

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

**Thursday 27 September 2012
TRIBUNAL SITTING No. 109 / CASE 3
CASE REFERENCE: 08104**

Level 2 provider: mBill Pty Ltd (Australia)

Type of service: Competition service

Level 1 provider: OpenMarket Limited

Network operator: All

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

BACKGROUND

Between 3 May and 25 July 2012, the Executive received 54 complaints regarding the prizeKing service (the “**Service**”) operated by mBill Pty Ltd on shortcode 89798. The Service consisted of a number of different play options, including a subscription option, which cost £4.50 per week. Subscribers received text messages that contained a link to the Level 2 provider’s website, where consumers could participate in quizzes and access content such as videos and wallpapers. In addition, there were non-subscription options, charged at either £9 or £18, that allowed consumers to enter, a weekly “Click2Win” competition, which in some instances involved entering a “win statement” in an attempt to win a prize. Consumers using the subscription and non-subscription options received “gold coins” which they could use to bid in weekly auctions or allegedly claim items or gift cards. Both the subscription and non-subscription options operated on shortcode 89798.

The majority of complainants stated that the text messages they had received from the Level 2 provider were unsolicited and that they had not requested the Service or consented to be charged. The complainant accounts were consistent with users entering the Service via affiliate marketing on social networks or via pop-ups on websites. In a number of cases users reported that they were induced into participating in the Service after being offered the opportunity to claim free products or complete a survey.

The Level 2 provider initially denied that it or its affiliate marketers promoted the Services on Facebook, using pop-ups, surveys or by offering free products. However, this appeared to be contrary to the complainant accounts and the content of a number of the “win statements” provided by the Level 2 provider. Examples of the “win statements” included:

“hi, i saw this survey and i have answered to the survey honestly and i deserve to win because i have been told i would win, i have never won this reward before.”

“why should i win?.... because i actually took the time to do the survey, so yeah thanks!”

“nineteen msgs! one survey! surely i deserve to win! +21 msgs”

i should defo win this prize as walkers crisps remind me of being pregnant with my beautiful son

“i think i should win because i am a regular shopper at tk maxx”

In addition, the Level 2 provider failed to establish how consumers accessed its landing pages.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 4 September 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Paragraph 4.2.4 - Conceal or falsify information
- Paragraph 4.2.5 - Failure to disclose information
- Rule 2.3.1 - Fair and equitable treatment
- Rule 2.3.2 - Misleading
- Rule 2.3.3 - Charges without consent

The Level 2 provider responded on 18 September 2012. On 27 September 2012, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Paragraph 4.2.4

“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission)”.

1. The Executive submitted that from the content of the “win statements” it could be inferred that additional affiliate marketers, whose identities were not disclosed to the Executive, led consumers to the Service. On the balance of probabilities, the Executive submitted that there had been some form of promotion by affiliate marketers using surveys, and referring to specific products and shops, such as Walkers crisps and TK Maxx. However, the Level 2 provider denied knowledge of any reference to or the use of surveys and products in the promotion of the Service. Accordingly, the Executive submitted that, at the very least, the Level 2 provider had recklessly provided false or misleading information by omitting to provide information in relation to the content of the “win statements” (and affiliate marketing) in breach of paragraph 4.2.4 of the Code.
2. The Level 2 provider strongly denied the breach. Specifically, the Level 2 provider stated that to suggest that Service was promoted in conjunction with brands such as TK Maxx and Walkers crisps, based on evidence from two out of 1377 win statements, was unwarranted and did not make sense. It added that, the Service promotion in question was a competition for a Dell laptop, and therefore it was reasonable to assume that if an affiliate wanted to generate a high number of new user signups to this promotion it would promote the fact that a Dell Laptop was on offer and not TK Maxx or Walkers crisps. The provider accepted that, judging from the input of some of the end-user win statements, a short survey seemed to have been used in conjunction with the promotion of Service.
3. The Tribunal considered the evidence and the Level 2 provider’s response and found that on the particular facts there was insufficient evidence to be satisfied on the

balance of probabilities of the breach. Accordingly, the Tribunal did not uphold a breach of paragraph 4.2.4 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH TWO

Paragraph 4.2.5

“A party must not fail to disclose to PhonepayPlus when required any information that is reasonably likely to have a regulatory benefit in an investigation.”

1. On 17 July 2012 the Executive directed the Level 2 provider to explain how consumers accessed the Service without going directly to the Level 2 provider’s website. The Executive highlighted that complainants had not referenced the Service’s website and that complainants appeared to have signed up to the Service by undertaking surveys or by other means such as through Facebook.

The Level 2 provider responded on 27 July 2012 that the £18 one-off charge option was only advertised via delllaptop.prizeking.com and was promoted using only one affiliate network. The Level 2 provider stated that neither Facebook nor pop-ups were used to promote the Service.

The Executive found the response to be insufficient and lacking detail. Consequently, on 3 August 2012 the Executive made a further request for information regarding the promotion of the Service. The Executive specifically asked the Level 2 provider to advise how consumers found the delllaptop.prizeking.com website and requested screenshots of how users entered and interacted with the Service.

The Level 2 provider responded with the following, “This website is promoted by [only one named affiliate network] and their affiliate partners. The prizeKing website is actively promoted in Google”. The level 2 provided screenshots of its own landing pages only.

The Executive submitted that the Level 2 provider’s response did not provide full details of the position regarding affiliate marketing. The Executive asserted that full information regarding affiliate marketing should have been submitted and that, as a result of the limited response, the Executive was prevented from clearly establishing how the Service was promoted. Accordingly, the Executive submitted that the Level 2 provider had failed to disclose information that was important to the investigation and would have had a clear regulatory benefit to the investigation in breach of paragraph 4.2.5 of the Code.

2. The Level 2 provider denied the breach, stating that it did not have visibility on promotional tools used by every affiliate that was contracted to the affiliate network. It added that it was reasonable to assume that many methods of online promotion such as display and banner ads, pop-ups ads, Facebook ads and email marketing were used by affiliate marketers when promoting the Service as this was simply standard practice in affiliate marketing. The Level 2 provider added that:

“Those forms of promotion are then used to point a user to the website <http://delllaptop.prizeking.com> which has been provided to the Executive. The nature of affiliate marketing is such that an affiliate is paid on the results of their promotion; therefore, if an affiliate is not able to produce any new user signups then the affiliate does not receive any commission... It is unclear what, if any, problem exists around the use of affiliates and their promotional activities for

premium rate services...the agreement between PrizeKing and [the affiliate network] regulates the type of promotional methods an affiliate can use in the promotion of PrizeKing and that are accepted by PrizeKing, if this agreement is breached there are clear consequences. Furthermore, there is no evidence of any promotional activity that would in any way mislead, deceive, confuse or somehow make a user believe they were getting a “free” Dell Laptop or somehow believe they had “won” a Dell Laptop. 98% of users who entered the Dell Laptop Click2Win service knew they were [sic] entering “for their chance to win.”

3. The Tribunal considered the submissions of the Executive and the Level 2 provider and found that the Level 2 provider had made little effort to provide the requested information regarding the affiliate marketers who promoted the Service. The Tribunal noted that the Level 2 provider was responsible for how its Service was promoted and that no evidence had been provided to show that the Level 2 provider had made any effort to assist the Executive to identify how consumers accessed the Level 2 provider’s landing page (save for direct access through the website address). The Tribunal was not persuaded by the Level 2 provider’s arguments that it was unable to obtain this information. The Tribunal found that the Level 2 provider had failed to disclose when required information that was reasonably likely to have had a regulatory benefit in an investigation. Accordingly, the Tribunal upheld a breach of paragraph 4.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Rule 2.3.1

“Consumers of premium rate services must be treated fairly and equitably”.

1. The Executive asserted that consumers had not been treated fairly and equitably for the following reasons.

PK Coins

The Executive noted that when consumers viewed the Service website and selected either the subscription or the £9 options they were told that they would receive a certain number of “gold coins”. The number of coins a consumer received depended on the day and time they interacted with the Service. The Executive noted that there were prominent instructions on how to use the “gold coins”. However, the following statement was “buried” in the conditions:

“PK Coins are only valid for a limited time and each eligible participant’s PK Coins Points Bank (the total number PK Coins in an eligible participant’s account) will be reset to zero on the first day of each calendar month”.

The Executive submitted that it was not fair to consumers to have this rule “buried” in the terms and conditions. Especially as the link to the terms and conditions section of the website was below the fold and in a light grey font. In addition, the terms and conditions were very lengthy (over 14 screenshots). Any consumer who had not read the condition would have been entitled to assume that the “gold coins” would not expire. Consequently, the Executive submitted that consumers were not treated fairly and equitably.

Click2Win: Monthly competition

The Click2Win competition was stated as being a monthly competition. When the Executive viewed the previous winners section of the Service website it was noted that winners were only listed for July 2012, August 2011, October 2010, July 2010 and March 2010. When queried by the Executive, the Level 2 provider advised, "Click2Win promotions are not run each and every month...For example we have only run Click2Win campaigns in April and May of 2012". However, the Executive noted that the "win statements" spreadsheet provided by the Level 2 provider contained 11 entries for January, February and March 2012. When queried by the Executive, the Level 2 provider responded, "The prizeKing Once-off-non-subscription Click2Win was not running in January, February or March 2012". The Executive concluded that no competition was running in January, February or March 2012. However as a result of the existence of "win statements" from these months, the Executive inferred that the competition was being promoted in these months. The Level 2 provider did not advise whether the 11 entries were pooled into the next available competition; however, consumers who submitted a "win statement" would have had an expectation that they would be entered into the competition for the month of entry, and therefore the Executive submits that consumers were not treated fairly and equitably.

Click2Win: Grand prize draw

The Executive noted that the terms and conditions on the Level 2 provider's landing page provided for a Grand prize draw. The draw was stated as taking place on or about the last day of each month. The Executive asked the Level 2 provider for evidence of the winners of previous draws. However the Level 2 provider stated, "the prizeKing Click2Win contest was only promoted in April and May 2012". The Executive submitted that in the absence of any other evidence, and on the balance of probabilities, this draw did not in fact take place. The Executive considered that it was not fair to consumers to suggest that draws would take place when in fact they did not.

Click2Win: Selection of winners and judging

The Level 2 provider stated that winners were selected by, "A panel of mBill employee's meet to discuss the entries and select which win statement is the most entertaining, amusing and skilful. Winners are drawn each month".

The Executive noted that Guidance on "Competitions and other games with prizes" advises:

"If there is any subjective assessment in the selection of the winning entries (e.g. tie-breakers) and/or awarding of prizes in a competition open to the public, then judging should be a person or persons independent of the provider any of the intermediaries involved, or by a judging panel including at least one independent member. For the avoidance of doubt, independence is defined here as being an individual who has no commercial interest in the competition or associated premium rate service concerned."

The Executive submitted that the Level 2 provider did not select winners in an independent manner and therefore consumers were not treated fairly and equitably.

Claiming prizes

The Executive noted that there were strict provisions in relation to the claiming prizes. The conditions included that winners would have to obtain an affidavit in order to obtain their prize. The Executive submitted that that the strict rules were “buried” in the terms and conditions, and were not readily apparent to consumers. The Executive submitted that consumers were not treated fairly and equitably as a result of the strict conditions and the wholly obscure manner in which they were communicated.

The Executive accordingly submitted that for the reasons outlined above rule 2.3.1 of the Code had been breached.

2. The Level 2 provider denied the breach. Specifically, the Level 2 provider stated the following.

PK Coins

The terms on the Service website were incorrect as the coins do not expire.

Click2Win: Monthly competition

The Service was a global competition website and was not running any Click2Win prize draws in the UK, in the months of January, February and March 2012. In reference to the 11 entries; these users joined the £9 one off entry to the Service via prizeKing.com, and submitted their win statements through the website. The above entries were rolled into the next month’s prize draw.

Click2Win: Grand prize draw

The Level 2 provider stated that the Grand prize draw was never run in the UK. Therefore it was never advertised or promoted in the UK. In addition, the provider stated that the Click2win prize draw was not the Grand prize draw.

Click2Win: Selection of winners and judging

The Level 2 provider stated that each entry was:

“[I]ndividually judged based on its literary and creative merit of the answer to the question provided. The winners are selected in accordance with Australian rules and legislation. We note that the PhonePayPlus’s Code of Practice around the governing of competition rules is different to that in Australia. This fact has only become clear to us as part of this investigation. The PrizeKing terms and conditions were written by an Australian lawyer, due to fact that we based in Australia we have followed the terms and conditions from Australia.”

Claiming prizes

The Level 2 provider stated that it had never had to execute an affidavit of eligibility and a liability or publicity release but that it reserved the right to execute an affidavit. The Level 2 provider highlighted that prize winners were selected and sent their prizes.

3. The Tribunal considered the evidence and noted the Level 2 provider’s response. The Tribunal found that consumers were not treated fairly and equitably where they entered the Click2Win competition in months where there was no draw and in relation to the lack of independence in the selection of winners. The Tribunal noted

the Level 2 provider's comments in relation to the terms and conditions relating to the "gold coins" and the claiming of prizes and found that, although the fact that the terms were incorrect or not followed was ultimately to the benefit of consumers, the terms lacked certainty. The Tribunal considered that where a Level 2 provider failed to follow its own published terms and conditions in a number of material respects it amounted to a failure to treat consumers fairly. Accordingly, the Tribunal upheld a breach of rule 2.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR
Rule 2.3.2

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.2 of the Code for the two reasons advanced below.

Reference to subscription

The Executive observed that two consumers received a free message that stated:

"Thanks 4 ur participation! You are now in the draw to WIN the Dell Laptop drawn on 1 Jun 2012. Stay subscribed to keep ur chance to win until draw date". From its own monitoring, the Executive also noted that the page to enter a "Win statement" states, "Stay subscribed till draw date to have a chance to Win!"

The Level 2 provider stated the one off charge options were not a subscription. Consequently the Executive submitted that any reference to a "subscription" was misleading, or likely to have misled consumers. In addition, the Executive was not aware of any provision in the terms and conditions that provided that consumers had to stay in the Service to win.

Prizes

The Level 2 provider stated in correspondence that the Click2Win prize for both May and June 2012 was a Dell laptop. However, the Executive noted from the message logs that some consumers were sent messages that advised that the prize in May and June was an Apple iPad 2. In addition, some of the "Win statements" submitted by consumers in May and June referred to iPads. The Executive submitted that consumers were misled, or likely to have been, as they entered the Service to win a prize that was not on offer.

Accordingly, the Executive submitted that there had been a breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied the breach. In particular the Level 2 provider stated that the £18 Click2Win contest was not a subscription service and that at no time were users of the £18.00 Click2Win promotion misled into thinking that they had "won" a prize, were going to receive a "free" prize or had to remain subscribed in order to get a prize.

In relation to the prizes, the Level 2 provider stated that its prizes varied on a periodic basis and although it was unlikely that a user would enter a "Win statement" for a

future month's prize, it was not impossible. However, the Level 2 provider stated that its promotional material was clear and at no time were consumers misled.

3. The Tribunal considered the evidence and noted the Level 2 provider's response. The Tribunal found that some consumers' message logs showed a discrepancy between the actual prize and the prize communicated in messages from the Level 2 provider. The Tribunal found that this was misleading, or likely to have misled consumers. Accordingly and for this reason only, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE 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 consent".

1. The Executive submitted that the Level 2 provider had been unable to verify that it had robust evidence of consent to charge consumers in breach of rule 2.3.3 of the Code.

The majority of complainants stated that they had incurred charges without consenting to being charged. As a result the Executive obtained sets of message logs from both the Level 2 and Level 1 providers for all complainants.

Timings

The Level 2 provider stated that in order to incur charges for the Service, consumers received a PIN which they had to enter onto the Service website. A consumer could only incur charges after entering the PIN.

The Executive noted that in some message logs, particularly those of the Level 1 provider, some consumers appeared to have received a chargeable message before the free message containing their PIN was received, or at exactly the same time. The Executive submitted that even taking into account the time zone difference between the Level 2 provider and the UK, charges should not commence before a PIN had been sent to the consumer and entered onto the website. The Executive submitted that consent to charge could not have been given where consumers received chargeable messages before receipt of the PIN.

PINs received twice

The Executive also noted that according to some message logs some consumers had received either two different PIN numbers or the same PIN twice. The Executive asked the Level 2 provider to advise why this had occurred. The Level 2 provider stated that consumers had refreshed the web page and therefore generated the sending of a second PIN and that there was no limit on the number of entries per mobile number as it was not a subscription Service. The Executive asserted that this explanation did not explain why identical PINs were sent multiple times, as where a consumer entered the Service twice, they would have received two different PINs.

The Executive also noted that in the case of one specific MSISDN, the message log provided by the Level 2 provider showed only one PIN being received, however the

message log obtained from the Level 1 provider showed the same PIN being received separately five times. These messages were however free of charge.

The Executive asserted that the Level 2 provider's explanation was implausible. Therefore the Executive submitted that in the absence of a plausible explanation for the discrepancies in the number of PINs, identical PINs being sent twice and variance between the Level 1 and Level 2 provider's logs, it could be inferred that some consumers were double charged and/or they were charged without consent.

Fake mobile originating messages ("fake MO")

The Executive observed on the Level 2 provider's logs that complainants who appeared to have entered the subscription option had received incoming messages stating, "start prizeKing subscription goldipad2 api.chance". By way of explanation, the Level 2 provider stated that the same application programming interface ("API") was used for both subscriptions and the one off charges, and that for subscriptions, an internal keyword was required in order to set up the subscription records within their system. The Level 2 provider added that, "[the] API will process a 'fake' MO into the system (eg: start prizeKing subscription goldipad2 api chance). Once off transactions do not require this since they are not a subscription service".

In reference to one message log, the Executive noted that the Level 2 provider log showed a "fake MO", however the Level 1 provider's message log did not record this same MO entry.

The Executive asserted that it is not best practice to have such insertions by the API appearing on the message logs as it gave the appearance that the consumer had opted in to the Service via a mobile originating message.

Consequently, the Executive asserted that the presence of "fake MO" messages suggested that the Level 2 provider did not have consent to charge consumers.

Robust verification to charge

The Executive noted that the Guidance on, "Privacy and consent to charge" specifically states that providers must be able to provide robust evidence of consent for every premium rate charge, which should be properly verifiable. "Properly verifiable" is stated to mean, "a clear audit trail that cannot have been interfered with since the record". The Guidance also states that PIN opt-in requires robust systems for verifying any PIN once entered.

The Executive requested that the Level 2 provider provide evidence of robust verification that it had used to verify consent to charge. However, the provider was not able to do so. The Level 2 provider accepted that prior to August 2012 there had been no third party verification (the Executive noted even post this date the verification was not by a third party who is independent from the revenue stream). The Guidance and the importance of robust verification of consent to charge were specifically pointed out to the Level 2 provider during previous Fast Track complaint resolution procedures; however the compliance advice given was not followed.

The Executive submitted that the Level 2 provider did not have consent to charge given the absence of evidence of robust verification, the discrepancies in the message logs in relation to the timing of chargeable messages and the complainant accounts that the charges were unsolicited. Accordingly, the Executive submitted that a breach of rule 2.3.3 of the Code had occurred.

2. The Level 2 provider accepted that it had breached rule 2.3.3 in part and made the following comments and submissions:

“...[A]ll messages sent to users were 100% consented by each user via PIN verification. Not only is there a time zone difference between us the (Tier 2 aggregator) and the Tier 1 aggregator (Open Market), but also all of our message timestamps are based on when the delivery receipt/report was received/posted to our server from the Tier 1 carrier for each MT (both Standard rate and Premium rate). The time stamps are not when the MT message were sent/received, they are when our server received the delivery receipt/report confirming if the message was successful or failed. Our servers are based on GMT+10 and all report timestamps are created based on the local time (GMT +10) that the report was received. For example when we receive a report for message sent at 10.00AM GMT+ 10, at 10.01AM GMT+ 10 we update the message timestamp to be 10.01AM GMT+ 10.

“Our platform does not process the timestamp we receive in the delivery receipt/report we get from the Tier 1 aggregator we use the local timestamp of the server so that we know exactly when the report was physically posted to our servers from the Tier 1 aggregator. Hence, timestamps for messages will be different to that of the Tier 1 aggregator. Timestamps on our message logs do not mean the user was sent the MT at that particular time; it means we received the notification report from the Tier 1 aggregator at the time in GMT+10.

“Our signup API will not allow any Premium message MT’s to be sent unless the PIN verification method is successful. This means the PIN that was sent to the user, must match the PIN that was entered on the signup website. IP’s are also matched between the 2 events as an extra layer of protection.”

Multiple PINs

The Level 2 provider gave a full technical account of the reasons why multiple PINs were sent to consumers. The Level 2 provider added that:

“The Executive seems have overlooked the ‘refresh’ issues and how this effect’s the user experience and what MT’s a user is sent...Firstly, as explained – Although a message is displayed on the web advising the user to wait for their entry to be processed, users do not always read what is in front of them. Users can be impatient, if a website is taking longer to load than they think is acceptable or they feel something is not working – a normal action for a user is to refresh the page to see if that helps or speeds things up. ...The Executive states “the Executive does not understand why a consumer would refresh where, according to the Level 2 provider’s explanation, a consumer has already entered their first PIN and had been sent four chargeable messages”...if our servers are experiencing load issue, our SMS Gateway may be delayed in sending premium MT messages to users. Other factors may include connectivity issues between the Tier 1 and us aggregator, or connectivity issues / degradation between the Tier 1 aggregator and the carrier and then also between the Carrier and the user’s handset (maybe the users network signal has dropped out or degraded)....If a user refreshes the PIN entry page after entering their PIN (a correct PIN), this will trigger another API call to the ‘SUBSCRIBE’ action, which will result in another set of Premium MT messages being sent to the user. Since the campaign in question by the Executive campaign is a non-subscription

Click2Win once off entry, there is no limit to how many times a user can enter (unlike a Subscription where a user can only subscribe once).”

In addition, the Level 2 provider asserted that:

“No users were ever ‘double charged’ as a result of failure on our end or by the fault of our signup API. User consent was always verified via PIN verification before any Premium MT messages were sent to a user”.

“Fake MO”

The Level 2 provider stated that it understood that by its very name a “fake MO” was confusing. The provider explained that the “fake MO” records that show ‘start prizeking subscription goldipad2 chance’ were for internal use only and were used to initialize a subscription event within their platform when using the PIN opt-in method. The provider added that, when using the PIN opt-in method its platform did not receive an MO from a user, however, in order for its platform to initiate a subscription it required an MO. The provider added that it understood that showing the internal MO on message logs was not ideal and that it has taken measures to remove such records from all future message logs to avoid any confusion with the customer and any third parties viewing message logs.

Robust verification to charge

The Level 2 provider accepted that prior to 1 August 2012 it did not have a system that provided robust verification of consent to charge. Consequently, the provider accepted that it had acted in breach of rule 2.3.3 of the Code.

3. The Tribunal considered the evidence and noted the Level 2 provider’s detailed response. The Tribunal did not accept the Level 2 provider’s explanation that the discrepancy in timings between the Level 1 and Level 2 provider’s logs was due to the time difference given the irregular nature of the timings. The Tribunal noted the Level 2 provider’s admission and found that it had not provided robust evidence of consent to charge. The Tribunal was concerned by the use of “fake MO” messages and noted that as a result it could not rely on the accuracy of the message logs. The Tribunal was not persuaded by the argument that upon refreshing the page consumers would be sent a second PIN – especially when this was identical to the first PIN. Consequently, on the balance of probabilities and in all the circumstances, the Tribunal found that the Level 2 provider did not have consent to charge a significant number (at least) of consumers. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 4.2.5 – Failure to disclose information

The initial assessment of paragraph 4.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Tribunal noted that the Level 2 provider ought to have had access to information regarding where the Service was promoted.
- The Level 2 provider failed to supply a full response to a direction to provide information which limited the scope of the investigation.

Rule 2.3.1 - Fair and equitable treatment

The initial assessment of rule 2.3.1 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of the breach was likely to have caused, or have had the potential to cause, a drop in consumer confidence in premium rate services.
- The Service was purposefully or recklessly promoted in such a way as to impair consumers' ability to make a free and informed transactional decision.

Rule 2.3.2 - Misleading

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

- The Service had a clear detrimental impact, directly or indirectly, on consumers and the breaches had a clear and damaging impact or potential impact on consumers.
- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.
- The Service was non-compliant in relation to a series of rules and/or responsibilities, which indicated a systemic failure to meet the outcomes set out in the Code.

Rule 2.3.3- Consent to charge

The initial assessment of rule 2.3.3 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider was unable to provide robust verification of consumers' consent to charge, which on the face of it suggested that consumers were charged without their consent. The Tribunal commented that this was amongst the most serious of all breaches under the Code.

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

Final Overall Assessment

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

- The Level 2 provider asserted that it had ceased promotion of the Service and refunded some consumers.

The total consumer spend on the Service was within the range of Band 2 (£250,000-£500,000).

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

Sanctions Imposed

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

- A formal reprimand;
- A direction to remedy the breaches;
- A fine of £150,000; and
- A requirement that the Level 2 provider must refund all complainants who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.