Code Compliance Panel

Tribunal Decision

Tribunal Sitting Number 129 / Case 2

Case Reference: 11196

Level 2 provider	Upright Line S.A.
Type of service	Quiz competition service
Level 1 provider	Velti D.R. Limited
Network operator	All Mobile Network operators

THIS CASE WAS BROUGHT AGAINST THE LEVEL 1 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

On 18 April the Tribunal adjudicated against a quiz competition service operated by the Level 2 provider Upright Line S.A. under the brand names Ustre, Oxyra and Ergma (the "Service") (case reference 11099). The Service was promoted using affiliate marketing. There was evidence, from both consumers and internal monitoring, that some of the affiliate promotions for the Service were misleading.

The Level 1 provider for the Service was Velti D.R. Limited. During the course of the investigation against the Level 2 provider, the Executive had concerns regarding the Level 1 provider's assessment of risk and the adequacy of the continuing steps taken to control risk in relation to the Service.

In addition the Executive had concerns regarding the method of exit from the Service and the timing of billing. As the Service operated using Payforit, the Level 1 provider was responsible for both the method of exit from the Service and the timing of billing.

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 1 provider on 18 June 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.11 – Method of exit
- Rule 2.3.2 – Misleading
- Paragraph 3.1.3 – Risk assessment and control

The Level 1 provider responded on 2 July 2013. After hearing informal representations made on behalf of the Level 1 provider, the Tribunal reached a decision on the breaches raised by the Executive on 11 July 2013.

Preliminary issue

The initial contract in relation to the provision of the Service was between the Level 2 provider and Mobile Interactive Group Limited. However, the Level 1 provider acquired Mobile Interactive Group Limited in November 2011. As a result, the Level 1 provider acquired all the rights, obligations and liabilities of Mobile Interactive Group Limited. The Tribunal noted that the Level 1 provider accepted that the adjudication had been correctly brought against it.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

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 legitimately incurred prior to exit.

1. The Executive asserted that the Level 1 provider breached rule 2.3.11 as text message logs supplied to the Executive demonstrated that STOP and STOP ALL commands sent to the Service were not acted upon.

   The method of exit was stated in the promotional material as requiring the sending of "STOP" to an opt-out shortcode, in this instance shortcode 64055. The method of exit was also provided in the subscription initiation message as requiring the sending of "STOP" to an opt-out shortcode, in this instance shortcode 64055.

   The Executive relied upon PhonepayPlus Guidance on Method of exit from a service, which states:

   > **2.2**
   > "With regard to how the 'STOP' command should work in practice, we consider it best practice that consumers **should be able to text 'STOP' to the mobile shortcode** the service was initially requested from, or **from which it is receiving (chargeable) messages, in order to stop the service**. For example, if a consumer enters a service on 89XXX, they should be able to text 'STOP' to that same shortcode to opt out." [Emphasis added by the Executive]
   >
   > **2.3**
   > "We accept that this may not always be possible – either for technical reasons, or because of the cost to a provider of doing so. However, where we discover that separate shortcodes for requesting a service and opting out from it are being used, then consideration will be given to a provider's motive for doing so as part of any investigation. Any actions which are likely to confuse consumers may be considered unacceptable by a PhonepayPlus Tribunal."
   >
   > **2.4**
   > **"For the avoidance of doubt, we would always expect the consumer to be able to text 'STOP' to the same shortcode from which they are being billed."** [Emphasis added by the Executive]

   Following the receipt of consumer complaints regarding the Service, the Executive contacted the Level 2 provider and requested text message logs showing the full interaction between complainants and the Service. Upon reviewing the text message logs, the Executive noted instances where "STOP" or "STOP ALL" had been sent to the Service chargeable shortcode 79910, but that Service charges had continued despite the clear request from the consumer that Service charges cease.

   Complainant message logs

   The Executive sent a sample of the text message logs showing the apparent failure of the STOP command to the Level 1 provider on 21 January 2013 and requested an explanation. A summary of a

sample of text message logs showing the failure of the STOP command was provided:

i. On 23 December 2012 the Service was initiated and the user received a £10 chargeable message from shortcode 79910, subsequent £10 charges were incurred on 23, 26 and 29 December 2012. After incurring the £10 charge on 29 December 2012, the user sent "STOP ALL" to shortcode 79910. Following the sending of "STOP ALL" the user received the following free messages:

"Sorry this service is not available on the Virgin network. You have not been charged for this."

"Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

The user sent a further "STOP ALL" message on 29 December 2012 to shortcode 79910 and was again sent the following free messages:

"Sorry this service is not available on the Virgin network. You have not been charged for this."

"Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

On 1 January 2013 the user received a £10 chargeable message from shortcode 79910.

ii. On the 4 September 2012 the Service was initiated and the user received a £10 chargeable message from shortcode 79910. After incurring the £10 charge on 4 September 2012, the user sent "STOP" to shortcode 79910. The user then received the following free messages:

"Sorry this service is not available on the Virgin network. You have not been charged for this."

"Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

On 7, 10, and 13 September 2012 the user received further £10 chargeable messages from shortcode 79910 (thereby incurring a total additional charge of £30).

On 14 September 2012 the user sent "STOP" to shortcode 79910. The user then received the following free messages:

"Sorry this service is not available on the Virgin network. You have not been charged for this."

"Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

On 16 and 19 September 2012 the user received two further £10 chargeable messages from shortcode 79910 (thereby incurring a total additional charge of £20).

Monitoring

The Executive asserted that in-house monitoring conducted demonstrated that STOP commands sent to the Service chargeable shortcode 79910 were not acted upon.

On 25 January 2013, the Executive monitored the Service. The Executive subscribed to the Service

using a monitoring phone and received a £10 chargeable message from shortcode 79910. A further £10 chargeable message from shortcode 79910 was received on 28 January 2013. On 29 January 2013 the Executive sent "STOP" to shortcode 79910. The Executive then received the following message:

> "Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

On 31 January 2013 the Executive received a further £10 chargeable message from shortcode 79910. The Executive asserted that the monitoring showed that users who sent "STOP" to shortcode 79910 were not unsubscribed from the Service and continued to receive charges.

In light of the Executive's analysis of the message logs, the monitoring and the Guidance on how the STOP command should work in practice, the Executive contacted the Level 1 provider on 21 January 2013 to ascertain why charges continued after "STOP" had been sent.

On 29 January 2013 the Executive received the response below from the Level 1 provider, which stated that the unsubscribe (64055) shortcode was advertised on the Payforit Payment Success Page (**Appendix A**). In addition, the STOP shortcode was included in the subscription confirmation message sent to all users. The Level 1 provider added that in the examples provided by the Executive, the STOP command had been incorrectly sent to the shared billing shortcode and not the advertised STOP shortcode. Therefore, the Payforit managed subscriptions continued. The Level 1 provider explained that:

> "Billing short codes vary based on price i.e. specific short codes have specific price points. To provide consistency to consumers we provide the dedicate [sic] Payforit stop short code. Also, on shared billing short codes various clients including non-Payforit clients can be providing various services. By providing a dedicated Payforit stop Shortcode we can ensure users are unsubscribed from the correct Payforit subscription service."

On 29 May 2013, in response to further questions from the Executive, the Level 1 provider stated:

> "We have a dedicated shortcode (64055) to process stop requests relating to Payforit subscriptions. However, some networks don't support Direct Billing and so PSMS is used, and sometimes on other networks where Direct Billing is supported, it can fail [sic] over to PSMS in the case of a network outage. In these cases PSMS is sent out at the required tariff point and we have to use different short codes for each of those tariff points.
>
> "In our initial implementation, if a user replied STOP to one of those messages the message does not go to 64055 (our dedicated Payforit code) and so therefore didn't unsubscribe the user. This is because the PSMS codes being used were our shared shortcodes, meaning that merchants use them directly, alongside Velti using them as part of our Payforit solution. The routing of any stop messages received to one of these codes is not a straightforward decision to make, given the large number of merchants involved on the code. Our initial implementation therefore required STOP messages to be sent to the dedicated shortcode which we had set aside for this purpose. The dedicated stop Shortcode 64055 was advised on the Payforit screen, the subscription confirmation message and monthly spend reminder.
>
> "We have since made an improvement to our logic for stop messages on shared shortcodes, which now allows end users to reply to this type of message with STOP. When a STOP message is received, we are now able to look in our logs to see the last service which sent a message to that end user and the stop message is attributed to their service. So now, if an end user replies to the

charging message on 79910, we are able to see that the most recent interaction was for Payforit and process the message accordingly."

The Executive noted that the Level 1 provider had now:

"[M]ade an improvement to our [Level 1 provider's] logic for stop messages on shared shortcodes, which now allows end users to reply to this type of message with STOP...and process the message accordingly".

The Executive asserted that, given the apparent ability to remedy the issue of "STOP" messages being sent to the chargeable shortcode and not being acted on, it was clearly possible, given the above response, for the Level 1 provider to have remedied the issue of "STOP" messages being disregarded and allow subscribers to leave the service where "STOP" was sent to the charging shortcode, as stated in the Guidance.

