Code Compliance Panel

Tribunal Decision

Tribunal Sitting Number 137 / Case 1

Case Reference: **10568**
Level 2 provider: **A&M Lead Factory B.V. (The Netherlands)**
Type of Service: **Competition and mobile content (subscription)-"Pikabooo"**
Level 1 provider: **i-pay24, Mob Invest and mblox Limited**
Network operator: **All Mobile Network operators**

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

BACKGROUND

Between 24 April 2012 and 1 June 2013, PhonepayPlus received 34 complaints from consumers in relation to a subscription competition and mobile content service, which operated under the brand name "Pikabooo" (the "**Service**"), and was operated by the Level 2 provider A&M Lead Factory B.V. The Service operated on the premium rate shortcodes 61827 and 65013 and cost £4.50 per week (3 x £1.50 per message). The Level 2 provider was contracted with the Level 1 provider i-pay24. In addition, there were two other Level 1 providers, Mob Invest and mBlox Limited. The Service operated between 21 March 2012 and June 2013, when it was voluntarily suspended by the Level 1 and Level 2 providers following correspondence with PhonepayPlus.

The Service was promoted online using affiliate marketers.

The Service landing page contained a trivia question which consumers were required to answer before using mobile originating ("**MO**") opt-in. The subscription entered consumers into a draw that took place every three months for a chance to win a prize, such as an iPad, iPhone or shopping vouchers. Consumers were also given an opportunity to download mobile content (three wallpapers) every week.

The majority of complainants stated that they had not understood they would be charged and did not recall entering the Service. In addition, some complainants experienced bill shock. The maximum cost incurred by a complainant was £270.00 over approximately one year.

In addition, PhonepayPlus' monitoring of affiliate marketing promotions for the Service gave rise to concerns in relation to consumers being misled into interacting with the Service.

The Investigation

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

The Executive sent a breach letter to the Level 2 provider on 25 September 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2- Misleading
- Rule 2.3.12(d) – Subscription reminder messages

The Level 2 provider responded on 8 October 2013. On 31 October 2013, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
Rule 2.3.2
"Premium rate services must not mislead or be likely to mislead in any way."

1. The Executive submitted that the Level 2 provider had breached rule 2.3.2 of the Code because consumers were (or were likely to have been) misled into subscribing to the Service as a result of misleading affiliate marketing.

   The Executive commented that Level 2 providers are responsible for the promotion of their services, including promotions conducted by affiliate marketers.

   The Executive noted that, in written correspondence, the Level 2 provider accepted that it used affiliate marketing to promote the Service.

   The Executive noted the content of the complainants' accounts which demonstrated that complainants did not appear to understand that they had subscribed to the Service or that they would incur charges.

   In addition, the Executive relied on monitoring conducted on 7 August 2012 by the Research and Market Intelligence team ("**RMIT**"). The RMIT searched Google using the term, "watch free online stream dark knight rises," and selected a search result which purported to contain a link to stream the film "Dark Knight Rises" (**Appendix A**) The RMIT was directed to the website www.care2.com where it was invited to select a link, which redirected the RMIT to the http://watchstreammovieonline.blogspot.co.uk website. The RMIT selected "Watch Movie Here" and was presented with a pop-up which stated:

   > "Please complete a survey from our sponsors below to view this content.
   > Win a New iPhone4S!
   > Sign Up and Win $50!
   > Win a 52" Sony Bravia HDTV!
   > Win an iPad 2!
   > This video has been temporarily locked. In order to unlock it, you must fill out the surveys above completely. These surveys take approximately 30 seconds to 1 minute to complete. After a survey is completed, you will have access to all videos on this site for 24 hours." (**Appendix B**)

   The RMIT selected "Win a New iPhone4S!" and was redirected to the Service landing page (**Appendix C**). The RMIT then opted-in to the Service by entering a monitoring MSISDN into the appropriate field on the webpage and responding to an SMS with the opt-in keyword. The RMIT followed the on screen instructions and waited for the film to play. After several attempts to obtain the film, by refreshing the webpage, the RMIT was unable to access a live stream of the "Dark Knight Rises".

   The RMIT conducted an additional monitoring session on 9 August 2012. The RMIT conducted a Google search using the phrase "Stream Live Olympics online free" and experienced a similar consumer journey to that detailed above. The RMIT was directed to two different webpages and after following the instructions was directed to the Service landing page. The RMIT did not subscribe to the Service.

The Executive asserted that consumers were likely to have been misled into believing that they were required to complete a "survey" in order to obtain access to "free" streaming of the "Dark Knight Rises" or "Live Olympics coverage". However, having completed a "survey" a consumer would have been directed to the Service landing page. In reality, the "survey" was a preliminary step to subscribe to the Service at a cost of £4.50 per week. The Executive asserted that, whilst pricing for the Service was provided and there was a description of the actual service offered, it was misleading to state that a consumer could view the streamed film content for "free" when that was not the case.

The Executive submitted that consumers had been or were likely to have been enticed to enter the Service through a route that had nothing to do with the actual service. Further, in relation to the monitoring on 7 August 2012, the "Dark Knight Rises" stream did not materialise even after subscribing to the Service.

The Executive submitted that consumers had been or were likely to have been misled into landing on the Service website and interacting with the premium rate service as a result of being informed that they had to complete a "survey" to obtain a "free" film or live Olympics streaming.

In light of the above, the Executive further submitted that consumers had been or were likely to have been misled into interacting with the Service acted in breach of rule 2.3.2 of the Code.

2. The Level 2 provider accepted that the promotions were misleading and represented a "clear violation of the Code". The Level 2 provider also acknowledged that, under the Code, it was responsible for the actions of its affiliate marketers.

The Level 2 provider stated that it had always maintained a strict policy towards affiliate marketing and had practices in place to control the risks associated. The practices included:

- Contracts with the affiliate networks that included specific prohibited practices.
- Pre-approval of affiliate marketing promotions.
- Proactive monitoring of affiliate marketing promotions.
- Correspondence with its affiliate networks regarding compliance updates to the rules and regulations concerning promotions.
- Investigation of complaints, sales peaks and referral codes.
- Notification of spikes in customer contacts between the customer service team (operated by the Level 1 provider) and the Level 2 provider.

The Level 2 provider provided evidence of its efforts to control its affiliate networks by producing a copy of "Network Guidelines" that it stated was issued to its affiliate networks and a monitoring checklist, which appeared to record monitoring of its affiliate marketing promotions. The Level 2 provider also provided a copy of an email sent on 17 February 2012 to its affiliate networks containing a warning about prohibited practices such as typosquatting.

The Level 2 provider stated that in situations where it appeared that a consumer had been treated unfairly it would always seek to resolve the complaint in a manner that was satisfactory to the consumer.

The Level 2 provider stated that it had foreseen financial issues with the UK market before it commenced operation but had nonetheless decided to expand the business into the UK. However, over a period of time the Level 2 provider had decided that the UK was not a profitable territory and in June 2013 had withdrawn from the UK market completely.

During informal representations, the Level 2 provider expanded upon its written submissions and stated that it was fully aware of the rules and regulations governing the premium rate market in the UK. It stressed that it strived to be fully compliant with the Code and its intention had always been to obtain legitimately sourced traffic. It was for this reason that it was extremely disappointed to be before the Tribunal for breaches of the Code.

By way of background, the Level 2 provider stated that it was a small company with only two members of staff operating across four countries.

Generally, the Level 2 provider stated that the use of affiliate marketers had presented it with problems and it had found it hard to source trustworthy affiliates with "good traffic". However, it asserted that it conducted close monitoring of affiliate marketing promotions for the Service.

The Level 2 provider stated it took swift action in February 2012 following concerns in the industry about "squatting" and "typosquatting", including writing to its affiliate networks to reinforce the message that this type of promotion was strictly prohibited.

The Level 2 provider explained that on 17 August 2012 the Level 1 provider (who dealt with the customer service on the Level 2 provider's behalf) contacted the Level 2 provider to notify its concerns in relation to an affiliate marketing promotion, as there was a spike of 12 consumer contacts. The Level 2 provider stated that, in accordance with its policy and following discussions with the Level 1 provide, it had dealt with the problem in a proactive fashion by terminating its contract with the affiliate marketer responsible, writing to the affiliate network to notify them of the problem (evidenced by email correspondence) and offering refunds to any consumers who had been affected. The Level 2 provider referred to a monitoring checklist which it said demonstrated that it had monitored the particular affiliate network from February to August 2012 and initially it appeared that the traffic from the affiliate network was sourced legitimately. The Level 2 provider stated it was surprised to learn that the affiliate network was using misleading practices. The Level 2 provider believed this was the same non-compliant misleading promotions that the Executive had experienced during its monitoring on 7 August 2012.

During the course of the investigation, the Level 2 provider provided a list detailing 60 affiliate marketing networks used to promote the Service. However, during informal representations, the Level 2 provider clarified that, in fact it only permitted ten affiliate networks to send traffic to the Service. In addition, the Level 2 provider stated that it did not trust 85-90% of the affiliate networks and for this reason believed that providers of similar services, who earn large sums of money, could not be generating revenue through traffic sourced legitimately.

3. The Tribunal considered the evidence and submissions before it. In particular, the Tribunal noted the Level 2 provider's admission that the affiliate marketing was misleading and it was responsible under the Code. The Tribunal also noted that the Level 2 provider had stated that it had identified and remedied the breach of the Code, of its own accord, before notification from PhonepayPlus in September 2012. The Tribunal found that the affiliate marketing promotions had been or were likely to have been misleading, as it was highly misleading to promote a service using an inducement that was wholly unconnected and/or different from the content offered by the service and which never materialised. Consequently for the reasons given by the Executive, the Tribunal concluded that consumers were likely to have been misled into entering the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
Rule 2.3.12(d)
"For all subscription services, once a month, or every time a user has spent £17.04 plus VAT if that occurs in less than a month, the following information must be sent free to subscribers:

(i) the name of the service;
(ii) confirmation that the service is subscription-based;
(iii) what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent;
(iv) the charges for the service and how they will or can arise;
(v) how to leave the service; and
(vi) Level 2 provider contact details."

1. The Executive submitted that the Level 2 provider had breached rule 2.3.12(d) of the Code as consumers had not received subscription reminder messages in accordance with the Code.

   Following the receipt of consumer complaints regarding the Service, the Executive contacted the Level 2 provider and requested message logs showing the full interaction between complainants and the Service. The Executive noted that a number of consumers had not received subscription reminder messages on a monthly basis or after £20.00 of charges had been incurred.

   The Executive accordingly submitted that for the reasons outlined above rule 2.3.12(d) of the Code had been breached as consumers had not received the subscription reminder messages in accordance with the Code.

2. The Level 2 provider stated that the Level 1 provider i-pay24 was responsible for the operation of the technical platform that included the provision of subscription reminder messages.

   During informal representations, the representative of the Level 1 provider accepted that it was responsible for the provision of subscription reminder messages and not the Level 2 provider. The Level 1 provider accepted that there had been certain issues in relation to some consumers not receiving some subscription reminder messages as a result of an algorithm that sent messages every month (as opposed to every four weeks). In addition, the Level 1 provider asserted that the logs supplied to the Tribunal were not complete and were not an accurate record of the messages sent to the complainants. The Level 1 provider provided evidence of this by logging onto its platform during informal representations and showing the Tribunal a random selection of logs (selected by the Tribunal members).

   The Level 1 provider confirmed that this Service was the only service to be affected and all consumers concerned had been offered a refund.

3. The Tribunal considered the evidence and submissions before it. The Tribunal noted that i-Pay24 had admitted that it was responsible for the operation of the technical platform for the Service, which included the provision of subscription messages in a compliant manner, and that these messages had not been sent in a manner which complied with rule 2.3.12(d) of the Code. As a result, the Tribunal concluded that the Level 1 provider was responsible for the sending of subscription reminder messages and any breach should be brought against it. Accordingly, the Tribunal did not adjudicate on this breach against the Level 2 provider.

Decision: NOT ADJUDICATED

SANCTIONS
Initial Overall Assessment

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

Rule 2.3.2 – Misleading

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

- Very serious cases have a clear and highly detrimental impact, directly or indirectly, on consumers.
- The nature of the breach, and/or the scale of the harm and potential harm to consumers, is likely to severely damage consumer confidence in premium rate services.
- The affiliate marketing promotions were designed with the specific purpose of generating revenue streams for an illegitimate reason.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal found no aggravating factors. The Level 2 provider had no relevant breach history.

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

- The Level 2 provider stated that it had the following measures in place to identify and mitigate against the risk associated with affiliate marketing:
  - Contracts with the affiliate networks that included specific prohibited practices.
  - Pre-approval of affiliate marketing promotions.
  - Proactive monitoring of affiliate marketing promotions.
  - Correspondence with its affiliate networks regarding compliance updates to the rules and regulations concerning promotions.
  - Investigation of complaints, sales peaks and referral codes.
  - Alerts of spikes in customer contacts between customer service operated by the Level 1 provider and the Level 2 provider, which would be followed up with an investigation.
- The Level 2 provider stated that it had proactively unsubscribed and offered refunds to all consumers who were likely to have entered the Service via the misleading affiliate marketing route.
- The Level 2 provider stated that on 17 August 2012 it had been alerted to the misleading affiliate marketing by the Level 1 provider as a result of an increase in consumer contacts to its customer service and immediately suspended the non-compliant promotion.

The Tribunal noted that the Level 2 provider had stated that it would no longer use affiliate marketing and it had left the UK market. The Tribunal also noted that the consumer harm occurred in summer 2012, which was prior to many of the Tribunal's adjudications concerning misleading affiliate marketing.

The Level 2 provider failed to provide exact revenue figures for the Service. The Tribunal commented that the lack of full revenue information was unsatisfactory, but on the evidence before it found that the Level 2 provider's revenue in relation to the service was in the range of Band 4 (£50,000-

£100,000). The Tribunal noted that the Service and the Level 2 provider's landing pages were not predicated on non-compliant activity, that the Service had some value and that a large part of the Level 2 provider's revenue appeared to be from legitimate sources.

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

Sanctions Imposed

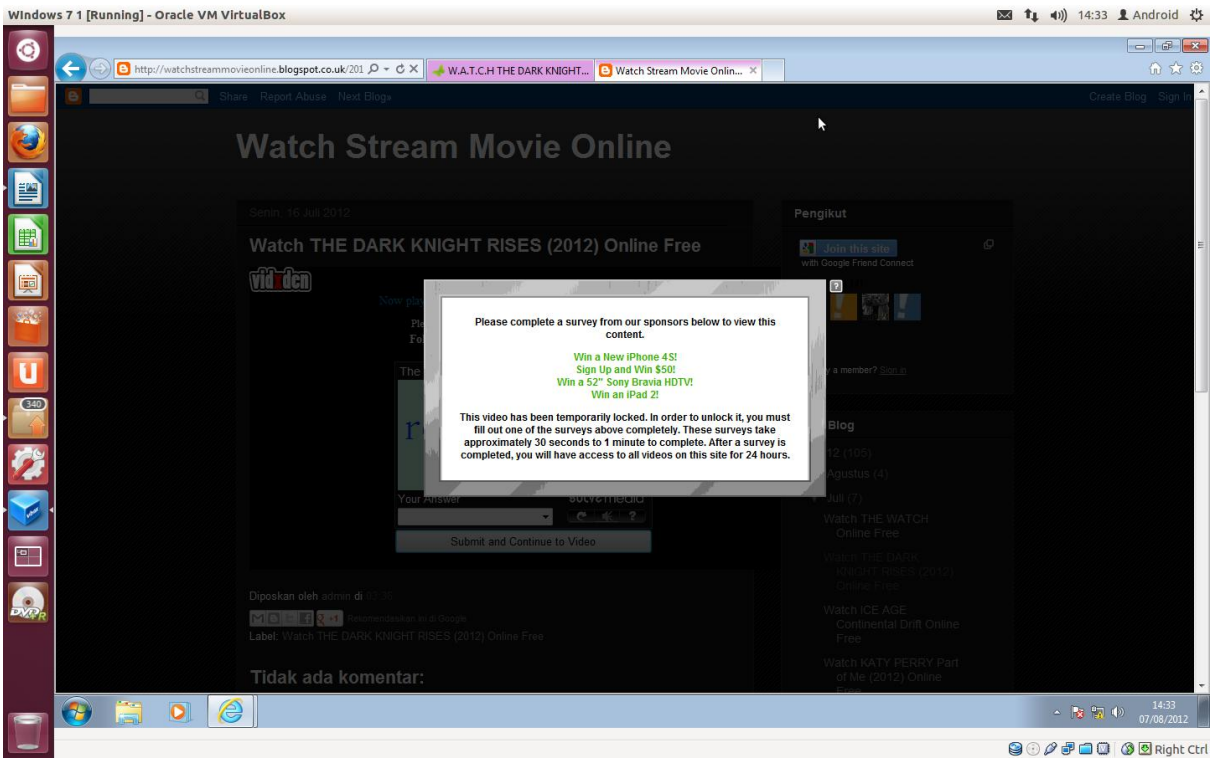
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £10,000; and
- a requirement that the Level 2 provider must refund all consumers 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.

Appendices

Appendix A: Screenshot of an affiliate marketing promotion for the Service:

Appendix B: Screenshot of an affiliate marketing promotion for the Service containing the "survey" pop-up:



Appendix C: Screenshot of the Service landing page: