

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 1 March 2012
TRIBUNAL SITTING No. 94 / CASE 2
CASE REFERENCE: 01251

Network operator: All Mobile Network Operators
Level 1 Providers: OpenMarket Limited, London and Mobile Interactive Group Limited, London
Level 2 Provider: Switchfire Limited, London

THIS CASE WAS ORIGINALLY BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.5 OF THE 12TH CODE

BACKGROUND

Since 1 September 2011, the Executive received 239 complaints in relation to a service operating on shortcodes 89911, 69001 and 61177. The service was an adult/glamour WAP pay-per-page/view service that allowed consumers to download such videos to their mobile handset.

The service appeared to have been promoted via sponsored adverts on search engines (such as Google) and via text messages containing a link to the WAP pay-per-page website.

Complaints about the service and promotional material fell broadly into three categories;

- complainants who stated they received unsolicited promotional text messages;
- complainants who stated they received unsolicited chargeable text messages; and
- complainants who stated that the promotional material was misleading or that pricing information was not prominently stated.

(i) The Executive's understanding of how the service worked

Monitoring performed by the Executive indicated that to access the service a user would have to either search for adult content via an internet search engine (such as Google) or click on a link contained in a text message sent to their handset. By searching for adult content or following a link sent to the mobile handset a user was directed to a landing page where thumbnails and a list of videos available for download were provided. The service landing page viewed by the Executive showed pricing information at the top of the page.

Accessing the service via Google

When accessing the service following a search via Google, the pricing was worded:

"Link to free vids see bottom of site. Premium vids/pictures just £3 each plus network data charges..."

When clicking on the play symbol of a video thumbnail on the landing page, the Executive was presented with a Payforit screen which required the user to confirm acceptance of a £3 charge to download the video. The wording on this screen stated:

"...Click "Pay Now" to get your hot pic/vid from SF WorkShop for £3..."

After accepting the £3 Payforit charge, the Executive was taken to a new page and presented with a video download screen with an option to click on a video to download or click on an option 'Next Harder Vids' (the "**Content Delivery Page**"). The Executive did not download a video but instead clicked on the option 'Next Harder Vids' and was taken to a new Content Delivery Page that was similar to the first, but provided a different video. This screen also contained an option for 'Next Harder Vids'. The Executive chose the 'Next Harder Vids' option a further three times and then closed the web browser. The Executive did not download any videos at any stage but, shortly after closing the web browser, the Executive was charged £15, which consisted of a £3 Payforit charge and £12 worth of reverse billed PSMS charges.

Accessing the service by clicking on a link on the handset

When accessing by clicking on a link on the handset, the wording was:

"Link to free vids see bottom of site. Premium vids/pics just £6 each plus network data charges".

In each case the T&Cs were available at the bottom of the landing page by scrolling down. The Executive clicked on one of the video thumbnails on the landing page and was taken to a Content Delivery Page which contained a video thumbnail and below that a button stating 'Next Harder Vid'. Below this button the page stated:

*"Pack 2 – premium vids pics just £6 each plus network data charges
HELP:08444457707".*

The Executive clicked on the button marked 'Next Harder Vids' and was taken to another Content Delivery Page with a video thumbnail and a button below it stating 'Next Harder Vids'. Beneath this button the page stated:

*"Pack 4 – premium vids pics just £6 each plus network data charges
HELP:08444457707".*

The Executive then exited the browser. After closing the browser, the Executive received 16 text messages charged at £1.50 each, thereby incurring a total charge of £24.

The above monitoring of the service via Google and a promotional text message to the handset showed that the cost of viewing a page was applied to the Executive's monitoring phone whether or not it had chosen to view the available videos within each of the Content Delivery Pages accessed. This therefore meant that a consumer accessing the service would be charged the same amount for accessing a Content Delivery Page (whether or not any videos were downloaded) as they would be for viewing the same page and downloading the video contained within it. Both scenarios would result in charges being reverse-billed to a consumer's handset.

THE INVESTIGATION

The initial concerns identified by the Executive were:

- Complainants receiving a high level of charges in a very short period of time;
- The issuing of unsolicited marketing messages;
- Complaints from parents on behalf of their children reporting that their children had been exposed to adult content;
- The misleading nature of the promotional material; and
- The continuing high number of complaints made by members of the public to PhonepayPlus.

In accordance with paragraph 4.2.3 of the PhonepayPlus Code of Practice 12th Edition (the “**Code**”), the Executive sent a preliminary investigation letter to the Level 2 provider on 23 January 2012, asking a series of questions as well as requesting evidence of opt-in to receive marketing messages and chargeable messages for several of the complainants’ MSISDNs. The Executive also asked the Level 2 provider to respond to consumer comments that the T&Cs in the promotional material were misleading. A response from the Level 2 provider was received on 30 January 2012. On 31 January 2012 the Executive wrote to the Level 2 provider and requested details of the opt-in to receive chargeable messages for one of the Executive’s monitoring phones. On 31 January 2012 a response was received from the Level 2 provider. On 1 February 2012 the Executive wrote to the Level 2 provider and again requested copies of recent contracts with all parties in the value chain. On 1 February 2012 the Executive received a response from the Level 2 provider.

On 1 February 2012 the Executive notified the findings of its preliminary investigation to three members of the Code Compliance Panel (the “**CCP**”) and sought authorisation to invoke the Emergency procedure on the Level 2 provider’s Adult WAP pay-per-page/view service under paragraph 4.5.1(b) of the Code. The CCP considered the seriousness and urgency of the case and reached an agreement on 2 February 2012 that the Emergency procedure should be used. This outcome was communicated to the Level 2 provider by the Executive on 3 February 2012 and the Executive further directed the Level 2 provider to suspend the service immediately. On 6 February 2012 the Level 2 provider wrote to the Executive confirming that the Adult WAP pay per page/view services on the relevant shortcodes had been suspended on 3 February 2012, but requested a review of the use of the Emergency procedure under paragraph 4.5.3 of the Code.

On 7 February 2012, in accordance with paragraph 4.5.1 (c) (iv) of the Code, PhonepayPlus published the use of the Emergency procedure on its website.

On 8 February 2012 three CCP members considered the review of the use of the Emergency procedure. Also on 8 February 2012, the CCP requested further information from the Level 2 provider. In response to this request, additional information was supplied by the Level 2 provider to the Executive on 9 February 2012. On 10 February 2012 a Tribunal considered the additional information supplied by the Level 2 provider and concluded its determination on the review application. The decision of the Tribunal was to keep the Emergency procedure in place on shortcodes 69026, 89911, 61177, 69001 and 69113. In relation to shortcodes 89292, 89996 and 89300 the Tribunal concluded from the evidence available to it that Switchfire was not the level 2 provider and therefore decided to withdraw the Emergency procedure against these three shortcodes. The decision of the Tribunal was communicated to the Level 2 provider on 10 February 2012. Further correspondence ensued between the Level 2 provider and the Executive in relation to this matter on 14 and 16 February 2012. The investigation then ceased with regards to shortcodes 69026 and 69113 as these related to facts and matters occurring prior to 1 September 2011 (the date on which the 12th Edition of the Code came into force).

The Executive therefore conducted this matter as an Emergency procedure investigation in accordance with paragraph 4.5 of the Code, and sent the Level 2 provider a breach letter with respect to shortcodes 89911, 61177 and 69001 on 20 February 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- **Outcome 2.3 (Fairness):**

“That consumers of premium rate services are treated fairly and equitably”

- **Rule 2.3.2**

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

- **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”.

- **Rule 2.3.6**

“Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage”.

- **Outcome 2.4 (Privacy):**

“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 consumer 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”.

- **Rule 2.4.3**

“Level 2 providers must ensure that consumers’ personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer”.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Outcome 2.3 (Fairness):

“That consumers of premium rate services are treated fairly and equitably”

Rule 2.3.2

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

1. The Executive raised a breach of Rule 2.3.2 for the following reasons.

Complainants:

Complainants stated that the promotional material did not make clear that when visiting the service website a user would be charged for browsing content rather than downloading it. The Executive presented the evidence of nineteen complainants. Examples of four of these complaints are described below:

Example 1

“Keep receiving text messages from this company at a charge of when it was my understanding from their website that download a video was a one off £3 charge”

In relation to this MSISDN the Executive requested from the Level 2 provider “screen shots of the exact promotional material (including all banners, landing pages, etc) accessed by these consumers”. The Level 2 provider responded:

“This user clicked on a text banner promoted by a Google Partner Site. The Google Display Network, through which we place these text banners, does not tell us which text banner was clicked on.”