The Executive further noted that during the course of the investigation it was informed that the Level 2 provider had raised concerns with the Level 1 provider concerning consumers sending "STOP" to the chargeable shortcode 79910 but that the Service subscription was not cancelled. In email correspondence the Level 2 provider stated:

"The shortcode 79910 is not ours. STOP messages to this short-code is not forwarded to us. Subscription Start, Stop and re-billing is all handled within the PayForIT platform. We have requested that our PayForIT provider does not use 79910 when sending their reminder messages. It appears to be a technical issue. We requested that any STOP messages sent to 79910 will cancel the user from our service if they are an active user.[sic]"

From the correspondence and message loges, the Executive submitted that it was clear that consumers sent "STOP" to the chargeable shortcode with an expectation that by doing so the Service would terminate and they would not incur further charges. This expectation was obviously reinforced by the subsequent sending of messages confirming that no further Service charges. Examples are provided below:

"Sorry this service is not available on the Virgin network. You have not been charged for this."

"Thank you. Your stop request to 79910 has been successfully processed. You will no longer receive messages."

In summary, the Executive accepted that the method of termination was clearly stated for consumers, but as a default, the billing shortcode should have actioned the STOP because:

i) this is clearly stated in the Guidance;
ii) consumers were reassured that STOP requests sent to the chargeable shortcode would be actioned by the responses they received, as demonstrated in the message logs; and
iii) the subsequent confirmation from the Level 1 provider that it now actions STOP requests sent to the chargeable shortcode shows it was technically possible.

The Executive accordingly submitted that for the reasons outlined above that the Level 1 provide had acted in breach of rule 2.3.11.

2. The Level 1 provider disputed that it had acted in breach of rule 2.3.11 on the following grounds:

1. the method of termination was compliant with rule 2.3.11 of the Code and Guidance.
2. the communicated method of exit was clearly communicated, treating consumers fairly and

equitably in compliance of the Payforit Scheme rules version 4.0.
3. it had acted honestly, swiftly and openly to address and limit consumer issues.

The Level 1 provider added that in its view the Executive sought to rely on the Guidance in order to assert a breach of the Code. The Level 1 provider invited the Tribunal to find that there had not been a breach of the Code. In the alternative, given the Executive's reliance on the Guidance, the Level 1 provider asserted that the Executive had failed to give due consideration to paragraph 2.3 of the Guidance, rather than seeking clarification as to the reasons for implementing the communicated method, and had focused his investigation on an exit method that was not the communicated method of exit.

1. Method of termination

In response to the Executive's assertion that, "the Level 1 provider breached rule 2.3.11", the Level 1 provider commented that it had ensured that the service could be terminated by *a* simple method of permanent exit from the service, namely: texting STOP to shortcode 64055 (the "**Communicated Method**"). It stated that this was a simple method that was clearly communicated to the consumer at no fewer than five times during the initial engagement with the Service. It added that, in the period 1 January 2013 to 30 June 2013, 32,887 consumers of 34,816 (94.5%) across all its Payforit services were able to follow the Communicated Method, it believed that this supported its assertion that this was a simple method of exit. Furthermore, in accordance with rule 2.3.11, where the consumer used the Communicated Method of permanent exit, the method of exit took effect immediately and no further charge to the consumer was incurred after exit.

The Level 1 provider noted the recommended method of exit detailed in Guidance paragraphs 2.2 and 2.4. However, in line with the exception set out in Guidance paragraph 2.3, due to technical reasons and cost, it was not possible to implement the recommended method of exit from the Service at the time in question. As a direct result of the exception set out in Guidance paragraph 2.3, it stated that it was its honestly held belief that the Communicated Method of exit was compliant with the Code and the Guidance.

In terms of users being able to reply to the premium MT message, the Level 1 provider stated that this was not initially implemented for technical reasons. The reasons were as follows:

1. This was a large technical project which incurred significant development time and cost.
2. The treatment of STOP messages on shared shortcodes is not clear as detailed below.

The Level 1 provider stated that a shared premium shortcode means that more than one merchant and service uses the billing shortcode. When a user responds "STOP" to a billed MT, it needed to be able to route that cancel request to the appropriate merchant. It stated that essentially it had two options:

i. **"Route the stop message to all clients associated with that shortcode**
This option can create significant user confusion. Texting in stop to a service results in all merchants who use that shared shortcode receiving the stop request. The subscriber then receives multiple messages back and is potentially opted-out of subscriptions they would like to remain in. Secondly many of the merchants, in the instance where they do not have a subscription with the customer, have difficulty responding correctly to an invalid stop. One stop requests can generate multiple MT events, from blanket 'opt-out' responses, to inability to find the subscriptions. This can be extremely confusing for end users.

iii. **"Use the last billed interaction to infer the message they were likely to be replying to**
The method does not provide a perfect solution. It has to be presumed that the last billed MT

was the service the customer is attempting to terminate. This requires detailed logging and decision making over three large applications and therefore required significant technical work."

The Level 1 provider said that after initial implementation and following the best practice guidelines its intention was always to implement the second option. However the technical complexity and the cost to the business meant that this could not be included in its initial implementation. A dedicated shortcode was a clear alternative under the rules and mitigated the problems associated with shared shortcodes outlined above.

The Level 1 provider said that it later embarked on this technical project which involved multiple changes to both its STOP application, its core gateway and the gateway API. This work was undertaken over a number of months after which users were able to reply "STOP" to a premium message from Payforit.

2. Consumers treated fairly and equitably

The Level 2 provider stated that it regarded the fair and equitable treatment of consumers as paramount in the delivery of its services and in this instance, as referred to above, it made particular effort to ensure that the Communicated Method of exit was clearly stated and communicated to the consumer no less than five times.

The Level 1 provider noted that the Executive acknowledged it had communicated the method of exit in the promotional material and the subscription initiation message. It added that the Communicated Method was also communicated via the Payforit Payment Success Page (**Appendix A**) and the subscription confirmation MT.

The Level 1 provider stated that it strongly believed that the above satisfied the exit obligation under the Code that, "the consumer must be clearly informed about prior to incurring any charge". Furthermore, it believed that the number of consumers who were able to understand this Communicated Method evidences its good faith and adherence to the Code and the Guidance.

It added that there is a point at which the responsibility for interaction with a service must reasonably pass from the Level 1 provider to the consumer who will be reasonably expected to follow the clear instructions provided and to avail itself of the assistance provided by the Level 1 provider.

Given the above, the Level 1 provider stated that it was frustrated to note that the Executive had chosen to focus on the actions of those consumers (4.5% for ALL services), who failed to follow the Communicated Method, in an attempt to assert a breach of the Code. It added that the Executive was fully aware that it invests considerable time, resource and money in providing a customer support service that, in instances where the consumer needs assistance, and it vigorously seeks resolution of all consumer issues.

3. Consumer harm

Addressing the Executive's monitoring, the Level 1 provider stated that the method of termination used by the Executive was not in accordance with the Communicated Method of exit. In both instances, the Communicated Method would have exited the service immediately had it been used. Furthermore, in the event that a consumer had been unsuccessful in exiting the service, then the consumer would have been able to seek assistance from either of the Level 1 or Level 2 provider and, where appropriate, be promptly refunded for any charges incurred as clearly communicated.

The Level 1 provider added that, arguably, the implementation of a technical facility that ceases Payforit subscription services when the user responds with a "STOP" to the wrong shortcode may result in certain services being stopped incorrectly (if the user has engaged with multiple services), which in itself is unfair on the consumer as it removes their ability to continue participation in the relevant service.

With regard to the Executive's assertion that it had failed to implement an available solution to a consumer issue, the Level 1 provider noted that the Executive had raised this issue not as a result of complaints, but from information openly supplied by the Level 1 provider. It added that it had identified the consumer issue from its own monitoring and review processes in September 2012 and began working towards changes to its platform so that the minority of consumers could be provided for. While it sought to change its platform at the earliest opportunity, it believed that its continued use of the Communicated Method was acceptable under Guidance paragraph 2.3. Nevertheless, by the time the Executive formally made contact on the 21 January 2013, some five months later, it had already incurred significant cost and technical development time to remedy this issue. By the time the Executive made contact on the 16 May 2013, it was able to confirm to the Executive on the 29 May 2013 that it had deployed the resulting improvement.

The Level 1 provider noted the Executive's reference to, "the Level 2 provider raised concerns with the Level 1 provider" and the referenced email correspondence. In response the Level 1 provider stated that its employee made clear that due to technical reasons, the only available method of exit was as per the Communicated Method of exit. Further, the Level 1 provider acted upon the consumer request and confirmed to the Level 2 provider that the consumer had been manually unsubscribed. The Level 2 provider was also advised that any consumer that did not use the Communicated Method of exit should be refunded.

Conclusion

In summary, the Level 1 provider concluded that the Communicated Method of exit:

1. was in accordance with Guidance paragraph 2.3 and the Code;
2. reasonable due to technical constraints; and
3. was implemented in an honest, clear and transparent manner.

During informal representations the Level 1 provider gave a brief description of its corporate history and position in the premium rate industry. The Level 1 provider strongly refuted that it had acted in breach of the Code and reiterated it written submissions.

3. The Tribunal considered the evidence, including the Level 1 provider's detailed written and oral submissions. The Tribunal noted that, generally speaking, a consumer would expect that s/he could terminate a service by sending a STOP command to the billing shortcode. In exceptional circumstances, where this is not technically possible, the Tribunal urged providers to seek compliance advice from PhonepayPlus, to ensure that the method of exit is compliant with the Code and Guidance. The Tribunal noted that the exception is very narrow. However, on the particular facts of the case, the method of exit from the Service was clearly communicated and effective. Further, the Tribunal accepted that until recently, it had not been technically possible for users to exit this Service by sending a STOP command to the billing shortcode. The Tribunal welcomed the proactive steps taken by the Level 1 provider to remedy issues when they became apparent (and prior to PhonepayPlus' intervention). Accordingly, the Tribunal concluded that on the particular facts of the case the method of exit was compliant with rule 2.3.11. Accordingly, a breach of rule 2.3.11 was not upheld.

However, the Tribunal commented that consumers who sent a STOP command to the billing shortcode and received a text message stating that they had been unsubscribed from the Service,

were likely to have been misled and/or not treated fairly and equitably. The Tribunal commented that it might have been minded to uphold a breach of 2.3.1 and/or 2.3.2 of the Code if it had been raised.

Decision: NOT UPHELD

ALLEGED BREACH 2

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 1 provider had acted in breach of rule 2.3.2 of the Code because initial Service rebilling occurred earlier than stated in promotional material and incorrect information was stated in the subscription initiation message which was likely to mislead users of the Service.

The timing of rebilling

The Executive asserted that the Level 1 provider breached rule 2.3.2 as text message logs supplied, and the Executive's monitoring, demonstrated that the initial Service rebilling charge occurred earlier than stated in the subscription initiation message and the Payforit screen.

According to the complainant message logs the initial rebilling for the Service took place a day prior to the date communicated in the initiation message and earlier than communicated on the Payforit screen.

Following the receipt of consumer complaints regarding the Service, the Executive contacted the Level 2 provider and requested text message logs showing the full interaction between complainant and Service. Upon reviewing the text message logs, the Executive noted that the initial rebilling for the Service occurred earlier than stated in the Service promotional material. Early rebilling was contrary to the information stated in the promotional material and was therefore likely to mislead consumer thereby breaching rule 2.3.2.

In one example message log, on 22 August 2012 at 00:15 the Service was initiated and the user received a £10 chargeable message. The content of the initiation message stated:

> "U are subscribed to Oxyra for £10.00 until 25/08/12 and then for £10.00 per 3 days until you send STOP to 64055. Helpline 02081503720"

The message log showed the next Service charge occurred on 24 August 2012 at 17:04.

In a second example message log, on 23 September 2012 at 00:54 the Service was initiated and the user received a £10 chargeable message. The content of the initiation message stated:

> "U are subscribed to Ustre for £10.00 until 26/09/12 and then for £10.00 per 3 days until you send STOP to 64055. Helpline 02033718127"

The message log showed the next Service charge occurred on 25 September 2012 at 17:43.

On 9 August 2012 the Executive monitored the Service. With respect to Oxyra, pricing information was given in the promotional material:

> "You've chosen to subscribe to Oxyra from Oxyra for an initial charge of £10.00 for 3 days and then charged £10.00 per 3 days". (**Appendix B**)

With respect to Ustre, pricing information was given in the promotional material as:

> "You've choosen to subscribe to Ustra from Ustra for an initial charge of £10.00 for 3 days and then charged £10.00 per 3 days".

The Executive noted that the billing frequency was clearly detailed within the Payforit screen as every three days.

The Level 1 provider was asked to provide an explanation regarding why consumers were being rebilled early. On 29 January 2013, the Level 1 provider provided a diagram that showed the timing of billing (**Appendix C**). The diagram clearly showed that rebilling occurred before the expiry of the previous subscription period. In addition, the Level 1 provider stated:

> "The diagram shows the "Rebilling Window" for the billing of the next subscription period. The Rebilling window is the last 10% of the subscription period, this is done because if we wait until the end of the subscription period the billing attempt may fail and then go in to re-try. This means that the user isn't successfully billed but still has access to the service without paying. In the case of Ustre, the period is 3 days, 10% of 3 days is 7 hours and 12 minutes. This billing does not reset the subscription period i.e users are not billed earlier and earlier, and therefore only ever charged for 3 day periods."

In addition, the Level 1 provider commented extensively on the complainant message logs. Later, the Level 1 provider stated:

> "The 10% rebilling period is applied to all of our subscription services. To clarify, there is no "reduction to the initial billing period". We differentiate between the subscription period i.e the duration the user has access to the service and the "rebilling period" i.e when the user is billed for the next subscription period. Subscriptions are billed periodically and to ensure the continuity of the subscription service being provided consumers are rebilled shortly before the next subscription period beings. The rebilling period to allow this to happen is calculated as the last 10% of the current subscription period. For example, a consumer initiates a subscription; we then bill the customer; on completion of a successful billing we then start the subscription period. For the subscription to continue we must bill before the next subscription period starts."

The Executive noted the distinction drawn by the Level 1 provider between the "subscription period" and the "rebilling period", however it asserted that it is reasonable to assume that a 'typical' consumer's understanding of the content of the promotional material would be that the next subscription charge would occur three days after opting-in to the service, especially as no information is provided in the promotional material stating that the next subscription charge would occur earlier than the three day period stated in the promotional material.

The Executive added that the Level 1 provider is responsible for the pricing information displayed on the Service Payforit screens. Pricing information stated on the Payforit screens did not accurately describe when the subsequent rebill charge would occur and was therefore misleading. The Executive accordingly submitted that the Level 1 provider had acted in breach of rule 2.3.2 as a result of the early rebilling of the Service, which rendered the pricing information within the Payforit promotional screens incorrect and therefore misleading, and the omission of information from the subscription initiation message which accurately detailed that the rebilling of the service would occur

early.

2. The Level 1 provider disputed the alleged breach on the following four grounds:

1. The communication of the Service rebilling did not mislead.
2. The Service provided was developed alongside and approved by the Mobile Network Operators ("MNOs") individually and the Payforit Management Group ("PMG") collectively as adhering to the Payforit Scheme Rules during the inception of the scheme and the subsequent roll out of the Level 1 provider's Service.
3. Following launch of the Payforit Scheme and the four (4) iterations of the Scheme Rules, the Level 1 provider's Service was and continues to be subject to audit by the MNOs and the PMG through which it has been an Accredited Payment Intermediary ("**API**") since 2006.
4. Rebilling did not occur earlier than stated, as dates referred to were in respect of subscription periods and not billing dates. The information stated in the subscription initiation message and the Payforit screen related to cost and subscription period.

1. Did not mislead

The Level 1 provider stated that there was no evidence that consumers were misled. It said the Executive's accusation was based on the Level 1 provider's open and co-operative approach to PhonepayPlus. It said, the Executive had chosen to focus on the Level 1 provider's reference to its authorised (Payforit) operational practices and attempted to tie them back to a breach of the Code.

2. Service development

The Level 1 provider stated that it had been an API for Payforit since 2006, being one of the first UK aggregators to launch a Payforit solution. It said since launch of the Level 1 provider's Payforit solution, the MNOs had individually investigated, monitored, reviewed and authorised it to operate its platform as an API. It stated that, at all times, the MNOs had been aware of the platform, its customer experience flows, re-billing process, pricing information and the promotion of its services. The Level 1 provider provided documentary evidence in support of this assertion.

The Level 1 provider asserted that at no point since inception has the timing of rebilling and/ or the description of that rebilling ever been identified as an issue under the Scheme Rules (and more recently the Code or the Guidance). As a result, the Level 1 provider asserted that it was its belief that the solution and the communication thereof have at all times been approved as being in accordance with the Scheme Rules (and more recently the Code and the Guidance).

The Level 2 provider added that it developed its Payforit platform capabilities and technical solution working closely with the MNOs whose primary focus was for mobile consumers to be able to purchase digital content and services with ease. It highlighted that the rebilling solution was designed to accommodate the fact that MNO billing is not synchronous, in some cases billing can take several days, and rather than terminating the consumer experience while waiting for payment to be actioned, the "Rebilling Window" was designed to allow for an uninterrupted consumer experience.

In addition, the Level 2 provider, given the evolving nature of Payforit and the regulation thereof, invited the Tribunal to give due consideration to the fact that it had, at all times, been transparent, honest and consistent in its delivery and communication of the service to the MNOs, the MPG and the Executive.

3. Service authorisation

The Level 1 provider stated that the MNOs had dedicated significant resource into testing providers' compliance with the Payforit Scheme Rules. In circumstances where MNOs find a breach of the Scheme Rules, it said MNOs contact the service provider and direct them to correct the breach. It said MNOs are quick, effective and efficient in ensuring the Scheme Rules are complied with. At no point had the "Rebilling Window", or communication thereof, been identified as a breach or even as an issue under the Payforit Scheme Rules, according to the Level 1 provider. Furthermore, it claimed it was not aware of a single consumer complaint, either in this instance or at any time since inception, relating to the "Rebilling Window".

4. Rebilling "earlier than stated"

The Level 1 provider highlighted that the rebill was applied prior to the cessation of the subscription period because, with the latency of billing from some networks, the user's subscription period would expire prior to the billing confirmation being received. With some subscription services, this would mean that consumers would be denied access to the products they have subscribed to during the period between applying billing and getting confirmation.

The Level 1 provider added that the information provided to consumers under the Payforit screens and text messages was strictly limited to the mandatory components, language and information defined under the Payforit Scheme Rules. As such, the communication of the precise rebilling information was not possible. The description on the Payforit screen is the product/service that the consumer is purchasing plus the amount. Therefore, the description was not misleading when it stated:

> "You've chosen to subscribe to Oxyra from Oxyra for an initial charge of £10.00 for 3 days and then charged £10.00 per 3 days".

Rather, the Level 1 provider claimed, it was not the charging pattern that was being described.

Furthermore, the Level 1 provider stated that given that the consumer actually received the service described and was only ever charged the sum stated, it honestly believed that the information provided to the consumer did not mislead. Taking the sample text message referred to by the Executive the Level 1 provider responded as follows:

1. "The chargeable message informed the consumer of the date up to which he/she is subscribed (until 25/08/12). As described, the consumer did receive the full amount of access to the service during this subscribed period".

2. "The consumer was notified that they will then be charged £10.00 per 3 days of access. Again, the consumer was not mislead [sic] and does receive 3 days of access for £10.00. The consumer bought an initial subscription to Oxyra for 3 days for £10. The subscription lasted for 72 hours from the initiation - therefore no one was misled on this part. The next part of the sentence states "...and then charged £10 per 3 days" This meant that for every £10 charged, the consumer got another 72 hours of subscription access. The words "and then" allowed it to apply the second charge from anytime from that moment onwards. The actual charging timing was not stated as it is the service that is being described (as per Payforit rules) and the Executive was suggesting this information should have been declared contrary to the Payforit rules".

The Level 1 provider asserted that the pricing information within the Payforit promotional screens and text messages was not incorrect. Therefore the information it provided did not mislead and was in accordance with the Scheme Rules including initiation text messages, the regular reminders and a route for consumers to cancel the subscription if needed.

The Level 1 provider acknowledged that, for the reasons stated above, information about the timing of the "Rebilling Window" was not included within the information communicated to the consumer. It was noted that the Executive acknowledged that the rebilling information was "omitted" from the subscription initiation message. The Level 1 provider stressed that, while "Rebilling Window" information was not included, it was not intentionally excluded with a view to misleading consumers. In addition, it contested that, as there has been no reported complaint from a consumer with regard to the "Rebilling Window", the absence of this information had not misled or been likely to mislead. If there had been an instance where a consumer wished to cancel a subscription before the end of his or her current subscription but after the "Rebilling Window", the consumer would have been able to seek a refund. The necessary information to claim a refund had been clearly communicated to the consumer at numerous points along the consumer journey.

The Level 1 provider asserted that, given its honest belief that its "Rebilling Window" was in the interests of the consumer experience, was authorised under the Payforit Scheme Rules, and never misled, it had not acted in breach of rule 2.3.2 of the Code.

In addition the Level 1 provider stated that PhonepayPlus and Ofcom have acknowledged the robustness of the Payforit Scheme and that it had relied on the approval of this Scheme in its development of and utilisation of an authorised billing mechanic and standard communication thereof. It said that if this method of rebilling and its communication to the consumer is deemed to be contrary to the requirements of the Code and Guidance then it would seek clarity from the Tribunal in this regard. It highlighted that there had been significant industry uncertainty with regard to the extension of the Code and the Guidance to include the Payforit Scheme, therefore, it should not be deemed to have breached the Code and Guidance in this instance.

The Level 1 provider referred the Tribunal to the PhonepayPlus statement on the regulation of Payforit that contained the clarification provided by PhonepayPlus on 29 May 2013. The Level 1 provider also noted that the Executive had been monitoring the Service since August 2012, yet its concerns were only directed to the Level 1 provider in January 2013.

Therefore, given the historic acceptance of the rebilling method and its communication to consumers, the industry uncertainty, that no consumer was misled, and the honest, transparent and consistent intentions of the Level 1 provider, it believed that any adjudication concluding that there has been a breach of the Code and /or Guidance would be an unjust decision in this instance.

During informal representations, the Level 1 provider repeated the salient parts of its written submissions, including that it believed that it had acted honestly, in good faith and in accordance with the Scheme rules. In addition, it accepted that a text message could have been sent to consumers expressly alerting them to the rebilling period prior to incurring additional charges. The Level 1 provider also appeared to be open to moving the rebilling period to after the end of the previous subscription period had ended.

3. The Tribunal considered the evidence, including the Level 1 provider's detailed written and oral submissions. In particular, the Tribunal noted the Level 1 provider's transparency regarding the rebilling mechanism with the MNOs, the PMG and PhonepayPlus and the submissions made in relation to the limited amount of information that can be displayed on a Payforit screen. However, the Tribunal found that consumers were likely to have been misled in to the belief that they would not incur a second charge until after the expiry of the initial subscription period. The Tribunal noted the limitations in relation to the amount of information that is permitted on a Payforit screen, however, it was noted that the Level 1 provider did not take any alternative steps to ensure that consumers were made aware of the difference between the subscription and billing periods, such as sending them a

text message including this information, prior to additional charges being incurred. The Tribunal noted that consumers were unlikely to know they could claim a refund if they wanted to exit the service after they have received a rebilling charge but prior to the start of their next subscription period. The Tribunal upheld a breach of rule 2.3.2 of the Code, but noted that the actual and potential for consumer harm was relatively modest in this particular case.

Decision: UPHELD

ALLEGED BREACH 3

Paragraph 3.1.3

All Network operators, Level 1 and Level 2 providers must assess the potential risks posed by any party with which they contract in respect of:

(a) the provision of premium rate services, and

(b) the promotion, marketing and content of the premium rate services which they provide or facilitate, and take and maintain reasonable continuing steps to control those risks.

1. The Executive submitted that the Level 1 provider acted in breach of paragraph 3.1.3 of the Code as it failed to:

    1. assess the potential risk posed by the Level 2 provider operating the Service;
    2. take and maintain reasonable continuing steps to control risks and re-assess the risk rating on a continuing basis.

    PhonepayPlus Guidance in relation to risk assessment and control states:

    6. Risk assessment and control of a client who is a Level 2 provider

    6.1
    "If a registered party contracts directly with a client who is responsible for ensuring the consumer outcomes of the PhonepayPlus Code of Practice (Part Two) are met (the client being considered by PhonepayPlus to be a Level 2 provider), we would expect the risk assessment and control to be of a nature that ensures that the consumer outcomes that PhonepayPlus' Code of Practice requires are able to be met."

    6.2
    "PhonepayPlus suggests that the following steps might be taken to help a Network operator and/or Level 1 provider to properly assess the level of risk posed by a Level 2 client. The list provided is not exhaustive, nor does it account for other potential factors that could constitute a 'risk' as part of any up-to-date assessment:
    • Obtaining information about a client's breach history, specific to any previous rulings made by a PhonepayPlus Tribunal (made accessible on the Registration Scheme);
    • Obtaining information about a client's previous trading history (for instance, this might include rulings made by the Office of Fair Trading);
    • Identifying the types of services being offered by the client and the risk such service types might pose, given previous adjudications which relate to them. This should be coupled with a policy of keeping up-to-date with PhonepayPlus' regulatory expectations in respect of particular service types (e.g. reference to Service-Specific Guidance, General Guidance, Compliance Updates and any other information made public by PhonepayPlus);
    • Seeking evidence of any prior permission certificate, where a service type is known to require it;
    • Informing PhonepayPlus, where it is feasible to do so, of any spikes in traffic

(or other practice) which may suggest or indicate potential consumer harm, where this has been notified or discovered;
• Checking whether any of the directors, parent company directors or other associated individuals have been involved, or connected, with other companies that have had previous rulings made against them by PhonepayPlus or other regulatory bodies (e.g. Advertising Standards Authority; Gambling Commission; Financial Services Authority; Information Commissioner's Office; Ofcom, including whether client is on Ofcom's 'Number Refusal List' or 'Under Assessment List'; etc.). Should such rulings exist, then the 'practices' that led to them being investigated should be considered as risks that might reoccur;
• Making an assessment of risk based on the promotional material the client is using. For new relationships, until confidence has been built up, draft promotional material and/or service content might be subject to advance review. An example would be that a major consumer brand using press advertising is likely to carry less risk than a new entrant using web-based, affiliate marketing.
• In instances of doubt or where further clarification is needed, advising clients that promotional material and/or any copy advice can be forwarded to PhonepayPlus for free compliance advice."

6.3
"Having ascertained this information, it might follow that a registered party is in a position to develop a plan of action (made bespoke to a particular client) to sit alongside the contract, or an equivalent commercial arrangement that has been entered into. This could be made available upon request by PhonepayPlus and used as mitigation in the event of a formal investigation being raised."

"6.4 The formulation of an action plan could be based on the following;
• To periodically test and/or monitor certain 'risks' that would normally be associated to a particular service category (e.g. for a subscription service, it may be prudent to test the clarity of promotions, whether reminder messages have been sent and that STOP commands have been responded to);
• The frequency of such testing should reflect the risk posed by both the client and the service type. For example, a client with no breach history, or where none of the directors are linked to other companies with breaches, and low-risk service types (such as football score updates), would require far less monitoring than a client with an extensive breach history that provides a high-risk category of service (e.g. a subscription-based lottery alerts system with a joining fee);
• 'Mystery shopper' testing could be used as, and when, appropriate;
• Internal mechanisms to encourage 'whistle-blowing' by staff, where appropriate;
• Putting in place internal checks that correlate with unusual patterns of activity which may indicate consumer harm (e.g. spikes in traffic and/or consumer complaints made directly to the provider about one specific service);
• Having a procedure to alter and address instances of non-compliant behaviour;
• Producing a compliance file, comprising of a written record of the assessment, the subsequent action plan and evidence of any monitoring and/or testing required by the plan having taken place. This record does not necessarily need to be lengthy (although this will depend on the client and the actions taken under the plan), but should be made available to PhonepayPlus upon request."

6.5
"Any assessment of risk should be an ongoing process and reconsidered in light of any new information. This might include updates to a client's breach history, a change in an individual client's approach to compliance or alterations to the company structure (e.g. the acquisition/amalgamation of another company, the creation of a holding company structure, appointment of new company directors, changes to the company name, etc.)."
(i) The Level 1 provider failed to assess the potential risks posed by the Level 2 provider when it launched the Service"

Insufficient risk assessment carried out resulting in incorrect risk rating

On 21 January 2013 the Executive wrote to the Level 1 provider to request evidence of the risk assessment conducted on the Level 2 provider and the rationale for any decisions made as a result. The Level 1 provider stated that, following the collation of various documents during the due diligence process conducted on the Level 2 provider, it had determined its client and the Service to be a low risk because, amongst other things, the Service was used Payforit. The Executive submitted that the purpose of conducting due diligence, whilst important in determining that a Level 2 provider exists and determining who the responsible individual(s) are does not constitute a risk assessment, and cannot be the basis for determining the risk level of the Level 2 provider and the Service.

Over estimation of the protection afforded by Payforit

Further, the Executive asserted that the submission by the Level 1 provider that the risk represented by the client was lower due to the use of Payforit was inappropriate. Payforit, as a payment method, cannot be regarded as an automatic safeguard against non-compliance as it has no control over the methods of promotion of the Service that would be used prior to the consumer landing on the Payforit screen.

On notice regarding the use of affiliate marketing

In addition, correspondence supplied by the Level 1 shows that it was put on notice of the fact that the Service would be promoted using affiliate marketing. The Executive questioned the Level 1 provider on 16 May 2013 regarding whether it had questioned its client on the use of its affiliate marketing. On 29 May 2013, the Level 1 provider responded stating:

> "Please note that as part of our established Due Diligence procedure with respect to review of promotional material, Velti requested all of the URL's used for each of the services. Please see attached Annex 3 for more details on the thorough testing carried out on these…Velti did not request copies of the "banners, pop-ups, pop-unders, search engine traffic, ad-networks" for these services. This is because we considered that our obligations as set out in the Code of Practice and the PhonePayPlus Guidance with regard to Risk Assessment and Control of a client's promotional material who is a Level 2 provider were restricted, in this instance, to reviewing the URL used for each of the services. We assumed that the responsibility for the review of the promotional material supplied by the affiliates lay with the Level 2 provider who we ensure is made aware of their obligations under the Code throughout the course of our engagement – please see below for more details. The above assertion is based on point 3 of the "Definitions of those involved in providing PRS" section of the Guidance as reproduced below:
>
> "3.5- PhonepayPlus is aware that not all entities who we would deem to be Level 2 providers will generate all the promotion or content, or perform all the operation of their services, in-house. A significant number of Level 2 providers will sub-contract with other entities to undertake promotional functions (whether in print, broadcast, SMS or the web), to support or supply certain technical platforms involved in the provision of a service, or purchase content which the Level 2 provider will then package and sell under their brand.
>
> "In such circumstances, PhonepayPlus **does not** regard a party which is sub-contracted to provide only one or two of the functions of promotion, operation and content as a provider. Rather, these entities are regarded as affiliates. Affiliates are not required to register with PhonepayPlus and are not considered to be directly regulated by PhonepayPlus' Code of Practice. Rather, the Level 2 provider to whom the affiliate is sub-contracted will be considered to retain responsibility for that

affiliate's actions.

"In addition to the above and in order to address growing concerns related to affiliate marketing, Velti requested and attended several meetings throughout 2012 and 2013 between PhonepayPlus and a client, (with Victoria Watkins -Velti Compliance Manager- being in attendance on behalf of Velti). These meetings were called for the purposes of ascertaining how to best improve Due Diligence and Risk Assessment (DDRC) specific to affiliates…Throughout the course of these meetings Velti had not been made aware that the Level 1 provider is required to review the affiliates via the Level 2 provider for the purposes of its DDRC obligations. Victoria Watkins raised the question concerning the Level 1 provider's obligations with regard to DDRC however discussions were focused around how the Level 2 can carry out DDRC on the affiliates with no reference being made to the Level 1's potential obligations with regard to these.

"The combination of the aforementioned extracts from the Guidance and the information derived from the meetings gave Velti no indication that these obligations were to be extended to the Level 1 provider.

"As is evident from the above Velti takes it responsibilities as a Level 1 provider very seriously and aims to ensure that any Level 2 provider it contracts with is continuously made aware of their responsibilities and obligations under the Code of Practice. We take the following steps with a view to achieving this:

a) Developing a robust DDRC system as is evidenced throughout this response and its supporting Annexes.

b) Ensuring that the entities we contract with adhere to their obligations under the Code of Practice through a thorough periodic review of their services and using transparent and open communication when required;

c) Proactively setting up and attending meetings between these Level 2 providers and with the relevant PhonePayPlus stakeholders to ensure that all parties are clear in their understanding of the parameters of their rights and obligations;

"Placing liability into our contracts on to the Level 2 providers for any breach of their relevant obligations under the Code of Practice."

The Executive submitted that it is clear from the content of paragraph 3.1.3 of the Code that a Level 1 provider's risk assessment obligations include an assessment of the potential risks posed in respect of the promotion and marketing of the service. In this instance, the Level 1 provider, by its own admission, failed to carry out sufficient risk assessment procedures in relation to the promotion of the Service as a result of its belief that it had no responsibility in relation to the use of affiliate marketing. It is asserted that this contravened express wording (and spirit) of the Code and Guidance.

The Executive submitted that the Level 1 provider was on notice that the use of affiliate marketing is inherently risky and open to abuse as a result of Guidance and recent adjudications. Yet, it failed to make any enquiries regarding how affiliate marketers would promote the Service and the controls in place to prevent consumer harm. As a result of the lack of enquiries, insufficient risk assessment was conducted and no continuing steps were put in place to control the inherent risks that should have been identified.

(ii) The Level 1 provider failed to take and maintain reasonable continuing steps to control risks following the launch of the Service and/or reassess the risk rating as a result of receiving complaints.

The Executive asserted that the Level 1 provider failed to monitor and assess complaint levels in

relation to the Level 2 provider and as a result failed to take and maintain reasonable continuing steps to assess and control the risks posed by the Level 2 provider. As of 14 June 2013, PhonepayPlus had received 168 complaints about the Service. The initial complaint about the Service was received by PhonepayPlus on 6 August 2012. The main complaint period occurred between January to March 2013. A breakdown was provider of complaints received by PhonepayPlus about the Service on a month by month basis:

Month	Number of Complaints
August 2012	4
September	18
October	13
November	10
December	10
January 2013	45
February	34
March	20
April	8
May	3
June	3

The nature of the complaints was that the charges incurred were unsolicited, the promotional material was misleading and the STOP command did not work. The Executive asserted that there were three instances where the Level 1 provider failed to take and maintain reasonable steps to control risks.

The Executive asserted that the Level 1 provider did not take action following receipt of PhonepayPlus' complainant reports. From September 2012, the Complaint Resolution team issued the Level 1 provider with a report on a monthly basis containing PhonepayPlus number check statistics and a breakdown of complaints from the previous month for the Level 1 provider's shortcodes. Therefore, since the submission of the first report in September 2012, the Level 1 provider had been receiving data from PhonepayPlus indicating that complaints were being received along with a summary of complainants' accounts.

The Executive noted that the Level 1 provider took no action to reassess the initial risk rating for the Service as "Low", despite having received notice of complaints direct to PhonepayPlus.

The Level 1 provider failed to promptly respond to a yellow card issued by the Mobile Network operator and did not re-assess the "Low" risk rating in light of this yellow card.

On 29 January 2013, the Level 1 provider advised the Executive that the Service was subject to a yellow card on 10 October 2012 from the Mobile Network operator. A copy of the correspondence exchanged between Mobile Network operator and the Level 1 provider in relation to the yellow card was supplied to the Executive. The Executive noted that in the correspondence concerns were raised regarding the manner in which the Level 2 provider was promoting the Service and broken links within the Payforit webpage.

The Executive noted that the Level 1 provider took no action to reassess the initial risk rating for the Service as "Low", despite being advised by a Mobile Network operator of concerns regarding the promotion of the Service.

Failure to respond to increased internal consumer complaints

The Executive asserted that, prior to 14 January 2013, the Level 1 provider did not produce adequate

internal reports reflecting increased customer care calls for the Service. On 6 February 2013, the Executive requested a breakdown of the number and nature of the calls received by the Level 1 provider and details of the resolution(s) of the calls. On 15 February 2013 the Executive received the following response from the Level 1 provider:

> "On the 14th January 2012 [the Executive notes that this new internal monitoring check was actually introduced on 14 January 2013], Velti introduced a new internal monitoring check; every Monday a report is run for the previous week to show the ten L2's who we received the highest amount of care calls for. Previously, we did the same report but for the previous month and to show only the top 3 L2's. In Velti's constant effort to improve our on-going risk assessment checks, we now do the report weekly and expanded the net to capture the top ten L2's. This is so Velti is analyzing more up to date data and of a bigger range. The improved report was first run on the 14th January and showed Upright Line receiving 16 calls meaning they were the L2 with the 4th highest amount of care calls. This prompted Velti to carry out a full service review which can be seen in Annex 15 of my last response.
>
> "The weekly report described above only shows the ten L2's we received the highest amount of care calls for and the number of calls. Velti runs a monthly report showing the resolution of all customer care calls. However, this shows the resolution for all calls and are not specific to Upright Line."

In the 'Upright Line Customer Care Calls' document supplied by the Level 1 provider, the Executive noted that, between the week commencing ("w/c") 14 January 2013, and the w/c 4 February 2013, there had been an increase in customer calls to the Level 1 provider. By the end of this period the Service was generating the highest number of customer calls. On 16 May 2013 the Executive contacted the Level 1 provider to ascertain what steps it had taken to determine why customer contact regarding the Level 2 provider was increasing.

On 29 May 2013 the Executive received the following response from the Level 1 provider:

> "Regarding the above comment I note prior to 14 January 2013 Velti is not able to provide data on customer care calls received about Upright Line", please note that we have, from the start of the New Year, introduced an additional monitoring check whereby every Monday a report is run for the previous week to show the ten L2's who we received the highest amount of care calls for. What Velti did previously (and still does) is the same report but for the previous month and to show only the top 3 L2's. Velti introduced this new check so we are analysing more up to date data and of a bigger range. Notwithstanding the above weekly and monthly reporting, Velti is able to pull data on any service at any time if so requested.
>
> "Regarding the increase in customer calls, Velti brought forward UprightLine's 6 monthly review date from the 27th March 2013 to the 17th January 2013. Velti tested all services end to end using a phone. We also reached out to UprightLine and requested copies of their promotional material (URLs) whilst pointing out to them our concern regarding the higher number in customer care calls. As is evident, we were concerned due to this "spike" in calls and we made sure we did everything within the remit of our obligations to review the service and to ensure that the Level 2 provider was aware of both the increased volume of calls and the uneasiness we had as to the compliance of the service it provided."

The Executive noted that prior to, "the start of the New Year [2013]," the Level 1 provider only reported on the top three Level 2 providers for whom it received customer care calls. The Executive accordingly noted that, prior to January 2013, the Level 1 provider was not reviewing or analysing complaints received directly by the Level 1 provider. The Executive asserted that by failing to do this

the Level 1 provider was not taking reasonable and continuing steps to assess and control the risk regarding the provision, promotion, marketing and content of the Service.

Following 14 January 2013, the Level 1 provider did produce reports on customer call levels, but failed to take reasonable continuing steps to control the risks identified

The Executive noted the Level 1 provider's following statement:

> "As is evident, we were concerned due to this "spike" in calls and we made sure we did everything within the remit of our obligations to review the service and to ensure that the Level 2 provider was aware of both the increased volume of calls and the uneasiness we had as to the compliance of the service it provided."

The Executive noted the content of an email exchange between the Level 1 and Level 2 providers during the 17 January service review, a summary of which was provided:

> "We [the Level 1 provider] have been receiving a high number of customer care calls for your services Ustre and Ergma recently. Could you please send me your promotional material for these two services so I can double check all is okay compliance wise?"
>
> "How many calls are you getting? Are we [the Level 2 provider] being forwarded all the information about all the calls? "
>
> "We [the Level 1 provider] had around 25 calls w/c 7th Jan and 16 calls w/c 1th Jan. The calls are either unsubscribe requests which we carry out here, or refund requests in which case we pass the customer over to you.[sic]"

The Executive noted that the Level 1 provider made reference to a high number of customer care calls yet it did not attempt to:

1) Obtain an explanation from the Level 2 provider as to why there may be an increase in customer care calls, or
2) Seek information on the outcome of the customer care calls that the Level 1 provider stated it has passed to the Level 2 provider.

The Executive submitted that by failing to ascertain, or attempt to ascertain, from the Level 2 provider the reason(s) for increased customer care calls about the Service, and the outcome of customer care calls passed to the Level 2 provider, reasonable and continuing steps in relation to the risk assessment and risk control for this Service were not undertaken by the Level 1 provider.

The Executive therefore submitted that the Level 1 provider had acted in breach of paragraph 3.1.3 by failing to appropriately assess the potential risks posed by the Level 2 provider, both at the outset and on a continuing basis. The Executive further asserted that the Level 1 provider also failed to take and maintain reasonable continuing steps to control those risks.

2. The Level 1 provider strongly refuted that it had acted in breach of paragraph 3.1.3 of the Code.

Insufficient risk assessment carried out resulting in incorrect risk rating

The Level 1 provider asserted that the Executive has incorrectly asserted a breach that, if it occurred at all, would have occurred (prior to 1 September 2011) under the previous edition of the PhonepayPlus Code of Practice (11th edition) and therefore cannot be deemed to have been a breach of the 12th edition of the Code.

In the alternative, the Level 2 provider asserted that, if the Tribunal asserts that the 12th edition of the Code were applicable in this instance, then it disputed the Executive's assertion that there was, "insufficient risk assessment carried out resulting in incorrect risk rating". This was on the grounds that it:

1. Assessed the potential risks posed by those parties with whom it contracted;
2. Took and maintained reasonable continuing steps to control those risks, and

In addition, the Level 2 provider stated that it had proactively sought direction, instruction and requested information from PhonepayPlus in order to better understand its obligations under the Code.

1. Initial Risk Assessment

The Level 1 provider stated that its risk assessment process includes:

a) Completion of a due diligence form prior to commencement of services;
b) Review of the due diligence report from the PhonepayPlus website including breach history;
c) Review of the trading history via 'Creditsafe';
d) Review of directors and officers via a search of associated regulatory bodies such as Companies House, Gambling Commission and Information Commissioner's Office;
e) Review of copies of all of the Level 2 provider's promotional material; and
f) Full review of the services including: a review of the offer page and an actual test of the service end-to-end with a handset.

It stated that it believed that the above steps are in accordance with the steps that PhonepayPlus had recommended in Guidance paragraph 6.2 that "might be taken". It drew the Tribunal's attention to the fact that the Level 2 provider's service went live in May 2011 when due diligence and risk assessment requirements were different (being subject to the 11th edition of the Code). It stated that, during the period in question, there was considerable industry need for clarification on the changed approach that had been introduced in September 2011 by the 12th edition of the Code. So much so, that PhonepayPlus issued a discussion on due diligence and risk assessment in September 2012. The Level 1 provider invited the Tribunal to give due consideration to the industry uncertainty that existed at the time of the risk assessment. It stated that it did take steps to bring the review of any services in line with the requirements under the 12th edition of the Code, through taking consistent and on-going steps to control risk as outlined below.

2. Continuing Steps to Control Risk

The Level 1 provider stated that, in line with its initial risk assessment, its continuing steps to control risk include:

"a. Depending on risk category all of the services are reviewed every six months, three months or one month.
b. Weekly customer care report showing the ten merchants it received the most calls for
c. Monthly customer care report showing the five merchants it received the most calls for.
d. Regulatory concern tick box in customer care tickets, an operator will tick this box if they have a regulatory concern which we will bring it to the attention of the Compliance Officer.
e. Spot check by the Compliance Executive/Officer of approximately ten traffic logs a week from people who called in via customer care to ensure everything looks ok in their traffic log from a compliance point of view."

In respect of the Level 2 provider, the Level 1 provider stated that it conducted a full service review on

15 June 2012 (four months before PhonepayPlus provided its further clarification on 3 September 2012) of all of the Level 2 provider's services.

Over-estimation of the protection afforded by Payforit

The Level 1 provider disputed the Executive's assertion that there was an "over estimation of the protection afforded by Payforit". It stated that the reliance on Payforit in its risk assessment of the Service was only one factor in its assessment and therefore was not an overestimation of its protection. It added that it had always been aware that the use of Payforit is not an "automatic safeguard against non-compliance". However, it asserted that the use of Payforit does reduce the risk of certain aspects of the service and therefore attributes to a lower risk assessment of the applicable service.

The Level 1 provider noted that in January 2009, PhonepayPlus introduced a prior permission regime for subscription services over £4.50 in a seven day period. At that time PhonepayPlus gave notice that subscription services which cost over £4.50 in a seven-day period but which used Payforit would be exempted from the requirement to seek prior permission. This was due to the assurances provided via the Payforit mechanic that a Level 2 provider would not control the presentation of key information to consumers prior to consent to a purchase, most importantly the cost of the service and that it is a subscription. The assurance provided by the Payforit mechanic was further reinforced by the PhonepayPlus statement on the regulation of Payforit dated 29 May 2013:

> "As such PhonepayPlus recognizes the Payforit scheme rules offers Level 2 providers the ability to lessen consumer risk by ensuring pricing clarity and robust proof of consent to charge where its systems and rules are properly followed."

The Level 1 provider accepted that the Payforit mechanic does not offer an automatic safeguard, however it believed it was justified in its belief that the mechanic does lessen consumer risk and should be one factor that attributes to a lower risk rating. It argued that the Executive had isolated specific comments in order to assert a breach of the Code rather than assessing its actions and conduct as a whole. It added that any regulatory assessment must give due consideration to the then current understanding of the industry.

On notice regarding the use of affiliate marketing

The Level 1 provider voiced concern that the Executive had asserted a breach of the Code and Guidance by implication and was seeking to apply current industry knowledge retrospectively. While it acknowledges that its own risk assessments and controls had identified that the Level 2 provider would use affiliate marketing, it disputed:

1. the Executives interpretation that it was "on notice"; and
2. the assertion that it had breached the Code as a result of the alleged failures.

1. On Notice

The Level 1 provider stated that, having identified that the Level 2 provider would be using affiliate marketing, it conducted its assessment of the Service's promotional material in accordance with the then current edition of the Code, Guidance and industry understanding. It asserted that concerns regarding affiliate marketing and the knowledge of what risks affiliate marketers pose were not present in the industry when it completed its risk assessment in March 2011. Therefore, as these concerns and risks were not known, its risk assessment did not focus specifically on the recently recognised issues posed by Level 2 providers and affiliate marketers. It stated that there had been

significant industry uncertainty regarding the application of the Code and Guidance to digital marketing practices and promotions. It asserted that this uncertainty resulted in a public consultation (which closed on the 27 June 2013).

In view of the above, it argued that it cannot be deemed to have been "on notice" and recent developments in industry knowledge cannot be applied retrospectively (particularly as they remain the subject of public consultation). It added that even during the recent development of industry knowledge, affiliate marketing cannot be reverse traced and therefore the ability to implement risk assessment retrospectively is limited.

2. Assertion of Failings

The Level 1 provider strongly disputed the Executives assertion that it believed it "had no responsibility in relation to the use of affiliate marketing". It stated that it takes its responsibilities extremely seriously with regard to assessment of potential risk and continuing control of those risks. In addition, it imposes contractual obligations on its Level 2 providers to ensure that any promotional material does not breach the Code, Guidance, industry standards or applicable laws. It performs constant monitoring of all of its services so that it can identify services that pose a risk of harm to the consumer. It regularly reviews those services that are identified as causing concern and is swift to suspend and terminate services to limit any potential harm.

3. Adjudications

The Level 1 provider contested the assertion that it "was on notice" as a result of recent adjudications on the following grounds:

1. The Service commenced in May 2011, prior to the current edition of the Code and related Guidance coming into force and prior to the adjudications referred to by the Executive taking place (the earliest being the 2 February 2012 (eight months after the Service commenced).
2. With regards to the adjudication where it was the Level 1 provider, PhonepayPlus gave no indication that Level 1 providers were required to investigate what due diligence a Level 2 provider had carried out on their affiliate marketers.
3. Following that adjudication (referred to above) PhonepayPlus did not launch any investigation, ask any questions or attribute any fault to it regarding its risk assessment of the affiliate marketing. This would serve to reinforce its (and the industry's) belief that responsibility for affiliate marketing rests solely with the Level 2 provider.
4. It believed that its interpretation of Guidance paragraph 3.6 was correct. Namely, that Level 2 providers are responsible for their affiliate marketers' actions.

Nevertheless, it stated that following the adjudication where it was the Level 1 provider, it took it upon itself to proactively arrange meetings every quarter with PhonepayPlus and the Level 2 provider (the actions of which were the subject of the adjudication). The sole purpose of these meetings was to discuss and ascertain from PhonepayPlus what it thought Level 1 and Level 2 providers should be doing to mitigate the risks of affiliate marketing. Even during these meetings many suggestions were made by PhonepayPlus as to what Level 2 providers could do, but no directions or suggestions were given to it with regard to Level 1 providers. Again, this further reinforced its belief that due diligence, risk assessment and control checks on affiliate marketers remained the responsibility of the Level 2 provider and not the Level 1 provider. It again asserted its belief that that the Executive was seeking to retrospectively apply recently acquired industry knowledge and standards relating to affiliate marketing. It referred the Tribunal to Guidance paragraph 3.6.

"In such circumstances, PhonepayPlus does not regard a party which is sub-contracted to provide

only one or two of the functions of promotion, operation and content as a provider. Rather, these entities are regarded as affiliates. Affiliates are not required to register with PhonepayPlus and are not considered to be directly regulated by PhonepayPlus' Code of Practice. Rather, the Level 2 provider to whom the affiliate is sub-contracted will be considered to retain responsibility for that affiliate's actions."

The Level 1 provider failed to take and maintain reasonable continuing steps to control risks following the launch of the Service and/or reassess the risk rating as a result of receiving complaints

The Level 1 provider stated that it had been receiving Number Checker and complaint data from PhonepayPlus since January 2012, after it pro-actively approached PhonepayPlus to request this data (nine months before PhonepayPlus began providing these reports to all Level 1 providers in September 2012. It argued that it was it who prompted PhonepayPlus to start assisting Level 1 providers in their efforts to maintain reasonable continuing steps to control risks.

As a result of pro-actively seeking these reports, the Level 1 provider began monitoring and assessing the complaint levels of its Level 2 providers. In this instance, it recalled having reviewed the complaint descriptions and noted that none of the complaint descriptions indicated that users had been misled in to using the Service.

Furthermore, it clarified that PhonepayPlus, who takes the calls and records the nature of the complaints, did not notify the Level 1 provider that consumers may have been misled into reaching the Service landing pages.

The Level 1 provider stated that as it was satisfied that the payment method was transparent and included robust verification, the complaint descriptions did not cause it to increase its risk rating. It did acknowledge that complaints had been received and believed that, as these had been dealt with via the PhonepayPlus complaints procedure, they had been resolved and did not require any further actions (having received no specific notification). Nevertheless, these complaints were given due consideration and were taken into account as part of robust continuing risk assessment procedures. The Level 1 provider stated that when it compared the volume of complaints to the volume of users of the Service, the ratio was extremely minimal and not unusual for this type of service.

The Level 1 provider highlighted that because of the nature of shared codes, the data provided by the Number Checker report does not identify the client or the service that is causing the increase in "look ups". It asserted that whilst it conducts its own assessment and analysis to corroborate the Number Checker data with the complaint data, the number of complaints in 2012 were not high enough to flag an issue. It referred the Tribunal to the figures below which show the total amount of subscribers per brand name for the duration of the Service:

30,264 Oxyra (08 March 2011 – 25 October 2012)
66,196 Ustre (29 June 2012 – 25 January 2013)
29,348 Ergma (04 January 2013 – 01 May 2013)
Total users – 125,808

It said that the 168 complaints that it received equated to 0.13% of the total subscriber base for these services, meaning that less than 1% of users lodged complaints of any kind. As a result of its own internal continuing risk control, assessment and monitoring of customer care calls coupled with PhonepayPlus' statistics, it did notice an increase in customer care calls at the beginning of 2013. This resulted in it deciding to bring the service review date forward and execute a full service review on the 17 January 2013.

With regard to the issues raised by the MNO, via the issuing of a Yellow card, the Level 1 provider clarified that that the issues were resolved to the MNO's satisfaction and did not indicate any other issues that would result in an increase of the risk assessment profile of the Level 2 provider. The issues raised were about the deployment of the Payforit frame within the Level 2 provider's site. While this temporarily increased the Level 2 provider's risk profile, this was subsequently decreased when the issues were resolved. The Level 1 provider submitted that the fact that a Yellow card (a "minor infringement") was issued, and not a Red card (a more serious infringement) indicated that there was nothing wrong with the Service which would cause serious consumer harm.

Failure to respond to increased internal consumer complaints.

The Level 1 provider clarified that it did review and analyse complaints prior to the 14 January 2013 and, due to the fact that the number of complainants was not sufficient to merit an increase in the risk rating the Level 2 provider was not flagged in the top three Level 2 provider's and therefore did not warrant specific investigation. However, the Level 1 provider stressed that all calls are logged and reviewed within its customer care department. If a customer care agent has a regulatory concern there is a system and process whereby regulatory concerns will be flagged for review by the regulatory compliance team. However its customer care team were satisfied that the numbers and basis for complaint were not sufficient to warrant a regulatory investigation at that time.

Following 14 January 2013, the Level 1 provider did produce reports on customer call levels regarding the Level 2 provider's Service, but failed to take reasonable continuing steps to control the risks identified

The Level 1 provider clarified that it was aware of the reasons for the customer care calls as each customer call ticket is logged by the care agent detailing the reason for the call. Furthermore, once the call was dealt with the ticket is closed using a closure code such as refund request, unsubscribe request, etc. Therefore, it had knowledge of the reasons for the calls, most of which were either unsubscribe or refund requests. Its agents are fully trained and advise the user to call back if they are not happy with the merchants' response. If there is a return caller, the system flags this allowing continuing risk assessment and control. Its records show that there was no evidence of repeat calls for the Level 2 provider, therefore it reasonably assumed that it was assessing the potential risks on a continuing basis.

In addition, the Level 1 provider was also aware of the Level 2 provider's 'no quibble' refund policy. Due to the increase in customer care calls, it reviewed the Service and made the Level 2 provider aware that there was an increase in calls, and communicated with the Level 2 provider. At the peak of the Level 2 provider's Service, complaints amounted to 48 calls out of a total of 8,896 subscribers. Therefore, although the numbers were high enough that it felt the need to review all of the Level 2 provider's Services and discuss the increase in calls, it was fully aware of the reasons for the calls that it was receiving. The Level 1 provider stated that its significant experience indicated that all services receive some level of complaints and due to the volume of complaints being received when assessed against the volume of subscribers, it was agreed that its risk assessment procedure indicated that this ratio was considered as being at a normal level.

During informal representations, the Level 1 provider representative's made extensive oral submissions regarding the alleged breach of paragraph 3.1.3 of the Code. It strongly opposed the allegations. It stated that although there was considerable industry uncertainty in relation to Level 1 provider's responsibilities where a Level 2 provider engages affiliate marketers, it asserted that the Code was clear that Level 1 providers are only required to view the Level 2 provider's own promotional material. It stated that in relation to the Service it viewed the Level 2 provider's landing

pages and tested the Service end to end. It added that it believed it had made the correct enquiries into how the Service was promoted, but that, had it realised that affiliates would be used in the manner they were, it would have asked further questions. It added that it believed it was not expected to check affiliate marketers (especially as it had no contractual relationship with them and it had no technical ability to conduct checks).

It reiterated that it contracted with the Level 2 provider and conducted its risk assessment at a time when the 12th edition of the Code was not in force. The Level 1 provider stated that the Service began operation in May 2011. It also provided further detail in relation to its risk assessment processes following the 12th edition of the Code coming into force, regular service reviews and thorough complaint analysis. In addition, the Level 1 provider expanded upon its written submissions in relation to the use of Payforit and previous adjudications.

3. The Tribunal considered the evidence, including the Level 2 provider's detailed written and oral representations. The Tribunal noted the content of the Guidance relied upon by the Executive and the Level 1 provider.

The Tribunal noted that the Level 1 provider interpreted the Code and Guidance as stating that a Level 1 provider's risk assessment obligations did not extend to the promotion of a service by affiliate marketers. The Tribunal commented that this assessment was wrong; the Code expressly states that all Level 1 providers must, "assess the potential risks posed by any party with which they contract in respect of… the promotion…of the premium rate service." Paragraph 3.1.3 does not limit the definition of "promotion" to direct promotions conducted by the Level 2 provider.

The Tribunal accepted that the initial risk assessment was conducted prior to the current edition of the Code coming into force; therefore, the Tribunal only considered the matters which arose after September 2011. However, the Tribunal commented that, from September 2011, Level 1 providers had an obligation to revisit risk assessment ratings as a result of the new obligations imposed on them and on a continuing basis.

The Tribunal commented that in order for a Level 1 provider to satisfy its obligation to assess the potential risks posed by a Level 2 provider in relation to the promotion and marketing of a premium rate service, a Level 1 provider must request and obtain details of how the service will be marketed and satisfy itself that the information given to it is accurate and complete. The Tribunal stated that for the avoidance of doubt a Level 1 provider's risk assessment obligation extends to making adequate enquiries in relation to the promotion of services by affiliate marketers.

In relation to the Level 2 provider's Service, the Tribunal noted that the Level 1 provider did take steps to monitor the Service, including viewing the Level 2 provider's own promotional material and making enquiries when spikes occurred. However, the Tribunal noted that affiliate marketing was the only method of access to the Service landing pages. Further, it was clear from the Level 1 provider's "Due Diligence Record", dated 14 March 2012, that the Level 1 provider had been made aware of the use of affiliate marketing. Yet, the Level 1 provider failed to make any enquiries into the use of affiliate marketing or the content of the affiliate marketers' promotions.

The Tribunal stated that recent adjudications against Level 2 providers in relation to misleading affiliate marketing were relevant as they highlighted the consumer harm caused by affiliate marketing. The Tribunal highlighted that all parties in premium rate value-chains have an obligation to ensure that services (including the promotion of services) comply with the Code and to avoid consumer harm. The Tribunal voiced concern that a leading Level 1 provider would assert that prior adjudications in relation to affiliate marketing were not relevant to this adjudication simply because the breaches were brought against the Level 2 provider rather than the Level 1 provider.

Accordingly, in relation to both the obligation to continually assess and to control risk, the Tribunal upheld a breach of paragraph 3.1.3 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.2- Misleading

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

- The breaches, if continued, may be capable of having a slight impact on consumer confidence in premium rate services.
- The cost incurred was more likely to be material to consumers, with the breaches capable of inflating revenue streams relating to the Service.

Paragraph 3.1.3- Risk assessment and control

The initial assessment of paragraph 3.1.3 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 1 provider failed to develop and/or consistently use risk assessment and control processes on its clients, which had a detrimental impact on enforcement of the Code.

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

Final Overall Assessment

The Tribunal did not find any aggravating factors and there was no relevant breach history.

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

- The Level 1 provider appeared to be responsive to advice from PhonepayPlus. For example, it made changes to its technical platform to allow consumers to terminate the Service by sending a STOP command to the billing shortcode.
- The Level 1 provider appeared to have a genuine, but mistaken, belief that the rebilling mechanic was compliant. Further, the Level 1 provider had been transparent in relation to the timing of rebilling to the Mobile Network operators, PhonepayPlus and the Payforit Management Group.
- The Level 1 provider provided a frank and co-operative response to the breach letter. In both its written and oral submissions it made admissions and seemed open to change.

The Level 1 provider's revenue in relation to the Service was in the range of Band 5 (£5,000 - £50,000).

Having taken into account the mitigating factors, the Tribunal concluded that the seriousness of the case

should be regarded overall as **significant.**

Sanctions Imposed

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

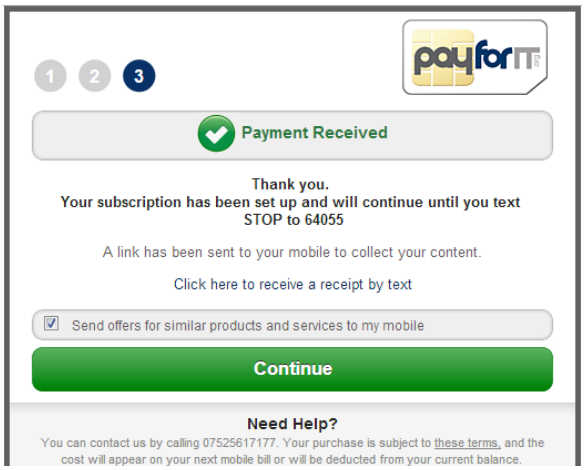
- a formal reprimand:
- a fine of £17,500
- a warning to the Level 1 provider, stating that Level 1 providers have an explicit obligation under the Code to make adequate enquiries in relation to how services are promoted. If a Level 1 provider does not make adequate enquires, it is likely to be found to have breached its risk assessment obligations

Pursuant to paragraph 3.8.2, and in light of the uphold of a breach of rule 2.3.2, the Tribunal considered it proportionate to impose the following additional sanction.

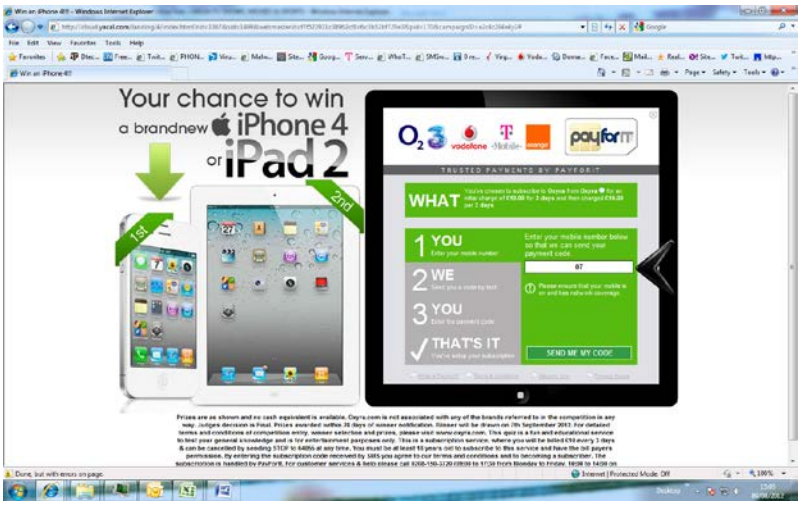
- To the extent that refunds have not already been satisfied by the Level 2 provider, a requirement that the Level 1 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

Appendix A: Screenshot of a Service Payforit payment page:



Appendix B: Screenshot of an Oxyra Payforit page:



Appendix C: Diagram provided by the Level 2 provider showing the timing of subscription charges: