THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday 24 January 2013
TRIBUNAL SITTING No. 118/ CASE 1
CASE REFERENCE: 11083

Level 2 provider: So Much Cheaper.com Limited

Type of service: Adult SMS chat

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

Since 17 January 2012, PhonepayPlus received 38 complaints from members of the public, regarding a live virtual chat premium rate service "liveflirtchat" ("**the Service**"), operated by the Level 2 provider So Much Cheaper.com Limited. The Service was operated on the premium rate shortcode 89797 at a cost of £1.50 per message received (mobile terminating message). The Service was promoted online on liveflirtchat.com and in print advertising (**Appendices A and B**). The Service was suspended by the Level 1 provider on 23 October 2012.

The majority of complainants stated that they had received text messages that were unsolicited. Certain consumers stated that they did not know what the Service was or what they had been charged for, and that they had not entered into an adult chat service. A number of consumers also stated that they had texted STOP to the 89797 shortcode, but they had continued to receive chargeable messages. There also appeared to be issues with the Level 2 provider's consumer services line, as consumers were not able to speak to an operator or request a call back. One complainant was a vulnerable person with a learning disability, who incurred £8598.14 in charges.

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 21 December 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.4.2 – Marketing without consent
- Rule 2.3.3 – Charging without consent
- Rule 2.3.11 – Exit
- Rule 2.3.12(c) – Spend reminder
- Rule 2.6.2 – Complaints process
- Paragraph 4.2.5 – Provision of information

The Level 2 provider did not substantively respond to the breach letter as the Level 2 provider entered into voluntary liquidation on 7 January 2013. On 24 January 2013, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE
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 submitted that the Level 2 provider had failed to obtain valid consent from consumers to send promotional messages for the following reasons:

   i. Inadequate terms and conditions regarding consent to market and the lack of an opportunity to withdraw consent;
   ii. No opportunity to withdraw consent in promotional text messages that were received after "opt-in"; and
   iii. The Level 2 provider's admissions.

   Reason 1: Inadequate terms and conditions regarding consent to market and the lack of an opportunity to withdraw consent

   The Executive noted that PhonepayPlus Guidance on Privacy and consent to charge contains a summary of the Privacy and Electronic Communications Regulations 2003 ("**PECR**"):

   > "Where there is no explicit consent, the marketer must have obtained the individual's details through a sale, or negotiations for a sale, and the individual must have been given the opportunity to refuse such marketing, when their details were collected (a practice known as 'soft' opt-in);
   >
   > "Soft opt-in marketing materials must relate to that marketer's products or services and only concern similar products to the individual's initial purchase, or area of interest (e.g. it would not be appropriate to promote adult services to someone who had only previously purchased ringtones);
   >
   > "Soft opt-in consumers must be given a simple means of opting out at the time of initial purchase, and in each subsequent promotion; and
   >
   > "Where soft opt-in conditions are not met a positive action signifying consent must be obtained from consumers after clear information about the intended activity has been provided. For example, where the individual's details are to be passed to third parties, they must be clearly informed of this, and positively confirm their acceptance (a practice known as 'hard' opt-in)."

   The Executive noted that the terms and conditions regarding consent to market differed between the print and online promotions for the Service. The Service website made no reference to consumers receiving promotional messages, whereas the print advertisement stated, "We may send you free promotional messages". The Executive

noted that both forms of promotion provided no opportunity for consumers to refuse to consent to receive marketing messages.

On 3 September 2012, the Level 2 provider advised the Complaint Resolution team that the majority of revenue generated by the Service was from historic print advertising and not from the website. The Executive queried whether certain MSISDN's had entered the Service via the website or print advertisements, however it did not receive a response.

Opt-in and consent via the Service website

In relation to consumers who opted in to the Service on 89797 via the website, the Executive submitted that there was no provision for hard opt-in, as there was no opportunity for consumers to provide a positive action signifying consent to receive marketing. In addition, the Executive asserted that the soft opt-in exemption did not apply as there was no opportunity to withdraw consent.