Following the £3 Payforit charge the text message log showed that this consumer incurred a further £6 through premium rate SMS charges.

Example 2

The consumer claimed to have been misled by the terms and conditions of an adult WAP service. It was alleged that the WAP site billed him for browsing and viewing pages/pictures, but the promotion only stated that he would be billed for downloading materials. In relation to this MSISDN the Executive requested from the Level 2 provider “screen shots of the exact promotional material (including all banners, landing pages, etc) accessed by these consumers”. The Level 2 provider responded:

“This user clicked on a text banner promoted by a Google Partner Site. The Google Display Network, through which we place these text banners, does not tell us which text banner was clicked on.”

The text message log supplied by the Level 2 provider showed that this consumer was charged £129 on 8 September 2011.

Example 3

“The first one I clicked on I seen it was a rude picture and I deleted it. The first one that came it was just a mobile number so I thought it was just one of my pals”.

In relation to this MSISDN the Executive requested from the Level 2 provider “screen shots of the exact promotional material (including all banners, landing pages, etc) accessed by these consumers”. The Level 2 provider responded:

*"This user followed the link in a marketing message that read, " Essex star Amy's Ex releases secret wet Knickers vids! - http://eygk.com/s/z?*auuW3tcP5GY90BW8a"*

The Executive noted that the text message log supplied by the Level 2 provider for this MSISDN indicated that the initial marketing message started with what appeared to be a mobile telephone number. After clicking on the link the text message log showed that the consumer was charged £9.

Example 4

"I just woke up and I had about 40 messages I don't know what these messages are."

The consumer stated that he had no information and stated that he had not opened the messages but simply woke up to find them all, together with total charges of £150.

In relation to this MSISDN the Executive requested that the Level 2 provider provide evidence of the interaction between the MSISDN and the service, including details of content purchased, websites visited and any other information which demonstrated the user's interaction with the service which resulted in the user incurring charges. The Level 2 provider responded:

"This user came to our site on 01/Jan at 23:07. At the time he was using an iPhone. We know this because the UserAgent at the time was: "Mozilla/5.0 (iPhone; U; CPU iPhone OS 4_2_1 like Mac OS X; en-gb) AppleWebKit/533.17.9 (KHTML, like Gecko) Version/5.0.2 Mobile/8C148 Safari/6533.18.5" The user accessed our site on 01/Jan from 23:07 to 23:16, and on 02/Jan at 12:25, from 16:25 to 16:39, at 19:47, and at 22:45. His first purchase was via Payforit (Open Market transaction ID 1080747544). In total he purchased £183 worth of content but was only charged £154.50."

The Executive's monitoring:

The Executive monitored the service on 25 January 2012 by searching for adult content on Google. The Executive clicked on a sponsored link at the top of the landing page it stated:

"Link to free vids see bottom of site. Premium vids/pics just £3 each plus network data charges". (Appendix A)

After clicking on a video thumbnail the Executive was presented with a Payforit screen which indicated a charge of £3. After accepting the charge the Executive was presented with a Content Delivery Page where the video was available to download. Also presented on the screen was the option called 'Next Harder Vids' (Appendix B). The Executive did not download the video, but instead clicked the button 'Next Harder Vids'. Again the Executive was presented with a similar Content Delivery Page with a video available for download and a button with 'Next Hard Vids' written on it. The Executive clicked on the button 'Next Harder Vids'. This process was repeated four times in total. The Executive then exited the website. During this monitoring of the

service the Executive did not download any video content at any stage. After leaving the website the Executive was charged a £3 Payforit charge and a further £12 (eight messages at £1.50 each), which indicated that the Executive was charged for five videos in total.

The Executive questioned the Level 2 provider about the charging mechanic for the service and was advised:

“Switchfire’s adult WAP Pay-per-page service operate on the basis that users pay to gain access to the download / streaming page. This is the way that all pay-per-page services operate and the way that Pay for it operates. Users are not charged for browsing the site and they are only charged for requesting access to the video download / streaming page. Whether they then choose to download the content that they have purchased is beyond our control for a number of technical and timing reasons”

The Executive submitted that the statement, *“Link to free vids see bottom of site. Premium vids/pics just £3 each plus network data charges”* did not clearly advise visitors to the website that they were paying to gain access to a Content Delivery Page, and this was reflected in the apparent confusion expressed by the consumer about the charges that had been incurred.

In light of the above complaints and the Executive’s monitoring it submitted that the promotion and/or service misled consumers as to the nature of the charging mechanism and cost of the service. The Executive submitted that a breach of rule 2.3.2 of the Code had occurred, and therefore in this respect, the Level 2 provider had not achieved Outcome 2.3

2. The Level 2 provider provided the following responses with respect to the Executive’s complainant and monitoring evidence:

Comments on Example 1

The Level 2 provider stated that this user appeared to be claiming that he thought he was entitled to download as much content as he wanted for £3. The Level 2 provider commented that the landing page of the site stated prominently and proximately that the cost was *“vids/pics just £3 each”*. This was repeated again at the bottom of the landing page which stated *“Cost is £ 3 per 1 vid /pics”*, and immediately below the purchase button on all subsequent pages, which stated *“vids just £ 3 each”*. It was submitted that the user was therefore aware of the £3 price and must have seen this information. It was unclear to Switchfire how the user missed the word “each” following the “£3”.

Switchfire submitted that In total this user accessed two free videos, then made a Payforit purchase for £3, and then made two further purchases for £3 paid via PSMS. The Level 2 provider argued that, given that the user found the free content and accessed two free videos first, he must have known which content was premium rate and which content was free. If there were any doubts in his mind, the Level 2 provider was of the view that such doubts would have been resolved during the Payforit

process to access the third video. It was not therefore credible that the user could have forgotten that there was both free content and premium rate content, and where the free content was located. For most first time purchasers of the Level 2 provider's content the user was directed through a Payforit transaction to further reinforce pricing clarity. Such pricing clarity was designed to enforce not only the cost of the purchase, but the exact point in the process at which charges were incurred. The Payforit process was not entirely user friendly, and therefore, having established absolute pricing clarity on this first purchase, the Level 2 provider used the more user-friendly PSMS billing mechanic thereafter. This argument was confirmed during informal representations at the Tribunal hearing on 1 March 2012.

Comments on Example 2

The Level 2 provider asserted that pricing and service T&Cs were provided prior to purchase on the service landing page (and subsequent pages). The word "download" never appeared prior to purchase, only appearing at the top of the Content Delivery Page, above the thumbnail with the "play" icon, instructing the user, "Click below to download". The Level 2 provider asserted that pricing was clear in that each video was charged at £3. Further, as this user's first purchase was via Payforit, the Level 2 provider believed that there could have been no misunderstanding that the videos were being charged for prior to obtaining access to download the videos, and prior to actually downloading them.

Comments on Example 3

The Level 2 provider argued that this user did not join any of its own WAP Pay-per-Page services, and that the relevant level 2 provider for the promotion in question was Pumpkin Film Productions Ltd (trading as Redlight Central TV) ("**Redlight**"), and not Switchfire. The Level 2 provider advised the Executive that, if it had any concerns about the promotion, they ought to have been addressed to Redlight. The Level 2 provider further noted that this user did not expressly claim that he was misled by either the price of the content on the site, or the Pay-per-Page mechanic.

Comments on Example 4

The Level 2 provider argued that the user appeared to be denying that he visited the Level 2 provider's site. However, his first purchase was via Payforit. The Level 2 provider further stated that OpenMarket Limited, who was the Payforit Approved Payment Intermediate ("**API**") associated with this Payforit purchase ("**OpenMarket**"), was in a position to confirm that the user was on the Level 2 provider's site. The relevant transaction ID was provided to the Executive on 30 January 2012.

The user was on its site in the evening of 1 January 2012, and accessed it four times on 2 January 2012. The Level 2 provider stated that the user purchased 61 videos at £3 each (resulting in a total cost £183), but was only charged £154.50. This was due to the Level 2 provider's implementation of a voluntary £150 monthly spend cap, which was put in place by early December 2011. The Level 2 provider provided evidence of this in the form of message logs and drew the Executive's attention to the following message which was sent to users once they had reached the monthly spending cap of £150:

“Thanks for using our services. From now until the end of the month all access will be free. Switchfire:Help:08444457707. Txt STOP 2 quit”.

The Level 2 provider further commented that the user did not claim to have been misled by either the pricing on its site or the Pay-per-Page mechanic. This user was instead claiming that he never went to the Level 2 provider’s site but, based on the evidence presented, it had.

