



Tribunal meeting number 153 / Case 1

Case reference: 19829
Level 2 provider: Acetelecom (France)
Type of service: Voicechanger
Level 1 provider: N/A
Network operator: Syntec Limited (United Kingdom)

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

BACKGROUND

Between 21 March 2013 and 16 August 2013, PhonepayPlus received 14 complaints from consumers in relation to a voice changer service, (the “**Service**”), which was operated by the Level 2 provider Acetelecom (the “**Level 2 provider**”). The Service operated on the premium rate numbers 09051050401, 09051050402 and 09051050403 that had been allocated to the Level 2 provider by the Network operator Syntec Limited. Consumers were charged £1.00 per minute (plus Network charges). The Service operated between 16 March 2013 and 9 May 2013, when it was voluntarily suspended by the Network operator. Promotions for the Service were suspended by the Level 2 provider on 22 April 2013, following correspondence with PhonepayPlus.

The Service was promoted using banner advertisements (“**Banner ads**”) which were displayed on third party applications (“**Apps**”) and websites. Consumers engaged with the Service by clicking on a Banner ad which automatically led the consumer’s device to call the Service.

The investigation

Following a referral to the French authorities, in accordance with the E-Commerce Directive (2000/31/EC), and receipt of confirmation that they were unable to take any action, the Executive subsequently conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 27 June 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.12 (b) – Spend caps
- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.2.1 (a) – Provision of information

The Level 2 provider responded on 11 July 2014. On 24 July 2014, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- Screenshots of webpages for the Apps used to promote the Service;
- A screenshot of a webpage for the Service, containing a description of how the Service operated;
- A media file containing the moving Banner ads;
- An audio file of the Executive’s monitoring of the Service;
- The complainants’ accounts;



- Third party forum commentaries on the Service submitted by the Executive;
- Correspondence with the Level 2 provider (including directions/requests for information and the Level 2 provider's responses);
- Promotions for the Service submitted by the Level 2 provider;
- The "site list" containing the names of Apps and websites used to promote the Service submitted by the Level 2 provider;
- Screenshots of Banner ads in situ on some Apps submitted by the Level 2 provider
- Correspondence with the Network Operator;
- PhonepayPlus Guidance on "Children's Services";
- PhonepayPlus Guidance on "Promotions and promotional material";
- The breach letter of 27 June 2014; and
- The Level 2 provider's response to the breach letter dated 11 July 2014 and associated annexures.

Complaints

The majority of complaints were made by parents on behalf of their children, who had interacted with the Service after viewing promotions on children's Apps. Some complainants stated that they were unaware that they would incur charges. The Executive relied on the content of all the complaints received, examples of which include:

"This premium rate number appeared as an ad on a children's app for iPhone. There is an ad bar at the top which has a voice changer phone number which charged at premium rate. My daughter tapped it by accident which then immediately phoned the premium rate 090 number. There was no secondary "are you sure you want to call this number" fail safe which meant that she has run up a £15 charge on my bill. I think that it is ridiculous that this sort of ad is allowed on a children's app. The fact that this ad only needed to be tapped once before activating the phone call is ridiculous. I would like to be reimbursed for the phone call which was made accidentally by a child who did not understand or wish to use the premium rate number which she inadvertently dialed [sic]."

"A children's app running on an iPhone app automatically dials this premium rate number I've been charged £150."

"[C]ust wife gave daughter phone to play with and believes the child may have pressed something on the game and 09 number was dialed out and cust charged.cust believes linked to children application - talking dog and baby flashcard - bought on apple itunes - removed now from itunes. 09 number was dialed 10 times within a few days two calls had same duration 19 mins a min apart [sic]."

"Summary of Complaint: This service is advertised on a small banner ad across the top of a kids iPhone cake making app. Unfortunately I deleted the app and don't have the name. I did take screen shots. Nearly all of the ad is obscured intentionally. You can see the price, but little else. It is targeted on a children's app where many children will accidentally click on it while using the app. Worse than this my child actually went back to the app leaving the call running in the background. Just to be clear, clicking on the banner triggers the call a £1 ppm number. This app is clearly targeted at children under 10. I have all the settings in place to stop in app purchases etc. So don't expect my daughter to be able to make premium rate calls from within an app [sic]."

"Consumer complains his 3 year old son was using a app aimed at children on his Apple iPhone when an advert caused the phone to dial an 09 number for a 'voice changer' service. £48 charged in total. [sic]"



SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.12 (b)

“Services aimed at, or which should have been expected to be particularly attractive to children, must terminate immediately when a maximum of £2.56 plus VAT per call, or in the case of a subscription service a maximum of £2.56 plus VAT per month, has been spent.”

1. The Executive submitted that the Level 2 provider had breached rule 2.3.12 (b) of the Code as a result of the following:
 - the Service was aimed at, or should have been expected to be particularly attractive to children, as it was advertised within children’s Apps; and/or
 - the style, content and composition of the promotional material was of a nature that was aimed at children and/or should have been expected to be particularly attractive to children; and
 - taking into account one or both of the above factors, calls to the Service should have terminated as soon as £2.56 plus VAT per call had been incurred.

Guidance

The Executive relied on the content of the PhonepayPlus Guidance on “Children’s services” which states:

Determining whether a service is targeted at children
Paragraph 2.1

“In determining whether a PRS has been targeted at children, or is likely to be particularly attractive to them, PhonepayPlus will consider each incident on a case-by- case basis. In doing so, the following factors are likely to be considered:

- Data which indicates how many readers, viewers, or listeners of a publication, broadcast, or other media where the service is promoted, are children;
- The style, content, and composition of the promotional material (i.e. does it contain factors likely to make it particularly attractive to children, or which would suggest children had been targeted?).”

Complaints

The Executive relied on all the complaints received but particularly noted the complaints outlined above in the “Background” section.

The Service was aimed at, or should have been expected to be particularly attractive to children, as it was advertised within children’s Apps

During correspondence, the Executive noted that the Level 2 provider had asserted the following regarding the target audience of the Service:

“Under no circumstances our service is targeted at children below 18. We advertise on entertainment applications because our voice changer service falls in the category of entertainment [sic].”

“in the detail of applications in which our ad appears, you will see that we advertise on all kinds of entertainment applications and not only on so-called “children” applications”.

The Executive was provided with a list of “site names” of the Apps and/or websites that the Level 2 provider stated the Banner ads for the Service were displayed. Following a comprehensive search, the Executive noted that the majority of the Apps were categorised as entertainment, were from well-known App stores and the content of a large number were rated as suitable for age 4+. Examples of these Apps include:

- Cool Monsters
- Dino Day
- Baby Flash Cards
- Sound Touch Lite
- Hello Kitty March – 3
- Toddler Flashcards
- Talking Ben the Dog

The Executive asserted that, notwithstanding the Level 2 provider’s assertions detailed above, the majority of the Apps were clearly designed for children. Accordingly, the Executive submitted that the Service was aimed at, or should have been expected to be particularly attractive to children due to the high likelihood that children would view the Service Banner ads, while interacting with the children’s Apps.

The style, content and composition of the promotional material was of a nature that was aimed at children and/or should have been expected to be particularly attractive to children

During the course of the investigation, the Level 2 provider supplied moving images of the Banner ads used to promoted the Service and the Executive took screenshots (**Appendix A, B and C**).

The Executive submitted that the banner ads and website promotions contained elements that would be attractive to children and suggested that the Banner ads had been specifically designed to target children.

In particular, the Executive noted that the following aspects of the style, content, and composition of the Banner ads, which it submitted would be appealing to children;

- the bright colours;
- the images of cartoonlike characters; and
- the use of wording such as, “Talk like an alien” which offered entertainment that children were likely to find appealing.

Taking account of the style and content of the promotions coupled with the placement of the Banner ads within children’s Apps, the Executive submitted that the promotions were likely to be particularly attractive to children and, furthermore, the factors suggested that the Service had been specifically aimed at children.

Taking into account one or both of the above factors, calls to the Service should have terminated as soon as £2.56 plus VAT per call had been incurred.



The Executive submitted that, in light of its assertion that the Service was aimed at or would have been particularly attractive to children, the Service should have terminated immediately upon £2.56 plus VAT per call being spent by the consumer.

The Executive stated that, as the Service cost £1.00 per minute, once a call reached three minutes it should have terminated as the cost would have exceeded £2.56 plus VAT.

The Executive noted that the Network operator had required the Level 2 provider to terminate calls after a maximum call duration of 20 minutes. Notwithstanding this the Network operator stated in correspondence with the Executive that it had noted that calls to the Service were persistently exceeding the 20 minute call limit. The Network operator stated:

“Syntec’s monitoring highlighted calls with very long durations to the Ace Telecom premium rate numbers, which identified that Ace Telecom were failing to limit service duration to 20 minutes on their service delivery platform as previously agreed. Syntec therefore implemented a forced release at network level on 25/03/13 and advised Ace Telecom of this....”

Following an analysis of the call records, the Executive noted that call records for a number of the complainants demonstrated that calls lengths resulted in consumers being charged in excess of £2.56 plus VAT and in some cases in excess of £20. The Executive particularly noted a call record for one complainant, which highlighted that a call had been made to the Service for 95 minutes and accordingly s/he was charged £95 plus network charges.

The Executive submitted that the call records provided by the Level 2 provider clearly demonstrated that calls to the Service consistently exceeded the required spending cap of £2.56 plus VAT for services that were aimed at or should have been expected to be particularly attractive to children.

Accordingly, for the reasons outlined above, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.12 (b) of the Code.

2. The Level 2 provider admitted that a breach of rule 2.3.12(b) of the Code had occurred. It accepted that children had been affected by promotions for the Service, but stated that it was not its intention for the Service to be used by children and it provided several reasons why that was the case. The Level 2 provider stated that:

- The Service was not specifically designed for children;
- A number of consumers including teenagers and adults were likely to be entertained by their voice being changed ;
- Promotions for the Service did not differ from other similar voice changer services, as other providers used similar imagery;
- The recording of the Service obtained by the Executive showed that the tone of the recorded voice was neutral and not specifically targeted at children.

The Level 2 provider referred to previous correspondence with the Executive’s Industry Services team, where it stated that it had contacted them to ascertain whether it was required to obtain prior permission to operate the Service. During the correspondence, it stated that it was not told that the Service was likely to fall into the category of a children’s service, therefore it was not aware that it was required to terminate the Service as soon as



a consumer had spent £2.56 plus VAT per call. It added that if it had been told this it would have implemented a forced termination at that point.

The Level 2 provider explained that it had a relationship with an advertising network, which used its Banner ads and website promotions to promote the Service on its behalf. It stated that the advertising network acted as an intermediary between App developers and providers of services such as the Level 2 provider. The App developers create advertising space; they use advertising networks to find providers who want to advertise their products/services in Apps. It stated that it had requested that the advertising network use its promotional campaigns to target iPhone users in the United Kingdom but it had not specified any other target criteria. It supplied a copy of an insertion order between the Level 2 provider and the advertising network. It stated that it was not aware that its promotions would appear in children's Apps, only that the advertising network would promote the Service across all iPhone Apps available to the advertising network and the United Kingdom consumers. Further, it stated that it could not request that specific Apps were not used to promote the Service, as the advertising network would not disclose where the advertisements had been placed, due to its belief that Level 2 providers could by-pass it and go directly to the App developers.

The Level 2 provider acknowledged that it had provided a list of Apps used to promote the Service but stated that this had only been disclosed by the advertising network once it had become aware that there was a PhonepayPlus investigation. The Level 2 provider stated that it had suspended its promotional campaign and reviewed the lists of Apps to determine whether children were likely to see the promotions for the Service. The Level 2 provider noted that the Apps were not solely games Apps but spanned a number of different categories. A number of these other categories could be considered appealing to children. The Level 2 provider supplied a breakdown of the category of Apps, which were as follows:

- Games: 19
- Entertainment: 9
- News: 2
- Education: 2
- Photo & Video: 2
- Health & Fitness: 1
- Music: 1
- Utilities: 1
- Lifestyle: 1
- Weather: 1

In addition, the Level 2 provider stated that games App users are usually adults and in support of this assertion it provided a study conducted by "The Flurry Mobile Advertising Network and Electronic Software Association". It stated that the report demonstrated that more than 70% of mobile game users were between 18-49 years of age. Accordingly, it asserted that as the majority of the Apps used to promote the Service were games Apps, it was likely that the majority of people that saw the promotions were over 16 years of age.

The Level 2 provider stated that over the period the Service was promoted (16 March 2013 – 22 April 2013) it had received 41,029 calls. It submitted that the level of complaints received by PhonepayPlus was relatively low compared to the number of consumers of the Service. It submitted that this was evidence that the vast majority of users of the Service knowingly engaged with it and had no reason to complain. Further, the use by children was occasional and limited to certain Apps designed for young children.



Consequently, the Level 2 provider stated that, in hindsight, it should have directed the advertising network to refrain from promoting the Service on children's Apps and it accepted that it was guilty of being careless for not doing so. It added that there was often no way of knowing who was using a device, since parents could give their device to children. In light of this, the Level 2 provider had decided to stop advertising the Service altogether and had reconsidered its business model. It had concluded that the advertising of premium rate services inside mobile Apps was incompatible with the varying degrees of security on different devices. It explained that it had since developed its own mobile App for the voice changer service, which no longer involved a premium rate element. The Level 2 provider confirmed that it now used well-known App stores, which it believed had a password protected system to prevent unauthorised use by children.

3. The Tribunal considered the Code, Guidance and all the evidence, including the written submissions made by the Level 2 provider containing its admission that a breach of rule 2.3.12 (b) of the Code had occurred.

The Tribunal noted that there had been some ambiguity in the Level 2 provider's submissions, and particularly that it was unable to instruct the advertising network to promote on certain Apps and websites, yet it had also stated that it should, in hindsight, have made these instructions. The Tribunal commented that as there was a commercial relationship between the Level 2 provider and the advertising network, (who promoted the Service on its behalf) it was for the Level 2 provider to impose boundaries and controls on the advertising network.

The Tribunal noted that the Service had been promoted on a variety of Apps and/or websites. It further noted that a large number of the Apps had been categorised by well-known App stores as suitable for children and the Tribunal found that having considered screenshots from many of the Apps, it was clear that they were aimed at and likely to appeal to children. Accordingly, the Tribunal found that as the Service had been promoted on these Apps and websites, the promotions for the Service were aimed at children.

In addition, the Tribunal noted the style, content and composition of the promotional material and found that it was clearly aimed at children. It particularly noted the cartoon-like characters that appeared in all but one of the promotions and found that this would be particularly attractive to children. The Tribunal commented that the combined effect of these two factors increased the likelihood that the Service had been targeted at children.

As a result of these factors, the Tribunal concluded that the Service should have terminated immediately upon £2.56 plus VAT per call having been spent. The Tribunal considered the complainants' accounts and the call records supplied by the Level 2 provider and found that there was clear evidence that calls had exceeded the £2.56 plus VAT threshold. The Tribunal commented that it was particularly concerning that there were a significant number of calls which exceeded 90 minutes.

Accordingly, and for the reasons asserted by the Executive, the Tribunal upheld a breach of rule 2.3.12 (b) of the Code.

Decision: UPHELD

ALLEGED BREACH 2
Rule 2.3.1



“Consumers of premium rate services must be treated fairly and equitably.”

1. The Executive submitted that the Level 2 provider had treated consumers unfairly and inequitably, due to the nature, placement and mechanism of the Banner ads on entertainment Apps/websites that were likely to have caused consumers to inadvertently engage with the Service.

The Executive relied on all the complaints but particularly noted the complaints outlined above in the “Background” section above. In addition, two of the complainants had supplied screenshots of the Apps their children had used, which contained banner ads for the Service (**Appendix D and E**). The Executive noted that both of these Apps required users of the App to touch the various icons.

During correspondence, the Level 2 provider stated:

“Our service is advertised through banner ads with a click-to-call model, so indeed when clicking on a banner, users are redirected to one of our 09 numbers. They are charged £1 per minute except if they immediately hang up the call.”

“The clic-to-call [sic] method is not illegal and is proposed by all advertising agencies working on mobile applications/website [sic].”

The Executive submitted that the positioning of the Service Banner ad within Apps (including but not limited to children’s Apps), which were designed to encourage frequent tapping were likely to cause consumers, and in particular children, to inadvertently engage with the Service and incur charges without their knowledge.

The Executive noted that the Level 2 provider had stated that the “click-to-call” mechanism activated a confirmation pop-up to appear on some devices, which asked the consumer to confirm that they wished to call the number. It provided a screenshot of the pop-up (**Appendix F**). The Executive submitted that it was clear that the pop-up was a technical feature of a device and not connected with the Service. The Executive submitted that the Level 2 provider could not rely on a technical feature of some consumers’ devices to act as a safeguard against accidental connection to the Service.

The Executive referred to call records for the Service provided by the Level 2 provider. These highlighted that two complainants had made simultaneous calls from their MSISDN and incurred charges for two calls. The Executive asserted that if a Banner ad was clicked in quick succession it may cause a call to be made, placed on hold and a further second call to also be made to the Service (while the first call continued in the background). It submitted that it was possible that two calls were inadvertently made at the same time. The Executive noted that both of the complainants who had made the simultaneous calls stated that the Service was accessed accidentally. The Executive asserted that it is highly unlikely that a consumer would have been aware that it was making two calls at the same time. Accordingly, the evidence from complainants and the call records indicated that the click-to-call service mechanic did not treat consumers fairly and equitably.

Consequently, the Executive submitted that, when taking into account all of the above evidence, consumers were not treated fairly and equitably as the placement of “click-to-call” Banner ads within Apps that were designed to be touched, had caused consumers (and in particular children) to unintentionally engage with the Service and incur premium rate



charges. The Executive further noted from the evidence that it was possible to inadvertently engage twice with the Service if a consumer repeatedly clicked a Banner ad.

Accordingly, for all the reasons outlined above, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code.

2. The Level 2 provider partially admitted the breach of rule 2.3.1 of the Code, as it accepted that the Service mechanic may treat children unfairly but it did not accept that consumers as a whole were treated unfairly. Further, it did not accept that it was responsible for the placement and mechanism of the Banner ads in the Apps, which it stated rested with the advertising network.

In particular, the Level 2 provider noted one of the complainants' accounts which stated that, "Nearly all of the ad is obscured intentionally". The Level 2 provider stated that it could not be held responsible for the placement of the Banner ads, which were determined by App developers.

Accordingly, it submitted that, as it did not know where its promotions would appear and taking into account the large amount of Apps that were available on the market, it was impossible to test and monitor the Apps to identify whether the Banner ads were likely to trigger accidental clicks.

The Level 2 provider stated that the Executive had failed to provide screenshots of what happened when a consumer selected one of its Banner ads. It provided a screenshot of a "pop-up" message that it stated would appear on some devices in order to ascertain from consumers that they wished to call the Service (**Appendix F**). It stated that this clearly made a consumer aware that they were calling the Service and, as with any call, the red button entitled "end call", which appeared on screen would immediately stop any call from being made.

The Level 2 provider gave a detailed summary of the consumer journey. It explained that it deemed the call mechanism to be clear and took issue with the assertion from some complainants that they had not made a call to the Service at all. It stated that it was impossible for a device to make a call without a consumer's knowledge. It submitted that it would have been more accurate for the complainants to state that they had selected a Banner ad, but did not realise that a call had been made, probably due to a lack of attention.

However, the Level 2 provider accepted that the security mechanism for the Service was not sufficient to prevent unsupervised children from calling the Service, as it acknowledged that children under the age of 16 would not be old enough to understand the mechanism.

Consequently, the Level 2 provider admitted that it was in breach of rule 2.3.1 of the Code because it believed that it had not been cautious enough in anticipating that promotions for the Service would appear in children's Apps and that unsupervised children using their parents devices could accidentally click on a Banner ad and make a call to the Service.

Finally, in relation to the simultaneous calls that were made to the Service by two complainants, the Level 2 provider stated that it regretted that this had happened but it was not something that it could have anticipated and technically it would have been very difficult for it to avoid.



3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written submissions containing a partial admission of the breach of rule 2.3.1 of the Code.

The Tribunal noted the Level 2 provider's submissions that it was not responsible for the placement of the Banner ad promotions in the Apps. However, the Tribunal also noted that the Code and previous Tribunal adjudications had made it clear that Level 2 providers are responsible for the services that they operate and this includes how the services are promoted. The Tribunal did not accept the Level 2 provider's submission that the placement of its promotions on Apps were outside of its control. Accordingly, the Tribunal found that the Level 2 provider was responsible for the display of its promotions on the third party Apps and websites.

The Tribunal found that the one "click" method of interacting with the Service did not treat consumers fairly and equitably, as consumers could easily inadvertently interact with the Service. Further, it found that the placement of the promotions on Apps that required consumers to repeatedly click the screen as part of a game actively encouraged consumers to inadvertently engage with the Service. The Tribunal commented that it was of concern that a Service that was aimed at children did not have better safeguards in place.

Accordingly, for the reasons outlined by the Executive and in light of the Level 2 provider's partial admission the Tribunal concluded that consumers had not been treated fairly and equitably and upheld a breach of rule 2.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH 3

Rule 2.2.1 (a)

"Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made. (a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious."

1. The Executive submitted that the Level 2 provider had breached rule 2.2.1 (a) of the Code as consumers were not fully and clearly informed of all information likely to influence the decision to purchase, before incurring charges. The Executive asserted that the following information was absent or not clearly presented:

- The Level 2 provider's identity; and
- The cost of the Service

Guidance

The Executive relied on the content of PhonepayPlus Guidance on "Promotions and promotional material", which states:

Paragraph 1.3

"...as a basic starting point, the following information is considered key to a consumer's decision to purchase any PRS, and so should be included in promotional mechanics for any PRS:



- The total cost of the service, including price per minute and/or text, and any initial charges (such as a joining fee);
- The name and customer service contact number of the provider (which should be the full name, or any abbreviation that could be found on the first page of an internet search engine);
- Whether the service bills by subscription - i.e. carries a repeat charge which ends only upon termination by the consumer.”

How should pricing information be generally presented?

Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion). Loose or unclear descriptions of price are not acceptable, as they are unlikely to provide a sufficient understanding to consumers of how much they are being charged. Examples of unclear descriptions would include the following:

- ‘premium rate charges apply’,
- 100ppm’,
- ‘1.50 GBP’
- 50p/min”

Paragraph 2.3

“PhonepayPlus strongly recommends the price should be expressed in conventional terms, such as ‘50p per minute’, ‘£1.50/msg’ or ‘£1.50 per text’. PhonepayPlus accepts there may be different conventions, based upon the amount of space available (for example, in a small print ad, or a single SMS promotion); however, pricing should remain clear. Variations on this, such as charges being presented in per second formats, or without reference to a ‘£’ sign (where the rate is above 99p), may breach the PhonepayPlus Code of Practice.”

What about network or data charges to the consumer in addition to the PRS charge?

Paragraph 2.6

“The overall charge to a consumer for calling a PRS will often exceed the actual cost of the PRS itself advertised by the provider or promoter. This can be for one of two reasons:

- Because many non-BT networks, both mobile and fixed, levy supplementary charges on voice-based calls.
- The possibility exists that consumers could incur data charges when downloading content to a mobile device, or when browsing a mobile internet site beyond the landing page.”

Paragraph 2.7

“While consumers may have a general awareness that calls from mobile phones and some landline networks may cost more than others, or that they may incur data charges if they do not have a data-inclusive contract with their Mobile Network Operator, it is



necessary to include information in the promotional material, stating these possibilities to consumers.”

Cost type

Standard per minute PRS

Standard per minute PRS where duration is known

Single drop charges

Example wording

Calls cost [x]p per minute plus network extras

Calls cost [x]p per minute and should last no more than [x] minutes. Network extras apply

Calls cost [x]p plus network extras

Complaints

The Executive relied on the content of the complaints received detailed in the “Background section” above. Specifically, and notwithstanding the evidence of use by children, the Executive noted that a number of complainants reported being unaware that they had interacted with a premium rate service and/or were unaware of the cost of the Service. The Executive submitted that this indicated that consumers were not aware of all the key information relevant to the decision to purchase.

The Level 2 provider’s identity

The Executive noted the content of the Banner ads for the Service that appeared on various third party Apps and websites (**Appendix A, B and C**).

The Executive noted that none of the promotions for the Service contained the name of the Level 2 provider. The Executive submitted that consumers should be informed of the Level 2 provider’ identity on promotional material that is viewed before a consumer enters a premium rate service.

The cost of the Service

The Executive noted that some of the banner ads provided by the Level 2 provider did not include clear pricing information as:

- i. Consumers were not told that calls from mobiles would incur Network charges.
- ii. Pricing was described as, “1£/Min” which was not sufficiently clear.
- ii. The Banner ad promotions switched between two or three screens every few seconds and not all of the screens contained pricing information (**Appendix A, B and C**).

The Executive submitted that consumers were not fully and clearly informed of the identity of the Level 2 provider and the cost of the Service for the reasons outlined above. Accordingly, not all the information that was likely to influence the decision to purchase, including the cost, had been made clear to consumers. The Executive accordingly submitted that for the reasons detailed above rule 2.2.1(a) of the Code had been breached.

2. The Level 2 provider denied that a breach of the Code had occurred as it stated that it had done all it could with the space available on the promotions.



The Level 2 provider explained that the Banner ads were 320 x 50 (4.444 x 0.694 inches) in size. Therefore, it was not possible to include all the information required by the Executive, along with the non-premium rate contact number, which it considered to be more important. It stated that consumers could easily ascertain the identity of the Level 2 provider and any other information by calling the contact number. Further, as it had registered the Service numbers with PhonepayPlus, consumers could easily find its identity using the number checker on the PhonepayPlus website.

In relation to the pricing information, the Level 2 provider asserted that the pricing information was compliant with the Code. It stated that the space available on the promotions was not sufficient to state, "Charged £1 per minute" in addition to the non-premium rate contact number. The Level 2 provider stated that, when designing the Banner ads it had considered the Code and PhonepayPlus Guidance and concluded that, "Charged 1£/min" was sufficiently clear. The Level 2 provider stated that if the pricing information was deemed to be unclear, then these examples should be included in the Code.

The Level 2 provider highlighted that consumers were told at the beginning of the call that calls from mobiles would incur Network charges and therefore the Executive would have been aware of this having interacted with the Service. Similarly, the reason the pricing information was not included on the promotions was due to the amount of space available.

The Level 2 provider also asserted that the lack of space available on the Banner ads prevented it from including pricing information on every screen of the moving Banner ads. However, this problem had only been limited to six Banner ads out of 14.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the written submissions from the Level 2 provider.

The Tribunal particularly noted that the Level 2 provider had stated that there was insufficient space on the promotional Banner ads to display all the information required by the Code. The Tribunal did not accept that this was a valid reason for failing to comply with the requirements set out in the Code.

The Tribunal determined that the Level 2 provider's identity should have been contained on the promotional material when it was not. Further, the Tribunal found that the cost of the Service was not present on every screen of the Banner ad and therefore it was possible for consumers to enter the Service without having viewed the pricing information for the Service. In addition, the Tribunal found that the pricing information displayed on the Banner ads did not state that consumers may incur extra Network charges.

For these three reasons, the Tribunal concluded that consumers had not been fully and clearly informed of all information likely to influence their decision to purchase and accordingly, it upheld a breach of rule 2.2.1 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.3.12 (b) – Spend caps

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

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

Rule 2.3.1 – Fair and equitable treatment

The initial assessment of rule 2.3.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Very serious cases have a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers.
- The nature of the breach was likely to severely damage consumer confidence in premium rate services.
- The Service harmed consumers through the use of a third party to promote the Service without any due diligence or control.
- The nature of the breach and particularly the style and placement of the promotions on the Apps were such as to take advantage of children.

Rule 2.2.1 (a) – Provision of information

The initial assessment of rule 2.2.1 (a) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breach means the Service would have damaged consumer confidence in premium rate services.

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

Final overall assessment

The Tribunal did not find any aggravating factors. The Tribunal noted that a significant number of complaints had come from parents, as a result of use by their children and therefore it was clear that a number of children had been affected by the breaches of the Code. However, the Tribunal was of the view that this had been adequately dealt with by the breaches of the Code and accordingly it did not find that this was a separate aggravating factor.

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

- The Level 2 provider voluntarily suspended promotions for the Service having received notification of complaints from PhonepayPlus and had moved on to develop a non-premium rate application.

The Level 2 provider's revenue in relation to the Service was in the range of Band 6 (£5,000-£49,999).



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

Sanctions imposed

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

- a formal reprimand;
- a fine of £60,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Administrative charge recommendation: 85% Investigation costs and 100% Tribunal costs

The Tribunal noted that a breach of the Code had been withdrawn by the Executive prior to the Tribunal and accordingly the Tribunal considered that it was appropriate to recommend a reduction in the costs, as the withdrawal had not already been taken into account.

Appendices

Appendix A – Screenshots of a Banner ad used to promote the Service:



Appendix B – Screenshots of a Banner ad used to promote the Service:



Appendix C – Screenshots of a Banner ad used to promote the Service:



Appendix D – A screenshot of an App containing a Banner ad for the Service:



Appendix E – A screenshot of an App containing a Banner ad for the Service:



Appendix F – A screenshot of a “confirmation pop-up” provided by the Level 2 provider:

