



Tribunal meeting number 144 / Case 2

Case reference: 27745
Level 2 provider: Frontier Limited
Type of Service: Glamour video downloads
Level 1 provider: IMI mobile Europe Limited
Network operator: Mobile Network operators

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

BACKGROUND

Between 30 April 2013 and 8 November 2013, PhonepayPlus received 39 complaints from consumers in relation to a pay-per-stream glamour video download service, which operated under the brand name "PLocker" (the "**Service**"). The Service was operated by the Level 2 provider Frontier Limited on various long numbers, (used for promotion and opt-in) and the premium rate shortcode 89987. Consumers were charged £3.00 per download. The Level 1 provider for the premium rate shortcode was IMI mobile Europe Limited ("**IMI mobile**"). In addition, there was another unidentified Level 1 provider who provided the long numbers. The Service operated between July 2009 to 1 November 2013, when it was voluntarily suspended by the Level 1 provider IMI mobile.

The Level 2 provider asserted that consumers engaged with the Service by sending a mobile originating ("**MO**") message to a Service long number or via "click to text" within a Wireless application protocol ("**WAP**") session.

The majority of complainants stated that they had not engaged with the Service but had been charged. Certain complainants acknowledged that they had received SMS messages from the Service but stated that the SMS messages were unsolicited.

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 2 provider on 24 January 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.3 – Consent to charge
- Paragraph 3.4.6 – Registration of an organisation

The Level 2 provider did not provide a response to the breach letter. On 20 February 2014, the Tribunal reached a decision on the breaches 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 consumers had been charged without their consent and/or the Level 2 provider has failed to provide evidence that established that the complainants 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 1.4

“...It is essential that providers can provide robust evidence for each and every premium rate charge”

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.”

Paragraph 2.10

“In both of the instances set out above, we would expect providers to be able to robustly verify consent to charge (or to marketing, see Part Two of this General Guidance Note). Factors which can contribute to robustness are:

- An opt-in is PIN-protected (e.g. the consumer must enter their number to receive a unique PIN to their phone, which is then re-entered into a website);
- A record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);
- Records are taken and maintained by a third-party company which does not derive income from any PRS. We may consider representations that allow a third-party company which receives no direct share of PRS revenue from the transaction, but does make revenue from other PRS, to take and maintain records. It will have to be proven to PhonepayPlus’ satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;
- PhonepayPlus is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed), and real-time access to this opt-in data upon request. This may take the form of giving PhonepayPlus password-protected access to a system of opt-in records;
- Any other evidence which demonstrates that the opt-in cannot be interfered with.”

Complaints

The Executive noted the content of the complaints received, examples of which included:

“I have noticed on my mobile bill- Multimedia Services Received and i have no idea what it is. I am getting 4 of these a month, the total cost being 12.00 pounds [sic]”

“Have received no messages but being charged from 89987...I have no idea what this number is billing me for. Iv text the number saying stop and it said you have been

removed. But this month I got billed again 2.50 per text (Wich I dont even get spam texts) and its staggerd across a few days to a bill of £12.50p this month iv been charged four times [sic].”

“I have no idea what service they offer. The first I knew of this number was when it appeared multiple times on my bill.”

Complainant message logs

The Executive obtained complainants message logs from the Level 2 provider and the Level 1 provider IMImobile. The Executive noted that as the second unidentified Level 1 provider had provided the long number, which the Level 2 provider stated was the method by which consumers opted-in to the Service, the logs provided by the Level 1 provider IMImobile would not be expected to contain any MO opt-ins. The Executive noted the following:

i) Discrepancies

The Executive noted that there were discrepancies between the message logs provided by the Level 2 provider and IMImobile. IMImobile’s logs contained additional chargeable messages, which were not visible in the Level 2 provider’s logs. Accordingly, the Executive asserted that the Level 2 provider’s logs were not an accurate record of the interaction between the complainants and the Service.

ii) Absence of promotional messages

The Executive noted that none of the logs provided by either the Level 2 provider or IMImobile contained any promotional messages. The Executive accepted that it may have been the case that the promotional messages were not sent by IMImobile but via another Level 1 provider. However, the Executive asserted that if such messages had been sent they should have appeared on the Level 2 provider’s logs. As a result, the Executive submitted that the complainants did not receive promotional messages for the Service.

iii) Absence of MO opt-in messages

The Executive noted that none of the Level 2 provider’s logs contained any evidence of an MO opt-in to a long number. Therefore, the Executive stated that it had no evidence in support of the Level 2 provider’s assertion that the complainants had triggered charges to the Service following an MO opt-in.

iv) Third party verifier log checks

Further, the Executive requested that a third party verifier (working for a Mobile Network operator) reviewed the logs of the complainants from one particular Network operator (which amounted to 11 complainants). The verifier confirmed that the records of IMImobile contained all the charges incurred by the complainants. The Executive noted that the Level 2 provider had previously stated that the opt-ins occurred at the same time as the first chargeable message shown in the Level 2 provider logs. However, the verifier found that the logs of the complainants contained no evidence of an MO opt-in having being sent by the complainants to the Service (to a long number or otherwise).

Reason one – Consumers were charged without consenting to be charged

The Executive asserted that the complainants did not consent to the charges incurred by the Service as a result of the following:

- The consistent complainant accounts stating that consumers had received unsolicited charges.
- The lack of evidence of promotional SMS messages which cast doubt on the Level 2 provider's assertion of how consumers opted-in to receive charges.
- The lack of evidence of an opt-in to receive charges in the Level 2 provider's message logs.
- The evidence provided by the third party verifier demonstrated that there were no MO opt-ins for 11 complainants.
- The Level 2 provider's lack of credibility as a result of inconsistencies between the message logs of IMI mobile and the Level 2 provider.

Further, in the absence of any evidence to the contrary the Executive submitted that the imposition of charges without consent was systemic and not confined to the 39 complainants.

Reason two – Robust verification of consent to charge

The Executive noted that the Level 2 provider was directed to provide evidence of the opt-ins for a sample of ten complainants. The Level 2 provider's response consisted of a single Word document and was identical for all ten mobile numbers, except for the date and time of the Service opt-in. An example of the response for one mobile number stated:

“Opted in on 28/04/2013 at 17:57:43 via MO...Records are taken and maintained by a third-party company which does not derive income from PRS”

The Executive noted that the Level 2 provider provided no further evidence with its response. The Executive gave the Level 2 provider a further opportunity to provide the evidence. The Level 2 provider stated that it had tried to obtain the requested information from its third party SMS provider and stated, “we have pushed them hard to update all logs so if you require this info then again let me know”. The Level 2 provider stated that it paid the SMS provider a flat fee, a record of the opt-in was taken and the data was time stamped. The Executive contacted the Level 2 provider again for the information and it provided, “the full logs for each individual MSISDN.”

The Executive noted that the logs provided by the Level 2 provider consisted of a single Excel spreadsheet. The Executive noted that the “Createdate” on the Excel spreadsheet was the same as the first chargeable message contained in the Level 2 provider's log for each complainant. In addition, the “Lastaccessdate” on the Excel spreadsheet was the same as the last chargeable message contained in the Level 2 provider's log for each complainant. The listed IP address for all ten mobile numbers was the same, yet the Executive submitted that it was unlikely that all the complainants would have used the same IP address as they were spread across the country. The Executive performed an online IP address search to determine that the IP address was based in London.

During the course of correspondence, the Level 2 provider supplied a copy of a contract between the Level 2 provider and its purported third party SMS provider. The Executive

noted that the agreement was entitled “Agreement for the provision of Marketing Service” and appeared to be for the provision of “non-exclusive basis marketing services”, and not for the provision of robust verification of consent to charge.

Further, the Executive made a number of attempts to contact the Level 2 provider’s purported third party SMS provider using the contact details provided by the Level 2 provider. However, an email was returned and marked “undeliverable”, no response to the telephone voicemail was received and a courier was not able to deliver the letter as it was unable to obtain a signature. A Companies House search revealed that the Level 2 provider’s purported third party SMS provider was listed as “dormant”.

The Executive submitted that the Level 2 provider has failed to provide evidence, which established that it had consent to charge the 39 complainants for the following reasons:

- i) It was unclear whether the Level 2 provider’s “third party SMS provider” existed. Numerous attempts to contact the third party failed and the company was listed as “dormant”.
- ii) The Level 2 provider’s purported third party SMS provider’s logs were provided by the Level 2 provider and therefore are not free from allegations of interference by the Level 2 provider.
- iii) Attempts to obtain the logs directly from the “third party SMS provider” failed.
- iv) The content of the logs provided did not contain evidence of consent for every charge.
- v) The accuracy of the logs was in doubt as a result of the single IP address and the discrepancies between the “third party SMS provider” logs and those of the Level 1 provider IMImobile.

The Executive submitted that the Level 2 provider acted in breach of rule 2.3.3 of the Code as consumers were charged without their consent and/or the Level 2 provider had failed to provide evidence that established that the complainants had consented to be charged.

1. During the course of the investigation, the Level 2 provider corresponded with the Executive and provided the information outlined above in paragraph one. However, it did not provide a response to the breach letter.
3. The Tribunal considered all the evidence before it, including the Level 2 provider’s initial response to correspondence with the Executive. The Tribunal noted the lack of evidence to establish that any promotional messages had been sent, that there were no MO opt-ins in any of the logs provided and the inconsistencies between the IMImobile and Level 2 provider’s logs. Further, the Tribunal noted that the evidence from the Executive’s third party verifier established that IMImobile’s logs contained all the charges and that there was no evidence of an MO opt-in in the logs. In addition, the Tribunal noted the consistent complainant accounts stating that they had not consented to be charged. Taking all of the evidence into consideration, 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 Level 2 provider had not provided evidence which established consent to charge. The evidence that it did provide was not sufficient to discharge the duty on the Level 2 provider, having regard, inter alia, to it not being complete, not having been independently verified and open to having been interfered with. Accordingly, for all the reasons advanced by the Executive, the Tribunal upheld a breach of rule 2.3.3. of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Paragraph 3.4.6

“Registration must be renewed annually or at intervals determined by PhonepayPlus.”

1. The Executive submitted that the Level 2 provider had breached paragraph 3.4.6 as the Level 2 provider had failed to renew its registration in 2013 when it fell due.

The Executive noted that all providers must register with PhonepayPlus prior to providing any premium rate services and the registration must be renewed annually.

The Executive noted that the Level 2 provider had operated the Service between July 2009 and 1 November 2013. The Executive acknowledged that the Level 2 provider was registered with PhonepayPlus from 1 September 2011 to 31 August 2012 and that it had renewed its registration for the period between 1 September 2012 to 31 August 2013.

The Executive submitted that the registration for the Level 2 provider lapsed on 31 August 2013. Leading up to the 31 August 2013, the Executive wrote to the Level 2 provider to advise that it was required to renew its registration. On 3 September 2013, the Level 2 provider wrote to the Executive to advise that it was experiencing technical problems renewing its registration. The Executive acknowledged that the technical issues were attributable to PhonepayPlus and not the fault of the Level 2 provider. The technical issues were rectified on 27 September 2013 and the Level 2 provider was notified accordingly. There was no further correspondence from the Level 2 provider regarding its registration renewal.

The Executive submitted that between 27 September 2013 (when the Level 2 provider was advised that the technical issues had been resolved) and 1 November 2013, (when the Service was suspended) the Level 2 provider continued to operate premium rate services without being registered.

The Executive accordingly submitted that for the reasons outlined above paragraph 3.4.6 of the Code had been breached.

2. During the course of the investigation, the Level 2 provider corresponded with the Executive and provided the information outlined above in paragraph one. However, it did not provide a response to the breach letter.
3. The Tribunal considered the evidence and noted that the Level 2 provider had been registered on the PhonepayPlus Registration database until 31 August 2013. It further noted that there had been technical issues which had prevented the Level 2 provider registering between 31 August 2013 and 27 September 2013 but that the Level 2 provider was notified that the technical issues had been resolved and that it could renew its registration. In these circumstances, the Tribunal concluded that between 27 September 2013 and 1 November 2013, the Level 2 provider had continued to operate the Service without being registered. Accordingly, the Tribunal found that the Level 2 provider had acted in breach of paragraph 3.4.6 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code were 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 criterion:

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

Paragraph 3.4.6 – Registration of an organisation

The initial assessment of paragraph 3.4.6 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider failed to maintain its registration as an organisation operating a premium rate service.

The Tribunal noted that a breach of paragraph 3.4.6 would normally warrant a higher seriousness rating. However, a higher seriousness rating was not warranted in this case in light of the technical issues, the fact that the Level 2 provider had registered previously (albeit that the registration had lapsed) and the short time period.

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

Final overall assessment

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

- The Level 2 provider failed to follow Guidance on "Privacy and consent to charge".
- At the time the breaches occurred there had been a significant number of prior adjudications concerning the requirement to provide robust verification of consent to charge.
- The Executive continued to receive complaints after the Level 2 provider was notified of the concerns relating to the potential breaches of the Code.
- On the evidence before the Tribunal and on the balance of probabilities, the Tribunal found that the Level 2 provider had intentionally attempted to mislead the Executive and hinder the investigation by asserting that the complainants' message logs were accurate when logs provided by IMImobile established that they were not.
- In an adjudication on 20 December 2012, the Level 2 provider was found to have breached the Code in relation to a failure to obtain consent to charge and consent to market. As a result, sanctions including a fine of £30,000 were imposed. The Tribunal found that this was relevant breach history.

In addition, the Tribunal noted that there had been an adjudication on 12 December 2013 against the Level 2 provider Ametro Ltd and the Tribunal had commented as follows:



“Whilst it was not an aggravating factor, the Tribunal noted that the Level 2 provider [Amectro Ltd] had the same service mechanic, IP address, terms and conditions and registered address as Frontier Media Service 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.”

Consequently, the Tribunal noted the connection between the Level 2 provider and Amectro Ltd, which had also recently been subject to an adjudication.

In determining the final overall assessment for the case, the Tribunal found no mitigating factors.

The Level 2 provider’s revenue in relation to the 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 services for 12 months or until compliance advice has been sought and implemented to the satisfaction of PhonepayPlus, whichever is 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.