THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday 22 December 2011
TRIBUNAL SITTING No. 90 / CASE 1
CASE REFERENCE: 03012

Network operator: All mobile network operators;

Level 1 providers: OpenMarket Limited (billing provider); and
Dialogue Communications Limited (bulk promotional messaging provider).

Level 2 provider: Blue Stream Mobile Limited.

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

BACKGROUND

PhonepayPlus received 70 complaints from members of the public regarding an Adult WAP Pay-Per-Page service promoted on the shortcodes 69700 and 89995, of which 68 were received after 1 September 2011.

The complaints concerned promotional text messages that had been sent to members of the public, and which were reported as being both offensive and unsolicited.

The two specific text messages that appeared to have caused offence were:

- *"What the FUCK were you thinking?! (Link) Bluestream, help:08448870432 Free Msg".*
- *"Fw: your SLUT of a mrs on webcam…haha!! (Link) Bluestream, help 08448870432 Free Msg".*

The service was operated by the Level 2 provider, Bluestream Mobile Limited, through the platform of the Level 1 provider, OpenMarket Limited. The bulk promotional messages for the service were sent through the platform of another Level 1 provider, Dialogue Communications Limited.

Potential breaches of the Code raised by the Executive

The Executive believed that the service contravened the PhonepayPlus Code of Practice (12th Edition) (the "**Code**"), and raised the following potential breaches under the Code:

Part Two Outcomes and Rules:

- Outcome: "That premium rate services do not cause the unreasonable invasion of consumers' privacy". Rule 2.4.2 – Privacy; and

- Outcome: "That premium rate services do not cause harm or unreasonable offence to consumers or to the general public". Rule 2.5.1 – Avoidance of harm.

The Investigation

The Executive conducted this investigation using the Track 2 procedure in accordance with paragraph 4.4 of the Code. On 28 November 2011, the Executive issued a breach letter to the Level 2 provider. The Level 2 provider responded on 12 December 2011.

On 22 December, the Tribunal considered the case and made a decision on the alleged breaches raised by the Executive. Informal representations were made by the Level 2 provider to the Tribunal on 22 December 2011.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE
OUTCOME 2.4:

"That premium rate services do not cause the unreasonable invasion of consumers' privacy".

RULE 2.4.2:

"Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the Level 2 provider of that service must be able to provide evidence which establishes that consent."

1. The Executive received 68 complaints from members of the public from 1 September 2011 onwards regarding the receipt of promotional messages from the Level 2 provider's Adult WAP Pay-Per-Page service.

   Many of the complainants specifically questioned how they had provided consent for their mobile numbers to receive the promotional text messages referenced above.

   The Executive asked the Level 2 provider to provide opt-in evidence of the mobile numbers of 27 complainants who had consented for PhonepayPlus to use their mobile numbers for the purposes of the investigation of this case.

   In response to the Executive, the Level 2 provider explained that 16 of the 27 mobile numbers were promoted to as part of a marketing list it had purchased from a third party company called Broadcast Systems Limited ("**Broadcast Systems**").

   Message logs received from the Level 2 provider on 26 October 2011 confirmed that 14 of these 16 mobile numbers had been marketed to since 1 September 2011 with the text messages referenced above.

The Executive focused on these 14 complainants in relation to this breach of the Code, while noting the potential that many of the other complainants' mobile numbers, for which PhonepayPlus had not requested information from the Level 2 provider, may have formed part of the marketing list.

In responding to the Executive's preliminary enquiries, the Level 2 provider had confirmed the following:

- The marketing list contained 115,000 numbers;
- The Level 2 provider had not obtained opt-in evidence from Broadcast Systems, but this was to be made available on request;
- The Level 2 provider was provided with information purporting to be evidence of opt-in on various occasions during the investigation of this case. Evidence in relation to six consumers was subsequently checked by the Mobile Network Operator, Orange, which confirmed that the evidence was not valid;
- Evidence purporting to demonstrate opt-in by another consumer was also confirmed as invalid, as the consumer's own telephone bill showed that no opt-in text message had been sent**;**
- The Level 2 provider stated that;

> "*Our attempt to validate the data is not conclusive as it represents a small proportion of the actual database and complainant MSISDNs provided in the case letter. However, we acknowledge that the initial results suggest that the validity of the database is without merit".*

In terms of the actual opt-in information that was supplied for the 16 mobile numbers that were confirmed as part of the marketing list, the unsubstantiated opt-in information that was supplied to the Level 2 provider by Broadcast Systems consisted of a time-stamp for a keyword which was sent to a shortcode that was unrelated to this service, together with a script of terms and conditions detailing a third party consent tick box.

The Level 2 provider had admitted it was not informed of the identity of the company that had gained the alleged specific opt-in and consent.

The Executive submitted that, since the marketing list had been purchased from a third party, the Level 2 provider required evidence that a hard opt-in had been obtained from consumers. The Executive referred to the PhonepayPlus General Guidance Note on 'Privacy and consent to charge', which states that the evidence should show that:

- The consumers had positively confirmed their acceptance for their mobile numbers to receive marketing from third parties;
- When the mobile numbers opted-in to receive marketing from third parties, it was for a similar service (i.e. adult services); and
- The opt-in had been obtained within the previous six months and had remained valid.

The Executive was of the opinion that consumers had been contacted by the Level 2 provider without their consent because:

- The majority of the 68 complainants, including some of the 14 complainants who were the focus of the investigation for this case, had stated that the text messages received were unsolicited;

- The Level 2 provider confirmed that the marketing list opt-in evidence appeared to be "*without merit"*. The Executive also discovered that that at least 16 complainants' numbers were on this list, and it was likely that this figure would have been far greater if the full details of the 68 complainants could have been provided to the Level 2 provider;

- With the exception of a script supplied by a company that would not disclose its identity, the lack of actual evidence of 14 specified consumers confirming their acceptance to receive promotional text messages did not comply with all the hard opt-in requirements set out above; and

- All checks to validate the hard opt-in information for numbers on the marketing list were revealed to be invalid.

In light of the above, the Executive submitted that a breach of Rule 2.4.2 of the Code had occurred, and the Level 2 provider had therefore failed to meet the required Code Outcome.

2. The Level 2 provider said that it had purchased the marketing list from Broadcast Systems in good faith on terms set out in a contract between the Level 2 provider and Broadcast Systems. The Level 2 provider further confirmed during its informal representations that the purchase of the marketing list was experimental and was not part of its standard procedure for obtaining validly opted-in MSISDNs. The Level 2 provider said it was informed that the marketing list contained numbers which had opted-in to an adult service or services; however, on the commencement of large scale marketing, it became clear that this was potentially not the case. The Level 2 provider said it had immediately ceased all marketing and sought evidence of the required hard opt-in.

   The Level 2 provider confirmed that, despite its best efforts and constant pressure on its supplier to provide further information, it had been unable to conclusively validate the marketing list. It could not therefore verify that the users had opted-in to receive adult promotions, nor could it verify the exact process that occurred in order for the numbers to be obtained. The Level 2 provider further stated that it was not in a position to confirm that the database was wholly without merit and that the users were <u>not,</u> in fact, opted-in to receive promotional information of this nature.

   For this reason, the Level 2 provider said it could not determine for sure whether the users on the marketing list had been contacted without their consent. However, it accepted on the facts that the marketing list remained invalidated and was not a credible source of data for the service. At the time the marketing list was used, the Level 2 provider said it genuinely believed (and was given no reason to disbelieve) that all users had opted-in and consented to receive adult marketing material.

