

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

**Thursday 2 August 2012
TRIBUNAL SITTING No. 105 / CASE 1
CASE REFERENCE: 06655**

Level 2 provider:	Sight Mobile LLC (USA)
Type of service:	Info Mobi Now, SMS Plan Tech and My Text Tech (battery application)
Level 1 provider:	Ericsson Internet Payment Exchange AB and Oxygen8 Communications 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 March and July 2012, the Executive received in excess of 300 complaints in relation to the premium rate SMS subscription services Info Mobi Now, SMS Plan Tech and My Text Tech (the “**Services**”). The Services were operated by the Level 2 provider Sight Mobile LLC. Info Mobil Now was operated on shortcode 60133 and was charged via two mobile terminating messages per month (at a cost of £4.50 per message). SMS Plan Tech was operated on shortcode 60140 and was charged via one mobile terminating message every two weeks (at a charge £4.50 per message). My Text Tech was operated on shortcode 60181 and was charged via three mobile terminating messages every two weeks (at a cost of £1.50 per message).

The Executive noted that prior to December 2011 a near identical service was operated by a partnership named Pegasus Blue.

Consumers entered into the Services by installing a free-to-download application, called “Battery Super Charger” (the “**App**”), which was available on the Android platform. Once the App was installed, consumers were given the opportunity to enter into one of the Services, which purported to provide additional functions to extend or “boost” the life of the handset’s battery. The Executive submitted that App and/or additional Services did not in fact “charge” a user’s battery, but merely facilitated the means of reducing the speed at which battery life decreased to varying degrees depending on the handset’s settings and type of handset.

Complaints in relation to the Services related to a number of different issues including, the clarity of the promotional material for the App and the associated premium rate subscription Services.

The Executive monitored the Services and viewed the promotional material to understand how the App worked and how it had been described to consumers. It was discovered that the App was free-to-download, however, only a small part of the App’s functionality was available for free. Other parts of the App only worked if the user subscribed to one of the Services.

The Executive considered that consumers were misled into interacting with the App in such a way as to trigger the premium rate service element and therefore consumers did not realise they had given their consent to be charged. A significant number of complainants suggested charges were incurred without consent, however, the Level 2 provider provided evidence of consent.

Executive monitoring of the Services supported consumer complaints in relation to the misleading descriptions of the Services. In addition, concerns were raised within regard to the content of subscription reminder messages.

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 review the consultant was told that the limited proposed user experience, "looks good apart from one aspect". That aspect related to the use what the Executive considered to be a 'scareware' promotion. PhonepayPlus had no direct contact with the Level 2 provider regarding the Services 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 25 June 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading
- Rule 2.3.12(d)- Pricing - Subscription reminder

The Level 2 provider responded on 9 July 2012. On 2 August 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 five reasons.

Reason 1- "Free app doubles battery! Download the FREE App Now"

The Executive noted that the App was described as, "Free app doubles battery! Download the FREE App Now," in notifications sent to users' handsets.

The Executive submitted that the wording suggested that the App was free-to-download and that it would act to double battery life for no charge. However, the Executive submitted that in reality any function of the App that would automatically act to reduce the amount of battery usage could only be activated via the additional paid for subscription Services and therefore the claim was misleading.

In addition, the Executive stated that consumers were encouraged to download the App on the grounds that the battery life on their devices would be doubled. However, in reality it was highly unlikely that battery life would be doubled, given the wide variation in Android handsets and factors such as the pre-existing settings on a consumer's handset. Therefore, the claim could not be substantiated and was therefore misleading.

Reason 2- Scareware (promotions)

During monitoring of the Services, a pop-up alert was received when viewing the download screen for the 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 A)**

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 3- Scareware (in app)

At various times during testing of the App by the Executive, the handset vibrated and made a sound, which alerted the user to a new notification. The notification was displayed with a warning triangle and had the following wording,

“Warning: Battery losing Charge – Tap here & Boost Your Battery Instantly”
(Appendix B)

This notification was observed over time to appear (i) when the App was initially opened; (ii) when the phone was used after it had been left for an extended time period on sleep mode (blank screen and inactive); (iii) automatically, at a timed interval following extended phone inactivity.

The Executive submitted that the notification did not appear to be linked to any App functionality associated with the reading and analysis of the phone's battery life. Instead it appeared to act as a reminder to the user about the prospect of the battery losing charge. When the notification was tapped, as instructed, the App instantly opened and the home screen for the App displayed the options of “Turbo boost” and “1-Tap Optimise”. The Executive submitted that in light of the ‘scareware’, and the wording of the warning that used the word “boost”, the notification was likely to mislead consumers into signing up to the premium rate subscription Service as they were falsely led to believe that they must act urgently to conserve the remaining power in their battery, which may in actual fact be fully charged.

Reason 4- “Battery Boosting”/ “Battery Boosted”

The Executive noted that two of the consumer-engagement (subscription) screens had displayed an icon of a battery, which stated either “Battery Boosting” or “Battery

Boosted” (**Appendix C**). The Executive submitted that the phrases would generally be understood by consumers to indicate that the application was charging or 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.

The Executive also submitted that a consumer may have unwittingly subscribed to the premium rate service as, following the “Battery Boosting” and “Battery Boosted” icons, the user was presented with a button marked “Done”. Full pricing information had been provided in a small font, however the Executive submitted that the combination of icons and wording led, or was likely to lead, consumers to believe that their battery had been “boosted” and not that they would be signing up to the subscription Service when they clicked on the ‘Done’ button.

Reason 5- User reviews

The Executive noted that promotional material contained user reviews (**Appendix A**). The user reviews were very positive of the application and gave the appearance to consumers that the application had many benefits. There was no reference to payment being made for any of the features of the App.

In addition, 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 were misled to believe that the review were very recent, when in actual fact they were potentially written months earlier. The Executive asserted that the user reviews were misleading as consumers were led to believe that other consumers had, on the very same day, uploaded highly positive reviews for the App.

In addition, the Executive stated that it was concerned that the reviews were not genuine. This was on the grounds that the same reviews were used across multiple versions of the App, and had not changed or been replaced by more recent reviews since September 2011. Further the Executive submitted that, in conjunction with the deliberate manipulation of the date of the reviews, the reviews appear to be designed to mislead consumers into downloading the App.

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

2. The Level 2 provider denied that the App and/or the Services were misleading and operated in breach of rule 2.3.2 of the Code. Generally, the provider submitted that PhonepayPlus had reviewed the Services and related promotional material in December 2011 and “signed off” the Services 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 of the Code had occurred. In relation to the individual reasons identified by the Executive, the Level 2 provider asserted:

Reason 1- “Free app doubles battery! Download the FREE App Now”

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 benefit potential customers by as much as double the battery life”. 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 double. As a result of the above, the provider did not accept that the claim was misleading

generally. However, during informal representations made to the Tribunal, it was accepted that the claim may not apply to all consumers.

The Level 2 provider also stated that, “Our product provides, in both free and premium functions, a one-stop shop for a consumer to manually or automatically adjust settings or stop processes on their phone that in turn decreases the drain on their battery which improves the battery life. Despite the Executive’s experience, all consumers not only receive the benefits from the Battery Overview and Task Killer functions but also those services provided through the Battery Management functions including the toggles that turn Bluetooth, WiFi, animations and sounds on and off for free. All of these features provide the customer free abilities to improve the battery life by decreasing the activities on the phone that drain the battery when they are operating. While the Executive explains that the information and “app killer” device (likely referencing the task killer function) features are all available on the Android phone, our position is that we provide these services in a convenient method for a consumer at no cost.”

Reason 2- Scareware (promotions)

During informal representations, the Level 2 provider stated that it had used the amended wording provided by the Complaint Resolution team, however the wording appeared to have “flipped back” or returned to the non compliant wording. 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. The provider also added, “[O]nce the Application is downloaded, there are features that do provide a consumer the ability to improve their phone’s battery life, at no cost, there are no financial implications associated with the advertisement”.

Reason 3- Scareware (in app)

The Level 2 provider denied that the alert was misleading and stated that, “[T]he alert that occurs after the application is downloaded is a reminder that their battery could be running low. As the Executive experienced, the consumer is taken back to the home page in the App if they click on the notification. This is beneficial to our customer because they can then utilise the manual free functions which can improve their battery life. The marketing is directly related to the services provided in our product and the consumer can gain benefit from the free features such as “task killer”, or the on/off toggle switches for WiFi, Bluetooth, animations and sounds in the Battery Manager function”.

During informal representations, the Level 2 provider added that the wording of both messages (set out in the Executive’s Reasons 2 and 3) was not intended to scare consumers, but merely to remind them that the App was available and to drive consumers to use the free and/or subscription features.

Reason 4- “Battery Boosting”/ “Battery Boosted”

The Level 2 provider asserted that the wording “Battery Boosting” and “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. During informal representations, the provider also

said it believed the distinction between the free elements of the App and the premium rate elements was clear.

Reason 5- 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.

During informal representations, the provider accepted that the changing dates was a “bad decision” and as a result of the Executive’s concerns, the provider asserted that it had changed the coding to make sure the date of reviews reflected the date they were written.

3. The Tribunal considered the evidence and noted the Level 2 provider’s detailed submissions. The Tribunal concluded that there had been a breach of rule 2.3.2 for the five reasons advanced by the Executive. In relation to reason 1, the Tribunal found that the impact of the App on a user’s battery would vary widely depending on a number of factors, including the state of a particular battery at the time and the handset’s settings, therefore the claim as to “Free app doubles battery! ...” was misleading or likely to mislead, in relation to at least some users. In relation to reason 2, the Tribunal found 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, as the App had no information regarding the actual level of battery charge. The Tribunal also found that the impact of the message would be to scare anxious consumers. The Tribunal found that the message detailed in reason 3 (“Warning: Battery losing Charge – Tap here & Boost Your Battery Instantly”), was likely to mislead consumers into signing up to the premium rate subscription service as consumers were falsely led to believe that urgent action was required to conserve their remaining battery power. With regard to reason 4, the Tribunal found that the use of the terms “Battery Boosting” and “Battery Boosted” was misleading, or likely to mislead, as it gave the impression that the App was independently increasing battery charge (as opposed to slowing down the speed at which the battery was losing its charge). Further, the Tribunal found that the large number of consumers stating that they had not consented to being charged was attributable to the misleading nature of the language used (notwithstanding the fact that the Level 2 provider had provided evidence of consent to charge in relation to all complainants). In particular, the combination of the words “Battery Boosted” and “Done” on the same screen were likely to mislead users into believing that the battery had already been “boosted” and by clicking “Done” they were ending the process, not subscribing to the premium rate elements. The Tribunal noted the Level 2 provider’s admission in relation to the dates of the user reviews and concluded that the provider had misled consumers in relation to the date of the reviews (reason 5). Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code for all 5 reasons.

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 noted that the message logs relating to complaints contained subscription reminders with the following wording,

“Android Power! Unltd Use!Ur sub 2Alerts+App Renewed, Avail now!Monthly £4,5 |help2help|stop2stop| droid.info-mobi-now.co.ukHottest App!Thanks!”

The Executive submitted that the above wording was unclear and confusing. Specifically, the Executive asserted that the confirmation that the Service was subscription based was not clear. As a result, the Executive submitted that rule 2.3.12(d) of the Code had been breached.

2. The Level 2 provider denied the breach. Specifically, the provider submitted that the reminder message would be understood by those familiar with common abbreviations in text messages. 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.
3. The Tribunal considered the evidence and noted the Level 2 provider’s submissions. The Tribunal found that there had been a breach of rule 2.3.12(d) on the basis that the words, “Ur sub 2Alerts+App Renewed” did not make it clear that the Service was subscription based. The Tribunal considered that the wording of the message as a whole was unclear. 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 **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The cost incurred was likely to be material to consumers, with the breaches likely to generate considerably inflated revenues for the Services. The Services themselves were still capable of providing some purported value to consumers.
- The Services had purposefully or recklessly been promoted in such a way as to impair the consumer’s ability to make a free and informed transactional decision.

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 criterion:

- The cost incurred was more likely to be material to consumers, with the breaches capable of inflating revenue streams to the Services.

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

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 failed to follow compliance advice given to its consultant during a Track 1 procedure in relation to the 'scareware' pop-up message.
- In light of the explanation given in informal representations that the Level 2 provider was closely connected with Pegasus Blue and Glass Mobile LLC and the overlap of the services provided and the personnel of the three companies, the Tribunal considered it was hard to differentiate between the three entities. The Tribunal noted that Pegasus Blue had been the subject of a previous PhonepayPlus adjudication (28 April 2011, Ref: 851621). In particular, the Tribunal noted that Pegasus Blue was found to have breached provision 7.12.5 from the 11th edition of the PhonepayPlus Code of Practice relating to the content of subscription reminder messages.

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

- The Tribunal noted that compliance advice from PhonepayPlus had been selectively implemented.
- The Level 2 provider asserted that it had changed the coding behind the user reviews and the wording of the subscription reminder messages and refunded 94% of complainants.

The revenue made by the Level 2 provider in relation to the Services was within the range of Band 1 (£500,000+).

Initially the Tribunal concluded that, in light of the serious aggravating factors in the case, the seriousness of the case should be considered as serious. However, on balance and having taken into account the complete circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as at the very top end of **significant**.

The Tribunal noted that a Tribunal had adjudicated against a separate legal entity, Glass Mobile LLC, in relation to a near identical service on 19 July 2012 (Ref: 06680). However, the Tribunal concluded that, in all the circumstances of the instant case and as it had taken a different view on the seriousness of the breaches, it could not follow the decision of the earlier Tribunal and the sanctions it imposed.

Sanctions Imposed

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

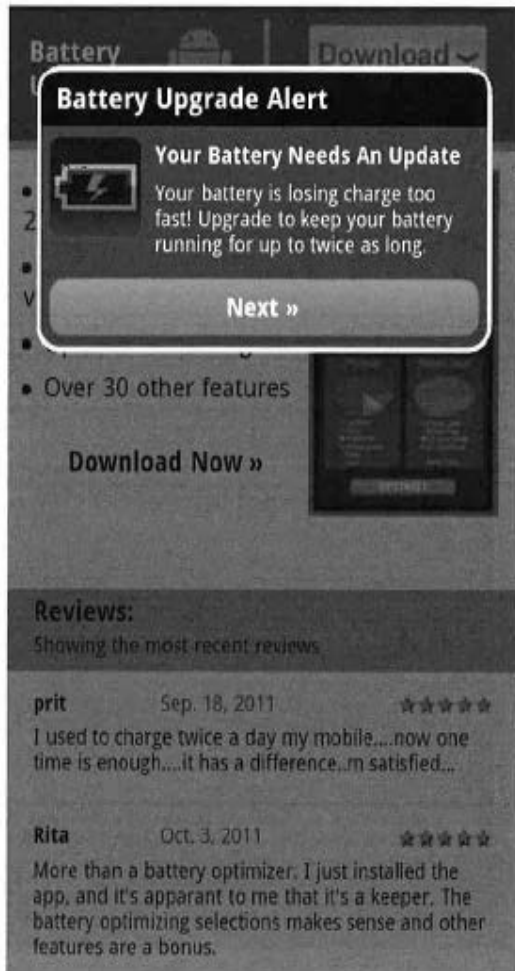
- A formal reprimand;
- A fine of £75,000; and
- A requirement for the Level 2 provider to submit any current or future app based services with a Premium Rate Service billing mechanism, including promotional material, to PhonepayPlus for prior permission for a period of one year.

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 Services, save where there is good cause to believe that such claims are not valid.

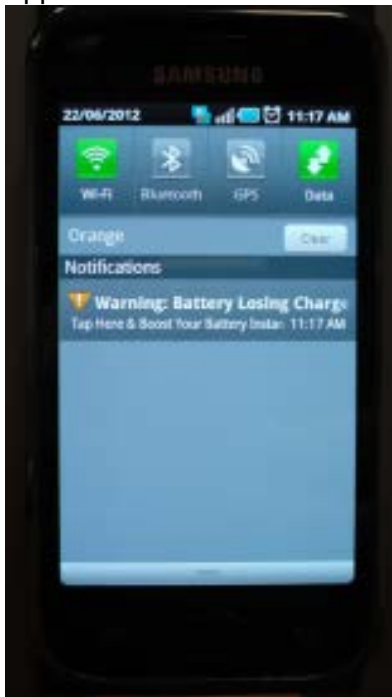
The Tribunal found there to be exceptional circumstances that justified the imposition of a fine in excess of the maximum recommended in the Investigations and Sanctions Procedure for cases with a serious rating of “significant”. These were the large number of complaints, the impact of the service on complainants and the scale of the Services (as evidenced by the revenue). As a result, the increased fine was required to ensure the imposition of a fair and proportionate sanction.

Appendices

Appendix A- Screenshot of pre-download 'scareware' and user reviews:



Appendix B- Screenshot of in-app 'scareware':



Appendix C- Screenshots of “Battery Boosting” and Battery Boosted” icons:

