



Tribunal Sitting Number 140 / Case 1

Case reference: 13335
Level 2 provider: Ametro Ltd
Type of service: Mobile downloads
Level 1 provider: OpenMarket Limited
Network operator: All Mobile Network operators

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

BACKGROUND

Between 26 September 2012 and 18 June 2013, PhonepayPlus received 19 complaints from consumers in relation to a pay-per-stream glamour video download service (the “**Service**”) operated by the Level 2 provider Ametro Ltd under brand names including “Home Fun” and “Sexy hot babes!”. The Service operated on the premium rate shortcode 89800 and cost £3.00 for 24 hours access or £3.00 per download depending on the method of entry. The Level 1 provider was OpenMarket Limited. The Service operated between 8 February 2011 and 12 March 2013, when it was voluntarily suspended by the Level 1 provider.

The majority of complainants stated that they had not engaged with the Service but had been charged. Certain complainants acknowledged receiving messages from the Service but stated that they were unsolicited. The maximum cost incurred by a complainant was reported to be £165.00.

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 adjudication was listed to be heard on 31 October 2013, however, prior to consideration of the breaches, the Tribunal adjourned the case to allow the Executive time to ensure that the Level 2 provider had received the breach letter and was aware of the proceedings. The Executive sent a further copy of the breach letter to the Level 2 provider by post (to the registered address) and email on 5 November 2013. Within the breach letter the Executive raised the following breach of the Code:

- Rule 2.3.3 – Consent to charge

The Level 2 provider did not provide a response to the breach letter. The Tribunal noted that the postal records showed the letter had been signed for and was satisfied that the Executive had used all reasonable endeavours to ensure the breach letter had been served on the Level 2 provider. On 12 December 2013, the Tribunal reached a decision on the breach raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.3

“Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”



1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.3.3 of the Code as it appeared that consumers had been charged for the Service without their consent. The Executive also submitted that the Level 2 provider had failed to provide robustly verifiable evidence that established that consumers had consented to be charged.

The Executive relied on the content of PhonepayPlus Guidance on “Privacy and Consent to charge” (the “**Guidance**”). The Guidance states:

Paragraph 2.1

“Robust verification of consent to charge means that the right of the provider to generate a charge to a consumer’s mobile bill is properly verifiable”. ‘Properly verifiable’ is stated to mean “a clear audit trail that cannot have been interfered with since the record”.

Paragraph 2.4

“For other charges to a mobile device – “The safest way to generate a charge is to rely on the consumer initiating the transaction with a Mobile Originating message (“MO”) to a shortcode. In this way, the billing Mobile Network operator record is sufficiently robust to verify the charge.”

The Executive noted the content of the complainants’ accounts, which appeared to demonstrate that some complainants had not received any Service or promotional messages but had incurred charges. Some complainants acknowledged receiving messages from the Service but stated that they were unsolicited. Some complainants stated:

“I am receiving charges on my Orange bill from this number for text messages I have not received nor requested”.

“Receiving texts from this number to the value of £16. Have tried to stop them but still receiving them.”

“I have tried to send stop if I have received any strange messages but i have not subscribed to anything at all. I am being charged £3 a message.....I have never initiated anything on my phone and receive no texts yet am being sent texts from this number”

Following receipt of consumer complaints regarding the Service, the Executive contacted the Level 2 provider and requested details regarding the promotion of the Service and the method of opt-in. The Executive noted that, in written correspondence, the Level 2 provider stated opted-in users would receive one of two free promotional messages from the Service, a free WAP push message from a long number containing a WAP link to the Service landing page or, a free promotional message containing a keyword to opt-in to the Service. The Level 2 provider provided two examples of promotional messages that it stated had been sent to consumers.

The Executive also requested robustly verifiable evidence to show that consumers had opted-in to the Service. The Level 2 provider stated the complainants:

“...opted into the service via a partner WAP PFI service. They are MT messages priced at £3 per video download.”

The Level 2 provider provided several complainant message logs either within the text of an email or as a separate list. The Executive noted that none of the logs contained a



promotional message from the Service or an opt-in message from the consumer. The Executive stated that it highlighted the discrepancy to the Level 2 provider, which responded by providing one complainant message log that contained a promotional message. However, the Executive noted that the message was marked as a “MO” and therefore was presumably not “free”. Further, the promotional messages appeared to have been inserted into the log at a later date, as the log had previously been provided in the same format without the promotional message.

The Executive asserted that the Level 2 provider’s logs were inadequate evidence of consent to charge, as the logs were either part of the text of an email or in a spreadsheet that often did not include the content of the messages. The Executive asserted that the Level 2 provider should have been able to provide full logs containing the MO messages sent from the consumer’s handset - or in the event that some other form of opt-in was used, evidence of an equally robust verifiable consent to charge.

During the course of the investigation, the Executive obtained an analysis conducted by a third party verifier (working for a Mobile Network operator). The third party verifier reported findings for complainants who were customers of the particular Mobile Network operator. The findings for six of the eight complainants’ MSISDNs indicated that there was an interaction with the shortcode, 89987 (which was operated by another Level 2 provider), by way of a mobile terminating (“MT”) message. All had received the message at a cost of £3.00 on 26 January 2011 between 12pm and 3pm. The message logs for the six complainants revealed that they continued to receive chargeable messages from the shortcode 89987. There was no record of a MO message being sent from the complainants’ MSISDNs to either of the shortcodes 89987 or 89800 since 1 January 2011. The Executive analysed the third party verifier logs and discovered that the other Level 2 provider had sent the six complainants a MT message on 29 November 2011 and the following day the Level 2 provider had also sent a MT message to the complainants and continued to send MT messages. The Executive submitted that this showed that the six complainants, at least, began receiving messages at the same time.

In relation to the two of the eight complainants, the third party verifier found that there was also no evidence of an MO opt in since 1 January 2011 to either shortcode (89987 and 89800).

The Executive stated that the message logs provided by the Level 2 provider did not predate 2012 and were therefore incomplete, as they did not show the interaction uncovered by the third party verifier.

The Executive asserted that as a result of the absence of a MO opt-in on the complainants messages logs (from the third party verifier and the Level 2 provider), the MT messages sent to six complainants at a similar time on the same date and the consistency of the complainant accounts, consumers had been charged for the Service without their consent. The Executive asserted that the findings of the third party verifier appeared to indicate that some complainants may have been transferred from one Service to another without providing their consent to be charged. Further, the Executive asserted that the Level 2 provider had not provided robustly verifiable evidence to establish consent to charge had been obtained. Accordingly, the Level 2 provider had acted in breach of rule 2.3.3 of the Code.

2. During the course of the investigation, the Level 2 provider corresponded with the Executive and provided the information outlined above in paragraph one. In addition, it



stated that it had been operating services utilising SMS, operator billing systems and Payforit for over five years and it had a customer complaint level of less than 0.2%. It recognised that there had been a number of complaints to PhonepayPlus but it stressed it had tens of thousands of satisfied customers. The Level 2 provider added that the complaints that it had received had been dealt with efficiently.

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

3. The Tribunal considered the evidence, including the Level 2 provider's initial response to correspondence with the Executive. The Tribunal noted that the Level 2 provider stated that it had sent promotional messages to consumers containing either a WAP link or a keyword to enable a consumer to opt-in, yet the complainant message logs from both the Level 2 provider and the third party verifier did not show the promotional messages or the complainants' opt-in. The Tribunal also noted that the third party verifier did not find any evidence of an MO opt-in for eight of the complainants. It also noted that a number of complainants had begun interacting with the Service on exactly the same date. Taking this evidence into consideration, and given the consistent complainants' accounts stating that they had not consented to be charged, the Tribunal found that on the balance of probabilities, consumers had been charged for the Service without their consent. Further, the Tribunal found that the evidence provided by the Level 2 provider was not sufficiently robust verification of consent to charge as it was not complete, was not independently verified and could have been interfered with. The Tribunal found that Level 2 provider had not provided evidence which established robust evidence of consent to charge. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.3 – Consent to charge

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

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

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

Final overall assessment

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

- There have been a number of previous adjudications published concerning the requirement to have, and produce when requested, robustly verifiable evidence of consent to charge.



- The Level 2 provider supplied complainant message logs to PhonepayPlus and stated the Service had been terminated in relation to a particular complainant. A third party message log for the same complainant showed that the complainant had continued to receive chargeable messages for two weeks after the Level 2 provider stated that it had been terminated.
- The Level 2 provider failed to respond to the Executive's request for information and co-operate with the Executive.

Whilst it was not an aggravating factor, the Tribunal noted that the Level 2 provider had the same service mechanic, IP address, terms and conditions and registered address as Frontier Media Services Limited, who had previously been adjudicated against in relation to similar issues. In addition, Frontier Media Services Limited's website stated that the Service was provided by the Level 2 provider.

In determining the final overall assessment for the case, the Tribunal found no mitigating factors. The Tribunal noted that the Level 2 provider stated that it had provided refunds to some complainants.

The Level 2 provider's revenue in relation to this Service was in the range of Band 1 (£500,000+). Having taken into account the aggravating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions Imposed

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

- a formal reprimand;
- a fine of £250,000;
- a requirement that access is barred to all the Level 2 provider's premium rate for 12 months or until compliance advice has been implemented to the satisfaction of PhonepayPlus, whichever is the later; 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.