



Tribunal Sitting Number 129 / Case 3

Case Reference: 18062

Level 2 provider	CommandM PTY. Limited
Type of service	Entertainment - non-adult
Level 1 provider	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

Between 18 July 2012 and 7 June 2013, PhonepayPlus received 77 complaints regarding a virus and malware facts subscription service (the “**Service**”), which was operated by the Level 2 provider CommandM PTY, Limited on the shortcode 80990. The Level 1 provider was OpenMarket Limited. The Service operated from December 2011 to 29 May 2013 (when it was voluntarily suspended by the Level 1 provider following correspondence from the Executive).

Consumers subscribed to the Service as part of an upgrade to the Level 2 provider’s ‘Battery Booster Application’ (the “**App**”) which was available free of charge for smartphones from the Android Market (**Appendices A and B**). The Service was not promoted by any other means.

Consumers were charged £4.50 per week for the Service and received one virus fact every week until “STOP” was sent to 80990. For example:

“‘virus’ 1st used in 1972 book ‘when HARLIE Was One’. A sentient pc writes virus 2get personal info 2blackmail the man wanting to turn it of [sic].”

The average consumer spend (based on complainants’ accounts) was £36.02, the largest charge incurred by a single customer was £150. Complainants either stated that they had received unsolicited, reverse-billed text messages and that they had not engaged with the Service, or acknowledged downloading the App but stated that they were under the impression that it was free. In addition, PhonepayPlus had concerns regarding the misleading nature of the Service, pricing prominence and the failure to disclose information likely to have a regulatory benefit.

Following the receipt of a number of complaints, the Level 2 provider was the subject of an investigation in April, June and October 2012. PhonepayPlus was unable to monitor the Service and was therefore reliant on the promotional material submitted by the Level 2 provider. The promotional material supplied by the Level 2 provider appeared to be compliant (save for some minor issues that were rectified), therefore the complaints were closed.

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 13 June 2013. Within the breach letter

the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.5 – Pricing
- Rule 4.2.5 – Failure to disclose information

The Level 2 provider responded on 27 June 2013. On 11 July 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 acted in breach of rule 2.3.2 of the Code as consumers were misled into using the Service and thereby incurred premium rate charges. Specifically, the Executive asserted that the Level 2 provider breached rule 2.3.2 of the Code for the following three reasons:
 1. Consumers were likely to have been misled into believing that the “instant upgrade” was part of the installation process for the App.
 2. Consumers were likely to have been misled into believing that the “upgrade” would enhance the performance of the App.
 3. Consumers were likely to have been misled into believing that the reviews of the App were made on the same date that they accessed the Service.

The Executive relied on the content of PhonepayPlus Guidance on Promotions and promotional material. The Guidance states:

Paragraph 3.1

“If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, an important term or condition likely to affect their decision to use the service.”

Paragraph 3.2

“PhonepayPlus expects that all promotions must be prepared with a due sense of responsibility to consumers, and promotions should not make any factual claims that cannot be supported with evidence, if later requested by PhonepayPlus to do so.”

Reason 1: Belief that the “instant upgrade” was part of the installation process

The Executive submitted that consumers were likely to have been misled into believing that the “instant upgrade” was part of the installation process for the App.

Complainants' accounts

The Executive received the following complaints from consumers:

"Consumer advises he thought the app was free, does not recall accepting any charges via the application."

"Consumer had downloaded something to do with the battery but deleted it."

"Consumer advises that she has installed the application but was not aware of premium charges"

"Consumer saying he does remember downloading a battery app but he is saying it said it was free."

The Executive's monitoring

The Executive noted that when it monitored the Service on 29 May 2013, the "upgrade" initiated as soon as the App had downloaded. Furthermore the Level 2 provider submitted that the upgrade was, "available when the consumer first opens the application" (**Appendix A**).

A number of complainants appeared to be confused as to why they were charged as they recalled signing up for a free application. The Executive asserted that when the first opt-in screen appeared on consumers' handsets it was reasonable to assume that they clicked on the "Continue" call to action button believing this was part of the installation process. The Executive noted that as all of the text was light grey, only the "instant upgrade" heading and the "continue" button stood out.

Furthermore, the Executive submitted that the "Skip" button, which was located in the top right hand corner of the screen, was not prominent when compared with the "Continue" button, which was likely to have resulted in consumers not being aware that they could bypass the "upgrade" process.

The Executive asserted that the Service upgrade page was set out in a way that was likely to mislead consumers into believing that the instant "upgrade" was part of the installation process for the App, as opposed to the separate Virus Facts premium rate Service.

Reason 2: Consumers were likely to have been misled into believing that the upgrade would enhance the performance of the App

The Executive's monitoring

On 29 April 2013 the Executive monitored the Service using a file containing the App sent in by a complainant (**Appendices B**). Immediately upon opening the App the Executive was offered an "instant upgrade". The Executive noted that the Level 2 provider asserted that the upgrade would provide consumers with access to all "Pro Features" including:

1. Power saving settings;
2. Background application detection;
3. Extended battery life;
4. Upgraded phone;
5. Reduced system crashes; and

6. SMS Virus Facts.

The Executive noted that the Level 2 provider failed to provide any evidence to substantiate the claims made regarding the availability of “Pro Features” (and/or additional functionality) to subscribers. On being questioned it stated:

“The upgrade is purely to the text alerts service where users can join an on-going subscription service...”

The Executive asserted that consumers were likely to have been misled into believing that the upgrade would include additional functionality and that the Level 2 provider’s admissions clearly indicated an inability to substantiate all of the factual claims made to entice consumers.

The Executive submitted that the Level 2 provider acted in breach of rule 2.3.2 of the Code as consumers were likely to have been misled into entering the Service based on factually inaccurate claims relating to the enticing additional “Pro Features”.

Reason 3: Consumers were likely to have been misled into believing that the reviews of the App were made on the same date that they accessed the Service

The Executive’s monitoring

When monitoring the Service on 24 April 2013, the Executive was presented with the following “most recent” reviews:

“Gregg: This app is amazing. My phone was running real slow and took forever to load anything but since running this app on my HTC Desire HD it is running smooth.”

“Alan: Very nice app. Quick to the point and informative.”

“Steve: I thought my 3D phone was fast but this is awesome! Be sure and reboot after using to feel the difference.”

When conducting further monitoring on 12 May 2013 the Executive was presented with the exact same “most recent” reviews from “Greg”, “Alan” and “Steve”. However, the date had changed to a more recent date.

The Executive asserted that the coding behind the App was set up to alter the date of the review to the date on which the page was viewed.

The Executive therefore submitted that the user reviews (which promoted the App) were misleading as consumers were led to believe that other consumers had, on the very same day, uploaded highly positive reviews for the App.

The Executive accordingly concluded that, for the reasons described above, the Service operated in breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied the breach. The Level 2 provider asserted that it was committed to acting ethically and in the best interest of its consumers. It added that any time an error, omission or concern was raised it had acted immediately to resolve it. Further, it stated that it



in no way intentionally attempted to mislead, confuse or otherwise cause issues with any consumers.

The Level 2 provider stated that it employs a methodology of continuous product development, improvement and optimization to ensure that the products and services are improving in line with the market, client needs and demographics. It stated that the screenshots presented by the Executive:

“[W]ould seem to be the result of this methodology and products evolution. The methodology generally involves incremental small changes with the aesthetics and wording in the pursuit of providing a better product/service. With each evolution since its launch, the product in its current form has moved away from the original model. We recognize more controls would have ensured a higher level of compliance but note this was unintentional and an oversight as the product team who managed these small changes (which compounded to larger changes) did not actually realize how far they had travelled from the original product form. That said, the product in its current form does still remain true to the original operation, content and value proposition – an app that has performance benefits for the phone and which features a service delivering information about virus’s and malware.”

Reason 1

The Level 2 provider disputed that the “upgrade” initiated as soon as the App had downloaded. It stated that a typical phone user would assume the App had installed fully on seeing the message stating, “Application installed”. It added that the App was been installed without any “upgrade” being mentioned or initiated.

The Level 2 provider submitted that it was not stated that the “instant upgrade” was “free”. Further, it stated that a double opt-in process had to occur for the “upgrade” to take place and that the “upgrade” could not take place without the user having positive interaction with the App, namely the explicit selection of each button (“Continue” and “Accept”).

In relation to allegation that consumers had clicked “continue” in the belief that it was part of the installation process, the Level 2 provider stated that, “this looks to have been unintended styling issues”. The Level 2 provider stated that they had no intention to confuse or obscure any information. In addition, the Level 2 provider asserted that the “upgrade” explicitly stated that SMS would be sent directly to the phone as part of a subscription service”. The Level 2 provider described the lack of prominence of the “Skip” button, as compared to the “Continue” button, as “another unintended styling issue”. The Level 2 provider stated that the Service upgrade page was unintentionally set out in a way that was likely to have misled consumers into believing that the “instant upgrade” was part of the installation process for the free App, as opposed to the separate Virus Facts Service. The Level 2 provider added that:

“The upgrade page begins with the heading of “Instant Upgrade” in bold letters, Pricing information and full subscription disclosure is detailed above this in font sizing that maintains all information on one line. This copy is also in keeping with the current product styling.”

It added that in its judgement users would have been aware that the App had been installed, due to the confirmation combined with the heading of “Instant Upgrade” and that it was clear to users that they were now reading information related to a post-installation offer.

Reason 2

The Level 2 provider submitted that it did not intend to mislead consumers in anyway. In addition, the Level 2 provider stated that:

“The app homepage explains that the app will optimise the phone, battery and hardware. The descriptive text that is used on the upgrade page was designed to remind consumers about these features by communicating that by upgrading, consumers retain the benefits of the application plus receive ‘ultimate virus facts’ delivered to the phone. “Plus” would indicate in addition to everything that the application already did. There was no intention to mislead consumers; rather the intention was to clearly communicate the benefits and features of both the application and the upgrade facts service.”

Reason 3

The Level 2 provider described the misleading reviews as a “coding error”. The Level 2 provider stated that they were, “unsure how it occurred”. However, it noted that “the reviews were real and in line with the functionality and improvements users did experience from the application which [they] have not seen contradicted by any of the screenshots or annexures”.

3. The Tribunal considered the evidence, including the Level 2 providers’ detailed written submissions and admissions, and found that promotional material for the Service was likely to have misled consumers for the three reasons outlined by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Rule 2.2.5

In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.

1. The Executive asserted that the Level 2 provider acted in breach of rule 2.2.5 as pricing information relating to the Service was not prominent or proximate to the means of access to the Service.

The Executive relied on the content of PhonepayPlus Guidance on Promotions and promotional material. The Guidance states:

Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).”

Paragraph 2.10



“Lack of prominence, or proximity, most often takes place online (both web and mobile web), where the price is provided in small print elsewhere on the page from the call to action.”

Paragraph 2.14

“The use of colour (see immediately below) also needs to be considered, as this could affect the need for close examination, regardless of font size.”

Paragraph 2.15

“There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity.”

Complainants’ accounts

The Executive received the following complaints from consumers:

“The consumer downloaded a battery upgrade app, called booster plus and an antivirus but claims not to have been made aware of any charges associated with the service. He claims to have scrutinised the promotion and found no pricing indicated.”

“Consumer advises that she has installed the application but was not aware of premium charges”

“Consumer saying he does remember downloading a battery app but he is saying it said it was free.”

“Consumer advises he thought the app was free, does not recall accepting any charges via the application.”

The Executive’s monitoring

On 29 April 2013 the Executive monitored the Service using a file containing the App sent in by a complainant.

On the first of the two opt-in screens the price was located in two places; the top and the bottom of the screen (**Appendix B**). The pricing at the top of the screen was not prominent as the text was light grey and was the smallest text on the screen. In addition, the pricing information was not proximate to the ‘Continue’ button, which is the means of access to the Service, as it was located at the opposite end of the page.

Similar issues arose in relation to pricing at the bottom of the screen. The pricing at the bottom of the screen was below the fold, meaning consumers would need to scroll down below the means of access to the Service in order to see it. Additionally the price was presented in a block of light grey text and was therefore not prominent.

The pricing information was presented in exactly the same format on the second opt-in screen

(Appendix C).

In light of the above, the Executive submitted that a breach of rule 2.2.5 of the Code had occurred as the pricing information was not sufficiently prominent or proximate to the means of access to the Service, which resulted in consumers not realising that they would incur premium rate charges. Accordingly, the Executive asserted that outcome 2.2, relating to transparency and pricing, had not been met.

2. The Level 2 provider accepted that issues had arisen in relation to pricing proximity and prominence as a result of, “product evolution in terms of both style and structure”. However, it added that in all its product development a key feature was clear and easily visible positioning of pricing information. It stated that:

“The decision was made to maintain price location at the top and bottom of the screen, to ensure that it was separate from the main product copy and also ensure that as much information as possible was detailed. With reference to the top positioning, the decision was made to keep all of the information together on one line for ease of review for consumers. It was also decided to keep the copy within the product style in terms of colour and also to ensure that it was identified as being separate from the heading ‘Instant Upgrade’ by having it in standard format when the heading was in old format. With reference to the bottom positioning, this appears to be a phone issue related to the way it interprets the style. With so many phone sets and resolutions sometimes the style does not apply correctly. The service information was not intended to be so far down the page so as to require scrolling by the user.”

Finally, the Level 2 provider emphasised that:

“[T]he text messages that were sent as a result of signing up to the service also clearly indicated the user had joined a paid subscription service and would easily see the associated charge”.

3. The Tribunal considered the evidence, including the written submissions made by the Level 2 provider. The Tribunal found that the pricing was neither sufficiently prominent nor proximate to the “Continue” button as it required consumers to scroll to see the pricing information, which was in a small font. Therefore, consumers may not have been aware of the full cost of using the Service. The Tribunal also noted that the large block of white space between the “Accept” button and the pricing information section, may have led consumers to believe that there was no further information on the page (thereby resulting in them not seeing the pricing information). The Tribunal noted the Level 2 provider’s account in relation to “product evolution”, but stated that it appeared as though the pricing information was intentionally neither prominent nor proximate by design. As a result, and for the three reasons outlined by the Executive, the Tribunal concluded that the promotional material for the Service was in breach of rule 2.2.5 of the Code. The Tribunal stated that the provision of pricing information in text messages sent after a consumer had incurred charges were irrelevant in respect of this breach.

Decision: UPHELD

ALLEGED BREACH 3

Paragraph 4.2.5



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

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.5 on the basis that full details relating to promotional material was not supplied when requested.

The Executive sent an initial request for information to the Level 2 provider on 26 March 2013. The Level 2 provider responded with screenshots relating to one consumer journey.

As the promotional material supplied by the Level 2 provider differed substantially from the consumer journey that the Executive experienced when monitoring the Service on 29 April 2013 and the complainant accounts, the Executive sent a further request for information on 13 May 2013. The Executive asked for information relating to:

“All methods by which consumers are able to opt-in to the service. If there are any additional routes to subscription please include screenshots.”

The Level 2 provider responded on 28 May 2013 stating, “the only method by which consumers can join this service is via the double opt-in process on the application”. No additional promotional material was submitted.

The Executive submitted that the Level 2 provider should have submitted details of the most recent version of the Service promotions and that this information would have had a clear regulatory benefit to the investigation as the Executive would have been able to consider all possible routes of access to the Service.

The Executive asserted that the Service was promoted in April 2013 using marketing materials which the Level 2 provider failed to disclose when requested. The Executive submitted that a breach of paragraph 4.2.5 of the Code has occurred as information was not provided which would have had a regulatory benefit.

2. The Level 2 provider denied that it had intentionally acted in a manner that was contrary to paragraph 4.2.5. It stated that, at the time of providing the information to the Executive the screenshots were current and correct. It added the person who supplied the material to the Executive was not a member of the “optimization team”, and did not know that the product had changed. It added that:

“Guidelines were still followed and they did not intentionally remove anything that fulfilled the balance of the service requirements.”

Finally, the Level 2 provider stated that:

“If the Executive did believe that there were other methods, or had proof, it would have been helpful for them to highlight this and work together in figuring out why there may have been a discrepancy. We understand the value of working together as can be seen by all our previous communications. We try to be responsive and always work on improving things and leading towards resolutions that are acceptable to the Executive.”

3. The Tribunal considered the evidence, including the Level 2 provider’s written submissions. The Tribunal commented that the Level 2 provider was aware of the receipt of a large number



of complaints and should have conducted sufficient internal enquiries to satisfy itself that all requested information likely to have a regulatory benefit had been disclosed. The Tribunal noted that it is unacceptable for a provider to not be aware of the current version of its product and/or to fail to provide current information to the regulator. Accordingly, and for the reasons given by the Executive, the Tribunal upheld a breach of paragraph 4.2.5 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.2- Misleading

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

- The nature of the breach and the scale of the harm caused to consumers are likely to have severely damaged consumer confidence in premium rate services.
- Consumers incurred unnecessary costs and gained little if any additional value.

Rule 2.2.5- Pricing

The initial assessment of rule 2.2.5 was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service generated substantial revenues through a reckless or intentionally non-compliant promotion that misled consumers.

Paragraph 4.2.5- Failure to disclose information

The initial assessment of Paragraph 4.2.5 was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- At best, the Level 2 provider had recklessly failed to comply with a PhonepayPlus request.

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

Final Overall Assessment

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

- The Level 2 provider had failed to follow Guidance on Promotions and promotional materials.
- There have been numerous relevant prior adjudications. Of particular relevance are the adjudications against Sight Mobile LLC and Glass Mobile LLC, which concerned misleading "battery" Apps and raised a number of similar issues to the instant case.
- The Service was cross promoted through applications designed to appeal to young children, which resulted to consumer harm to minors. The Tribunal noted that eight complaints were made in relation to children engaging with the Service.

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



mitigating factor:

- The Level 2 provider stated that on becoming aware of PhonepayPlus' concerns it immediately suspended the Service and all marketing.

The Tribunal also noted that the Level 2 provider:

- i. voluntarily sought compliance advice, but this related to an aspect of the Service that was not relevant to this case and therefore was not mitigation in relation to the breaches raised.
- ii. said it had a "lenient" refund policy, but had not provided any evidence to support the assertion that refunds had been made to consumers in this case.

The Level 2 provider's revenue in relation to the service was in the range of Band 1 (£500,000+)

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

Sanctions Imposed

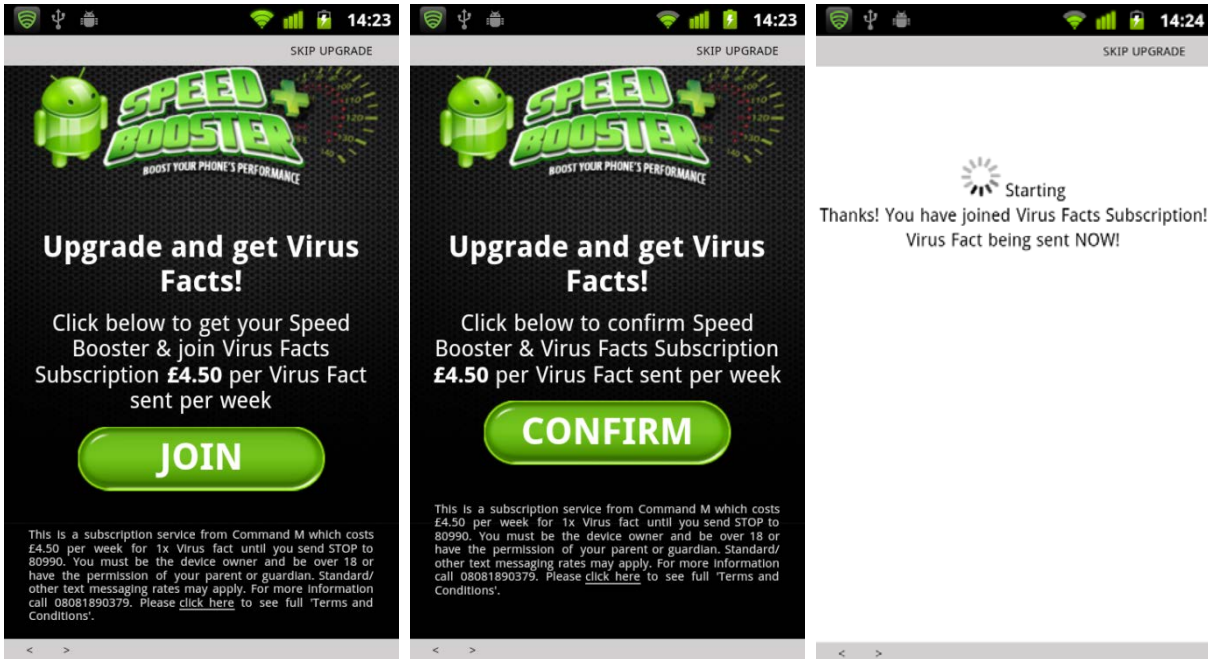
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £250,000;
- a requirement that access to the Service is barred until compliance advice has been implemented to the satisfaction of the PhonepayPlus; 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.

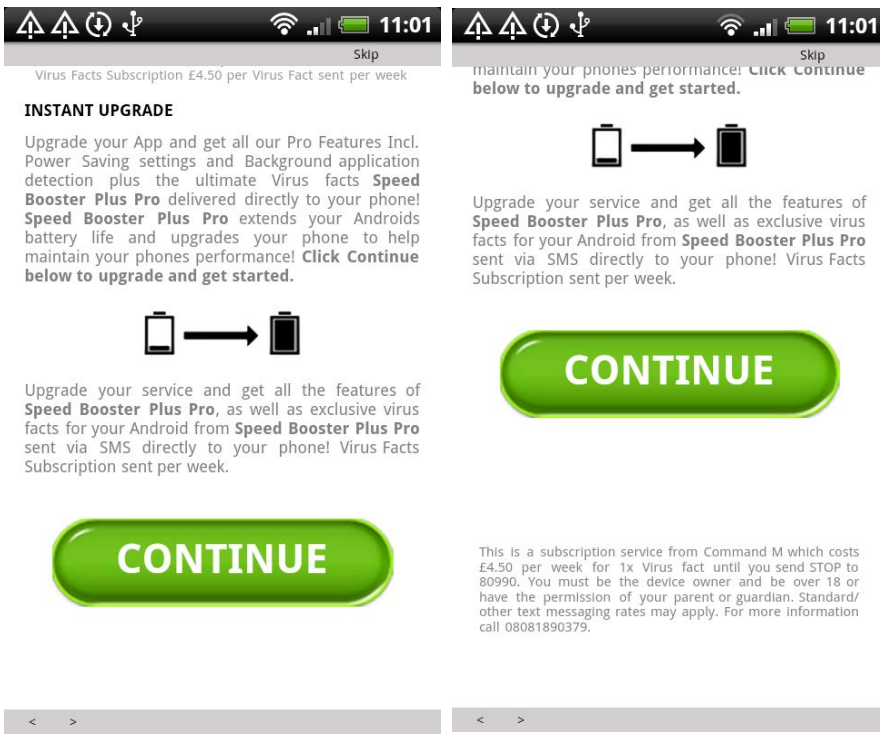
The Tribunal commented that promotional material for the Service was fundamentally misleading and that, but for the overlap between the mischief addressed by the breaches of rule 2.3.2 and 2.2.5, it would have imposed a significantly higher fine. The Tribunal noted the Level 2 provider's intention to permanently suspend the Service. However in light of the seriousness of the breaches upheld, the Tribunal concluded that a bar on access to the Service was a proportionate sanction to avoid future consumer harm.

Appendices

Appendix A: Screenshots submitted by the Level 1 provider:



Appendix B: Screenshots of in-app promotional material for the Service provided by a complainant:



Appendix C: Screenshots of the second opt-in and loading screen provided by a complainant (red boxes added by the Executive):