The Level 2 provider further stated that it understood the Executive's request to be to provide whatever information it felt demonstrated that the user interacted with the service, and that this interaction resulted in the user consenting to being charged. The Level 2 provider felt that the Payforit transaction was sufficient to demonstrate that the user had interacted with the service as the transaction was hosted by another entity and there was therefore third party confirmation that the user was on its site. In addition the Level 2 provider argued that pricing was clear and the user definitely consented to being charged.

Further arguments in relation to all complainants

The Level 2 provider stated that of the 280,559 people who purchased content from the WAP Pay-per-Page service since 1 September 2011, only 19 were cited as potentially being misled. The Level 2 provider argued that not a single one of them represented good evidence of being misled. The Level 2 provider made the following observations in relation to the 19 complainants presented by the Executive to the Tribunal:

- nine made their first purchase via Payforit, yet four of these nine claimed to have never visited the Level 2 provider’s site. The assertion that these people were misled was perplexing given that Payforit was the gold standard for pricing clarity. The Level 2 provider queried how these users could be clear about the price and mechanic of the service for the first Payforit purchase, but be misled for subsequent purchases;
- of the ten complainants who did not use the Payforit billing mechanic in the first instance, not all seemed to claim that they were misled. The Level 2 provider asserted that four were only providing hearsay evidence, typically repeating what their children told them. The Level 2 provider asserted that evidence such as this was not reliable in terms of determining whether the service was misleading, or whether the actual user of the site felt misled;
- four complainants only offered an opinion on what they thought the actual users of the phones were doing. Of these, two asserted that the user of the phone did not go to the Level 2 provider’s sites whilst there was robust evidence that they did;
- two complainants offered up a story that was at odds with the robustly verifiable facts and were therefore unsafe. The Level 2 provider asserted that eight of the 19 complainants asserted facts that had been robustly verified to be false;
- three complainants did not actually appear to be claiming to be misled by the Pay-per-Page mechanic or the Level 2 provider’s pricing information. It further appeared that 14 complainants were not claiming to have been misled. Instead they claimed that they never visited the Level 2 provider’s site (when it had been

proven that they did), or they just wanted messages to stop, or they were asking for an explanation of the facts; and

- one complainant did not seem clear about which site he was looking at. The Level 2 provider further stated that at least four of the 19 complainants appeared to have had multiple sites open around the same time and it appeared that they might be complaining about other people's sites. With regard to one complainant, it was entirely unclear from his description and perhaps in his own mind whether he even checked whether the Level 2 provider's content was free or not. The Level 2 provider stated that, if the user had enquired about this by telephone, he would have been given a full refund as a goodwill gesture.

The Executive's monitoring

With respect to the Executive's monitoring the Level 2 provider stated that, after accepting the Payfortit charge, the Executive was presented with the Content Delivery Page which provided (i) the link to the content that had already been purchased via Payfortit, and (ii) a link to further chargeable content. Having made the applicable payment via Payfortit, the Executive was simply required to press 'PLAY' to access the content purchased. The Level 2 provider claimed that its system was not designed so as to automatically download content onto the user's handset without the user pressing 'PLAY' as it was not convinced that this would constitute good practice.

The Level 2 provider made a number of observations once it viewed the Executive's monitoring video taken on 25 January 2012:

- The price of the videos was visible as stated at the top of the landing page. It was prominent, proximate, in line with compliance advice sought and obtained from the Executive in April 2009 and, in the opinion of the Level 2 provider, was compliant with the Code (in particular Paragraph 2.12 of the General Guidance Note: Promotions and promotional materials);
- The price was visible at the bottom of the landing page which the Level 2 provider believed went beyond the requirements of the Code;
- The price was prominent and proximate on the Content Delivery Pages, as it was immediately below the "*Next Harder Vids*" button;
- The first purchase by the Executive was via Payfortit, meaning that the Executive was informed of the price yet again before having spent any money, and had to click a button labelled "*Pay Now*";
- The Executive saw the price of the service five times in relation to that first purchase. Every single time the pricing was prominent and used extremely clear language;
- The Executive purchased five videos and was charged for five videos. In accordance with the Level 2 provider's standard practice, after the initial Payfortit transaction, the Executive was charged via PSMS. The experience was perfect in all regards;
- The Executive's experience on 25 January 2012 was not unique. The Level 2 provider stated that OpenMarket monitored the Level 2 provider's WAP Pay-per-Page sites on a regular basis and had always found pricing to be prominent and proximate, and billed correctly every time. The Level 2 provider further stated

that OpenMarket told the Executive this in their reply to the preliminary investigation of this case, sent on 19 January 2012.

- On this basis, the Level 2 provider was keen to assert that its sites were not misleading either in terms of pricing clarity, the pay-per-page mechanic, or the way the pay-per-page mechanic was presented.

The Level 2 provider further stated that the Executive's submission that the information on the landing page (see below) did not clearly advise visitors to the website that they were paying to gain access to a Content Delivery Page was perplexing:

"Link to free vids see bottom of site. Premium vids/pics just £3 each plus network data charges",

The Level 2 provider further asserted that it had sought and obtained compliance advice obtained from the Executive in April 2009. After receiving this advice the service was tested and the following confirmation was received from the Executive:

"I can confirm that I have no concern regarding the WAP landing page as following the amendments made."

The Level 2 provider found it perplexing that the Executive now found the service to be so misleading as to require an Emergency procedure to be invoked, whereas the Executive had nearly three years to change its mind about its previous compliance advice and was prompted on 8 December 2011 to reconsider it when the Level 2 provider wrote to PhonepayPlus on this exact point. It was the view of the Level 2 provider that this distinction between downloading and purchasing was of no consequence as to whether there had been a breach of the Code. This was the way that online purchases worked, and around which the Payforit mechanism was designed.

The Level 2 provider further stated that there were two standard ways of selling content via WAP sites: (i) pay-per-download, and (ii) pay-per-page. PhonepayPlus required providers to obtain Prior Permission to operate Pay-per-Page services. The Level 2 provider confirmed that it had Prior Permission to operate these services, and operated its services in line with this Prior Permission. The Level 2 provider believed that these points were relevant because it was operating under this Prior Permission and the compliance advice when the CCP investigated and ruled on cases against the Level 2 provider on 7 January 2010. In both cases the CCP found that the Level 2 provider's operation of Pay-per-Page services and how it described these services was fair and not misleading. The Level 2 provider further argued that there was no material difference between the service as at the date of the Tribunal hearing for this case, and the date of the prior adjudications on 7 January 2010. The Level 2 provider argued that there was no new evidence that distinguished this case from these prior adjudications and that therefore, the alleged breach of rule 2.3.2 of the Code should be dismissed out of hand.

3. The Tribunal considered the evidence and concluded that, notwithstanding the Level 2 provider's submissions with respect to nineteen of the complainants, the Content Delivery Page was misleading as it failed to inform consumers that, by clicking on the button *"Next Harder Vids"*, the consumer would immediately incur a charge, whether or not he or she had chosen to view the available video within each Content Delivery Page. In the judgment of the Tribunal a reasonable consumer would assume, in the absence of information to the contrary, that by clicking on *'Next Harder Vids'* he or she

would be presented with a further opportunity to browse thumbnails without further charge and/or a further warning that a cost would be incurred by proceeding. The Tribunal accordingly concluded that the service was in breach of rule 2.3.2 of the Code and as a consequence, the Level 2 provider had not achieved Outcome 2.3 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Outcome 2.3 (Fairness):

“That consumers of premium rate services are treated fairly and equitably”

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 raised a breach of rule 2.3.3 for the following reason.

On 26 January 2012 the Executive again monitored the service, this time by clicking on a marketing message sent to the handset that day. The Executive was taken to a landing page with a selection of videos available to download. At the top of the landing page it stated:

“Link to free vids see bottom of site. Premium vids/ pics just £ 6 each plus network data charges”.

