

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 16 August 2012
TRIBUNAL SITTING No. 106 / CASE 2
CASE REFERENCE:

Level 1 provider: txtNation Limited
Level 2 provider: Mobegen Limited
Type of service: "Brain Buster"- Quiz game alerts
Network operator: All mobile Network operators

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

BACKGROUND

Between 24 February 2012 and 30 April 2012, the Executive received 14 complaints regarding the free-to-download Brain Buster application (the "**App**") and quiz game alerts subscription service (the "**Service**"). The Service operated on shortcodes 68899, 80556, 84383, 84459. The Service was charged at £4 per week. Additional quizzes cost £5 per quiz (although consumers were charged for two additional quizzes at any one time at a cost of £10).

On 2 August 2012, a Tribunal upheld four breaches of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**") against the Level 2 provider in relation to the Service. During the investigation concerns were raised regarding the operation of the STOP command.

In correspondence with the Executive, the Level 1 provider accepted that it was responsible for the failure of the operation of the STOP command.

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 24 July 2012. Within the breach letter the Executive raised the following potential breach of the Code:

- Rule 2.3.11- Method of Exit

The Level 2 provider responded on 31 July 2012. On 16 August 2012, the Tribunal reached a decision on the breach raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

In light of the evidence and the submissions and admissions made by the Level 1 provider, the Tribunal found that the Level 1 provider was responsible for the operation of the STOP command in relation to the Service.

ALLEGED BREACH ONE

Rule 2.3.11

“Where the means of termination is not controlled by the consumer there must be simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charge to the consumer after exit except where those charges have been legitimately incurred prior to exit.”

1. The Executive submitted that the Level 1 provider had breached rule 2.3.11.

The Executive highlighted five examples of instances when consumers incurred charges between 20 February 2012 and 20 March 2012 after a STOP command was sent in the prescribed format to the correct shortcode. Accordingly, the Executive submitted that the method of exit did not take effect immediately upon the consumer using it and that charges were incurred in breach of rule 2.3.11.

2. The Level 1 provider accepted that it was responsible for a breach of rule 2.3.11. The Level 1 provider gave the following explanation.

“When this short-code was first integrated an incorrect assumption by a developer (based on a previous integration) meant if an end user sent a STOP command in on either of the billing codes it had a different network ID which meant our system did not process it, as it did not recognise it. This was fixed on 19th January.

All STOP requests received by txtNation are forwarded to txtNation clients (This is the case on all shortcodes / Longcodes). txtNation Clients are expected to honour all STOP requests as they are posted to them. As a supplemental measure to client processing, txtNation also stores all STOP requests in our database, and as a matter of course, a table is checked for all (MT) traffic passing through the TxtNation Gateway. Due to database corruption, txtNation lost part of the contents of the STOP Request `database` table for a period of hours on February 14th 2012. The bulk of the data was recovered from backup however this was very challenging due to the scale and size of the data (we store over 8 million stops); however the corruption which was also found in the backups, delayed complete recovery of historical data, and the data was not fully recovered until engineers cleaned up the historical data.

All lost STOPS were then processed and we sent a broadcast message to affected end users offering a refund for any charges incurred in the interim period.

The intent of txtNation under normal operating conditions is to supply sufficient means for end users to opt out of all services operated by our clients. Our current software and policies are aimed towards this goal. The current investigation centres on a rare and unintended issue which we deeply regret. We would like to make clear we made every effort to treat end users fairly by pro-actively offering refunds for any charges caused by our failings. Our platform is geared towards end user protection and this incident is a result of a rare and isolated technical failing.”

3. The Tribunal considered the evidence and noted the Level 1 provider’s admissions. The Tribunal found that the method or exit from the Service was not operating effectively between 20 February and 20 March 2012. Further, the Tribunal noted that there was a discrepancy between the dates when the STOP command failed and the dates when the Level 1 provider stated that it had experienced technical issues. The Tribunal commented that the Level 1 provider had failed to provide a satisfactory

explanation for the reason for the STOP command failure. The Tribunal upheld a breach of rule 2.3.11 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.11- Method of exit

The initial assessment of rule 2.3.11 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.

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

Final Overall Assessment

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

- The Tribunal noted that, in light of the inadequate and contradictory explanation provided by the Level 1 provider, it had no alternative but to consider that the Service was not of adequate technical quality in relation to the functioning of the STOP command.
- The logs demonstrated that the STOP command was not working for a period of time after the Level 1 provider claimed that the problem had been rectified.

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

- The Level 1 provider stated that it had refunded some consumers.

The revenue made by the Level 1 provider for the Service was within the range of Band 5 (£5,000-£50,000).

The Tribunal was provided with details of the Level 1 provider's relevant breach history. The Tribunal particularly noted that a Tribunal on 19 January 2012 (case ref: 02896) found a breach of the PhonepayPlus Code of Practice (11th edition) in relation to the inadequate technical quality of part of a Service operated in conjunction with the Level 1 provider and for which it was responsible.

Having taken into account the aggravating and mitigating 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 fine of £15,000 (£5,000 of which was imposed as a result of the relevant breach history); 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 determine the adequacy and technical quality of systems relating to the STOP command by which consumers exit any service for which the provider is a Level 1 or 2 provider, 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 the 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.

The Tribunal noted that the Tribunal on 2 August 2012 had imposed a requirement for the Level 2 provider to pay general refunds to complainants and therefore concluded that there was no need to impose such an obligation on the Level 1 provider.