provided premium rate services to UK consumers using UK shortcodes whilst not registered with PhonepayPlus. Accordingly, the Tribunal upheld a breach of paragraph 3.4.1.

**Decision: UPHELD**

## **SANCTIONS**

### **Initial Overall Assessment**

The Tribunal's initial assessment of the breach of the Code was as follows:

#### **Rule 2.2.5- Pricing**

The initial assessment of rule 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.

#### **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 2.3.3- Pricing**

The initial assessment of rule 2.3.3 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service had the sole purpose of generating high revenue and did so through recklessly misleading promotion and design.

#### **Paragraph 3.4.1- Registration**

The initial assessment of paragraph 3.4.1 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's actions fundamentally undermined the regulatory regime.
- The Level 2 provider did not register with PhonepayPlus when alerted of the breach.

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

### **Final Overall Assessment**

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

- The Level 2 provider appeared to have no regard to the Code and/or Guidance.
- The Level 2 provider failed to co-operate with the investigation in a prompt and/or adequate manner.

In determining the final overall assessment for the case, the Tribunal noted that the Service was suspended by a party other than the Level 2 provider and therefore concluded that the suspension of the service was not a mitigating factor.

The total consumer spend on the Service was within the range of Band 3 (£100,000-£250,000). No information was available in respect of the Level 2 provider's share of the revenue from the Service.

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

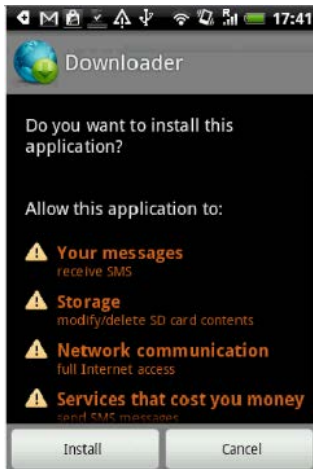
### **Sanctions Imposed**

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

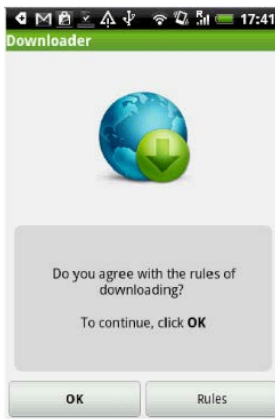
- A formal reprimand;
- A fine of £50,000;
- A requirement for the Level 2 provider to submit all premium rate services to PhonepayPlus for prior permission for two years; and,
- A requirement that the Level 2 provider make refunds, within three months, to all consumers who have used the service for the full amount spent, regardless of whether or not they have claimed a refund. Refunds should be directly credited to the users' mobile accounts and the Level 2 provider must provide evidence to PhonepayPlus that the refunds have been made.

## Appendices

Appendix A- Screenshot of the Android “Downloader” screen pre installation of the App:



Appendix B- Screenshot of the landing page post installation of the App:



Appendix C- Screenshots of pages 1, 2 and 6 of the terms and conditions of the Service:

