

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 21 February 2013
TRIBUNAL SITTING No. 120/ CASE 1
CASE REFERENCE: 12494

Level 2 provider: Circle Marketing Ltd
Type of service: Adult video download subscription service
Level 1 provider: IMImobile Europe 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 20 September 2012, PhonepayPlus received 41 complaints from members of the public regarding the adult video download subscription service “Urhottestbabes.com” (“**the Service**”), operated by the Level 2 provider Circle Marketing Ltd. The Service was operated on the premium rate shortcode 89333 and offered adult video downloads at a cost of £3.00 per week (via two mobile terminating text messages costing £1.50 each).

Consumers received promotional text messages, which presented them with a WAP link. On clicking on the link, consumers were directed to a Service landing page, where they were provided with Service cost information and an “ENTER SITE” link which, when clicked, initiated the premium rate subscription.

Generally, complainants reported that they had received promotional material without consenting to receive marketing material and/or they had incurred charges without giving their consent.

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

Rule 2.3.3 – Consent to charge
Rule 2.4.2 – Consent to market

The Level 2 provider responded to the breach letter on 14 February 2013. On 21 February 2013, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

PRELIMINARY ISSUE

During correspondence with the Executive, there was some confusion regarding the legal identity of the Level 2 provider. Prior to the Tribunal, the Level 2 provider confirmed that its

legal name is “Circle Marketing Ltd” and that it accepted and understood that the adjudication was against that legal entity. The Tribunal noted that the Level 2 provider had raised no issue in relation to the adjudication proceeding against “Circle Marketing Ltd”.

The Tribunal noted that the Executive had inadvertently included “Reason 2- Overcharging” as part of the alleged breach of rule 2.4.2, when it should have formed the second reason for the alleged breach of rule 2.3.3. Prior to the Tribunal, the Executive notified the Level 2 provider regarding the mistake and communicated that “Reason 2- Overcharging” would be considered as a second reason for the alleged breach of rule 2.3.3. The Level 2 provider raised no issue in relation to this change.

ALLEGED BREACH ONE

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 that consent.”

1. The Executive asserted that the Level 2 provider had acted in breach of rule 2.3.3 of the Code.

Reason 1 – No robust evidence of consent to charge

The Executive noted that PhonepayPlus Guidance sits alongside the Code to aid providers in complying with the Code. Guidance concerning “Privacy and consent to charge” specifically states:

“[it is] essential that providers can provide robust evidence for each and every premium rate charge...”;

“Robust verification of consent to charge means that the right of the provider to generate a charge to a consumer’s mobile bill is properly verifiable...By properly verifiable we mean a clear audit trail that categorically cannot have been interfered with since the record, either of consent to purchase or simply of consent to future marketing...was created”;

“It is more difficult to verify where a charge is generated by a consumer browsing the mobile web, or by using software downloaded to their device. In these circumstances, where the consumer may only have to click on an icon to accept a charge, the MNO has no record of an agreement to purchase, and so robust verification is not possible through an MNO record alone”; and

“[Specifically appropriate to the Service] we would expect providers to be able to robustly verify consent to charge. Factors which can contribute to robustness are [only appropriate examples provided]:

- A record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);
- Records are taken and maintained by a third-party company which does not derive income from any PRS;
- PhonepayPlus is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed), and real-time access to this opt-in data upon request. This may take the form of giving PhonepayPlus password-protected access to a system of opt-in records; and

- Any other evidence which demonstrates that the opt-in cannot be interfered with.”

The Executive noted that it had received 41 complaints from members of the public about the Service, the majority of whom explicitly stated that the billed messages received were unsolicited and that they had not signed up to the Service.

When asked how one specific consumer had opted-in to the Service and consented to incur charges, the Level 2 provider stated:

“The consumer opted into the service by opening the free promotional WAP message that was sent on 26th April 2012 at 16:21:44. The consumer has entered the WAP page [**Appendix A**], read the Terms and Conditions and subscribed to the service on 26th April at 16:22:31. The consumer was then sent a free message – (FREEMSG: You joined urhottestbabes for £3 per week. Support 01618840150, STOP to 89333 to unsubscribe.SP Circle Marketing. 18+).

The Executive stated that the information provided by the Level 2 provider showed that there was no system in place that was capable of robustly verifying that consumers had given their consent to be charged. The Executive stated that it would have expected the Level 2 provider to have had access to robust evidence of consent to charge with a clear audit trail, for example, time and date stamp logs held by an independent third party that could not have been interfered with. The Level 2 provider accepted that it had no systems in place capable of providing such information.

The Executive noted that rule 2.3.3 of the Code states that:

“...Level 2 providers must be able to provide evidence which establishes that consent [to incur charges].”

The Executive asserted that the evidence, including the complainants’ accounts and the admissions made by the Level 2 provider, suggested that the Level 2 provider did not have in place a process that was capable of providing robust evidence of consent and as a result the Level 2 provider had failed to provide evidence which established consent to charge. Further, the Executive submitted that the information provided by the Level 2 provider, to evidence that consumers had consented to charges, was not sufficient to provide robustly verifiable evidence that could disprove the consistent complainant statements that they had not consented to incur charges from the Service.

Reason 2 – Overcharging

The Executive stated that it had acquired message logs for all the complainants. One of the message logs concerned a consumer who had incurred charges of £111.00. Despite the Service costing £3 per week, the consumer had been charged in excess of £3 per week. In a request for information, the Executive asked:

“...The Executive notes that the service costs £3.00 per week. The Executive notes that there are billing discrepancies shown on the log. For example: On 06/06/2012 – user billed £3.00 (two messages at £1.50 each). Three days later, user is billed again £3.00 (two messages at 31.50 each). Again, on 16/06/2012, the user is billed four times - £1.50 per message and this pattern continues

throughout the message log. Please provide a full explanation as to why this user is billed more than £3.00 per week.”

The Level 2 provider responded:

“This number has subscribed to our service multiple times therefore has received multiple charges for the subscription activated.”

The Level 2 provider failed to provide any further information regarding the reasons for the multiple subscriptions by the same MSISDN. In light of the complainant’s account that he had not consented to any charges and in the absence of a plausible explanation, the Executive submitted that not only had this consumer not consented to the Service (see Reason 1 above), he was also overcharged.

In light of the lack of robustly verifiable evidence to verify that valid consent to charge had been obtained, the Executive submitted that a breach of rule 2.3.3 of the Code had occurred.

2. The Level 2 provider accepted that it did not have systems in place capable of providing robust evidence of consent to charge.

The Level 2 provider gave an insight into the breakdown of how its UK revenues were generated. It stated that it used third party data obtained from adult providers in the UK. It explained that this allowed it to directly market to consumers and up sell with up to the minute products. This was around 20% of its business, but had been suspended as a result of the investigation. It submitted that this accounted for 40 of the 41 complaints (this was accepted by the Executive). It stated that the other complaint regarded a different product that was verified by mobile originating (MO) opt-in.

The Level 2 provider stated that in its data agreement it stipulated that any numbers it obtained should have a valid consent to market (less than six months old) and have a robustly verifiable opt-in. As part of its standard procedures it checked a random number of opt-ins (in this case 10) and it was happy that these were suitable for marketing. As the complaints began to start filtering through, it asked its data supplier for opt-ins and found that some of these dated back to 2010 and 2011. Although, it was satisfied that the opt-ins were robust, in the sense that the users used the sites, it noted that the consent to market was over six months old.

In terms of pro-activity, the Level 2 provider stated that it had voluntarily suspended all marketing messages (in relation to the Service) on 9 December 2012. In addition, it subsequently suspended chargeable messages. The Level 2 provider asserted that it had acted swiftly to cease promoting all third party marketing data. It stated that in its first response to the PhonepayPlus Complaint Resolution team it had provided what it thought as a company was sufficient evidence to show all numbers had a suitable consent to charge. However, it was highlighted that this was not a robust form of verification. It asserted that it had again acted swiftly and made enquiries regarding what forms of verification were acceptable for its third party marketing services. It was advised that there were several companies that offer verification services, one of them being Pinchecked. It approached Pinchecked and through a series of communications sought to use its services as a third party verification company. It stated that it had acted swiftly to contact all consumers who were unhappy with any of its services and assure them that they would not receive any

further messages. It also offered full refunds to any consumers that were not happy with its services.

In summary, the Level 2 provider stated that it maintained that it had a right to charge consumers, only one of its services “applies to this investigation”, it had made positive steps to stop any potential consumer grievances relating to the Service and it had worked on having the ability to provide robust verification services for all its remaining services moving forward.

In relation to the alleged overcharging of one consumer, the Level 2 provider stated that it had a robust billing systems in place that was monitored daily and as such overbilling had not and could not take place. It stated that a mobile number can be subscribed to multiple services (even in the same URL – pushing different style content) or from deducting credit where messages were not billed successfully. This automatically triggers another attempt to charge the mobile for the amount due. The Level 2 provider stated that it could see from the logs that in all instances this was applied and in the majority of cases where monies were collected at first instance it followed this pattern.

3. The Tribunal considered the evidence, including the Level 2 provider’s detailed submissions, and found that the Level 2 provider did not have any systems in place that were capable of providing robust evidence of consent to charge. The Tribunal noted that this was accepted by the Level 2 provider. As a result, the Tribunal found that the Level 2 provider was not in a position to counter the 40 complainants who stated that they had incurred charges without consenting. In these circumstances, the Tribunal preferred the evidence of the complainants and determined that consumers had incurred charges without consenting to those charges. In relation to Reason 2 – Overcharging, the Tribunal determined that the explanation provided by the Level 2 provider that the individual had subscribed on more than one occasion was not sufficient evidence to demonstrate that the consumer had agreed to be charged on multiple occasions for the same content. The Tribunal was satisfied, on the balance of probabilities, that one consumer had been overcharged, thus making the breach of rule 2.3.3 more serious in relation to that consumer. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.4.2

“Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the Level 2 provider of that service must be able to provide evidence which establishes that consent.”

1. The Executive asserted that the Level 2 provider acted in breach of rule 2.4.2 of the Code.

The Executive noted that PhonepayPlus Guidance sits alongside the Code of Practice to aid providers in complying with the Code. Guidance concerning “Privacy and consent to charge” specifically states:

“Providers using marketing lists should ensure that each number marketed to has a valid opt-in, gathered no more than six calendar months ago. Providers should ensure that they can robustly verify each and every consumer’s opt-in, and ensure that none are currently suppressed. Please note that, where a hard opt-in is used to market to consumers who have not previously purchased from a provider, or been in ‘negotiations for a sale’, then we will expect opt-in to be robustly verifiable in the event of any complaints, no matter how small or large the scale.”

The Executive noted that the above Guidance specifically applied to the Level 2 provider’s marketing campaign for the Service and therefore simply providing a screenshot of a consent ‘check box’ and stating that the complainants had ticked it, did not constitute robustly verifiable evidence that could be audited by the Executive, to counter the reports by the complainants that they had not consented to receive marketing from the Service.

Consent to being contacted

Of the 41 complaints that PhonepayPlus received in relation to the Service, six complainants specifically questioned how they had consented to receive marketing messages from the Level 2 provider.

Following questions from the Executive, The Level 2 provider stated that it obtained consent to market:

“Using a (3rd) party, to which the above mobile number has confirmed agreement to receive promotions and marketing messages of a similar nature, we receive a mobile number from a (3rd) party marketing company. On receiving this number we send out a free promotional Wap message to that mobile number.”

“Using a (3rd) party, to which the above mobile number has confirmed agreement to receive promotions and marketing messages of a similar nature, we receive a mobile number from a (3rd) party marketing company. The mobile numbers from the (3rd) party have Clicked on YES on marketing material that they have received. They have accepted that they will receive marketing material of a similar nature from (3rd) party customers. I have attached a screen shot of the message that they have consented to [**Appendix B**].”

The Executive asserted the Level 2 provider’s explanation and the accompanying screenshot (**Appendix B**) was insufficient to evidence that the Level 2 provider had obtained the complainants’ consent to receive marketing. Specifically, the Level 2 provider has failed to provide any evidence that the complainants ticked the relevant box to actively opt-in to receive promotional material.

The Executive questioned why the Level 2 provider had failed to provide a robust verifiable opt-in trail as specified in the Guidance. The Level 2 provider responded that:

“The reason that we originally did not have this in place was that as we explained to [PhonepayPlus] we were un-aware of how fully important it was to implement third party verification into our services...After receiving the list of companies we have since signed up to Pinchecked services.”

In light of the above, the Executive submitted that a breach of rule 2.4.2 of the Code had occurred.

2. The Level 2 provider accepted that it had acted in breach of rule 2.4.2 of the Code. The Level 2 provider restated the relevant parts of its response to the breach of rule 2.3.3.

In summary, the Level 2 provider stated that it accepted that as the opt-in data was over six months old it was ultimately at fault. It stated that it had put into place measures, including the suspension of the Service, which will ensure that the breach will not be repeated.

3. The Tribunal considered the evidence, including the submissions made by the Level 2 provider. In particular, the Tribunal noted that the breach was accepted by the Level 2 provider. In light of the Level 2 provider's admissions and the complainants' accounts that they had not consented to receive marketing for the Service (or any similar service), the Tribunal concluded that there had been a breach of rule 2.4.2 of the Code for the reasons advanced by the Executive.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.3 – Consent to charge

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

- The breach had a clear and detrimental impact on consumers.
- The nature of the breach meant the Service would have damaged consumer confidence in premium rate services.
- The Service was operated in a way that demonstrated a degree of negligent or reckless non-compliance with the Code.

Rule 2.4.2 – Consent to market

The initial assessment of rule 2.4.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The breach had a clear and detrimental impact on consumers.
- The nature of the breach meant the Service would have damaged consumer confidence in premium rate services.
- The Service was operated in a way that demonstrated a degree of negligent or reckless non compliance with 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 aggravating factor:

- In late 2012, the Level 2 provider was told by the PhonepayPlus Complaint Resolution team that the systems it had in place were not capable of providing robust evidence of consent to charge or market. The Tribunal commented that it was surprised that the Level 2 provider had not acted more quickly to implement a system capable of providing robust verification of consent to market and charge.

The Tribunal noted that the Level 2 provider had failed to follow the specific and detailed Guidance with regard to systems to demonstrate consent to charge and market. However, as this failure was integral to the breaches, the Tribunal did not determine that this was a separate aggravating factor.

The Tribunal noted that the Level 2 provider stated that it had provided some refunds but the evidence provided was limited. Accordingly, the Tribunal found there were no mitigating factors for it to take into account.

The Level 2 provider's revenue was in the range of **Band 3 (£100,000- £250,000)**.

Having taken into account all the circumstances of the case, 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 £60,000; 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.