Opt-in and consent via print promotions

In relation to consumers who opted-in to the Service on 89797 via print advertisements, the Executive again submitted that there was no provision for any hard opt-in, as there was no opportunity for consumers to provide a positive action signifying consent. The Executive noted that there was reference in print promotions to consumers receiving free promotional messages, however crucially there was no opportunity provided to withdraw consent.

Promotional messages received by consumers who entered into other services via 89797

The Executive noted that some of the message logs indicated an opt-in from shortcodes other than 89787 prior to receiving promotional messages for the Service. For example, one consumer appeared to enter the Service via a tarot service.

The Executive sought full details of the services operating on the other shortcodes. The Level 2 provider responded:

> "It would be impractical to list all the service terms for all of these services that ran previously especially as all of them have now been closed, however the key component in all the advertised service terms, was the phrase "We may send you additional promo and service msgs."; or words to that effect. It was because of this that cross promotions of age appropriate services were sent to all customers regardless of the short code that they opted into".

The Executive made a further request for the information as the information would have assisted the Executive in establishing whether hard opt-in could apply, or whether the soft opt-in exemption was applicable. The Executive noted that for soft opt-in to apply, consumers would have needed to have been entered into an adult chat service originally, and not one of the Level 2 provider's tarot services (as this is not a similar service).

The Executive did not receive a response from the Level 2 provider. The Executive was therefore unable to establish whether hard or soft-in was applicable, and therefore if consent has been given by consumers to receive promotional text messages or not.

In light of the message logs and in the absence of any satisfactory evidence to the contrary, the Executive asserted that consumers who had previously interacted with a tarot service but had received promotional messages regarding the Service had been contacted contrary to the Guidance and had therefore not provided valid consent to be marketed to.

Promotional messages received by consumers who attempted to enter the CSI competition

The Executive noted that some of the complainants first interacted with the Service with a text message stating, "csi b". It transpired that the complainants had wanted to enter a television competition but had sent the message to the wrong shortcode. After sending the message, complainants then received messages from the Level 2 provider. The Executive submitted that complainants in this category had not consented to receive marketing messages from the Service.

The Executive also noted that even if the Level 2 provider had a hard opt-in, the large passage of time between opt-in and the first promotional message received was contrary to PhonepayPlus Guidance, which states that marketing should happen soon after consent is given, and that no consumer should be marketed to more than six months after the date of their last consent. In addition, the Executive noted that the Level 2 provider accepted that:

> "The period of silence or no response should be up to 6 months from the last SMS sent. I,e [sic] there may have be a message sent to the customer whereby nothing happened for 6 months but to re engage the customer we may have sent another message. Looking at some of the logs it's clear that the 6 month internal guideline that was set had lapsed in some cases".

Reason 2: No opportunity to withdraw consent in promotional text messages that were received after "opt-in"

The Executive noted that PhonepayPlus Guidance provides that:

> "When marketing via SMS, providers should follow this format to minimise any risk of invading privacy. The message should begin 'FreeMsg'. The message should state contact information of the initiator of the message (not any affiliate or publisher). This can be in the metadata of the SMS (so, if consumers can text back to the shortcode on which the communication was sent, then this is likely to be sufficient). The message should also include a means of refusing future marketing. A best practice example of a message compliant with these guidelines would be: "FreeMsg: to receive more guidance on privacy contact us on 0845 026 1060, to end marketing reply STOP" [116 characters]."

The Executive asserted that even if the soft opt-in exemption did apply in the relation to the Service, some consumers received promotional messages that stated:

> "Free MSG: Txt svc Msgs r 1.50 to rcv. ADVERT: Wanna chat LIVE to horny Girls? Call them NOW! Dial 69977 from yr mobile LIVE 1 to 1 Phone Sex! (calls 1.50p/m)"

> "FreeMsg: Looking for LIVE hardcore sexchat? Real, horny women want you to get down and dirty with them NOW. DIAL 09081231234. 18+ Calls cost £1.50/min."

The Executive asserted that the messages were totally deficient as they did not provide an opportunity for consumers to withdraw consent.

Reason 3: The Level 2 provider's admissions

The Executive noted the following specific admissions of error by the Level 2 provider:

> "As short codes were cancelled, customer data from related services were consolidated. E.g. all adult chat service customers were combined to simplify promotions, to ensure that duplication was not occurring and that the stop command was working properly. It's clear that this process wasn't done as carefully as it should have been and that some lists may have been combined that should not have been.
>
> "We cannot accurately determine the exact number of customers affected, however, as previously stated, for any genuine complaints, we have provided goodwill refunds to compensate customers for their time."

Accordingly the Executive submitted that there had been a breach of rule 2.4.2 of the Code.

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of rule 2.4.2 for the three reasons advanced by the Executive. The Tribunal was particularly concerned that an adult service was marketed to consumers who had shown no interest in such services and that those consumers who had inadvertently interacted with the Service received promotional material which did not contain details of how to stop the messages. Accordingly, the Tribunal upheld a breach of rule 2.4.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO
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 submitted that the Level 2 provider had breached rule 2.3.3 of the Code as consumers who had entered an invalid opt-in incurred charges. In addition, consumers were charged to receive promotional messages.

Reason 1: Invalid opt-in

The Executive noted that a number of complainants who had not entered an applicable keyword for the Service incurred charges. For example, some consumers interacted with the Service by accident when attempting to enter a television competition (and texted "csi b").

The Level 2 provider stated:

"In reference to CSI on 85555, this was a common customer error when Channel 5 was running competitions and customers could not remember the channel 5 short code and sent in messages by mistake. The tarot service had a default position to accept all interaction/ messages as by nature of the service customers could send in anything".

The Executive submitted that where an applicable keyword has not been entered by a consumer they cannot have been taken to have validly entered that service, and therefore cannot have consented to incur charges. The Executive asserted that consumer's expecting to enter a television competition would not expect to be opted into and charged for an adult chat service. The Executive asserted that the Level 2 provider's systems should have been able to recognise that an incorrect opt-in had been sent, and steps should have been taken to advise the consumer that their message had been sent in error, and/or chargeable messages should not have been sent.

Reason 2: Chargeable promotional messages

The Executive noted that in the Level 2 provider's print promotional material, it was stated, "we may send you free promotional messages". However, from the complainant message logs, it was clear that consumers incurred charges to receive some promotional messages.

The Executive asserted that where consumers had previously been advised that the messages they would receive were free, there was an expectation that such messages would indeed be free. Secondly, consumers should not have been charged for receiving promotional messages. The Executive submitted that the chargeable element of the Service was the messages that were received from the operator when 'chatting', and therefore consumers should not have been charged for promotional/advertising messages that were not part of the core service.

The Executive submitted that even where consumers consented to exchange chargeable chat messages, they did not consented to be charged for promotional messages that were not directly related to the Service.

Accordingly the Executive submitted that there had been a breach of rule 2.3.3

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of rule 2.3.3 for the two reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE
Rule 2.3.11

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

1. The Executive submitted that eight consumers had experienced difficulty exiting the Service as the "STOP" command did not appear to function correctly.

The Executive noted that some complainants stated that they had texted STOP to the 89797 shortcode, however they continued to receive chargeable text messages from the Service.

The complainants' accounts were supported by the message logs. A number of the Level 1 provider's logs showed "STOP" being sent by consumers. However, the Level 2 provider's logs did not show the "STOP" command (instead the message content was blank). Further, the logs showed that the Level 2 provider continued to send chargeable messages after consumers sent the "STOP" command.

In relation to one specific request, the Level 2 provider stated:

> "In the case of this MSISDN, messages on our system, when passed across to the relevant service that it related to, came through to that service incorrectly. It was not a customer error. This customer was fully compensated for this error. OpenMarket assisted in correcting the mistake so there were limited instances where this occurred and I'm informed that all customers that contacted us were compensated."

The Level 1 provider stated:

> "There are no issues with OpenMarket's systems in relation to these discrepancies. Our logs and subsequent verification of those logs suggest that STOP commands were successfully sent to 89797."

The Executive submitted that where the "STOP" command was not processed correctly, there was no method of exit from the Service which took effect immediately, and therefore there had been a breach of rule 2.3.11.

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of rule 2.3.11 for the reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.11 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR
Rule 2.3.12(c)

"All virtual chat services must, as soon as is reasonably possible after the user has spent £8.52 plus VAT, and after £8.52 plus VAT of spend thereafter:
(i) inform the user separately from the service or any promotion that £8.52 plus VAT has been spent; and
(ii) terminate the service promptly if the user does not interact further with it following the provision of the message sent in accordance with (i).

1. The Executive submitted that the Level 2 provider had failed to inform consumers of their spend when using the Service, contrary to rule 2.3.12(c).

The Executive noted that one consumer had received the following message (after receiving seven chargeable messages):

"free MSG: Txt svc Msgs r £1.50 to rcv. ADVERT: Wanna chat LIVE to horny Girls? Call them NOW! Dial 69977 from yr mobile LIVE 1 to 1 Phone Sex! (calls £1.50p/m)"

The message log shows further messages exchanged in this pattern (seven messages were received before the consumer was sent the free message). In the absence of spend reminders, the complainant incurred £8,598.14 of charges in approximately two months.

The Executive also noted that a second complainant received eight chargeable messages on 25 December 2011, before receiving the free message/ advertisement.

The Executive submitted that the message detailed above is wholly inadequate as a spend reminder message. The message did not inform consumers how much they had spent.

The Executive also asserted that the use of truncated 'text language' is not clear and confusing to consumers. Further, the text message sits alongside an advertisement. While promotional messages can be included in free messages, the Executive submits that this overshadows the intention of telling consumers about the costs incurred. In addition, the Executive submitted that the breach of 2.3.12(c) was exacerbated by the fact that rule 2.3.12(c)(ii) could not be met, as the Service could not be terminated by consumers since 2.3.12(c)(i) had not been complied with (and therefore consumers had not been told about their spend).

In light of the above, the Executive asserted that the Level 2 provider had acted in breach of rule 2.3.12(c).

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of rule 2.3.12(c) for the reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.12(c) of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE
Rule 2.6.2

"Level 2 providers must provide a proportionate complaints process which is easily accessible through a non-premium UK telephone number and must be effectively publicised".

1. The Executive submitted that the Level 2 provider had failed to provide a complaints process that could be accessed easily, as consumers reported that on calling the Level 2 provider's customer services number they could not get through or leave a message.

On 3 September 2012, the Level 2 provider stated:

"During this process I have been informed that we had a few occasions whereby the customer services number was diverted to an incorrect number where no

answer phone was available. I believe this has frustrated some customers that have tried to contact us to resolve their enquiry hence the increased calls to PhonepayPlus. We have taken steps to ensure that this doesn't happen again. In taking over the systems of the previous company there were some systems where we had not changed and updated the routing of calls so hence the error on our part."

The Executive noted that the Level 2 provider accepted that there had been failings in relation to its provision of a customer service number. As a result of the failings, the Executive asserted that consumers were unable to access the complaints process, in an easily accessible manner through a non-premium rate UK telephone number, and as such there had been a breach of rule 2.6.2.

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of rule 2.6.2 for the reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.6.2 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX
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 submitted that the Level 2 provider had failed to disclose to PhonepayPlus when requested information that was reasonably likely to have a regulatory benefit to an investigation.

On 18 October 2012, the Executive wrote to the Level 2 provider noting that the message logs in some instances showed opt-in from shortcodes other than 89787 prior to receiving promotional messages for the Service. The Executive sought full details of the services operating on the non 89797 shortcodes, including terms and conditions and price points. The Executive made a further request on 3 December for further information including promotional material. Such information would have assisted the Executive in clarifying whether hard opt-in could have applied, or whether the soft opt-in exemption was applicable.

