

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 8 November 2012
TRIBUNAL SITTING No. 113/ CASE 2
CASE REFERENCE: 11015

Level 1 provider: Tribecton Trading Limited
Level 2 provider: ООО Коннект (“**Connect Ltd**”)
Type of service: 7Mobi.net- Download app
Network operator: All mobile network operators

THIS CASE WAS BROUGHT AGAINST THE LEVEL 1 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

Between 9 February 2012 and 17 April 2012 the Executive received ten complaints from members of the public in respect of a service operated by the Level 2 provider Connect Ltd trading as SMSBill. Enquiries made by the Executive revealed that there were four Level 1 providers, Tribecton Trading Limited, NTH AG, txtNation Limited and OpenMarket Limited.

The service, which was accessed by downloading an app, enabled users to access popular games. Before installation of the app, consumers were presented with a screen titled “Downloader”. On selecting “install” consumers were presented with a screen which stated, “Do you agree with the rules of downloading,” which had two buttons, one marked “OK” and a second marked “Rules”. Where a consumer selected “OK”, a text message was automatically sent to shortcode 80079, which prompted the service to charge the user £10 by sending a message from shortcode 79555. Where a consumer selected “Rules”, s/he was presented with eight pages of terms and conditions. Inaccurate pricing information for UK users was located on the sixth page. Consumers were given the opportunity to select buttons marked “Agree” or “Disagree”. Where “Agree” was selected, a text message was automatically sent to shortcode 80079, which prompted the service to charge the user £10 by sending a message from shortcode 79555. The Executive took the view that consumers were not notified in advance of the charges. After being charged, the consumer was redirected to the 7mobi.net “GamePortal”, where s/he could play popular games. The complainants raised a number of concerns including lack of pricing information and charging without consent. In addition, Executive monitoring revealed that Connect Ltd was not registered with PhonepayPlus.

On 16 August 2012 (case reference 06161), the Tribunal upheld four breaches of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

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

The Tribunal concluded that the overall seriousness of the case should be regarded as **very serious** and imposed a formal reprimand, a fine of £50,000, a requirement to submit all premium rate services for prior permission for two years and refunds to all consumers who

used the service. In addition, an administrative charge was imposed. The Level 2 provider failed to co-operate with PhonepayPlus, or pay the fine and administrative charge.

During the investigation against Connect Limited, the Executive had concerns regarding the Level 1 provider, Tribecton Trading Limited's (the "**Level 1 provider**") due diligence and risk assessment and control measures.

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 1 provider on 3 October 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Paragraph 3.3.1 – Due diligence
- Paragraph 3.1.3(a) – Risk assessment and control

The Level 1 provider responded on 17 October 2012. On 8 November 2012, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Paragraph 3.3.1

"All...Level 1 providers must perform thorough due diligence on any party with which they contract in connection with the provision of premium rate services and must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances."

1. The Executive submitted that the Level 1 provider had breached paragraph 3.3.1 of the Code as there was no evidence that it had followed any due diligence procedures in relation to the provision of a shortcode to the Level 2 provider and it had provided a "test" connection to a Level 2 provider who was not registered with PhonepayPlus.

The Executive noted that the Level 1 provider had not provided any evidence or documentation in support of its responses to the investigation.

The Executive submitted that the term 'contract' (and the spirit of the Code provision in paragraph 3.3.1) extends to non written and informally negotiated commercial agreements and/or arrangements including the provision of a testing connection.

The Executive relied on the Level 1 provider's acknowledgement that it had a commercial arrangement with the Level 2 provider, referred to the Level 2 provider as the "customer", and that it had provided a "test" connection shortcode to it. The Executive also noted that, from the Level 1 provider's response, it was clear that there were terms of use attached to the provision of the "test" connection. In addition, the Executive noted that revenue was generated on the "test" shortcode, which would have been passed to the Level 1 provider had it not been withheld by another Level 1 provider.

The Executive submitted that based on the above it was clear that a commercial arrangement existed between the Level 1 and Level 2 providers, which was akin to a

'contract', albeit the Executive had not seen any evidence of the existence of a written contract.

Reason 1: Failure to carry out any due diligence prior to the provision of a "test" connection

The Executive explained that it contacted the Level 1 provider on 13 March 2012 requesting the identity of the Level 2 provider. The Executive supplied the service shortcodes and keywords. On 14 March 2012, the Executive received a response from Tribecton requesting more information about the investigation from the Executive. The identity of the Level 2 provider was not supplied. On 19 March 2012, the Executive wrote to the Level 1 provider enclosing complainant text message logs and again requested the identity of the Level 2 provider. On 20 March 2012, the Level 1 provider replied:

"All other MSISDNs were ordering the service from the web-sites, were our short codes were used illegally. Due to the similarity of the keywords our system recognized them as requests for social network and the users were billed as for another service".

