



### Tribunal Sitting Number 132 / Case 2

**Case Reference:** 16682  
**Level 2 provider:** Tel4U Ltd  
**Type of Service:** Recorded Information  
**Level 1 provider:** O-Bit Telecom Limited  
**Network operator:** Premium O Limited

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

#### BACKGROUND

Between 10 January 2013 and 1 February 2013, PhonepayPlus received five complaints from consumers regarding a payday loan recorded information line (the “**Service**”) operated by the Level 2 provider Tel4U Limited. The Level 1 provider was O-Bit Telecom Limited.

The Service was operated on the premium rate numbers 09050022777, 09050022999 and 09825555555. The cost of the call was £1.53 per minute and lasted approximately 3 minutes and 16 seconds per call. The Service operated between December 2012 and 13 February 2013 when following an exchange of correspondence with PhonepayPlus, the Service was terminated. The Service was promoted by SMS messages.

The Service offered consumers the opportunity to listen to a recorded message containing generic payday loan information, including:

“Payday loans are a quick and efficient solution to your cash flow problem. The online application process is quick and simple and the decision is instant in most cases.”

“Payday loans are also an affordable alternative to the unarranged overdraft charges that some banks impose, therefore offering a quick and effective cash solution.”

“So go on and take the stress out of your life and apply for a payday loan today.”

At the end of the recorded message, the premium rate call disconnected.

The majority of the complainants stated that the SMS messages they received were unsolicited. In addition, complainants stated the promotional SMS messages did not contain any pricing information. The total charge per call was approximately £4.99 from a landline.

#### The Investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 15 July 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.2.5 – Pricing prominence and proximity
- Rule 2.4.2 – Consent to market
- Paragraph 3.4.12 (a) – Registration of numbers

The Level 2 provider responded on 26 July and 31 July 2013. On 22 August 2013, the Tribunal reached a decision on the breaches raised by the Executive.



### SUBMISSIONS AND CONCLUSIONS

The Tribunal noted that the Level 2 provider disputed the Executive's determination that it was the Level 2 provider. The Tribunal stated that, pursuant to paragraph 5.3.8(c) of the Code, the determination as to whether a provider is a Level 2 provider (or not) is one for PhonepayPlus. The Tribunal noted the Executive's comments that:

- Tel4U was in control and responsible for the operation of the premium rate payday loan recorded information line.
- Tel4U was contracted with the Level 1 provider for the provision of the three premium rate numbers that were used to access the Service.
- Tel4U accepted, in correspondence with PhonepayPlus, that it had, "set up a pay day loan information line."

Further, the Tribunal commented that, despite express requests for evidence, the Level 2 provider had failed to provide any evidence to support its assertion that it was not the Level 2 provider.

### ALLEGED BREACH 1

#### 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 submitted that the Level 2 provider had acted in breach of rule 2.2.5 because, during the course of the promotion of the Service, consumers were not fully and clearly informed of the cost of dialing the premium rate number.

#### Complainants' accounts

The content of the SMS message promotions was provided by all five complainants. None of the messages contained any pricing information. Two examples stated:

"Need extra cash? You have been approved for a £1000 loan until your next payday, just complete the form at <http://advance4wages.com> Call info line on 09050022999"

"You have been pre-approved for up to £1000 cash today TO receive your cash within 15 minutes Apply now to [advance4wages.com](http://advance4wages.com) Call on line on 09050022999"

The Executive received the following complaints from consumers:

"Service Description: Company is offering payday loans illegally via SMS spam. Summary of Complaint: A company is illegally sending SMS spam (see transcript) advertising payday loans. These illegal text messages ask you to call the premium rate number that is the subject of this complaint. If this number is genuinely being operated by these fraudsters then the service should be shut down and the operators prosecuted. Thank you. To clarify, I have not contacted the service or been billed for anything, however they are still breaking the law just by sending these messages. Transcript of Text: Need extra cash? You have been approved for a £1000 loan until your next payday, just complete the form at <http://advance4wages.com> Call info line on 09050022999".



“Service Description: No idea, I'm fed up with yet another unregulated, unwanted spam text offering credit and a premium number to contact. When will someone do something about these companies. O2 and other networks could very easily block them.”

“Summary of Complaint: as above STOP THESE SPAM MESSAGES. Transcript of Text: You have been pre-approved for up to £1000 cash today TO receive your cash within 15 minutes Apply now to [advance4wages.com](http://advance4wages.com) Call on line on 09050022999.”

The Executive submitted that in accordance with rule 2.2.5, where a premium rate service is being operated and promoted, the consumer must be clearly informed of the cost of accessing the service before any purchase is made (i.e. before the premium rate number is dialed). Accordingly as there was no pricing information in the SMS promotion, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.5.

2. The Level 2 provider denied that it was responsible for any breach. The Level 2 provider explained that it had contracted with the Level 1 provider, set up the recorded payday loan information line and then passed the details on to its clients, who were in the main payday loan companies, and that they then advertised the Service via different means, the nature of which was not known to the Level 2 provider.

The Level 2 provider stated it did not have any control over the advertising of the premium rate numbers, as the clients were able to advertise as they wished. Furthermore, it did not receive any profits from the premium rate service because the costs were distributed to the relevant client. The Level 2 provider maintained that it had discharged its duty to provide cost information, because it did not have any direct dealings with the public and was therefore under the impression that it did not need to take any further steps as this had been delegated.

3. The Tribunal considered the evidence, including the brief written submissions made by the Level 2 provider. The Tribunal found that the promotional SMS messages were ‘promotions’ for the Service (as defined in paragraph 5.3.29 of the Code) and therefore the Levels 2 provider was responsible for them (as set out in paragraph 5.3.8(b) and the preamble to part 2 of the Code). Accordingly, since there was no pricing information in the promotional SMS messages advertising the Service, there was a clear breach of rule 2.2.5. In addition, the Tribunal noted that, as there was also no pricing information on the recorded information line either, consumers who called the number had no means of ascertaining the cost of the Service prior to being billed. Accordingly, the Tribunal upheld a breach of rule 2.2.5 of the Code.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 2**

##### **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 breached rule 2.4.2 of the Code as complainants had clearly stated they had received unsolicited promotional SMS messages and the Level 2 provider had not provided any evidence to demonstrate that consent to market had been obtained.



The Executive relied on the content of PhonepayPlus Guidance on “Privacy and consent to charge”, which states:

“PECR’s provisions on consent (which apply to all marketing relating to a premium rate service by virtue of rule 2.1 of the Code) in summary are that:

- 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 also relied on the summary of complainant’s accounts set out in the Executive’s submissions for the breach of rule 2.2.5. Four of the complainants stated the SMS text messages were unsolicited.

The Executive stated that the Level 2 provider had been given a number of opportunities to respond to the request to provide evidence of consent to market but the Level 2 provider had not provided any evidence and repeatedly stated that it was not involved in advertising and promotions.

Accordingly the Executive submitted that for the reasons outlined above rule 2.4.2 had been breached.

2. The Level 2 provider stated that it was not responsible for the breach. The Level 2 provider provided a very brief written response stating that it had not engaged in the marketing of the Service nor delegated the promotion of the Service.
3. The Tribunal considered the evidence. In particular, the Tribunal noted that four of the complainants expressly stated that they had been contacted without giving their consent and that the Level 2 provider had failed to provide any evidence that it had obtained the complaints’ consent to send them promotional text messages. Therefore the Tribunal concluded that a breach of rule 2.4.2 had occurred.

**Decision: UPHELD**

### **ALLEGED BREACH 3**

#### **Paragraph 3.4.12(a)**

Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.



1. The Executive submitted that the Level 2 provider had acted in breach of paragraph 3.4.12(a) as it had failed to promptly register the Service's premium rate numbers as required by the Code and as set out in a number of PhonepayPlus publications.

The Level 2 provider confirmed to the Executive that it used the premium rate numbers from December 2012. In addition, the Level 1 provider provided the Executive with a breakdown of calls, which showed that the first calls to the Service were made on 1 December 2012. The Executive noted that the Level 2 provider registered the Service on the PhonepayPlus Registration Database on 16 January 2013.

Further, call logs for the premium rate numbers appeared to indicate that the Service was running from early December as the maximum call length of the calls matched the length of the recorded message in a large number of instances.

Accordingly, the Executive asserted that Service registration did not take place until six weeks and four days had elapsed from the commencement of the Service and therefore the Executive submitted that the Level 2 provider had not promptly registered in breach of paragraph 3.1.12(a).

2. The Level 2 provider denied the breach and asserted that although it obtained the premium rate numbers in December 2012, it did not begin operation of the Service until the second week of January 2013. Generally, the Level 2 provider submitted that it was a new company and it had no experience of premium rate services. It stated that it had not been advised by the Level 1 provider of the requirement to register with PhonepayPlus until six weeks after the numbers had been provided.
3. The Tribunal considered the evidence and noted the breakdown of calls provided by the Level 1 provider showed that the Service was active from 1 December 2012. It also noted that the spreadsheet showed that virtually no calls lasted in excess of the length of the recorded message, so it concluded, on the balance of probabilities, that those calls were indeed calls to the payday loan information line. In addition, the Tribunal commented that an invoice from the Level 1 provider showed outpayments were due to the Level 2 provider as a result of calls being made to the numbers from early December 2012. Therefore, the Tribunal did not accept the Level 2 provider's submission that the premium rate numbers were not used for the Service prior to the second week of January 2013. Further, the Tribunal commented that even if a different service was operated on the number prior to this date, the numbers should have been registered. Consequently, the Tribunal upheld a breach of paragraph 3.4.12(a) of the Code.

**Decision: UPHELD**

### **SANCTIONS**

#### **Initial Overall Assessment**

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

#### **Rule 2.2.5 – Pricing prominence**

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

- The breaches demonstrated fundamental non-compliance with the Code in respect of a valueless service.

#### **Rule 2.4.2 – Consent to market**

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



- Very serious cases have a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers.
- The nature of the breach, and/or the scale of harm caused to consumers, is likely to severely damage consumer confidence in premium rate services.

#### **Paragraph 3.4.12(a) – Registration of numbers**

The initial assessment of paragraph 3.4.12(a) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider unreasonably failed to register numbers with PhonepayPlus for an extended time period.

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 failed to follow Guidance on “Privacy and consent to charge” and “Promotions and promotional material”.
- PhonepayPlus has published a number of documents in relation to registration requirements.
- The Service appealed to consumers who were in a vulnerable position as a result of their financial circumstances. However, the Service failed to provide full details of the potential negative aspects of payday loans, for example the very high interest rates.
- No meaningful service was provided. The content of the recorded message was valueless.

In determining the final overall assessment for the case, the Tribunal found no mitigating factors. The Tribunal noted that the Level 2 provider had applied for its dissolution but questioned whether this had been done in an attempt to circumvent regulation and commented that this was not a mitigating factor.

The Level 2 provider's revenue in relation to this Service was in the range of Band 6 (£1 - £5,000).

Having taken into account the aggravating 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 £10,000;
- a prohibition on the Level 2 provider from providing or having any involvement in, any premium rate service or promotion for five years, starting from the date of publication of this decision; and
- a requirement that the Level 2 provider make refunds to all consumers who have used the Service for the full amount spent, regardless of whether or not they have claimed a refund. Refunds should be directly credited to the users' telephone accounts and the Level 2 provider must provide evidence to PhonepayPlus that the refunds have been made.