On 5 December 2012, the Executive requested information from the Level 2 provider regarding discrepancies it had identified between the logs provided by Level 1 and Level 2 providers. Such information would have advanced the Executive's understanding of the position regarding hard and soft opt-in and consent, and assisted the Executive in attempting to resolve the discrepancies it had identified.

On 6 December 2012, an employee of the Level 2 provider contacted the Executive and sought an extension in time to respond to the requests. On 06 December 2012, the Executive emailed the Level 2 provider and advised that an extension would be granted until 19 December 2012. On 19 December 2012, the Level 1 provider communicated to the Executive that the Level 2 provider was entering into administration. On 19 December 2012, the Executive emailed the Level 2 provider to follow up the information request, however, to date a response has not been forthcoming.

As the Executive did not receive a response to its requests for information from the Level 2 provider, it was unable to establish whether hard or soft opt-in would have applied for certain aspects of the Service. In addition, a number of queries with respect to the message logs were not answered or resolved.

The Executive therefore submitted that the Level 2 provider failed to disclose information that was important to the investigation and would have had a regulatory benefit to the investigation in breach of paragraph 4.2.5 of the Code.

2. The Level 2 provider did not provide a response to the breach letter.

3. The Tribunal considered the evidence, the submissions made by the Executive and the content of correspondence between the Level 2 provider and the Executive and concluded that there had been a breach of paragraph 4.2.5 for the reasons advanced by the Executive. The Tribunal was satisfied that the Level 2 provider had deliberately failed to disclose information and had unreasonably sought to suggest that the voluntary liquidation was a valid reason for failure to comply with requests for information. Accordingly, 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 2.4.2 – 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 criterion:

- The breach had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact or potential impact on consumers.

Rule 2.3.3 – Consent to charge

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

- In relation to a significant number of consumers, there was a total absence of evidence of consent to charge.

Rule 2.3.11 – Exit

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

- The Level 2 provider committed a breach which was likely to have severely damage consumer confidence in premium rate services and undermine the premium rate industry.

Rule 2.3.12(c) – Spend reminder

The initial assessment of rule 2.3.12(c) of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- There was a total absence of effective spend reminders.
- The breach was likely to have had a material impact, directly or indirectly, on consumers and showed potential to cause a drop in consumer confidence in premium rate services.

Rule 2.6.2 – Complaints process

The initial assessment of rule 2.6.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The breach had a damaging impact on consumers. However, the complaints process was not completely absent (there was some evidence of refunds).

Paragraph 4.2.5 – Provision of information

The initial assessment of paragraph 4.2.5 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The breach had a damaging impact on the regulation of the premium rate industry.
- The breach damaged confidence in premium rate services.

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

Final Overall Assessment

The Tribunal noted that the two directors of the Level 2 provider had previously been directors of a Level 2 provider that had been found to be in breach of an earlier edition of the Code. The Tribunal noted the age of the adjudications and did not give any weight to the previous adjudications in reaching its decisions.

The Tribunal took into consideration the following aggravating factor:

- The Level 2 provider failed to follow Guidance.

There was a discrepancy between the revenue figures provided by the Level 1 and Level 2 providers. The Level 2 provider did not respond to the Executive's queries in relation the discrepancy regarding revenue. Therefore the Tribunal took the figure provided by the Level 1 provider into account. The revenue figure provided by the Level 1 provider did not include the revenue for September and October 2012, therefore the Tribunal estimated that the revenue figure was higher than the figure provided. The Level 2 provider's revenue in relation to the Service was in the range of Band 2 (£250,000- £500,000).

Having taken into account all the circumstances of the case the Tribunal concluded that the seriousness of the case should be regarded overall as **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; 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 promotional material for the Service:

18+. Msgs sent to 89797 max 12p. One free msg per mobile number, subsequent msgs or photos msgs that you receive are charged at (£1.50/€2); photos you send are charged at (£3/€4). Responses may be up to two msgs long (£3/€4).Charges inc vat. We may send you free promotional msgs. All models used are 18+. EIRE:0818200075. UK FTXT: 08707505254.

Appendix B: Screenshot of promotional material for the Service: