

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

**Thursday 19 July 2012
TRIBUNAL SITTING No. 104 / CASE 1
CASE REFERENCE: 06680**

Level 2 provider:	Glass Mobile LLC (USA)
Type of service:	My Mobile SMS and SMS Now 4 U (battery application)
Level 1 provider:	Netsize UK Limited
Network operator:	All Mobile Network operators

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

BACKGROUND

Between 13 March 2012 and 6 July 2012, the Executive received 87 complaints in relation to the premium rate SMS subscription services, My Mobile SMS and SMS Now 4 U (the “**Services**”). Both Services were operated by the Level 2 provider Glass Mobile LLC. Previous to December 2011 the Services were operated by a partnership named Pegasus Blue.

Consumers entered into either Service by installing a free-to-download application, called “Battery Supercharger” (“**the App**”), which was available on the Android platform. Once the App was installed, consumers were given a number of options to extend or “boost” the life of the handset’s battery. Some of the options sent the consumer to a screen headed, “This is a Pro Feature Only” and gave an opportunity to subscribe. My Mobile SMS operated on shortcode 60053 and was charged via two mobile terminating messages per fortnight (at a cost of £2 per message). SMS Now 4 U operated on shortcode 60054 and was charged via one mobile terminating per month (at a cost of £4).

The App and/or additional subscription Services did not in fact “charge” a user’s battery, it merely facilitated means of reducing the speed at which battery life decreased.

Complaints in relation to the Services related to a number of different issues including, consumers not being aware of why they had been charged, the identity of the provider, the number of functions offered and the provision of “useless” or confusing information.

Executive monitoring of the Services supported consumer complaints in relation to the misleading descriptions of the Service provided. In addition, concerns were raised in regard to the content and frequency of subscription reminders, and the veracity of claims made by reviewers.

From September to December 2011, following a number of complaints that were dealt with using PhonepayPlus’ informal compliance and Track 1 procedures, a consultant acting on

behalf of Pegasus Blue sought compliance advice from the PhonepayPlus Complaint Resolution team, In response, but without a thorough compliance audit, the consultant was told that the proposed user experience, “looks good apart from one aspect”. The one aspect related to the use of a scareware promotion. PhonepayPlus had no direct contact regarding the Services with the Level 2 provider prior to the instant investigation.

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 22 June 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading; and
- Rule 2.3.12(d)- Pricing- Subscription reminder.

The Level 2 provider responded on 4 July 2012. On 19 July 2012, after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

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 for seven reasons.

Reason 1- “Increase battery life 200%”

The Executive noted that the promotional material contained the claim, “Increase battery life 200%” (**Appendix A**). The Executive submitted that the effect of any increased battery life would be dependent on the handset and therefore such a statement without qualification was misleading, or likely to mislead.

Reason 2- “Over 30 other features”

The Executive noted that the promotional material contained the claim, “Over 30 other features” (**Appendix A**). The Executive submitted that, in reality, the App had nine features. Therefore the claim was misleading, or likely to mislead consumers.

Reason 3- User reviews

The Executive noted that promotional material contained user reviews. On closer inspection it transpired that the coding on some pages updated the date of the review to the date the promotional material was viewed by a consumer. Therefore consumers would be misled into the belief that the review was very recent, when in actual fact it was potentially written months earlier.

Secondly, the Executive noted that on further promotional material the date of the review predated the launch of the Services in December 2011. The Executive submitted that this was evidence that the review was not genuine and therefore was misleading, or likely to mislead.

Reason 4- Scareware

During monitoring of the Services on 6 February 2012, a pop-up alert was received when viewing the download screen for the free App. It stated,

“Battery Upgrade Alert
Your Battery Needs An Update
Your battery is losing charge too fast! Upgrade to keep your battery running for up to
twice as long.” **(Appendix B)**

The pop-up was designed to appear regardless of the actual battery charge level. The Executive submitted that the message was ‘scareware’ and was misleading, or likely to mislead, as consumers were falsely led to believe that they must act quickly to conserve the remaining charge, when in reality the battery may have been fully charged. It was also noted that the Level 2 provider’s current consultant had previously been advised of concerns regarding the wording used, and the proposed alterations had not been made.

Reason 5- “Battery Boosted!”

The Executive noted that two of the ‘consumer-engagement’ (subscription) screens displayed an icon of a battery, which stated “Battery Boosted!” **(Appendix C)**. The Executive submitted that the phrase would generally be understood by consumers to indicate that the application had charged their handset’s battery. In reality, the App did not charge the battery. Therefore the Executive submitted that the use of the phrase was misleading, or likely to mislead consumers.

Reason 6- Content of ‘tips’

The Executive noted that a key part of the Services was the provision of unlimited free text messages, which contained battery saving ‘tips’. A number of complainants stated that they had received text messages that promoted unrelated products and services as a result of participating in the Services. The Executive submitted that it was not made clear at the outset that ‘tips’ would include unrelated third party promotions. As a result, the Executive submitted that the description of the ‘tips’ as related to ‘battery saving’ was misleading.

Reason 7- Pie charts

The Executive noted that a number of pie charts, purporting to show an individual handset’s CPU and memory usage, were displayed on the free of charge App overview page. The Executive submitted that although the pie charts appeared to be tailored to the individual handset, in reality they were solely of cosmetic value. Therefore, the Executive asserted that the use of the pie charts was misleading, or likely to mislead, consumers into believing that the charts reflected the CPU and memory usage of their handset. **(Appendix D)**

The Executive accordingly submitted that for the seven reasons outlined above rule 2.3.2 had been breached.

2. The Level 2 provider denied that the Services were misleading and operated in breach of rule 2.3.2. Generally, the provider submitted that PhonepayPlus had reviewed the Service and related promotional material in December 2011 and “signed off” the Service as compliant with the Code. Therefore, it was submitted that the provider could not be responsible for any breach. In the alternative, the Level 2 provider denied that any breach of rule 2.3.2 had occurred. In relation to the individual reasons identified by the Executive, the Level 2 provider asserted:

Reason 1- “Increase battery life 200%”

The Level 2 provider submitted that the claim was not intended to exaggerate the benefit of the Services, but to communicate that the Services could increase battery life by as much as 200%. The provider accepted that the benefit gained by an individual consumer would depend on their handset and claimed that some users would experience an increase in battery life of over 200%. As a result of the above, the provider did not accept that the claim was misleading generally. However, during informal representations, it was accepted that the claim may not apply to all consumers and therefore may be misleading to them.

Reason 2- “Over 30 features”

The Level 2 provider submitted that the App had 31 subset features. Therefore the claim of “30 features” was factually correct and not misleading. It was asserted that the Executive had only counted the App’s nine “functions”.

Reason 3- User reviews

The Level 2 provider accepted that the coding behind the user reviews did alter the date of the review depending on the date it was accessed. However, as the user reviews were real, the Level 2 provider did not accept that the re-dating of them was misleading. As a result of the Executive’s concerns, the provider asserted that it had changed the coding to make sure the date of reviews reflects the date they were written.

The Level 2 provider explained that the reviews predating the start of its Service were written about an identical service, which was then being run by Pegasus Blue, and therefore the reviews were not misleading.

Reason 4- Scareware

During informal representations, the Level 2 provider accepted that it had not used the amended wording provided by the Complaint Resolution team. However, the provider did not accept that the pop-up was misleading as the advertising within the pop-up was directly relevant to the features contained in the App.

Reason 5- “Battery Boosted!”

The Level 2 provider asserted that the wording “Battery Boosted” was consistent with the App’s features. The provider accepted the Executive’s assertion that a battery can only be ‘charged’ by connection to a power source. However, the provider asserted that it had never claimed that the App boosted charge. It maintained that by providing tools that decreased battery usage, the App enabled consumers to “boost” battery life. As a result, the provider denied that the wording was misleading.

Reason 6- Content of ‘tips’

The Level 2 provider stated that the Services that the consumer subscribed to are bundled and included both the upgraded battery-saving features in the App and access to technical 'tips' via SMS messaging. The provider submitted that the 'tips' via SMS, "[A]re considered to go beyond just the battery tips, so that the customer can grow their understanding of how to maximize the capabilities of their Android phone for battery life utilization to any of the other categories. In the case of the tips presented above, the consumer is provided with Application specific tips that provide guidance on specific ways to maximize the functionality of their Android phone experience. Our position is that superior Application products are essential in maximising the Android experience and that giving tips which present good products is indeed a service to our customers. Please note, we do not have any business association with the products we present in our "App" tips and we do not receive any monetary gain for providing these tips."

Accordingly, the provider denied any breach of rule 2.3.2.

Reason 7- Pie charts

The Level 2 provider submitted that the pie charts were interactive and reflected the CPU and memory usage of the handset that the App was opened on. The provider stated that as the pie charts were genuine and therefore not misleading.

1. The Tribunal considered the evidence and noted the Level 2 provider's detailed submissions. The Tribunal concluded on the basis of the Executive's submissions that there had been a breach of rule 2.3.2 for reasons 1, 2, 3, 4 and 5 but not for reasons 6 or 7. In relation to reasons 1 and 5, the Tribunal found that the two claims were misleading on a literal basis. With regard to reason 2, the Tribunal found that most consumers would not consider sub-sets of a feature to be features in themselves. With regard to reason 3, the Tribunal accepted that the user reviews relating to the identical service operated before commencement of the Services was not misleading but found the false dating of the reviews to be particularly misleading. With regard to reason 4, the Tribunal noted that the Level 2 provider had not used the wording suggested by the Executive and that a consumer could easily be misled by the content and format of the message. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

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 the 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 submitted that the Level 2 provider had breached rule 2.3.12(d) for two reasons.

Reason 1

The Executive noted that subscription reminders sent by the My Mobile SMS Service included, “Ur sub 2Alerts+App Renewed, Avail now!” and in the case of the SMS Now 4 U Service, “Ur sub 2Alerts+App Renwd, Avail now!” The Executive submitted that the above wording was unclear and confusing. Specifically, the Executive asserted that the confirmation that the Services were subscription based was not clear. As a result, the Executive submitted that rule 2.3.12(d) of the Code had been breached.

Reason 2

The Executive submitted that, contrary to rule 2.3.12(d) of the Code, subscription reminder messages were not sent every month in relation to two specific complainants, as was apparent from the relevant logs.

The Executive accordingly submitted that for the reasons outlined above rule 2.3.12(d) had been breached.

2. In relation to reason 1, the Level 2 provider denied the breach. Specifically, the provider submitted that the reminder message was clear. In the alternative, it was submitted that, at worst, the reminder messages fulfilled all but one requirement of rule 2.3.12(d) and therefore the spirit of rule 2.3.12(d) had been followed. However, the provider stated that the content of the message had now been changed.

In relation to reason 2, the Level 2 provider accepted that, due to a technical issue, some consumers had not received a reminder message every month. The provider assured the Tribunal that the issue had been rectified.

3. The Tribunal considered the evidence and noted the Level 2 provider’s detailed submissions and its admission in relation to reason 2. The Tribunal found that there had been a breach of rule 2.3.12(d) on the grounds advanced by the Executive. The Tribunal noted in respect of reason 1, that the wording of the message as a whole was unclear. In relation to reason 2, the Tribunal noted that the Level 2 provider had admitted that a reminder message was not sent to all consumers every month. Accordingly, the Tribunal upheld a breach of rule 2.3.12(d) of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.2- Misleading

The initial assessment of rule 2.3.2 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- A breach was found within Services that were still capable of providing value to consumers and which were designed to provide a legitimate service.
- The breach was likely to have had a discernable effect, directly or indirectly, on consumers and showed evidence of some potential harm that was likely to have affected consumers.

Rule 2.3.12(d)- Pricing- Subscription reminder

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

- A breach was found within Services that were still capable of providing value to consumers and which were designed to provide a legitimate service.
- The breach was likely to have had a discernable effect, directly or indirectly, on consumers and showed evidence of some potential harm that was likely to have affected consumers.

The Tribunal's initial assessment was that, overall, the breach was **moderate**.

Final Overall Assessment

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

- The Level 2 provider failed to follow compliance advice given to its consultant in relation to the scareware pop-up message.

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

- In December 2011, the proposed user experience was submitted for "feedback" to a member of the PhonepayPlus Complaint Resolution team.
- The Level 2 provider asserted that it had changed the coding behind the user reviews and the wording of the subscription reminder messages.
- The Level 2 provider stated that it had refunded 94% of complainants.
- The Level 2 provider engaged with PhonepayPlus in a manner that went beyond the level of co-operation that is generally expected. This included an offer to meet the Executive during the investigation.

The revenue in relation to the Services was within the range of Band 1 (£500,000+).

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

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 £5,000; and
- A requirement for the Level 2 provider to submit the two Services, including promotional material, to PhonepayPlus for compliance advice within two weeks, any such advice to be implemented within two weeks of its receipt.

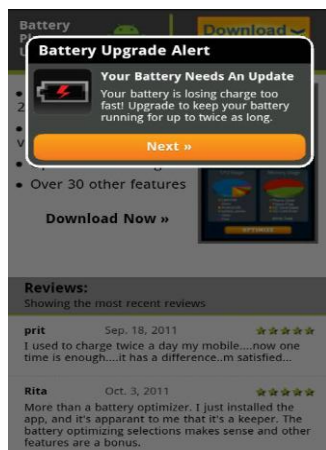
The Tribunal commented that it expected refunds to continue to be made to all complainants who claim a refund, for the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid.

Appendices

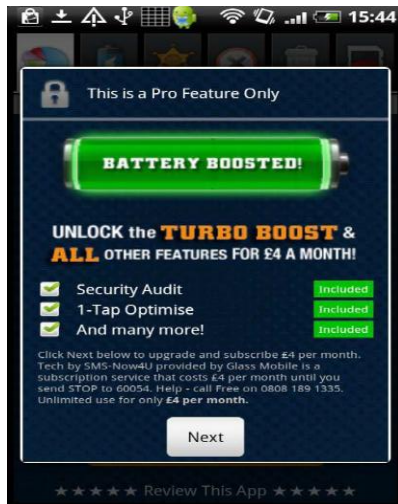
Appendix A- Screenshot of promotion on the Android Marketplace:



Appendix B- Screenshot of scareware pop-up:



Appendix C- Screenshot of an example of the “Battery Boosted!” message:



Appendix D- Screenshot of pie charts showing CPU and memory usage:



