

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 7 February 2013
TRIBUNAL SITTING No. 119/ CASE 1
CASE REFERENCE: 11740

Level 2 provider: Bongo Operations Pty Limited
Type of service: Entertainment question and answer SMS service
Level 1 provider: mBlox Limited and OpenMarket Limited
Network operator: All mobile Network operators

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

BACKGROUND

Since 10 September 2012, PhonepayPlus received 13 complaints from members of the public in relation to an entertainment question and answer service (“**the Service**”) operated by the Level 2 provider, Bongo Operations Pty Limited, on the dedicated premium rate shortcode 66668. Consumers were charged £2.50 per mobile message sent (mobile originating (“**MO**”) message).

Examples of questions asked and answered included:

Question - “Does [name redacted] fancy me”

Answer - “Bongo knows you need to keep a positive mind and have faith, your love life is going uphill but you will also need to make the first move with [name redacted]”

Question - “Do you think I’ll get a girlfriend”

Answer - “Bongo knows [name redacted] will meet a girl soon who will turn her head like a car crash, but sexier! They will be making so many sparks they’ll be a fire hazard!”

The Service was promoted via the Service website (**Appendix A**), Facebook (**Appendix B**), at live events (**Appendix C**) and on television.

Eight of the 13 complaints were from parents/family members regarding under 16s interacting with the Service; the youngest of whom was 11 years old. Some complainants stated that the Service was aimed at children or that the content was not suitable for children. One complaint was made on behalf of a consumer with learning difficulties, who incurred charges of £917.50 in 10 weeks.

Prior to the investigation in March 2012, the Level 2 provider had been subject to a Fast Track complaint resolution procedure.

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 16 January 2013. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.5.8 – Services aimed at or particularly attractive to children
- Rule 2.3.5 – Unauthorised use by non-bill payers

The Level 2 provider responded to the breach letter on 30 January 2013. On 7 February 2013, after hearing informal representations made on behalf of the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.5.8

“Premium rate services aimed at or likely to be particularly attractive to children must not contain anything which a reasonable parent would not wish their child to see or hear in this way.”

1. The Executive asserted that the Level 2 provider had breached rule 2.5.8 of the Code on the grounds that the Service was likely to be particularly attractive to children and a reasonable parent would not wish their child to be exposed to the content of messages sent by the Service.

The Service was likely to be particularly attractive to children

PhoneyPayPlus Guidance contains assistance on the definition of what is deemed to be particularly attractive to children. The Guidance states:

“In determining whether a PRS has been targeted at children, or is likely to be particularly attractive to them, PhoneyPayPlus will consider each incident on a case-by case basis. In doing so, the following factors are likely to be considered:

- Data which indicates how many readers, viewers, or listeners of a publication, broadcast, or other media where the service is promoted, are children;
- The style, content, and composition of the promotional material (i.e. does it contain factors likely to make it particularly attractive to children, or which would suggest children had been targeted?).”

The Executive submitted that the Service was likely to be particularly attractive to children and that the Level 2 provider should have been aware of this. The Executive noted that the Service was promoted on the social networking site Facebook. Publicly available data taken from Facebook confirmed that the most popular age group of Facebook users visiting the webpage and “liking” the Facebook page is the 13 – 17 years age group. The Executive accordingly asserted that the data from Facebook clearly showed that the Service is particularly attractive to an age group, which includes children between the ages of 13-15 years old.

The Executive also noted that the Service was promoted on the Level 2 provider’s own website, askbongo.com, and was of a style, content and composition that is juvenile and lends itself to being particularly attractive to children. The Executive cited the following examples:

- The use of the ‘Bongo’ character;
- The use of a cartoon image of a monkey’s face and bottom; and
- The bright colours used to attract attention.

The content of text messages sent to users of the Service was of a nature that a reasonable parent would not wish their child to see.

The Executive submitted that the call logs of the eight complaints relating to children interacting with the Service contained text messages that a reasonable parent would not wish their child to see. The Executive's submission was supported by a complaint from the parent of a 13 year old, who stated:

"Consumer's 13 year old daughter has been using the service. Consumer is angry about this service. He feels the service is being aimed at children. "Some of the messages my daughter is receiving are explicit."

Examples of content sent to children include the following messages.