The Executive scrolled down to the bottom of the landing page. Whilst doing so, the monitoring Executive inadvertently touched two of the video thumbnail icons on the landing page. The Executive was, however, not taken to the relevant Content Delivery Pages. The Executive scrolled back up to the top of the landing page and clicked on a video thumbnail. The Executive was taken to a Content Delivery Page which contained a video thumbnail and below that a button stating ‘Next Harder Vid’. Below this button the page stated:

*“Pack 2 – premium vids pics just £6 each plus network data charges
HELP:08444457707”.*

The Executive clicked on the button marked ‘Next Harder Vids’ and was taken to another Content Delivery Page with a video thumbnail and a button below it stating ‘Next Harder Vids’. Beneath this button the page stated:

*“Pack 4 – premium vids pics just £6 each plus network data charges
HELP:08444457707”.*

The Executive then exited the browser. After closing the browser the Executive received 16 text messages charged at £1.50 each (total charge £24). The Executive questioned the Level 2 provider about the activity on its monitoring phone and was advised the following:

"The user was sent a marketing message the next day which read: "(freemsg) Famous BB Star Sex Tape Leaked!! (61177):: http://adpd.net/s/z?*Tk6ZT2BBsGYcq 0IVa". They followed this link at 14:11:35 and 14:33:10 on 26/Jan. By clicking on this link the Executive was taken to a site called "Carline Flack I" [(Appendix A)]... Content on this site costs £6 per video. It says this at the top of the page - "Premium vids/ pics just £ 6 each". And at the bottom of the page – "Cost is £ 6 per 1 vid/ pics". Between 14:11 and 14:35 on 26Jan the user purchased 4 videos for £6 each. All purchases were paid via PSMS".*

The Executive did not however accept that it had purchased and/or consented to purchase four videos as the above monitoring showed that it did not select any video to download or stream, and had not been advised that by simply clicking on a video thumbnail on the landing page, a charge would be incurred. The Executive also referred to complainants mentioned under the alleged breach of rule 2.3.2 above, who were not clear that they would incur charges for accessing a Content Delivery Page, as opposed to downloading videos.

The Executive also specifically referred to the following complainant:

"Switchfire.com - this service was not requested and has not been subscribed to at any time by me or through my telephone. I have incurred costs of £48 as a result of unsolicited text messages on the 1st and 32nd [sic] December 2011. The company do not respond to calls. I have been compelled to change my mobile number to avoid the risk of more unsolicited charges. : [sic] I was not aware of this service until I started receiving unsolicited text messages. With the help of my mobile phone provider, I established that they are Switchfire.com, some form of adult chat service. I received 25 texts in an hour on the 1/12/11, and 12 in 30 minutes on the 2/12/11 - all with the same wording indicated below. I have never requested, viewed, accessed, activated or subscribed to this service, and the texts are costing me £1.50 each. These are totally unrequested text messages. I have tried to stop them without success, have called the company but they do not reply."

In relation to this MSISDN, the Executive requested that the Level 2 provider provide evidence of the interaction between the MSISDN and the service, including details of content purchased, websites visited and any other information which demonstrated the user's interaction with the service which resulted in the user incurring charges. The Level 2 provider responded:

"This user came to our site on 30/Nov at 21:29. He was using an Orange Rio at the time (also known as an ZTE-G X991). His UserAgent at the time was: " ZTE-G-X991-Rio-orange/X991_V1_Z2_FRES_D18F109Profile/MIDP-2.0Configuration/CLDC-1.1 Obigo/Q03C". The user accessed our site on from 21:29 to 21:36 on 30/Nov. In total he purchased £48 of content and was charged £48. We note that this user tried to return to one of our sites on 20/Jan but was blocked. At that point he had moved his SIM to a Windows phone as the UserAgent was: " Mozilla/5.0 (Windows NT 6.1) AppleWebKit/535.7 (KHTML, like Gecko) Chrome/16.0.912.75 Safari/535.7"

The Executive submitted that both its monitoring and the complaints received demonstrated that consumers incurred charges from the service without their consent.

In light of this, the Executive submitted that a breach of rule 2.3.3 of the Code had occurred, and therefore in this respect, the Level 2 provider had not achieved Outcome 2.3 of the Code.

2. The Level 2 provider argued in its responses to the Executive, within the witness statement of its operations director (together with accompanying annexes), and during informal representations, that the Executive's summary of the monitoring session on 26 January 2012 was seriously flawed in a number of key regards. As such the Level 2 provider asserted that the Executive's statement that, "*After closing the browser the Executive received 16 text messages charged at £1.50 ...*" was untrue. The Level 2 provider stated that, in light of such flaws, the evidence relating to the monitoring session on 26 January 2012 should have been excluded in its entirety from the case investigation.

The Level 2 provider described its arguments in relation to the Executive's monitoring evidence as follows:

- On 30 January 2012 the Level 2 provider pointed out that the Executive's monitoring started at 14:11 on 26 January 2012 and not 14:32 (as claimed by the Executive). During the period between 14.11 and 14.32, the Executive had made a purchase of £6. This information was ignored when seeking to invoke the Emergency procedure and ignored when the formal breach letter was sent to the Level 2 provider on 20 February 2012. The Level 2 provider repeated this assertion during informal representations at the Tribunal hearing on 1 March 2012 and concluded that this £6 purchase accounted for the first £6 of the £24 charged to the Executive's monitoring phone, whilst not appearing on the monitoring video
- In the witness statement of the operations director of the Level 2 provider dated 28 February 2012, the operations manager asserted that the two inadvertent touches on video thumbnail icons by the Executive during monitoring on 26 January 2012 did not result in additional charges to the Executive's monitoring phone. During informal representations the Level 2 provider conducted a technical analysis of the Executive's monitoring evidence and revealed that no payment instructions were sent to the Level 2 provider in response to either of the inadvertent touches on the video thumbnail icons by the Executive during monitoring.
- During informal representations the Level 2 provider further argued that the monitoring method used by the Executive was a dangerous environment in which to test a service given that it involved connecting the monitoring phone to a computer which ran specialist monitoring software. The Level 2 provider argued that the interaction of three separate devices (the PC, the handset and the monitoring software) created an environment that was not a realistic representation of the user experience. The Level 2 provider argued that, as a consequence of this, the Executive had used a dangerous monitoring environment that was prone to flaws. The Level 2 provider pointed to one such flaw which seemed to indicate that the monitoring handset had sent purchase

instructions of £6 to the Level 2 provider's server although the monitoring video showed that the Executive user had not clicked on an icon within the service. The Level 2 provider concluded that this £6 purchase accounted for the second £6 of the £24 charged to the Executive's monitoring phone.

- The Level 2 provider confirmed, by way of accounting for the remaining £12 charged to the Executive's monitoring phone that a £6 charge had been incurred when the Executive clicked on a video thumbnail on the landing page. The final £6 charge was incurred when the Executive clicked on the button on the Content Delivery Page stating '*Next Harder Vid*'.

In relation to the complainant cited by the Executive the Level 2 provider asserted that the complainant's claim did not stand up to scrutiny. The user had claimed that he did not use the Level 2 provider's service and that no one else used his phone to access it. However, the Level 2 provider claimed that dialogue data held in its records could confirm that this user accessed the service at 21:29:01 on 30 November 2011. The Level 2 provider stated that this was undeniable robust verification of someone using this user's handset to access the service.

The Level 2 provider further stated that in addition to its monthly spend cap of £150, it also had a daily spend cap on some networks, after having purchased £48 worth of content in a day, this user was cut off with the message:

"FREE MSG:: You have reached your daily spend limit on this service, you can continue using this service tomorrow."

The Level 2 provider further noted that it spoke to this user on 7 December 2011, and the Level 2 provider's customer services operator offered her a full refund.

3. The Tribunal considered the evidence and confirmed its earlier finding that the Content Delivery Page was misleading as it failed to inform consumers that, by clicking on the button "*Next Harder Vids*", they would immediately incur a charge, whether or not they had chosen to view the available videos within each Content Delivery Page. The Tribunal therefore concluded that, notwithstanding the Level 2 provider's persuasive arguments in relation to the Executive's monitoring, consumers who had been misled in this way would not have consented to the charges they subsequently incurred. The Tribunal accordingly concluded that the service was in breach of rule 2.3.3 of the Code and as a consequence, the Level 2 provider had not achieved Outcome 2.3 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Outcome 2.3 (Fairness):

"That consumers of premium rate services are treated fairly and equitably"

Rule 2.3.6

“Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage”.

1. The Executive raised a breach of Rule 2.3.6 of the Code for the following reason.

A number of complainants demonstrated a high level of charges being incurred. Examples of these complaints are provided below:

Example 1

The consumer claimed to have been misled by the T&Cs of an adult WAP service. The WAP site billed him for browsing and viewing pages/pictures, but the promotion only stated that he would be billed for downloading materials. In relation to the above MSISDN the Executive requested from the Level 2 provider:

“screen shots of the exact promotional material (including all banners, landing pages, etc) accessed by these consumers”.

The Level 2 provider responded:

“...This user clicked on a text banner promoted by a Google Partner Site. The Google Display Network, through which we place these text banners, does not tell us which text banner was clicked on.”

The text message log supplied by the Level 2 provider showed that this consumer was charged £129 on 8 September 2011.

Example 2

“I was on you tube I received a message saying view this site I clicked on the link and it said down load for 10p I did a few downloads and then after would I kept getting text saying thanks for viewing content I have received 104 texts my phone company has cut me off

Guaranteed the site said 10p to download if it was anything more I would not have done it I mean 10p it's a bargain

The consumer [sic] was on you tube and I came out and then a few hours later I received a message saying download for 10p”.

In relation to this MSISDN the Executive requested from the Level 2 provider:

“screen shots of the exact promotional material (including all banners, landing pages, etc) accessed by these consumers”.

The Level 2 provider responded:

“...This user clicked on a text banner promoted by a Google Partner Site. The Google Display Network, through which we place these text banners, does not tell us which text banner was clicked on.”

The Executive noted that the text message log supplied by the Level 2 provider for this MSISDN indicated that the first transactions listed on the text message log were for content charged at 10p. After the initial 10p entries the log showed that the total charges of £216 were incurred by the consumer for activity on 16 October 2011, although the Executive noted that £180 of the £216 charges were not billed to the consumer until 26 October 2011.

Example 3

"My daughters [sic] only 14 she hasn't viewed anything." [From PhoneyPayPlus' complaints records] The consumer stated her daughter is only 14 and she has not viewed any content on the phone.

In relation to this MSISDN the Executive requested that the Level 2 provider provide evidence of the interaction between the MSISDN and the service, including details of content purchased, websites visited and any other information which demonstrated the user's interaction with the service which resulted in the user incurring charges. The Level 2 provider responded:

"...This user came to our site on 03/Dec and 09/Dec. Both times he was on an iPhone as the UserAgent was: " Mozilla/5.0 (iPhone; CPU iPhone OS 5_0 like Mac OS X) AppleWebKit/534.46 (KHTML, like Gecko) Version/5.1 Mobile/9A334 Safari/7534.48.3" The user accessed our site on the 3rd, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 23rd, 26th, 27th, 28th, 30th, and 31st of December. He accessed it on the 1st, 4th, and 6th of January. In total he purchased £1761 worth of content; however, we voluntarily capped his spend in Dec to £153 and his spend in Jan to £154.50."

Example 4

"[From PhoneyPayPlus' complaints records] Consumer has been charged by Switchfire but is insistent that he has not used the service. He has spoken to Switchfire and they have been no help. I've told him what to look for on the bill and to be aware if anyone else has used the phone without his knowledge but he says that no-one else has access except his mother who is in her 60's. The consumer claims that his phone service was switched off on the day, Switchfire claims he used their service. He claims not have internet access or call access on the day of the call. I have advised to send in a copy of his itemised bill".

In relation to this MSISDN, the Executive requested that the Level 2 provider provide evidence of the interaction between the MSISDN and the service, including details of content purchased, websites visited and any other information which demonstrated the user's interaction with the service which resulted in the user incurring charges.

The Level 2 provider responded:

"...This user came to our site on 25/Jun, 01/Oct, and 02/Oct. He was using a Samsung GT-S5570 the entire time as his UserAgent was: " Mozilla/5.0 (Linux; U; Android 2.2.1; en-gb; GT-S5570 Build/FROYO) AppleWebKit/533.1 (KHTML, like Gecko) Version/4.0 Mobile Safari/533.1" On the shortcodes in question the user accessed our site on 1st, 2nd, 3rd, 5th, 8th, 11th, 14th, 17th, and 20th October. His

first purchase was via Payforit (Open Market transaction ID 21891647). In total he purchased £462 worth of content and was only charged £430.50.”

In the Level 2 provider’s correspondence to the Executive dated 30 January 2012, Switchfire stated the following in relation to spending caps:

“Monthly Spend Caps: For a number of years now we have been running self imposed monthly spend caps and recently we have lowered those caps to around £150 per month. Therefore once a user hits this spend in a month, all further activity on that sites during that month is without charge. As a result of this limit we are now sending the following message: [“]FreeMsg: Thanks for using our services. From now until the end of the month all access will be free. Switchfire Help: 08444457707. Txt STOP 2 quit[“] As examples; [the]User...purchased £183 worth of content in January but was only charged £154.50. User 07738106215 purchased £1761 worth of content in December and January, but was only charged £153 in December and £154.50 in January.”

The Executive noted the Level 2 provider’s comments in relation to its spend cap, but also noted that in the case of this MSISDN the complainant was charged £430.50 in October 2011. The Executive further noted that the payment mechanic of the service allowed consumers to be charged a very high level of charges in a very short period of time. For example, the text message log for the MSISDN in Example 1 showed billable activity for £129 on 8 September 2012 between 05:05:04 and 05:23:21 (a period of just over 18 minutes). The Executive also noted that in some cases, it was only when the user left the WAP-Push site that chargeable messages were received, at £1.50 each, and in some instances over a period of days after accessing the service. Further, although the user was informed of charges on the landing page (albeit misleadingly in the Executive’s view), they were not informed again of any charges.

Irrespective of the spending cap purportedly applied, the Executive submitted that the high level of charges, some of which had been incurred within a very short period of time, amounted to excessive use and that the Level 2 provider had not taken reasonable and prompt steps to identify such excessive use and inform the relevant users. The Executive submitted that this failure constituted a breach of rule 2.3.6 of the Code, and therefore in this respect, the Level 2 provider had not achieved Outcome 2.3 of the Code.

2. The Level 2 provider provided the following responses with respect of each of the above sample complainants.

Example 1

The Level 2 provider asserted that this user's first purchase was via Payforit and as such there could have been no misunderstanding that the service content cost was £3 per video. The Level 2 provider further asserted that the user had not claimed that the service charges were excessive.

Example 2

The Level 2 provider asserted that although one of its sites accessed by this user sold videos for 10p, this exceptionally low price was highlighted on the page both in the title of the site and with a visible 10p coin in the logo. The Level 2 provider's other two sites did not contain this offer. The Level 2 provider therefore believed that there was no ambiguity in the user's mind as to which site was offering 10p content, and which sites were offering £6 content. The Level 2 provider further asserted that this user's first purchase was via Payforit and as such there could have been no misunderstanding that the service content had a cost of £3 per video, and that the Level 2 provider was charging prior to the user even gaining access to the download page, let alone being prior to actually downloading the content. The Level 2 provider further noted that the user did not claim that the service charges were excessive. The user's total bill of £216 was incurred in October 2011, when the monthly spending cap was not £150, but £500. The monthly spending cap was not reduced to £150 until December 2011.

Example 3

The Level 2 provider categorically stated that this user did not access any adult content. She did access the Level 2 provider's service, but at no time did she have access to adult content. The Level 2 provider stated it had evidence to confirm that the user accessed the service seventeen times and purchased 587 items of content. The Level 2 provider claimed that it complied with and went beyond the requirements of rule 2.3.6 of the Code by informing the user and voluntarily stopping all further charges for that month. The user's mother had not claimed that the charges were excessive but had claimed that her daughter did not visit the service. The Level 2 provider did however have evidence to prove that she had.

Example 4

The Level 2 provider stated that this user's claim did not stand up to scrutiny. This user's first purchase was via Payforit, and the Level 2 provider claimed that, as a result, the user used the service, was aware of the price of the service content, and was further aware of the point in the process at which the charges took place (i.e. before download). The Level 2 provider further pointed out that the user did not claim that the service charges were excessive but he was instead claiming that he did not visit the service at all. The Level 2 provider further confirmed that this user's activity was in October 2011, when the monthly spend cap was £500, and this explained why the user was billed £430.40. The Level 2 provider further rejected the suggestion that, the fact that it took the user only 18 minutes to find the six videos that he wanted to enjoy later, represented excessive use. This Level 2 provider further pointed out the fact that the user never claimed that the service charges were excessive.

This user visited the service once on 27 August 2011, six times on 8 September 2011, once on 12 September 2011, and four times on 13 September 2011. The user accessed only free content on 27 August 2011 and, the Level 2 provider asserted that the user must have decided he liked the quality of the service and decided to visit it again on 8 September 2011 with the intention of purchasing content.

The Level 2 provider further stated that, while the Executive's claim that charges were sometimes incurred by users only after they had exited the service was factually

correct, it was exceptionally disingenuous. The Level 2 provider stated that the Executive's claim that users were not informed of any charges once they left the landing page was factually incorrect. The price was listed on the landing page and on every Content Delivery Page. The price of the content was stated five times during the first Payfort purchase. It was further the nature of premium rate SMS as a billing mechanic that such chargeable messages cannot be delivered if the user has insufficient credit. Such messages are then delivered when the user next topped up the credit on their handset. The Level 2 provider confirmed that network operators had since the inception of the industry, published policies regarding the retrying of failed chargeable text messages. Further, once a premium-rate SMS leaves the Level 2 provider's platform, its delivery would be completely outside the Level 2 provider's control and it would not be possible to retract an SMS that had been sent but not yet delivered. It was the Level 2 provider's view that the issue that the Executive raised therefore affected every single premium rate service in existence in every country in the World. It further asserted that this issue was not raised by any of the complainants.

The Level 2 provider further stated that "Excessive use" was not defined in the Code or its General and & Service-Specific Guidance (the "**Guidance Notes**") In the adjudications involving the Level 2 provider on 7 January 2010, the Level 2 provider noted that the Executive had cited users who had spent very large sums of money, such as £746, £1798, £712 and £654 in a relatively short period of time. Particular attention was drawn to one user who spent £1528. The Level 2 provider further stated that, in its ruling on 7 January 2010, the Tribunal *"expressed concern at the potential for this service mechanic to result in users incurring high charges"*. However, the Level 2 provider stated that the Tribunal found both the mechanic and how the Level 2 provider described this mechanic to be fair and not misleading. The Level 2 provider added that, to emphasise this point the alleged breaches in 2010 of Paragraph 5.4.1(a) of the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) were described as being about "fairness". As such, by not upholding the alleged breaches, the Tribunal ruled that the above charges were "fair" and thus by extension not "excessive".

In light of these benchmarks the Level 2 provider submitted that for WAP Pay-per-Page services "excessive use" should be somewhere in excess of £1000 in one month, although, notwithstanding this view, the Level 2 provider had voluntarily introduced the cap of £150, which was far below this threshold. The Level 2 provider further stated that, when the notes of the 7 January 2010 adjudication were sent to the Level 2 provider, the Executive at the time stated that PhonepayPlus would be meeting internally to agree how to react to the Tribunal's comments. The Level 2 provider confirmed that it still had not heard back from PhonepayPlus and that, as such, PhonepayPlus had the opportunity to define "excessive use" but chose not to. The Level 2 provider further asserted that none of the examples given in the current case was in excess of £500 in one month. Only two users spent more than about £150 in one month, and both of these:

- Incurred their charges in October 2011 (and since then the Level 2 provider had lowered its voluntary monthly spend cap);

- made their first purchases via Payforit; and
- spent £216 and £428 respectively, which was well below the £1000 threshold that the Level 2 provider believed should have been the benchmark for excessive use.

The Level 2 provider stated that, since January 2010, it had voluntarily and proactively taken a range of additional steps to reduce expenditure. It reduced the average price of its content, lowered the monthly spend cap, became very generous in terms of refunds to users who felt that they had lost control, and brainstormed other ideas with Vodafone, which were in the process of being implemented.

The Level 2 provider also stated that it kept in close touch with PhonepayPlus. It asked for renewed compliance advice on 8 December 2011. The Level 2 provider asked if there were any specific concerns about the operation of its services. On 18 December 2011 the Level 2 provider had met with PhonepayPlus face-to-face to discuss these services and stated that PhonepayPlus never once suggested that it was concerned by any excessive use. The Level 2 provider stated that, in December 2011, it unilaterally took the decision to further lower the monthly spend to £150, which explained why some earlier complainants mentioned a spend greater than £150, but lower than £500. The Level 2 provider claimed that all these steps were above and beyond what was required by the Code, the Guidance Notes, and Prior Permission conditions. To the best of its knowledge the Level 2 provider stated that no other provider in the market was doing any of these things.

3. The Tribunal considered the evidence and observed the Level 2 provider's view that it identified excessive use by imposing a monthly £150 cap on the service. The Tribunal did not accept the Level 2's submission that excessive use had not been established on the facts of this case and noted the 'bill shock' apparent from some of the complaints. The Tribunal concluded that the text message sent to consumers who had incurred a charge of £150 in a month (or, in some cases £48 a day) failed to inform relevant consumers of their excessive usage of the service. The Tribunal accordingly concluded that the service was in breach of rule 2.3.6 of the Code and as a consequence, the Level 2 provider had not achieved Outcome 2.3 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

Outcome 2.4 (Privacy):

"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

consumer 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 raised a breach of rule 2.4.2 of the Code for the following reasons.

A number of complainants stated that they received unsolicited marketing text messages. A sample of complainants’ accounts is provided below;

Example 1

“Adult texts being sent to my phone. Never signed up for this service and worried that I may be being charged for them.”

*“Crude adult text messages being sent to my phone. I have never signed up for any sort of service like this. The website address featured in the text messages is http://eygk.com/s/z?*yPnWdb0PEGMgzkJzasfltd. I am unsure if I have been billed or not, but I fear I may have been.”*

The Executive requested opt-in details from the Level 2 provider for this MSISDN and was advised the following:

“We have not yet received the relevant opt-in details from Redlight”.

Example 2

“i receive texts regarding adult images. i havent opened them but for example see lady gaga knickers etc

Transcript of Text: as i haven’t opened it i can not describe its content but it will be of an adult nature. if i open it then i most certainly will be charged!”

The Executive requested opt-in details from the Level 2 provider for this MSISDN and was advised the following:

“...This user made a Payforit purchase on 21/May/11. This purchase is Transaction 92306314 within Open Market's systems. This user spent money on Switchfire's products on 25/May, 31/May, and 04/Jun. The relevant premium MTs can be confirmed by the relevant aggregator(s). This user accessed free content on 09/Jun. Promotion to this MSISDN stopped on 29/Nov.”

The Executive noted that the log supplied by the Level 2 provider did not list the transactions listed in the Level 2 provider’s response.

Example 3

“Spam purporting to show a celebrity sex tape. I have not signed up for this service, nor do I allow my number to be used for marketing purposes”

The Executive requested opt-in details from the Level 2 provider for this MSISDN and was advised the following:

“Peekaboo are the Level 2 service promoter for 10 MSISDN. They have produced a separate document detailing the opt-ins of each...”

Example 4

“I am being bombarded with unwanted adult content text messages that are usually quite graphic in description, i have never signed up/subscribed etc etc to any service of this type or any other type to be honest, i have no idea how they got my mobile number and it’s obviously a huge scam (lots of people complaining about this on the internet)”

The Executive requested opt-in details from Switchfire for this MSISDN and was advised the following:

“...This user visited one of Mobile Magic's site hosted on the Switchfire platform and purchased a range of content on 26/Nov/11. This visit was logged in our third-party Robust Verification database (discussed in more depth in our answer to Question 19). The relevant premium MTs can be confirmed by the relevant aggregator(s).”

The Executive noted that the log supplied by the Level 2 provider did not list the transactions referenced in their response.

Example 5

“I haven’t accessed any adult site the site I’m on is Flirt.com. I’ve been having service messages coming through but they were free then on the 14th I got all these messages saying thanks for visiting. I think it probably used about £14. I only access to download music and go on Flirtfinder and google search that’s basically it.”

The Executive requested opt-in details from the Level 2 provider for this MSISDN and was advised the following:

“...This user made a Payforit purchase on 05/Oct/11. This purchase is Transaction 21792237 within Open Market's systems. This user spent money on Switchfire's products on 09/Dec. The relevant premium MTs can be confirmed by the relevant aggregator(s). Promotion to this MSISDN stopped on 03/Jan/12.”

The Executive noted that the log supplied by the Level 2 provider did not list the transactions submitted in the Level 2 provider’s response. In addition, the Executive noted that a large number of marketing messages were sent to the consumer between 5 October 2011 and 3 January 2012, however the log showed no interaction between the consumer and the marketing messages, and the consumer did not incur any charges on 9 December 2011 or on any date.

Executive monitoring:

The Executive monitored the service with a new unused SIM card and searched on the term “sex” through Google. The Executive visited an adult website (Pornhub.com), and clicked on a button stating “HD premium” which resulted in an error message. The Executive did not purchase any content and did not visit the landing page of any Level

2 provider service. Shortly after leaving the adult website a marketing message promoting one of the services under investigation was received by the Executive to the same monitoring handset:

“61177: (FreeMsg) Here's ur Free bookmark to UK's Best Amateur Vids, CLICK HERE – <http://v-hot.co/s/a?172927>”.

The Executive questioned the Level 2 provider about how consumers could opt-in to receive promotional messages for the service. In the Level 2 provider's response dated 30 January 2012 it stated:

“Users soft opt-in to receive marketing messages from Switchfire by either purchasing content from us, downloading free content from us, navigating our sites to see what content we have available and at what price, or by texting into one our shortcodes”

The Executive submitted that the above complaints and the Executive's monitoring demonstrated that valid consent had not been obtained from consumers before contacting them. The Executive was of the view that simply being on a website did not constitute 'consent' for the purposes of rule 2.4.2 of the Code, neither did it constitute consent if a consumer purchased content, or downloaded free content, or navigated through a Level 2 provider site for any purpose or sent texts to a Level 2 provider shortcode. The Executive noted that rule 2.4.2 of the Code did not make provision for any 'soft opt-in' exemption (such as is provided for in regulation 22(3) of the Privacy and Electronic Communications (EC Directive) Regulations 2003) and therefore it would expect some form of positive action from the consumer signifying consent to be contacted by the service and/or provider. No evidence of such consent was provided to the Executive. The Executive therefore submitted that this was a breach of Rule 2.4.2 of the Code, and therefore in this respect, the Level 2 provider had not achieved Outcome 2.4

2. The Level 2 provider provided the following responses with respect of each of the above example complainants.

Example 1

The Level 2 provider stated that, in line with its response to the Executive dated 30 January 2012, all marketing messages sent to this MSISDN were sent by another Level 2 provider called Redlight. The Level 2 provider further stated that on 1 February 2012 it supplied copies of the contract between itself and Redlight. The Level 2 provider stated that, given that the Executive had requested no further evidence as to whether Redlight was the Level 2 provider for this MSISDN and offered no evidence to the contrary, the Level 2 provider asked that this MSISDN should be dropped from this case. The Level 2 provider further stated that, in an attempt to be helpful during the preliminary investigation, it forwarded to PhonepayPlus details of opt ins provided to it by other Level 2 providers. The Level 2 provider argued that this action appeared to have confused the Executive as to who the Level 2 provider was. The Level 2 provider confirmed that it was aware that Redlight did have available their opt in evidence for the marketing message received by this user. The Level 2 provider asked the Executive to contact this level 2 provider directly to obtain this information as Switchfire was purely the platform provider in respect of this service.

Example 2

The Level 2 provider stated that this quotation was cited as evidence of unsolicited marketing but believed that this was a confusing assertion as (i) the user did not claim that the marketing was unsolicited; and (ii) this user made a Payforit purchase of some of the Level 2 provider's content prior to being sent any marketing messages. The fact that this user made a Payforit purchase prior to receiving any marketing was, in the Level 2 provider's opinion, a robustly verifiable fact. The Executive was given the relevant Payforit transaction in the Level 2 provider's response to the Executive on 30 January 2012. The Level 2 provider asked the Executive to liaise with OpenMarket (the relevant Payforit approved payment intermediary) if they had any further questions.

Further, on 6 December 2011, PhonepayPlus asked for a log of this user's activity on the shortcode 61177. The Level 2 provider stated that Payforit transactions were not associated with shortcodes, and did not appear on message logs. The Payforit transaction did not therefore come up when a customer services representative of the Level 2 provider pulled up the log of activity on 61177. The Level 2 provider stated that PhonepayPlus was fully aware that message logs did not record Payforit transactions, as these records were held by OpenMarket who was the the Payforit accredited payment intermediary, and not the Level 2 provider. The Level 2 provider confirmed that it had previously instructed its customer services staff to go beyond each request made by PhonepayPlus to include whatever additional information (for example, Payforit transactions) that would put the rest of the log into context. The Level 2 provider argued that it would appear that this attempt at being helpful confused the Executive into believing that, if a Payforit transaction is not listed, then it must not have occurred. However, its absence simply meant that it was not included manually on this occasion. The fact that it was actually sent could however be verified.

During the time that transpired between the Level 2 provider's response dated 30 January 2012 and the issuing of the breach letter on 20 February 2012, the Executive had had plenty of opportunity to email OpenMarket and ask them for their logs of the Payforit transaction for this user. The Level 2 provider took the fact that the Executive had not done so as evidence that the Executive accepted that this Payforit transaction did occur and as a result, this marketing message was solicited.

Example 3

The Level 2 provider stated that, as mentioned in its response of 30 January 2012, all marketing messages sent to this MSISDN were sent by another level 2 provider named Peek A Boo TV Limited ("Peekaboo"). On 1 February 2012 the Level 2 provider stated that it supplied copies of the contract between itself and Peekaboo. The Level 2 provider argued that, given that, in its view, the Executive had accepted that Peekaboo was the Level 2 provider for its users, the Level 2 provider asked that this MSISDN be dropped from this case. The Level 2 provider also asked the Executive to contact Peekaboo directly about its marketing messages.

Example 4

The Level 2 provider stated that, as mentioned in its response of 30 January 2012, all marketing messages sent to this MSISDN were sent by another level 2 provider named Mobile Magic Limited ("Mobile Magic"). On 1 February 2012 the Level 2

provider stated that it supplied copies of the contract between itself and Mobile Magic. The Level 2 provider argued that, given that the Executive had requested no further evidence that Mobile Magic was the level 2 provider for this MSISDN and had offered no evidence to the contrary, the Level 2 provider asked that this MSISDN should be dropped from this case. The Level 2 provider also asked the Executive to contact Mobile Magic directly about its marketing messages.

Example 5

The Level 2 provider stated that the quotation for Example 5 was cited as evidence of unsolicited marketing. The user denied having ever purchased a similar product from the Level 2 provider. The Level 2 provider asserted that this user did previously buy similar products from it and that this was a robustly verifiable fact. In its response dated 30 January 2012 the Level 2 provider stated that it provided the Executive with a Payforit Transaction ID on the OpenMarket platform. The Level 2 provider stated that it took the fact that the Executive appeared not to have asked OpenMarket to confirm this transaction as evidence that the Executive accepted that this transaction occurred and that the subsequent marketing messages were not unsolicited. The Level 2 provider stated that on 4 January 2012, PhonepayPlus requested logs of this user's activity on shortcode 89911, however the Payforit transaction for this user was not billed via this shortcode and this was why the transaction was not listed in the logs in question.

Executive Monitoring

With regard to the Executive's monitoring the Level 2 provider stated that the Executive had not interacted with the Level 2 provider's service. The Level 2 provider stated that it was aware that Peekaboo sent the marketing message as the Level 2 provider's systems "*saw it go by*" given that it acted as a Level 1 aggregator to some clients. The Level 2 provider asked the Executive to refer all questions about this marketing message to Peekaboo, whom the Executive had accepted was the Level 2 provider in respect of its users.

The Level 2 provider further stated it checked its database logs and confirmed that the MSISDN used in the Executive's monitoring had never visited any service belonging to the Level 2 provider, site nor any service hosted on its platform. The Level 2 provider confirmed that its logs did indicate that Peekaboo sent this MSISDN a marketing message and asked that the Executive contact them directly, as the accepted level 2 provider, about this user. The Level 2 provider therefore asked that this MSISDN be dropped from this case.

In summary, the Level 2 provider confirmed that the users described in Examples 2 and 5 were sent marketing messages by the Level 2 provider. However, it argued that each user purchased similar products from the Level 2 provider via Payforit prior to being sent marketing messages. The Level 2 provider confirmed that the relevant IDs for these transactions on the OpenMarket platform were supplied to the Executive on 30 January 2012. The Level 2 provider further argued that that, as the Executive had not contacted OpenMarket to verify these transactions, this was evidence, in the Level 2 provider's opinion, that the Executive accepted that these transactions occurred, and therefore the two marketing messages sent to these two users were solicited.

The Level 2 provider confirmed that it obtained valid consent to the sending of marketing messages during the users' purchase transaction, by virtue of its T&Cs and proximity of the opt-out link. By agreeing to proceed with the Payforit transaction on

the terms stated, and choosing not to opt-out via the link, the Level 2 provider confirmed that both users signified their consent to future contact. Every purchaser of the Level 2 provider's services had the opportunity to opt-out of marketing at the time of purchase and in each and every subsequent marketing message by using the STOP command, clicking a WAP link or calling customer services. The Level 2 provider asserted that its services were compliant with regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003. The Level 2 provider argued that, given that there was no evidence whatsoever of it sending unsolicited marketing, and given that the only relevant evidence supplied by the Executive showed it actually sent solicited marketing, it asked that this potential breach be summarily dismissed.

3. The Tribunal considered the evidence and concluded that with regard to the MSISDNs in examples 2 and 5 consumers had been contacted without their consent contrary to rule 2.4.2 of the Code. The Tribunal accepted the submission of the Executive that rule 2.4.2 does not make provision for any 'soft opt-in' exemption (such as is expressly provided for in regulation 22(3) of the Privacy and Electronic Communications Regulations 2003). In light of this finding the Tribunal determined that it was not necessary to consider the Executive's additional evidence from other complainants. The Tribunal concluded that the service was in breach of rule 2.4.2 of the Code and as a consequence, the Level 2 provider had not achieved Outcome 2.4 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

Outcome 2.4 (Privacy):

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

Rule 2.4.3

"Level 2 providers must ensure that consumers' personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer".

1. The Executive raised a breach of Rule 2.4.3 of the Code for the following reason.

The Executive monitored the service with a new unused SIM card and searched on the term 'sex' through Google. The Executive visited an adult website (Pornhub.com), and clicked on a button stating "HD premium" which resulted in an error message. The Executive did not purchase any content. Shortly after leaving the adult website a marketing message promoting one of the services under investigation was received by the Executive:

"61177: (FreeMsg) Here's ur Free bookmark to UK's Best Amateur Vids, CLICK HERE – <http://v-hot.co/s/a?172927>"

The website visited by the Executive did not state that by going to the website, the MSISDN would be collected. The Executive questioned the Level 2 provider about

how consumers could opt-in to receive promotional messages for the service. In the Level 2 provider's response dated 30 January 2012 it stated:

"Users soft opt-in to receive marketing messages from Switchfire by either purchasing content from us, downloading free content from us, navigating our sites to see what content we have available and at what price, or by texting into one of our shortcodes"

The Executive submitted that by navigating to a website on a mobile handset a visitor's MSISDN was captured by the website owner and then used for the purposes of promoting the premium rate service under investigation. The Executive further submitted that visitor's MSISDN's had been collected without their consent and that as such information was not collected for the sole purpose of facilitating refunds and a breach of Rule 2.4.3 of the Code had occurred. In this respect the Executive asserted that the Level 2 provider had not achieved Outcome 2.4

2. The Level 2 provider asserted again that the marketing message in question was sent by Peekaboo and not Switchfire. The Level 2 provider therefore stated that the Executive had offered no evidence whatsoever for this potential breach, and kindly requested that this alleged breach be summarily dismissed.
3. The Tribunal considered the evidence and concluded that, on a balance of probabilities, insufficient evidence had been presented to uphold a breach of rule 2.4.3 of the Code. The Tribunal therefore accepted the submissions of the Level 2 provider. and accordingly did not uphold the alleged breach of Outcome 2.4 of the Code.

Decision: NOT UPHOLD

SANCTIONS

1. Service Revenue

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

2. Initial Overall Assessment

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

Rule 2.3.2 (Misleading)

The initial assessment for the breach 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 by using the service was likely to be material to consumers and the breach of rule 2.3.2 of the Code was likely to generate considerably inflated revenues for the service. The service itself was however still capable of providing some purported value to consumers.

Rule 2.3.3 (Charging without consumer consent)

The initial assessment for the breach of Rule 2.3.3 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 by using the service was likely to be material to consumers and the breach of rule 2.3.2 of the Code was likely to generate considerably inflated revenues for the service. The service itself was however still capable of providing some purported value to consumers.

- **Rule 2.3.6 (Excessive use)**

The initial assessment for the breach of Rule 2.3.6 of the Code was **moderate**. In determining the initial assessment for this breach of the Code, the Tribunal applied the following criteria:

- The breach was likely to have a discernable effect, directly on consumers and showed evidence of some potential harm like to affect consumers.

- **Rule 2.4.2 (Contact without consent)**

The initial assessment for the breach of Rule 2.4.2 of the Code was **moderate**. In determining the initial assessment for this breach of the Code, the Tribunal applied the following criteria:

- Whilst this breach would normally attract a higher assessment than **moderate**, the Tribunal had regard to the fact that Code 12 imposed a new, higher standard of consent and so decided a lesser assessment was appropriate in the circumstances of this case.

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

3. Final Overall Assessment

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

- While the Executive had given limited compliance advice in April 2009 with respect to the landing page only, compliance advice had not been sought with respect to the Content Delivery Page which was found to have been in breach of the Code.

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

- The Level 2 provider took steps in advance to identify and mitigate against the impact of external factors and risks that might result in a breach of the Code and notified PhonepayPlus of this action. In March 2009 the relevant service provider had obtained prior permission to operate the service. In April 2009 the Level 2 provider had obtained compliance advice. The Executive commented that the compliance advice provided by the Executive in April 2009 was (1) with respect to the service landing page only and was not in relation to the Content Delivery Page and (2) was with respect to a screenshot of a landing page. The

Executive stated that it was not provided with the means to test the service once it was live.

- In two previous adjudications on 7 January 2010, services which were very similar to the one in question had been found not to have been in breach. The Executive commented that, although the previous alleged breaches had not been upheld, there were distinguishing features between those adjudications and the present case. In particular, the Executive noted that there was no video monitoring evidence for the Tribunal to consider at the previous adjudication and the Tribunal had then reached its conclusion on a balance of probabilities, on the basis that there was insufficient evidence to uphold the cases
- Following the adjudications in January 2010, the Level 2 provider had raised a number of questions with the Executive in relation to the service but no feedback had been provided;
- The Level 2 provider had imposed a voluntary spend limit of £150 for each user of the service, after which, for the remainder of the month, the service was free to use.
- The Level 2 provider had had a meeting with the PhonepayPlus regulatory development team on 30 November 2011 to ensure that the service was compliant. The Level 2 provider had also approached the Executive in December 2011 for the purpose of proposing a new Robust Verification mechanism of its WAP services. The Level 2 provider further stated that on 21 December 2011, its managing director had met and discussed these issues with PhonepayPlus;
- The Level 2 provider's evidence in relation to the complainants showed that they displayed a degree of unreliability.
- The Level 2 provider operated a refund policy for complainants.

Having taken into account the aggravating factor and the mitigating factors, the Tribunal concluded that the final overall assessment of the case should be regarded overall as **significant**.

4. Sanctions Imposed

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;
- A Direction for the Level 2 provider to obtain compliance advice within seven days of publication of this decision, to be implemented to the satisfaction of the Executive within a further seven days of receipt of such compliance advice. For the avoidance of doubt, access to the service remains barred until compliance advice has been implemented to the satisfaction of the Executive;
- A Fine of £35,000; and
- A Direction to make refunds 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, and to provide evidence to PhonepayPlus that any such refunds have been made.

Appendix A

The Executive clicked on a sponsored link at the top of the landing page:

The screenshot shows a mobile browser window with the title 'HT98DL901612'. The address bar contains the URL 'http://m.i-tub.net/universal/home...'. Below the address bar is a large advertisement for 'PORN PASS VIP' featuring a smartphone graphic. The ad text reads: 'Link to free vids see bottom of site. Premium vids/pics just £ 3 each plus network data charges HELP:08444457707'. Below the ad is a section titled 'Latest Videos' with a grid of video thumbnails. Each thumbnail includes a play button, a title, a rating, and the number of videos in the series. The thumbnails are arranged in two rows: the first row has two large thumbnails, and the second row has four smaller thumbnails. Below the video grid is a section titled 'Most Popular Girls' with two video thumbnails. At the bottom of the browser window is a navigation bar with links: 'Home Menu Back Search Call End call'.

HT98DL901612

Record Explore Open Url

http://m.i-tub.net/universal/home... ↻

PORN PASS VIP

Link to free vids see bottom of site. Premium vids/pics just £ 3 each plus network data charges
HELP:08444457707

Latest Videos

dirty student pleasu... Rating: 9/10 Vids: 1 of 51	Hot rich babe f*cks... Rating: 9/10 Vids: 1 of 12		
Rating: 9/10 Vids: 1 of 57	Rating: 10/10 Vids: 1 of 33	Rating: 9/10 Vids: 1 of 36	Rating: 10/10 Vids: 1 of 39

Most Popular Girls

Home Menu Back Search Call End call

Appendix B

After accepting the charge the Executive was presented with a Content Delivery Page where the video was available to download. Also presented on the screen was the option called 'Next Harder Vids'