The Level 2 provider's identity was not provided. On 3 May 2012, the Executive wrote to the Level 1 provider in order to discover the identity of the Level 2 provider and requested clarification concerning the revenue generated by the service and, "If paid out to another provider please identify that provider(s) and provide the contract covering the business relationship". On 10 May 2012 the Level 1 provider responded:

"Regarding the illegal usage of our short codes.

We have provided the testing connection to 7mobi.net in the beginning of the year. The service was the purchase of digital games...However, after the testing period we noticed that the service is different from that once which was supplied to us. We disconnected the customer at once. However, that customer didn't remove the short codes from the web-site and we didn't know about that (because the customer didn't notify us). Their old script in our system was receiving the MO-requests and sending the reply MTs. When we received the complaints from NTH AG, we have discovered the error and fixed it. We also asked them to make the refunds to the users that were billed for that service."

The Executive noted that, although a URL was provided, the identity of the Level 2 provider was not provided. On 25 May 2012, the Executive wrote again to the Level 1 provider, stating:

"Please confirm your relationship with SMS Online [the service name as understood by the Executive at that time] and their role in relation to a) The fraudulently used service...Please also provide all documents in support of this explanation including correspondence and contracts and all other relevant documents".

The Executive requested this information in order to ascertain the identity of the Level 2 provider.

On 1 June 2012 the Executive received the following response from Tribecton:

"First of all I'd like to clarify that not the service, but the short code was use illegally. The short code was used for the service that we did not authorize or approve. As I have already mentioned in my previous e-mail we have provided

the testing connection to 7mobi.net in the beginning of the year. They applied the service of purchasing of digital games. To download the game from the web-site users need to send SMS to the short code. The service was promoted on the web-site www.7mobi.net (Please also refer to the attached screen shot). However, later we noticed that the service that was working on the shortcode 80079 is different from the initial description. Due to that we stopped the testing of the service and disconnected that customer. The customer should have removed our short code from the promotional materials and stop using the short code. However they didn't do that. They continued to use the short code on some other web-site or application that we do not know (they didn't present it to us). That is why the requests were still coming to our platform, however, we couldn't notice it at once, due to the similarity of the keywords to other services and some technical discrepancy. As soon as we noticed it, we fixed the error. Please, notice, that the contract wasn't signed with that customer, since we provided only the testing connection and later it was switched off, due to the reasons described above. Here is the e-mail of the party 7mobi.net that was using our short code without authorization: support@smsbill.ru."

As a result of the investigation and the correspondence detailed above, the Executive asserted that the only information the Level 1 provider knew about the Level 2 provider was the name of the Service (7mobi.net) and a contact email address (support@smsbill.ru).

The Executive asserted that the Level 1 provider had failed to follow PhonepayPlus Guidance on, "Due diligence and risk assessment and control on clients" and noted that:

"The PhonepayPlus Code of Practice requires that effective due diligence processes are in place. It does not prescribe the process, or the information to be gathered, so the examples set out below are to illustrate the kinds of information gathering and other actions both Network operators and providers could take, before a binding commercial agreement is formed:

- Contact details for a client's place of business;
- Copies of each client's current entry (and first entry, if different) in the companies house register;
- Names and addresses of all owners and directors;
- Names and addresses of all individuals who receive any share from the revenue generated by the client;
- Undertakings from the client that no other party is operating in the capacity of a shadow director under the Companies Act, if appropriate;
- The names and details of any parent or ultimate holding company which the client is a part of, if appropriate; and
- To make clients aware of PhonepayPlus and requiring adherence to the PhonepayPlus Code of Practice."

Using the email address, the Executive located the Level 2 provider's website (smsbill.ru) and obtained contact telephone numbers for the Level 2 provider. The Executive submitted that the Level 1 provider had not conducted any due diligence on the Level 2 provider and that as a result the Executive had spent a great deal of additional time on the investigation.

The Executive submitted that there was no evidence that the Level 1 provider knew the identity of the Level 2 provider, obtained any documentation in relation to the Level 1 provider's identity or conducted any other due diligence.

Reason 2: The Level 2 provider carried out business with an unregistered Level 2 provider

The Executive noted that the Level 2 provider had never registered with PhonepayPlus. As a result, a breach of paragraph 3.4.1 of the Code was upheld against the Level 2 provider in the adjudication dated 16 August 2012. Further, the Executive noted that PhonepayPlus Guidance on the Registration Scheme states:

“We would expect providers to consult the Registration Scheme as a cross-check against any information collected about potential clients and their recent history of compliance with the PhonepayPlus Code of Practice.”

As stated in the Guidance, the Executive expects providers to check that clients are registered with PhonepayPlus before premium rate services are provided. Given that the Level 2 provider operated premium rate services in the UK without registering with PhonepayPlus, the Executive submitted that the Level 2 provider failed to undertake a basic due diligence check on its client.

In light of the above, the Executive asserted that the Level 1 provider had acted in breach of paragraph 3.3.1 of the Code.

2. The Level 2 provider denied the breach. Specifically the Level 2 provider stated:

“We have to admit that we were unable to provide the identity of the Level 2 provider at once (but provided it as soon as it was practically possible in that situation) due to the following reason: Tribecton has terminated any business with that provider (Connect Ltd) and suspended its services. Unfortunately, due to some technical error Connect Ltd somehow continued to use the short code without any authorization from Tribecton.

“Tribecton was not aware of the situation until some claims were received from aggregator NTH and Phonepay Plus. Tribecton has implemented the investigation and discovered the unknown service. In order to speed up the process of identifying the service provider Tribecton asked for some additional information from the Executive.

“Another reason which made it difficult to identify immediately the service provider was that the service was different from that one which was that provider supplied to Tribecton earlier, before the beginning of tests.

“However, after making certain analysis Tribecton was able to identify the service provider (Connect Ltd) and report about it to the Executive.

“The provider was named as 7mobi.net for the reason of convenience, since it was the provider’s brand name which was used on the web-site and in reply MT-messages.

“Moreover, the information was requested by the Executive in a bit misleading way: “if paid out to another provider please identify that provider and provide the contract covering the business relationship”. Since Tribecton was not aware about the unauthorized service, *received no payouts from the mobile operators* for it, *made no payouts to any other provider* and had that is why had no contractual relationship with them, it was unclear what particular information was requested from Tribecton.”

3. The Tribunal considered the evidence, including the written submissions made by the Level 1 provider. The Tribunal noted that the Level 1 provider had failed to provide any documentary evidence to support its assertions, save for one screenshot. In light of the nature of the acknowledged business arrangement, the absence of documentary evidence to the contrary and for the reasons given by the Executive, the Tribunal concluded, on the balance of probabilities, that there was a contract between the Level 1 and Level 2 providers (whether written or otherwise). The Tribunal concluded that the Level 1 provider had failed to take any steps to obtain and verify the identity of the Level 2 provider and without “knowing” (for example, being in possession of the legal name and details of the registered address etc.), the legal identity of the Level 2 provider it was impossible to conduct “thorough” due diligence. The Tribunal also noted that the Level 2 provider was not registered with PhonepayPlus and it appeared that the Level 1 provider had not checked this before providing services to it. Consequently, the Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Paragraph 3.1.3(a)

“All...Level 1... providers must...assess the potential risk posed by any party with which they contract in respect of...the provision of premium rate services...and take and maintain reasonable continuing steps to control those risks”.

1. The Executive asserted the Level 1 provider had failed to take and maintain reasonable continuing steps to control the risks of the provision of the premium rate connection to the Level 2 provider.

The Executive relied on the content of correspondence outlined in relation to the breach of paragraph 3.3.1 above. In addition, the Executive noted that on 20 June 2012 the Level 1 provider stated:

“We have provided testing connection to 7mobi.net as of the beginning of the year, 01 January 2012. That connection was supposed for a one month period. On 01 February 2012 the customer was disconnected. Closer to the end of February 2012 we received the complaints from the end-users and realized that the connection is still functioning (the script wasn't deactivated on the customer's side). We have fixed the error in script and fully disabled it on 27 February 2012. We have also contacted the customer and required to remove all promotions of the short code.

“Regarding your question from your previous e-mail: “After you disconnected the customer and notified them of this why did they continue to use your shortcode?” As we have found out afterwards the customer was also unaware of the error in script, and according to their report they didn't know it was still functioning until we contacted them regarding it. We also suppose that the customer also didn't take the proper actions in order to completely remove the short code from all promotional web-sites of their own and their possible sub-clients, that is why some of them continued to function.”

Reason 1: Failure to monitor the testing connection

The Executive noted that the Service was initially provided on a “testing connection” basis for one month (January 2012). However, at the end of January 2012 the

service was not disconnected as agreed. The Executive noted that of the ten complaints received about the service, nine complainants incurred charges in February 2012. The Executive asserted that this clearly showed that the Level 1 provider did not actively monitor the activities of its client to ensure that the “testing connection” was not misused. Consequently, the Executive asserted that the Level 1 provider did not take reasonable steps to assess and/or control the risk of the provision of the premium rate service to the Level 2 provider.

Reason 2: Charges continued after the discovery of misuse of the testing connection

The Executive noted that the Level 1 provider stated that it “fully disabled” the connection on 27 February 2012. However, one consumer incurred charges after this date. The Executive submitted that this demonstrated that reasonable steps to control the risk of the provision of the premium rate service to the Level 2 provider, having discovered misuse of the testing connection, were not taken by the Level 1 provider.

For the two reasons detailed above, the Executive submitted that a breach of paragraph 3.1.3 (a) had occurred.

2. The Level 1 provider denied the breach. The provider stated that as nine of the ten complaints concerned charges incurred in February 2012, it was clear that the “test” connection was properly monitored as no serious complaints were received in relation to charges incurred in January. The Level 1 provider asserted that it “cut off” the service after the testing period. Further, the provider added that it did not agree that no reasonable steps were taken in order to stop the “harmful” service, as with the help of other aggregators in the value chain the Level 1 provider asserted that it had done everything necessary to discover the error, fix it and delete all harmful scripts. The provider added that, since the service was stopped shortly after receiving the notification from PhonepayPlus, it believed that the necessary steps were implemented.
3. The Tribunal considered the evidence, including the Level 1 provider’s submissions. The Tribunal noted that, save for one screenshot, the Level 1 provider had failed to provide any documentary evidence of any assessment of potential risk and/or the presence of any reasonable continuing steps to control any risks identified. The Tribunal concluded that since consumers had incurred charges in February 2012, the Level 1 provider had not disconnected the service at the end of the “test” period. Further, a different service to the one allegedly described to the Level 1 provider operated on the “test” connection and, even when the Level 1 provider was alerted to the discrepancy, it did not take immediate action to control the risks. Consequently, the Tribunal upheld a breach of paragraph 3.1.3(a) of the Code for the reasons advanced by the Executive in relation to Reason 1.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 3.3.1 – Due diligence

The initial assessment of paragraph 3.3.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- There was no evidence that the Level 1 provider had conducted any due diligence on the Level 2 provider prior to the provision of the premium rate shortcode and access to the billing platform.

Paragraph 3.1.3(a) – Risk assessment and control

The initial assessment of paragraph 3.1.3(a) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 1 provider failed to provide any evidence of the assessment of the potential risks posed by the Level 2 provider.
- Despite being put on notice in relation to the service, the Level 1 provider failed to take all appropriate continuing steps to control the risks posed by the operation of the service.

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

Final Overall Assessment

The Tribunal took into consideration the following aggravating factors:

- The Level 1 provider failed to follow Guidance and a Compliance Update on due diligence and risk assessment and control.

The Tribunal did not find any mitigating factors. The Tribunal noted that the Level 1 provider asserted that it gave its consent to NTH AG to make refunds; however, the Tribunal held that this was not relevant mitigation to the breaches raised.

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

Sanctions Imposed

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

- A formal reprimand;
- A fine of £50,000; and
- A requirement that the Level 1 provider submits to a compliance audit in accordance with paragraph 4.8.2(k) of the Code. The provider must commission an independent auditor, the terms of reference of which are to evaluate the compliance culture, policies and corporate governance of the provider in relation to due diligence and the assessment and control of risks, and to report on any recommended changes. The provider must obtain express consent from the independent auditor for provision of its report to PhonepayPlus. The auditor must be an independent third party approved by PhonepayPlus. The provider may seek the approval of PhonepayPlus to vary the above terms of reference. Any varied terms of reference agreed with PhonepayPlus will form part of this order. The provider shall comply in full with the recommendations in the auditor's report, subject to any express exemptions, or modifications agreed with PhonepayPlus.
- A prohibition on the Level 1 provider from providing, or having any involvement in, any premium rate services, from the date of publication of this decision until a

compliance audit is undertaken in accordance with the terms of reference set out in the audit sanction and any recommendations made by the auditors are fully implemented to the satisfaction of the Executive.