Example 1 – child aged 11 years old

- "Bongo Knows [name of child removed] is so hot she has every boy in town melting like toffee in a fire. She's that hot the sun sweats whenever she steps out the door."
- "Bongo knows that a proper hottie has been making eyes at you from across the room! Some of your mates are already aware of their lusting after you!"
- "Bongo knows [name of child removed] is such a hot piece that a friends [sic] sibling has been checking her out from afar and thinks she is hotter than being on the equator!"
- "Bongo knows that you have got even more class and charm than [name redacted]. He Dreams about the prospect of one day being able to give you a full body massage"

Example 2 – child aged 13 years old

- "Bongo knows that [name of child removed] is even more breathtaking than a sleeper hold. Her male admirers like to stick photos of her face on pillows then spoon them"
- "Bongo knows [name of child removed] wears space clothes... Coz that body is out of this world. Many a biscuit company have crumbled at the sight of her beautiful eyes!"
- "Bongo knows that gorgeous [name of child removed] is so sexy she makes Megan Fox look like Gandalf the Grey! Her mates wish they were that sexy, she's the new Kate Moss!"
- "Bongo knows [name of child removed] will meet a girl soon who will turn her head like a car crash, but sexier! They will be making so many sparks they'll be a fire hazard!"

Example 3 – child aged 13 years old

- "Bongo knows that [name of child removed] is a sexy lass who will never get bored of guys checking her out. [name redacted] and [name redacted] would do anything for her legs."
- "Bongo knows [name of child removed] has flaming lips she could burn you with some hot kisses. Nearly accidentally burn [name redacted] and [name redacted] because shes too hot."

In summary, the Executive submitted that the Service was promoted in a manner that made it particularly attractive to children. The Executive submitted that this assertion was supported by the statements of parents complaining on behalf of their children, as well as evidence such as the data provided by Facebook and the style, content and composition of promotions. Additionally, the Executive asserted that some of the text messages sent to children contained adult themed language which a reasonable parent would not wish their child to see.

In light of the above, the Executive submitted that a breach of rule 2.5.8 of the Code had occurred, and therefore the Level 2 provider has failed to meet the required Code outcome.

2. The Level 2 provider strongly disputed that it had acted in breach of rule 2.5.8 of the Code.

The Level 2 provider asserted that the data provided by PhonepayPlus in relation to its Facebook fan base was not a true representation. The Level 2 provider asserted that 16 and 17 year olds were included in the groupings and that the data was not segmented by geographical location and therefore produced a result on a global basis.

The Level 2 provider stated that, using its Facebook administrator tools, it had re-segmented the data according to age and geographic location. The Level 2 provider submitted that 79% were of people who had "liked" its Facebook page were aged over 16.

The Level 2 provider submitted that the language, imagery and written content of all its promotional material is aimed at a mature audience, far above children's understanding. Additionally, in relation to the Facebook page, the Level 2 provider asserted that only a small fraction of the content advertises the Service by way of a call-to-action; the vast majority is viral content such as amusing images and videos in addition to promoting concerts and events that the Service sponsored. The Level 2 provider stated that the social media profile is primarily used as a branding exercise and occasionally as a channel for customer service. As such, it asserted that there is very little inducement for children (or others) to engage with the Service as a result of merely viewing the Service Facebook profile. Finally, the Level 2 provider stated that its own empirical evidence suggested that customers are attracted to use the Service primarily after viewing a television commercial, and secondarily via a street team promotion. It added that "online" is not an active targeted channel for the Service. The Level 2 provider added that as its television advertisements are rated "ex-Kids" by Clearcast and its street team are instructed to not distribute promotional material to children (**Appendix C**) it believed the Service was/is not particularly attractive to children.

The Level 2 provider asserted that the use of cartoon imagery and bright colours is not the exclusive domain of children's services and provided examples of other companies who market products to persons over the age of 18 with references to Monkeys or similar logos, typefaces and colours to the Service promotions. In addition, the Level 2 provider stated that the use of bright contrasting colours is in accordance with its requirements pursuant to the Australian mobile carrier regulations which state:

"Ads in which the product and service disclosure is obscured by a graphic element and ads that display the product and service disclosure obscurely, such as in unnecessarily tiny fonts and low-contrast colours, so it likely escapes customers' notice, are unacceptable...Good colour visibility exists when the brightness difference and the colour difference between the two colours are greater than a set range. Colour schemes that employ white and yellow, light grey and white, dark grey and darker grey, and similar low-contrast combinations fail to meet the requirements for legibility."