The Level 2 provider further submitted that there was, at the time of the investigation, no industry mechanism available for Level 2 providers to directly validate the marketing list opt-ins with the Mobile Network Operators. The Level 2 provider said that this was a shortcoming within industry as a whole, and this was especially concerning given that the use of marketing lists was becoming more and more widespread. The Level 2 provider confirmed that the only way to truly validate any opt-ins would be to contact the consumers' Mobile Network Operators and obtain proof of their messages originating (MO), although this was not currently practical. The following factors were therefore considered by the Level 2 provider as reasonable endeavours for verifying the marketing list:

- It had been obtained through a supplier with whom the Level 2 provider had worked for several years and therefore trusted;
- When the marketing list was acquired and cleaned, 7% of the numbers were already listed in its own records as adult users;
- During all correspondence, the Level 2 provider stated that it had been led to believe that the end supplier of the marketing list was Netcollex Limited ('Netcollex'). The Level 2 provider was familiar with Netcollex as a well-established premium rate advertiser and legitimate source of opted-in adult users; and
- It had not been put on notice or given cause to believe that the marketing list was anything other than valid.

The Level 2 provider further stated that initial sampling trials of the marketing list provided no indication that there were any problems with the validity of the opt-ins; however, despite assurances of its credibility, the marketing list did not perform as expected and the revenue generated from it remained extremely low. The Level 2 provider asserted that, on this basis, very few consumers had engaged with the service as a result of the promotional messages it had sent, and therefore the financial consequences for consumers were low.

Having reviewed consumer complaints concerning the service, the Level 2 provider said it had only received referrals of 23 complaints from PhonepayPlus. The Level 2 provider stated that it had attempted to contact all of these complainants in order to advise them of the messages received and ascertain whether any charges had accrued. Where charges had accrued, full refunds were issued.

The Level 2 provider further asserted that it had done its best to be open and upfront with PhonepayPlus throughout the investigation of this case. As a direct result of this experience, the Level 2 provider's new best practice policies strictly prohibited the use of third party marketing lists without comprehensive due diligence and upfront provision of explicit opt-in information. The Level 2 provider further confirmed that, given the practical limitations (i.e. the lack of validation services from the Mobile Network Operators), it had adopted a preference to avoid the use of any third party data in future.

The Level 2 provider further confirmed during its informal representations that the employees who were associated with this campaign were no longer employees of the company and new management arrangements were in place.

3. The Tribunal noted that the Level 2 provider had accepted during its informal representations that at least some of the consumers on the marketing list had not given the necessary hard opt-in consent to receive the promotional messages they had received. Accordingly, the Tribunal concluded that the Level 2 provider was in breach of Rule 2.4.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO
OUTCOME 2.5:

"That premium rate services do not cause harm or unreasonable offence to consumers or to the general public".

RULE 2.5.1:

"Premium rate services must not cause or be likely to cause harm or unreasonable offence to consumers or to the general public".

1. In addition to those already raised in relation to the breach of Rule 2.4.2 of the Code, the Executive gave the following reasons for its belief that the Level 2 provider was in breach of Rule 2.5.1 of the Code.

   Of the 68 complaints received by PhonepayPlus since 1 September 2011, 35 explicitly stated or strongly indicated that they had received text message promotions containing content that they had found offensive.

   The text message promotion that appeared to have been central to the complaints received and that had clearly caused offense was routinely reported by complainants as:

   "What the FUCK were you thinking?! (link) Bluestream, help:08448870432 Free Msg"

   The Level 2 provider informed the Executive that, in relation to the 16 complainants who were also on the marketing list, it could not confirm that valid opt-in consent existed which may have permitted the receipt of adult promotional text messages from the Level 2 provider.

   The Executive submitted that the act of sending complainants the promotional text message referred to above caused (or was likely to cause) unreasonable offence to those consumers. The Level 2 provider confirmed to the Executive that the text message promotion stated above was sent to mobile numbers on the marketing list on 3 and 4 September 2011. The message was sent to 65,050 mobile numbers on 3 September 2011, and to 59,108 mobile numbers on 4 September 2011. It was the Executive's opinion that the potential for the text message promotion stated above to have been of an unreasonably offensive nature was aggravated further by the apparent lack of opt-in evidence from those on the marketing list to receive potentially offensive adult material.

   The Executive submitted that, in the circumstances, sending 124,145 text message promotions to consumers (including the 13 complainants) was also likely to have caused unreasonable offence to at least some of those consumers. In light of the above, the

Executive submitted that a breach of paragraph 2.5.1 of the Code had occurred and that the Level 2 provider had therefore failed to meet the required Outcome.

2. The Level 2 provider asserted that the promotional message and service was strictly intended and designed to be targeted and received by an adult audience. As detailed within the supplier contract between the Level 2 provider and Broadcast Systems, the Level 2 provider believed these users to have been '*guaranteed over the age of 18',* having opted-in to marketing through use of a similar service '*within the last 6 months.*' It said the opt-ins provided to the Level 2 provider by Broadcast Systems were provided via an adult shortcode for services offering adult natured mobile content.

   The Level 2 provider said that it had, however, subsequently transpired that the recipients may not have been opted-in through the methods/services it had been led to believe at the time the campaign was created and promoted. The Level 2 provider was therefore of the opinion that, had the messages actually been delivered to their intended recipients, as they were presented to the Level 2 provider, the message itself would not have been deemed offensive, but would have been appropriate for an adult audience.

   The Level 2 provider said it recognised that, if the users were indeed 'non-adult', a message of the above nature would have been inappropriate for the consumer. The Level 2 provider reiterated that it was unable to say categorically whether the recipients of the above 'strongly worded' message were indeed opted-in through adult services or not.

   The Level 2 provider stated that it was important for it to stress that it had not engaged in any intentional or reckless action in order to deliberately cause offence to any consumer, and that the breach outlined had been directly influenced by problems of potentially invalid opt-in among the consumers on the marketing list. During its informal representations, the Level 2 provider further confirmed that it had placed its internal customer call centre on enhanced alert to monitor any complaints relating to the service following mass submission of the potentially offensive text messages. The Level 2 provider argued that the complaints received both via its own customer service number and via PhonepayPlus were minimal by comparison to the number of consumers who received the promotional text message.

   The Level 2 provider therefore asserted that, but for the marketing list being flawed, the service content would have been deemed appropriate for its intended audience. The Level 2 provider accepted that this did not negate the offence that may have been caused to the actual recipients of the message, although it considered that the lack of intent should be taken into account by the Tribunal as a mitigating factor.

   The Level 2 provider further confirmed that, as soon as it had been placed on notice of the problems concerning the marketing list, it took immediate action to avoid and reduce potential harm to consumers. This included:

   - Immediate removal of the campaign/marketing list;
   - Notification of the issue to PhonepayPlus;
   - Dispatch of letters of apology to consumers who were affected;
   - Enhanced internal monitoring of incoming complaints relating to the service;
   - Payment of consumer refunds, where applicable;

- Execution of data verification attempts via the database supply chain; and
- Execution of data verification attempts via the Mobile Network Operators.

The Level 2 provider stated that, of the 23 MSISDNs it had received from PhonepayPlus, only four had directly complained about the message being offensive. While these users had already been contacted by the Level 2 provider, it requested the opportunity to contact all affected complainants personally, if authorised to do so.

The Level 2 provider repeated that it did not believe that the message in its entirety was offensive, given that it was intended for an audience that had opted-in to adult services and, had the message been delivered exclusively to this type of audience, the outcome would have been noticeably different. The Level 2 provider further pointed out during its informal representations that its contact details had been made available within the text message sent to consumers so that they could provide feedback with relative ease. Notwithstanding these arguments, the Level 2 provider acknowledged that it was a strongly worded marketing campaign and, in hindsight, would have sent a softer opening message to users on a new marketing list.

The Level 2 provider said it wished to apologise unreservedly for any offence caused and stated that it could confirm that it had since implemented a raft of new procedures and guidelines within its marketing department, which outlined a best practice promotional approach to newly acquired MSISDNs.

3. The Tribunal noted the Level 2 provider's acceptance (during the informal representations) that, for those recipients of the messages who had not opted-in to receive marketing from third parties about adult services, the wording used in those promotional messages was likely to cause unreasonable offence and appeared to have done so. The Tribunal further noted that three of the 11 complainants who were not on the marketing list but had instead opted-in to receive messages directly from the Level 2 provider, had complained about the offensive nature of the promotions. On this basis, the Tribunal concluded that the promotional messages were also likely to cause harm or unreasonable offence to consumers who had validly opted-in to receiving marketing messages about the service. The Tribunal concluded that the Level 2 provider was therefore in breach of Rule 2.5.1 of the Code in relation to both sets of recipients.

Decision: UPHELD

SANCTIONS

The Tribunal determined the following initial severity rating for each breach:

- Rule 2.4.2 (Privacy): Serious
- Rule 2.5.1 (Avoidance of Harm): Serious

One of the criteria considered by the Tribunal in determining the severity rating for each breach was the revenue generated by the service. The revenue generated from consumers whose details were provided to the Level 2 provider from the marketing list was within the lower end of Band 5 (£5,000 - £50,000). The revenue in relation to the service as a whole was in the high end of Band 2 (£250,000 - £500,000). The Tribunal concluded that, for the purpose of assessing the severity of the above breaches, it would not place much emphasis on the level of revenue,

as consumers who were offended were unlikely to have engaged with the service and so were unlikely to have contributed to the revenue generated.

The initial overall severity rating determined by the Tribunal in respect of the breaches was **serious**.

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

- The Level 2 provider failed to follow guidance or take alternative steps which, had they been followed, would have avoided the breaches. Paragraph 5.7 of the PhonepayPlus General Guidance Note on 'Privacy and consent to charge' states:

  "…if one provider wishes to purchase a marketing list from an unrelated provider, then evidence of a hard opt-in for each number on that list should be obtained".

  When the Level 2 provider purchased the marketing list, evidence of the hard opt-in was not obtained but was instead to be provided upon request. The Tribunal noted that, while the Guidance Notes did not come into effect until 1 September 2011, they were published for the industry to take note on 30 March 2011.

  The Tribunal further noted that the Level 2 provider took no steps to ascertain the validity of the marketing list until problems arose. The Level 2 provider had not therefore taken any alternative steps, or done all it could have done, to avoid the breaches.

- PhonepayPlus had previously published numerous adjudications where the upheld breach related to failure to obtain consent before sending marketing messages by SMS.

- The relevant breach history of the Level 2 provider.

The Tribunal took into account the following mitigating factors:

- The Level 2 provider had taken some steps in advance to identify and mitigate against the impact of external factors and risks that might result in a breach; while the Level 2 provider had failed to obtain evidence of valid opt-ins, some testing of the marketing list had been carried out.

- The Level 2 provider took steps to end the breaches and remedy their consequences in a timely fashion, thereby potentially reducing the level of consumer harm.

- The Level 2 provider proactively refunded consumers in an effort to relieve consumer harm.

- The Level 2 provider had taken action to ensure the risks of any breaches reoccurring were minimised, and any detriment remedied. During its informal representations at the Tribunal hearing, the Level 2 provider said it had put in place new internal guidelines and confirmed that it was very unlikely it would use marketing lists again, and if it did, it would not use such strong language within any initial opening messages.

The Tribunal considered the Level 2 provider's submission that the breach of paragraph 2.4.2. was caused by the invalid marketing list from the third party company, Broadcasting Systems, over which it had no control. The Tribunal concluded that this could not be a mitigating factor because the contractual relationship between the Level 2 provider and Broadcasting Systems meant that the latter was (or should have been) within the control of the Level 2 provider.

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

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

- A Formal Reprimand; and
- A fine of £35,000.

The Tribunal commented that it expected claims for refunds to continue to be paid by the Level 2 provider for the full amounts spent by complainants, except where there is good cause to believe that such claims are not valid.