The Level 2 provider explained that it applied this principal to its brands globally and that brightness is used to ensure all relevant copy can be read by the customer; in order to avoid any doubt that the customer has had the ability to read and interpret costs, terms and conditions etc. The Level 2 provider submitted that the use of bright colours had not been used as an inducement to children.

In addition, the Level 2 provider stated that it intended the Service to be used by customers aged over 16. Its view is that the content of messages, whilst sometimes brash in nature, is appropriate for the target audience and of a comparable nature to other forms of entertainment such as recorded music and television shows.

It was asserted that the Service was primarily advertised on television and all Service commercials were rated “ex-kids” and cannot be played during children's television viewing times. Additionally, it was stated that recent advertising campaigns feature ‘Gaz’ from television show *Geordie Shore*, a show aimed at a 16+ audience and that, “All advertising has been approved by Clearcast to ensure they are not misleading or harmful to this audience”.

The Level 2 provider accepted that the case of the 11 year old girl being sent messages containing mature language should have been handled with more care, but it believed that the Service was not, “aimed at or likely to be particularly attractive to children,” and as such, the language used as part of the Service is not subject to the ‘reasonable parent’ test on an on-going basis.

Finally, although the Level 2 provider did not accept that it had breached the Code, it stated that it had made a number of changes to its operator procedures and policies during the investigation to improve its technology and procedures.

3. The Tribunal considered the evidence, including the Level 2 provider’s oral and written submissions and found that – on a narrow balance of probabilities - the Service was likely to be particularly attractive to children. The Tribunal made this determination as a result of all the evidence before it, including:
 - i. the complainant evidence (eight of which were from parents concerned about use of the Service by under 16s);
 - ii. the fact that at least 21% of those who had “liked” the Service Facebook page were under 16 (suggesting a considerable interest in the Service by under 16s);
 - iii. (although the Tribunal accepted that, within reason, any question can be asked) the Service is primarily promoted as a way of finding out what “Bongo” knows about you, which is likely to particularly appeal to a younger audience, including under 16s; and
 - iv. the television advertising occurs during programmes which, generally speaking, are likely to be attractive to under 16s (as well as other age groups).In addition, the Tribunal found that the content of the message sent by the Level 2 provider was of a nature that a reasonable parent would not wish their child to see. Accordingly, the Tribunal upheld a breach of rule 2.5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.3.5

“Premium rate services must not be of a nature which encourages unauthorised use by non-bill payers.”

1. The Executive asserted that, for the reasons set out below, the Level 2 provider had acted in breach of rule 2.3.5 of the Code.

The Executive noted that all 13 complaints related to charges incurred on a contract phone (as opposed to a pre paid phone). As a minor cannot enter into a mobile phone contract, the Executive stated that it was clear that any usage by a minor

constitutes usage by a non-bill payer and the Level 2 provider should have taken steps to ensure that use of its Service was authorised. Further, the Executive noted that the minimum age for using the Service is 16. The Executive therefore expected that the Level 2 provider should not have encouraged any individuals under the age of 16, who are highly likely to be unauthorised non-bill payers, to interact with the Service and, on discovering that a user was under 16, ought to have ceased interacting with the user in accordance with the Level 2 provider's own age restrictions for the Service. In addition, the Executive further asserted that no measures were in place to ensure that non-bill payers did not interact with the Service.

The Level 2 provider encouraged interaction with unauthorised non-bill payers

Of the 13 complaints received by PhonepayPlus, eight related to Service interaction by children under the age of 16, who were non-bill payers. The Executive received call logs for each of the eight children. The message logs indicated that, on at least three occasions, once the Level 2 provider was made aware that the consumer was likely to be or actually under 16 years of age, the Level 2 provider encouraged unauthorised usage by non-bill payers by continuing to interact with them. In each example, the Level 2 provider was either explicitly provided with information regarding the consumer's real age or could have inferred that the user was under 16 from the information provided, which should have led to termination of interaction with that consumer.

Example 1

On 6 August 2012, the user initiated interaction with the Service. Interaction continued for three days and consisted of questions and general conversation. For example:

“Thx I could almost believe that I think I'm fat but my mum says I slim [sic].”

“Cool I have a crush on somebody.”

On 9 August 2012, in response to a message from the Level 2 provider stating:

“Bongo knows all, so he doesn't need you to send a pic, Bongo thinks you're o beautiful Mona Lisa has come to life just so she can start bitching and wining [sic].”

The user replied with a text message that stated, “I'm only 11,” at a cost of £2.50. In response, the user was sent an automated spend reminder and a message stating:

“Bongo knows you are such a fashionista that Rogue are naming your house the fashion capital. Your mates think you are cooler than a polar bear on an iceberg [sic].”

As the above message shows, despite being told the user's age, the Level 2 provider continued to interact with the 11 year old and a further 32 messages were sent by the 11 year old user that day (at a cost of £80). Subsequently, the user received promotional messages, which encouraged further interaction with the Service. For example, on 16 August 2012, a promotional message was sent to the user, which contained an invitation to enter a competition to win an iPad 3:

“FreeMSG Got a crush? Reply with their FULL NAME TOWN to find out their personal info & u could win an iPad3! £2.50/MSG stop marketing msgs go2 askbongo.com.”

After receiving the message, the user renewed interaction with the Service on 17 August 2012. Each time the user stopped her interaction with the Service, the Level 2 provider continued to send promotional text messages in order to encourage further use:

“FreeMSG OMG Bongo has 2 much gossip!Txt any FULL NAME TOWN for personal info on someone & u could win an iPad3! £2.50/MSG stop marketing msgs go2 askbong.com”

“FreeMSG Reply FULL NAME TOWN to see what goss Bongo has on your mates, you could win an iPad3! £2.50/MSG stop marketing messages go2 askbong.com”

“FreeMSG Bongo has new dirt on you! Reply with FULL NAME TOWN 2 find out & u could win an iPad3! £2.50/MSG stop marketing messages go2 askbong.com.”

The Executive submitted that as a result of the Level 2 provider failing to act on the user’s statement that she was 11 years old, a further 53 text messages, at a cost of £132.50, were sent by the user to the Service. All of which were encouraged by the Level 2 provider providing responses and actively promoting the Service to the user. The Executive submitted that continuing to interact with the 11-year-old user clearly encouraged unauthorised use by a non-bill payer.

Example 2

On 4 November 2012, this user initiated interaction with the Service with a text message containing a name and a date of birth (“**DOB**”) in the year 2000. This was sent twice. The Level 2 provider interacted with the user, despite the fact that she had indicated, by giving her DOB, that she was 12 years old at the outset. In addition, during interaction with the Service on 4 November 2012, the user sent five further messages containing her DOB:

“who loves [name, DOB and location redacted]”
“Will [name, DOB and location redacted] ever find love?”
“How old will [name, DOB and location redacted] be when she finds love?”
“What does [name, DOB and location redacted] look like?”
“What sort of braces does [name and DOB redacted] have?”

The user incurred charges of £52.50 (21 sent messages) after alerting the Level 2 provider to her age. The Executive asserted that every time the Level 2 provider answered a question the user was provided with encouragement to send a further question to the Service. Given that the Level 2 provider was explicitly made aware of the user’s age, the Executive submitted that continued interaction and promotion encouraged unauthorised use by a non-bill payer.

Example 3

On 15 August 2012, this user initiated interaction with the Service and sent a text message stating, “Who is my favourite teacher at school”. The Executive asserted that, as a matter of common sense, it can be inferred that the user is of school age and therefore highly likely to be under 16. The Executive states that it was subsequently informed that the user was a 15 year old.

The Executive asserted that the operator(s) of the Service should have acted with caution on receipt of information that the user was at school and either sought further clarification of the user’s age and that she was the bill payer or ceased interaction with that user.

However, the Service continued to interact with the user, thereby encouraging further unauthorised use by a non bill-payer, by responding to her text message stating:

“Bongo knows that you have always been a little bored when around school, it isn’t the greatest place to be around, day dreaming about one direction helps though.”

By ignoring the information that the user was of school age, and therefore likely to be under 16 years of age and a non bill-payer, 25 further text messages were sent to the Service by the user, at a cost of £62.50. The Executive submitted that this amounted to encouraging unauthorised usage by a non-bill payer.

Lack of controls to prevent usage by non-bill payers

The Executive asserted that the Level 2 provider did not have sufficient controls in place to ensure non-bill payers were not encouraged to interact with the Service. The Executive noted that on 1 October 2012, and in response to the Executive’s preliminary investigation question, “Please can you advise what procedures does the Ask Bongo service have in place if an operator identifies a user is a minor”, the Level 2 provider stated:

- “Our training now includes the requirement for our operators to discontinue service customers if they explicitly disclose they are under 16...”; and
- [In response to a question about a specific mobile number] “In this particular case we believe our human operator(s) were incorrect in continuing to answer the customer’s questions once it was disclosed that they were 11 years old. This situation is unique and as a result we are in the process of re-training all of our operators to discontinue serving customers who explicitly state they are under 16 years old.”

The Executive asserted that the above three examples showed that interaction with minors was not a “unique situation”. Further, the Executive produced evidence to suggest that the Service continued to interact with at least one minor post the implementation of the Level 2 provider’s training update.

In addition, the Executive asserted that it was not acceptable for a service to rely exclusively on express disclosure of age by consumers during their interaction with the Service. The Executive submitted that where there is any indication that the user is under the age of 16, and therefore unlikely to be the bill payer, steps should be taken to ascertain the user’s age and/or cease interaction.

As a result of the above, the Executive submitted that the Level 2 provider did not have sufficient controls in place to prevent unauthorised use by non-bill payers, particularly minors.

In summary, given the nature of the Service (including the language and content of messages sent by the Level 2 provider’s human operators and the fact that consumers under the age of 16 were allowed to interact with the Service in practice), the Executive asserted that the Service was/is of a, “nature which encourages unauthorised use by non-bill payers”. In addition, the Executive stated that it had not been provided with any evidence that adequate controls were in place to identify and discourage unauthorised use by non bill-payers.

Accordingly, the Executive submitted that a breach of rule 2.3.5 of the Code had occurred.

2. The Level 2 provider strongly disputed the breach.

The Level 2 provider stated that children who use a contract phone should have the permission of the account holder before using premium rate services. However, the Level 2 provider asserted that it is not provided with any information from the aggregator (nor to the best of its knowledge is the aggregator passed this information from the carrier) regarding whether the customer is on a pre-paid or contract plan. Therefore, it asserted that it cannot rely upon a person using a phone on a contract as a basis on which to determine unauthorised use by a non-bill payer.

Further, the Level 2 provider stated that only one of the users relied upon by the Executive explicitly stated that they were under the age of 16 years. For example, "John Citizen 15" does not explicitly identify "John Citizen" as being the customer themselves. Notwithstanding this, the Level 2 provider stated that it had amended the way in which it interprets ambiguity surrounding these types of questions.

In regards to the specific examples, the Level 2 provider stated the following;

Example 1

This customer was sent spend reminder notifications, however, the Level 2 provider accepted that it should have taken more caution with this customer to determine that they had the permission of the account holder once it was known they were potentially not the bill payer.

Example 2

This customer did not explicitly identify themselves as the person with the year 2000 DOB. However, the Level 2 provider stated that it had amended the way in which it interprets ambiguity surrounding these types of questions. Furthermore, the Executive's assertion that by answering a question you are encouraging someone to send in another question is a generalisation and is incorrect; the Level 2 provider asserted that the average question rate for December 2012 was 2.15 questions per customer, making it statistically unlikely that a customer would ask additional questions after their second question had been answered. Furthermore, only 0.4% of customers in December 2012 incurred enough cost to warrant a £30 message being sent.

Example 3

This customer did not explicitly state they were under 16. Furthermore, given the fact school includes persons aged 16-18, it was not unreasonable for the operator to assume this person was at least 16 years of age.

Although, the Level 2 provider did not accept the breach, it provided a detailed account of the measures it had taken to address the Executive's concerns.

In its oral submissions, the Level 2 provider added that it would be wrong for it to refuse to answer a question, as the consumer would have already paid for the answer and that it had no ability to block numbers to prevent further questions being asked or to stop those numbers being billed when a question was sent.

3. The Tribunal considered the evidence, including the submissions made by the Level 2 provider and Executive, and found that there had been some unauthorised use of the Service by non-bill payers. However, the Tribunal considered that the real issue here was use of the Service by under 16s (who happened to be non-bill payers using their parents' phones) but that this issue had already been addressed by the breach

of rule 2.5.8. Further, the Tribunal concluded that, although there was clear problem with under 16s using the Service, the Service was not of a nature that “encourages” unauthorised use (although, the Tribunal noted that “encouragement” does not have to be “active encouragement”). Accordingly, the Tribunal did not uphold a breach of rule 2.3.5 of the Code.

Decision: NOT UPHELD

SANCTIONS

Initial Overall Assessment

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

- **Rule 2.5.8 – Services aimed at or particularly attractive to children**

The initial assessment of rule 2.5.8 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Some children were sent inappropriate content, which was potentially damaging.
- As a matter of principle, breaches where potential or actual harm is caused to children are serious.
- The nature of the breach means that the Service would have damaged consumer confidence in premium rate services.

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

Final Overall Assessment

The Tribunal found there were no aggravating factors for it to take into account.

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

- During the investigation, the Level 2 provider confirmed it had taken the following steps to address the concerns raised during the investigation:
 - i. Updated under 16s policy (including updated operator procedure and amended operator training process).
 - ii. Updated technical platform to detect users under the age of 16.
 - iii. New “16+” pop-up.
 - iv. Implementation of free messages where a user is suspected of being under 16.
 - v. Promotional messages will only be sent to users who have confirmed that they are over 16 or have the bill payer’s permission.
- The Level 2 provider stated that it had a “customer centric” refund policy.

The Level 2 provider’s revenue was in the range of Band 1 (£500,000+).

Having taken into account all the circumstances of the case, including, the mitigating factors, the fact that the breach was not intentional and the limited evidence of the scale of consumer

harm (which appeared to be minimal), the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

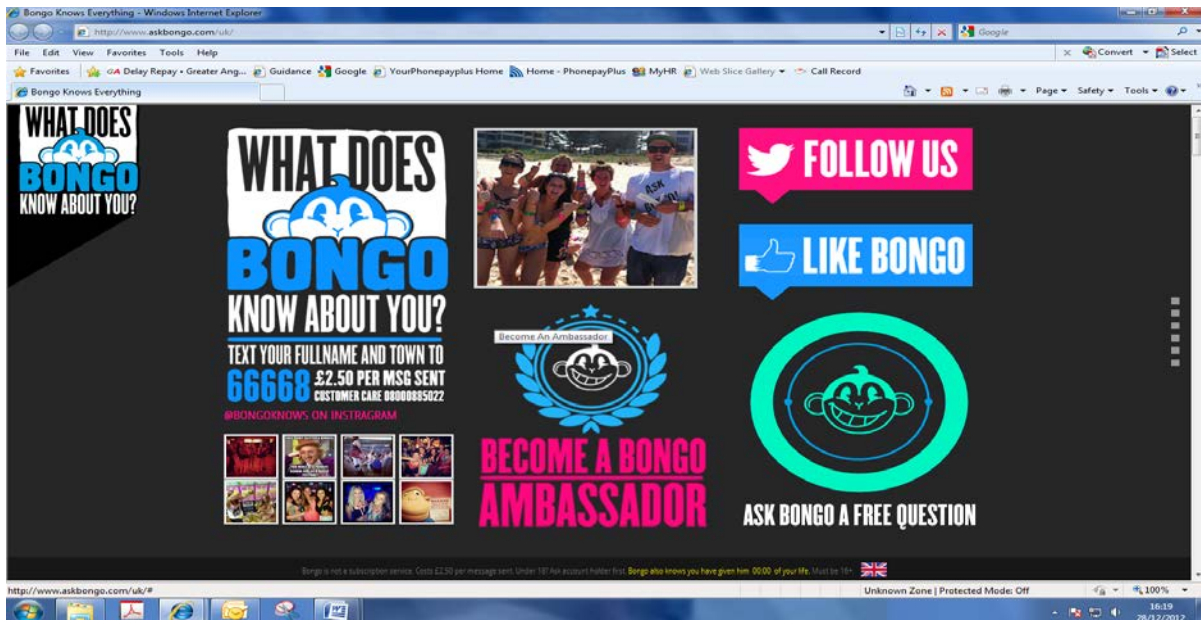
Sanctions Imposed

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

- A formal reprimand;
- A fine of £35,000; 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 the Service website:



Appendix B: Screenshot of promotional material for the Service on Facebook:



Appendix C: Promotional wrist band distributed by "street teams":

