Code Compliance Panel

Tribunal Decision

Tribunal meeting number 148 / Case 1

Case reference: **04842**
Level 2 provider: **JJP Mobile B.V. (The Netherlands)**
Type of Service: **Competition - non-scratchcard**
Level 1 provider: **OpenMarket Limited (UK) and TxtNation Limited (UK)**
Network operator: **All Mobile Network operators**

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

BACKGROUND

Between December 2011 and January 2012, PhonepayPlus received 14 complaints from consumers in relation to a trivia competition subscription and non-subscription service (the "Service(s)"). The subscription Service operated under brand names including, "Grocery Shopping", "Win £500 grocery shopping vouchers", "Win 2 tickets to the Champions League Final 2012", "Win an iPad" and "Win a pharmacy coupon". The Services were operated by the Level 2 provider, JJP Mobile B.V. on the premium rate shortcodes 64888 and 65558. There were two Level 1 providers, OpenMarket Limited and TxtNation Limited. TxtNation Limited was directly contracted with the Level 2 provider. The Services were operational from at least September 2011 and were voluntarily suspended in February 2012 by TxtNation Limited, following correspondence with PhonepayPlus.

Consumers were charged £4.50 per week (via three chargeable SMS messages costing £1.50 each) for the subscription Service. Consumers were charged either £1.50 per SMS message or £1.50 per SMS message plus a £3.00 "sign up" fee.

The majority of complainants stated that they had received unsolicited promotional SMS or email messages; in some cases they were personalised. Other complainants reported viewing misleading promotions and/or promotions without pricing information.

Tribunal 5 July 2012

During the initial investigation and as a result of communication with TxtNation Limited, the Level 2 provider was identified as JJP Mobile BV. Accordingly, the Executive conducted the 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 8 June 2012. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.4.2 – Consent to market
- Rule 2.2.1(a) – Provision of information regarding the identity of the Level 2 provider
- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.3.2 – Misleading
- Rule 2.3.12(d) – Spend reminders
- Paragraph 4.2.4 – Provision of false or misleading information

The Level 2 provider responded to the breach letter on 25 June 2012. On 5 July 2012, the Tribunal was scheduled to consider the breaches raised against JJP Mobile BV. During informal representations, the Chief Executive Officer (the "**CEO**") of JJP Mobile BV, Mr Joost Verpoort stated to the Tribunal that JJP Mobile B.V. was not the Level 2 provider and that it was a Level 1

provider as it had only provided the shortcodes and the technical platform on which the Services operated.

Further, the CEO submitted that JJP Mobile B.V. had contracted with JJP Mobile Limited, which had contracted with 12SMS LTD. It was asserted that 12SMS LTD had provided the Services and was therefore the Level 2 provider. Following these submissions, as a direct result of the representation made to it and before consideration of the alleged breaches of the Code, the Tribunal adjourned the case to allow the Executive time to obtain further information from JJP Mobile B.V. in support of its claim that it was not the Level 2 provider.

The Executive subsequently informed the Tribunal that, having considered further documents provided by JJP Mobile B.V. and placing reliance on the representations within these, which included a purported contract between JJP Mobile B.V. and JJP Mobile Limited, it did not consider that JJP Mobile B.V. was the Level 2 provider. The Executive stated that it would conduct a further investigation to ascertain the correct identity of the Level 2 provider. The Tribunal noted the Executive's conclusion and, as a result, the Tribunal did not adjudicate on the breaches. The Tribunal recommended that in due course the Executive consider pursuing breaches against the correct Level 2 provider and in respect of any non-compliance with the Code that was attributable to JJP Mobile BV.

Following the Tribunal, the Executive further investigated the value-chain to ascertain the identity of the Level 2 provider. Despite the Executive's post Tribunal view that JJP Mobile B.V. was not the Level 2 provider, the investigation into the other potential Level 2 providers led the Executive to conclude that its previous conclusion had been wrong and JJP Mobile B.V. was the Level 2 provider.

Correspondence with JJP Mobile B.V.

Between 23 February 2012 and 1 May 2012, the Executive sent requests for information to JJP Mobile B.V. regarding the Services. JJP Mobile B.V.

On 5 March 2012 (and prior to the Tribunal hearing of 5 July 2012), during a telephone conversation, through its CEO, Mr Joost Verpoort, JJP Mobile B.V. stated, that:

- It had previously conducted business as JJP Mobile Limited (a company incorporated on 15 July 2009 and based in Tel Aviv).
- 12SMS LTD was a "trademark" of JJP Mobile Limited.
- In March 2011, the trademark 12SMS LTD was sold to an unknown "individual buyer". The Level 2 provider explained that there was no contract for the sale, as it was concluded solely on the basis of what the Level 2 provider described as a "golden handshake". JJP Mobile B.V. stated that an Israeli golden handshake is conducted by, "looking the man in the eyes, judging his honesty and shaking hands to seal the deal".
- JJP Mobile B.V. was incorporated on 8 August 2010, and as a result, JJP Mobile Limited Israel became a "sales office".
- On 29 September 2010, JJP Mobile B.V. contracted with the Level 1 provider TxtNation Limited**.**
- In July 2011, JJP Mobile B.V. commenced business with 12SMS LTD, who then became its client. It stated that, 12SMS LTD's role in the Services was promoting the Level 2 provider's competitions on its website www.12sms.mobi, and providing trivia questions which were used in the Services' competitions. JJP Mobile B.V. stated that it operated all other aspects of the Services. In light of this, it registered with PhonepayPlus on 17 August 2011.

On 25 June 2012 and in response to the original breach letter, JJP Mobile B.V. further stated that 12SMS LTD was the Level 2 provider. In addition, during informal representations at the Tribunal hearing on 5 July 2012, the CEO of JJP Mobile B.V. asserted that the breach letter response had been compiled by JJP Mobile Limited and 12SMS LTD, and that JJP Mobile B.V. had simply forwarded the response to the Executive.

Following the adjournment of the Tribunal on 5 July 2012 the Executive sent a request for further information to JJP Mobile B.V. which included a request for copies of all correspondence that evidenced that JJP Mobile Limited and 12SMS LTD had provided the response to the breach letter. JJP Mobile B.V. responded and stated that it did not have the correspondence as it had moved to a, "new hosted exchange email platform".

On 11 July 2012, the Executive repeated its request for this information and JJP Mobile B.V. responded by stating that it did not have the information in Amsterdam and it would need to obtain it from JJP Mobile Limited but it stated that it was unsure whether it could get the information in the timeframe specified.

Investigation into 12SMS LTD

JJP Mobile B.V. provided purported contact information for 12SMS LTD which included a PO Box address in Tel Aviv, the company registration number and the name of the operational director. The Executive noted that the company registration number provided was identical, save for the last two digits which had been reversed, to the company registration number for JJP Mobile Limited. The Executive also noted that the registration number that had been provided for 12SMS LTD was exactly the same as the number that had been included in the promotional material for the Service.

The Executive contacted the Israeli equivalent of Companies House to establish the identity and the details of the company with the registered number that had been provided. A response from the Israeli Companies House confirmed that there was no company registered under the number or name provided.

JJP Mobile B.V. provided a copy of the 12SMS LTD operational director's passport. The Executive located the operational director's LinkedIn profile, as a result of matching the profile picture to that on the passport provided. The LinkedIn page listed the named individual as working for an organisation unconnected with the investigation. However, the Executive noted that the individual's list of previous roles included "VP Business development" and "sales at JJP Mobile" between September 2010 and February 2012. The Executive noted that it appeared as though the individual had worked for a JJP Mobile entity at the time the Services were operational.

Further, the Executive conducted an internet search that revealed that 12SMS LTD was scheduled to attend an exhibition in London held between 11-12 September 2013. The contact for 12SMS LTD was listed as the CEO of JJP Mobile B.V. The contact address listed was the same address provided to the Executive by JJP Mobile B.V. for JJP Mobile Limited.

In light of the above the Executive concluded that 12SMS LTD did not exist independently of JJP Mobile B.V. Despite this, the Executive attempted to contact 12SMS LTD by sending a request for information by post on 23 January 2014 to 12SMS LTD at the address provided.

The Executive did not receive a reply from 12SMS LTD or from the "operational director". As a result of its investigations and in the absence of robust evidence to the contrary, the Executive concluded that 12SMS LTD was not a company and appeared to be a trading name used by JJP Mobile B.V.

Investigation into JJP Mobile Limited

Following the Tribunal of 5 July 2012, JJP Mobile B.V. provided purported contact information for JJP Mobile Limited, which included a named contact, an address in Tel Aviv and an email address. In addition, it stated that the office phone was no longer in use. The Executive was provided with identification documentation for the named contact, who JJP Mobile B.V. stated was the, "VP sales and marketing in time when this issue became active [sic]". The Executive noted that the named contact was the same person who had previously been put forward by JJP Mobile B.V. as the operational director for 12SMS LTD.

On 19 September 2012, the Executive sent a request for information to JJP Mobile Limited using the contact details provided by JJP Mobile B.V. Request reminders were also sent. However, the Executive did not receive a response.

JJP Mobile B.V. provided the Executive with a generic undated "master agreement" between JJP Mobile B.V. and JJP Mobile Limited. The Executive submitted the contract was not complete as the "Premium SMS chart" and the "Letter of Understanding – pre financing" documents listed in the agreement were not provided. Despite sending a request for the additional documents, the documents were not provided to the Executive. As a result, the Executive concluded that the agreement was not evidence that JJP Mobile B.V. was contracted with JJP Mobile Ltd for the provision of the shortcodes (or anything else) for the Services under investigation.

The Executive noted that the agreement was signed on behalf of JJP Mobile Limited by a named individual who was listed as being the director of sales. The Executive requested identification documents for the named individual from JJP Mobile B.V. However, it was informed that the documents were not on file and the individual was no longer with JJP Mobile Limited.

In addition, the Executive noted that JJP Mobile Limited was at no time registered with PhonepayPlus.

As a result of the Executive's investigations and in the absence of robust evidence to the contrary, the Executive concluded that JJP Mobile Ltd was not the Level 2 provider for the Services.

Additional information

In February 2012, JJP Mobile B.V. provided the Executive with a copy of terms and conditions relating to a marketing agreement between 12SMS LTD and an affiliate marketer. JJP Mobile B.V. stated that the affiliate marketer had provided a marketing list. The Executive noted that the document listed Mr Verpoort as the "billing contact" and "sales rep" for 12SMS LTD. The Executive submitted that this document was an indication that JJP Mobile B.V. was in control of the promotion of the Services, which is a function that is attributed to Level 2 providers in accordance with paragraph 5.3.8(b) of the Code.

In January 2013, the Executive contacted the Level 1 provider to further understand the nature of the relationship between JJP Mobile B.V. and the Level 1 provider. The Level 1 provider stated the following:

> "We remain of the view that, and in respectful contradiction of the previous ruling, that JJP should fall under the Level 2 because JJP has direct control over promotions and we are sceptical about the existence of any other parties in running these promotions. For example, when we advised JJP about promotions compliance, they were able to make changes almost instantly, implying their level of control over the promotions was direct and exclusive."

The Level 1 provider later confirmed that the JJP entity referred to in the above statement was JJP Mobile B.V. and that it had dealt with the JJP Mobile B.V.'s Dutch office.

As a result of all the evidence and in the absence of robust evidence to the contrary, the Executive concluded that JJP Mobile B.V. was the Level 2 provider.

Accordingly, the Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the Code. The Executive sent a breach letter to the Level 2 provider on 25 February 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.4.2 – Consent to market
- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.2.1(a) – Provision of information regarding the identity of the Level 2 provider
- Paragraph 4.2.4 – Provision of false or misleading information

The Level 2 provider did not provide a response to the breach letter. As a result, the Executive made contact with Mr Verpoort, through his email address at another company. Despite receiving an initial acknowledgement the Level 2 provider supplied no response to the breach letter. On 17 April 2014, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;
- The complainants' message logs provided by the Level 1 and Level 2 providers;
- Correspondence with the Level 1 provider (including incorporation certificates for JJP Mobile Limited and JJP Mobile B.V.);
- Correspondence with the Level 2 provider (including the preliminary investigation correspondence, the first request for information and the Level 2 provider's response, the second request for information and the Level 2 provider's response);
- The original breach letter and the Level 2 provider's response;
- The Tribunal decision of 5 July 2012;
- Post 5 July 2012 correspondence with the Level 1 and 2 providers;
- A copy of the operational director's LinkedIn profile;
- A copy of the operational director's passport;
- The exhibition listing;
- A screenshot of JJP Mobile Limited's PhonepayPlus registration details;
- Israeli companies house correspondence (including a translation); and
- PhonepayPlus Guidance on "Privacy and consent to charge".

SUBMISSIONS AND CONCLUSIONS

The Tribunal found that the evidence regarding the identity of the Level 2 provider was cogent and compelling and therefore accepted the Executive's conclusion that JJP Mobile B.V. was the Level 2 provider.

ALLEGED BREACH 1
Rule 2.4.2
"Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the Level 2 provider of that service must be able to provide evidence which establishes that consent."

1. The Executive submitted that the Level 2 provider was in breach of rule 2.4.2 of the Code as consumers were contacted without giving their consent and/or the Level 2 provider had failed to provide evidence that established that complainants had consented to be contacted.

Guidance

The Executive relied on the content of the PhonepayPlus Guidance on "Privacy and consent to charge" (the "**Guidance**"). The Guidance states:

Verifying consent for soft and hard opt-in for the purposes of PECR [Privacy and Electronic Communications Regulations] and rule 2.4.2 of the Code

Hard opt-in

Paragraph 5.4
"In order to reach a greater number of consumers, some providers trade or purchase consumers' personal data. In these circumstances, further protection is necessary because the connection between the consumer and the business they first interacted with, and subsequently with the provider who is now marketing to them, is remote and indirect."

Paragraph 5.5
"Sharing of data in these circumstances includes any transfer – including renting, or trading or even disposing free of charge. A third party is any other, distinct legal person – even in the same group of companies or partners in a joint venture."

Paragraph 5.6
"For this reason, promotions designed to gain a hard opt-in must draw each consumer's attention specifically to the issue of consent, and that consent must involve a positive step beyond mere purchase of the service by the consumer, to be valid."

Paragraph 5.7
"For example, if one provider wishes to purchase a marketing list from an unrelated provider, then evidence of a hard opt-in for each number on that list should be obtained."

Paragraph 5.8
"When obtaining consent via a website, using a pre-checked tickbox is not sufficient for this purpose."

Paragraph 5.9
"In this context, a compliant example is an empty box that a consumer must tick in order to consent. Next to this, a clear explanation should be made of how the data will be used in future. If this explanation is not clear enough, then the hard opt-in is likely to be invalid."

Paragraph 5.10
"A good example of compliant consent is: "I want to hear from other companies so that they can send me offers to my phone. Please pass my details onto them so that they can contact me.

"Where this text is placed next to an unchecked box which the consumer checks, and where there is a robust and independent audit trail of the data which supports the

consumer having provided their consent, then it is likely this would be regarded as compliant."

Paragraph 5.11
"A hard opt-in can also be obtained via a conversation. However, a recording of the conversation, or of key-presses during the call, should be retained to provide robust verification."

Paragraph 5.12
"Providers using marketing lists should ensure that each number marketed to has a valid opt-in, gathered no more than six calendar months ago. Providers should ensure that they can robustly verify (see the whole of section 5 of this General Guidance Note) each and every consumer's opt-in, and ensure that none are currently suppressed. Please note that, where a hard opt-in is used to market to consumers who have not previously purchased from a provider, or been in 'negotiations for a sale', then we will expect opt-in to be robustly verifiable in the event of any complaints, no matter how small or large the scale; this is in contrast to the approach to soft opt-in set out at paragraphs 5.1-5.3 of this General Guidance Note."

Complaints

Complainants reported either receiving an unsolicited promotional message or viewing a pop-up or banner while they were on a social networking site. The Executive relied on the content of all the complainant accounts. Examples of the complainants' accounts include:

"…Reply OK and WIN a £500 grocery shopping voucher! (Info 12sms.mobi at £4.50/week. To cancel send stop) This is the website I found for them: 12sms.mobi/ This cost me 10p to unsubscribe to something I never subscribed to in the first place. I never subscribe to any premium text services and am getting very pissed off with texts from companies who have somehow obtained my details"

"Received unsolicited text from 65558. 'Hi Anthony, reply OK and WIN a £500 x-mas grocery shopping voucher!"

During correspondence, the Level 2 provider was requested to provide evidence of how consumers had consented to receive promotional messages. In response, the Level 2 provider stated that there were two methods:

a) The majority of consumers consented to receive direct marketing, "in the "old fashion" way," by entering their mobile number in to a webpage of a "12SMS campaign".

   The Executive noted that the soft opt-in method of consent would suffice for this method of entry.

b) Some complainants had consented via a third party affiliate website, the owners of which sold/transferred data in the form of marketing lists to the Level 2 provider.

   The Executive noted that consumers should have provided hard opt-in to receive such marketing.

As stated above, the Level 2 provider asserted that some consumers had consented to be contacted via a third party affiliate website. It added that these third party affiliates had

confirmed that the consumer wished to receive promotional messages by ticking a box on a website. In addition, the full terms and conditions including the pricing information had been clearly presented. The Level 2 provider stated that it had only obtained data from respected parties which were connected to the Direct Marketing Association.

Third party affiliate A

The Level 2 provider stated that it had been assured by this third party affiliate that consent to market had been obtained on a website. In respect of two of the complainants, the Level 2 provider confirmed that the third party affiliate had provided it with their details and stated that they had both consented to receive marketing on a website. Further, the Level 2 provider supplied screenshots of the website and the terms and conditions. The Executive noted that the screenshots showed that consumers were required to tick a box, however this was only to confirm that the consumer was over 18 years of age, a UK resident and that they had read the terms and conditions and the privacy policy. The Executive also noted that clause 20a under the heading "General" in the terms and conditions contained a link entitled "Sponsors". Upon selecting the link, consumers would have been presented with the following statement:

> "…By Registering you agree to our sponsors contacting you regarding their products and services that may be of interest to you".

The Executive submitted that the above mechanism for consumers to consent to receive marketing was inadequate as it did not meet the criteria specified within the Guidance in relation to hard opt-in consent outlined above. Paragraph 5.3 of the Guidance states that:

> "…promotions designed to gain a hard opt-in must draw each consumer's attention specifically to the issue of consent, and that consent must involve a positive step beyond mere purchase of the service by the consumer to be valid".

The Executive asserted that the method of "opt-in" to marketing was not sufficient as it merely drew consumers' attention to the terms and conditions and it did not sufficiently draw consumers' attention to the specific wording relating to consent to market that was contained within the terms and conditions. In addition, the relevant provisions relating to consent were hidden within a separate link contained in clause 20a and the opt-in was not a method of hard opt-in.

Accordingly, the Executive asserted that the above method of obtaining consent to market did not function as a means of obtaining hard opt-in consent that was compliant with rule 2.4.2 of the Code. Therefore, the Executive submitted that the Level 2 provider had failed to establish that it had valid consent to market for at least two of the complainants.

Third party affiliate B

The Level 2 provider asserted that it had verified this third party affiliate marketing list by ascertaining that it was a respected company as a result of checks on the "List warranty register".

The Executive noted that the "List warranty register" was operated by the Direct Marketing Association. Marketing list owners and users that appear on the register guarantee good practice by agreeing to sign warranties for the supply and use of data.

The Level 2 provider confirmed that the details of one complainant had been obtained from the third party affiliate B. The Level 2 provider stated that to obtain evidence of consent, it had engaged in lengthy correspondence with the affiliate who ultimately refused to provide the evidence. Further, the Level 2 provider commented that the third party affiliate had stated that it purchased its data from another company and that the Level 2 provider should seek evidence of consent from that company. The Level 2 provider later asserted that it was still waiting for details from the third party affiliate which was, "hiding behind the Data Protection Act," and had stated that all requests were responded to within 40 days. The Executive did not receive any further information from the Level 2 provider.

In light of this, the Executive asserted that the Level 2 provider had failed to provide any evidence establishing consent to market for this one complainant. The Executive submitted that the Level 2 provider had not verified the data it had purchased from any of the third party affiliates and instead it appeared to have relied on assertions made by the third party affiliates. The Executive noted that if the Level 2 provider had verified the data it would have identified that the third party affiliates were not able to directly provide evidence of consent as it had itself purchased data from another third party.

The Executive asserted that the process of checking if a company is "respected" does not demonstrate that the third party affiliate had verified its marketing lists to ensure that the data was from consumers who had provided valid hard opt-ins to receive third party marketing. To review the Level 2 provider's "checking" process, the Executive conducted its own research on the third party affiliate and identified that neither it, nor its holding company, were listed on the "List warranty register".

Third party affiliate C

The Level 2 provider stated that consumers appearing on the marketing list from this third party affiliate had, "…checked the box for receiving our opt in message". The Executive requested screenshots of the website to show that consumers had "checked the box", and a copy of the terms and conditions so that it could ascertain what consent consumers had provided (if any). In response to this request, the Level 2 provider stated that the evidence was unavailable as the promotion had been taken offline before the request.

The Executive asserted that, contrary to the above statement, the above Guidance requires that hard opt-in consent to receive marketing must be verifiable. The above Guidance was published in March 2011 (prior to commencement of the Services) and, as such, the Level 2 provider ought to have been aware that it should obtain evidence of hard opt-in consent from third party affiliates for each consumer on the marketing list. The Executive submitted that such evidence should have at least included screenshots of the consumer journey used to obtain consent along with evidence of individual consumer opt-in.

In addition, upon inspection of the marketing list, the Executive noted that only mobile numbers and names were provided. Contrary to the requirements set out in the above Guidance, the extensive list contained no verifiable information to ensure that each of the names appearing on the list had provided valid, hard opt-in consent to receive third party marketing.

The Executive submitted that given that the consumers would have previously engaged in a service operated by a third party, the Level 2 provider was required to provide evidence of a hard opt-in for each consumer's consent to be contacted in accordance with the above Guidance and in order to comply with rule 2.4.2 of the Code. The Executive asserted that

no such evidence was provided and that consequently, on the balance of probabilities the Level 2 provider had contacted consumers without their consent. Accordingly, the Level 2 provider had acted in breach of rule 2.4.2 of the Code.

2. The Level 2 provider did not provide a response to the breach letter that was sent on 25 February 2014. In response to the breach letter sent to the Level 2 provider on 8 June 2012, the Level 2 provider stated that it generally denied that consumers had been contacted without their consent. It stated that 12SMS LTD had always tried to do everything it could to ensure that consent was given. The Level 2 provider asserted that the marketing lists had been discussed with TxtNation Limited which was happy for them to be used as long as the data provider had confirmed that consent had been obtained.

   As a result of the first request for information from the Executive, the Level 2 provider stated that it had instructed 12SMS LTD not to use marketing lists for promotion. The Level 2 provider stated that the Executive was pleased that this was being done.

3. The Tribunal considered the Code, the Guidance and all the evidence before it, including the Level 2 provider's written submissions in response to the first breach letter that was sent on 8 June 2012. The Tribunal noted that the Level 2 provider had stated in correspondence that some consumers had consented via third party affiliate websites and that it had obtained the data via a sale and/or transfer of the marketing lists.

   In respect of the third party affiliate A's marketing list, the Tribunal noted that the Level 2 provider had supplied screenshots, which it stated demonstrated how consumers had consented to be contacted. The Tribunal also noted that a hard opt-in consent to market is required for future marketing from third parties. The Tribunal found that the screenshots provided demonstrated that consumers had not provided a hard opt-in to consent to be contacted. Further, the wording contained on the website did not sufficiently inform consumers regarding the nature of the consent that they were providing.

   In respect of the third party affiliate B's marketing list, the Tribunal noted that the Level 2 provider had stated it had experienced difficulties obtaining evidence of consent from the third party affiliate. However, the Tribunal found that the Level 2 provider should have obtained this evidence prior to its use of the data to satisfy itself that all consumers had given their full and informed consent. The Tribunal noted that the Level 2 provider had failed to provide adequate evidence to establish that consent to market had been obtained from the complainants.

   In relation to the third party affiliate marketing C's marketing list, the Tribunal noted the Level 2 provider's comment that consumers had ticked a box on a website to opt-in to receive marketing. However, the Tribunal also noted that the Level 2 provider had not provided any evidence to support this assertion.

   In respect of all three marketing lists, the Tribunal concluded that the Level 2 provider had not provided sufficient evidence to demonstrate that consumers had consented to receive future marketing from a third party. Further taking all the evidence, including complaints of unsolicited marketing from consumers and the submissions of the Level 2 provider into consideration, the Tribunal found on the balance of probabilities that consumers were contacted without their consent. Accordingly, the Tribunal upheld a breach of rule 2.4.2 of the Code for the reasons advanced by the Executive.

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 was in breach of rule 2.3.1 of the Code as consumers were not treated fairly and equitably for the following reasons:

    1) Some consumers who had correctly answered a question were sent a chargeable message stating that the answer was incorrect (therefore they did not receive the correct points entitlement).
    2) A number of complainants were sent two questions within seconds of each other (and therefore there was confusion as to which question should be answered).
    3) Some Services' messages did not make it clear that they had been sent in relation to the Services.
    4) Promotional SMS messages sent near to Christmas referred to an "Xmas shopping voucher" competition. However, the competition entry period ended nearly six months after Christmas.
    5) No evidence was provided to demonstrate that the competition prizes existed.

    Reason one: Some consumers who had correctly answered a question were sent a chargeable message stating that the answer was incorrect (therefore they did not receive the correct points entitlement).

    The Executive examined complainant message logs which revealed that some complainants who had correctly answered a question were sent a chargeable message stating that their answer was incorrect. Therefore consumers did not receive the 100 points which a correct answer entitled them to.

    On 13 December 2011, a complainant received the following question, "Is Steve Jobs the CEO of Apple?" The complainant replied "no" but received a chargeable message stating that the answer was incorrect. The Executive notes that Steve Jobs died on 6 October 2011, and therefore the complainant's answer was in fact correct.

    On 25 December 2011, a complainant received the following question, "Giggling is also known as laughing?" The complainant replied "yes" but received a chargeable message stating that the answer was incorrect.

    The Executive asserted that the Services penalised some consumers for responding with a correct answer. The Executive noted that winning a prize was dependent on the number of points accumulated from correct answers. Accordingly, consumers had not been treated fairly when they answered questions correctly but were informed they were incorrect as they were not awarded the points that they were entitled to (and had less chance of winning a prize).

    Reason two: A number of complainants were sent two questions within seconds of each other (and therefore there was confusion as to which question should be answered).

    The Executive noted from an analysis of complainant message logs that some complainants had been sent two questions within seconds of each other.

The message log for a complainant revealed that s/he received two questions in very quick succession. The message log read as follows:

- 14:14:41 A minute has 90 seconds?
- 14:41:43 A lemon is sour?
- 14:14:59 No
- 14:15:01 Incorrect
- 14:15:02 No
- 14:15:03 Correct

The Executive noted that if the first answer was in response to the first question then the complainant's answer was correct, but was deemed incorrect by the Service.

The Executive asserted that the sending of two questions simultaneously may confuse consumers as to which question they should respond to and in what order. The Executive also asserted that sending two questions simultaneously may result in a consumer texting an incorrect answer if the second message is delivered before the first. The Executive submitted that there was a possibility that the Level 2 provider may incorrectly penalise a consumer for a correct answer.

The Executive submitted that for these reasons, the sending of two questions simultaneously, or within seconds of each other does not treat the consumer fairly and equitably.

Reason three: Some of the Services' messages did not make it clear that they had been sent in relation to the Services.

The Executive noted that message logs for four complainants showed that the complainants had received a personalised promotional message which stated:

> "Hi [name], reply OK and WIN a £500 X-Mas grocery shopping voucher! (Info +442033180464). Subscription £4.50/week. Send Stop to cancel."

Subsequently, the complainants received three chargeable SMS messages per day, once a week containing content similar to:

> "12sms.mobi/c/?id=89XzI9AaKyyHl6f5-qBZCSTUESSCJC13Fc4co9VhN34."

The Level 2 provider described the above message as a, "WAP-push message with a link to the download portal" but did not provide any evidence of what this was.

The complainants who received these chargeable messages stated that they did not associate them with the Services as there was no obvious link with the earlier promotional message. The complainants did not appear to know why they had been charged.

The Executive relied on a complainant account which stated:

> "The consumer text back ok. The consumer was not told how much it was going to cost to text back ok. The consumer said when he sent ok he did not receive no message back [sic]."

The Executive asserted that the complainant account demonstrated that the complainant did not appreciate that the subsequent chargeable messages received were in related to the Service.

Another complainant account stated:

> "I text okay and then I got 7 messages coming through then Orange said that they will stop it but then I got another 7 and then another 3 today. There was absolutely nothing like that about cost it was just about the shopping vouchers and then these silly links and pictures."

The Executive asserted that the complainant's message log showed that he had received nine of these chargeable messages. The complainant appeared not to understand the messages and was consequently not properly engaging with the Service despite incurring charges.

Another complainant account stated:

> "Consumer said she has not received the messages on her phone, "i called last month asking them to stop service and this month they have chaged [sic] me again £36.00."

The Executive asserted that this consumer appeared to be confused as to the nature of the subsequent chargeable messages that were received after opting-in to the subscription Service. As a consequence, the Executive submitted that the unclear content of the chargeable messages confused consumers and that consumers did not realise they were chargeable. The Executive accordingly asserted that consumers were not treated fairly and equitably.

Reason four: Promotional text messages sent near to Christmas referred to an "Xmas shopping voucher" competition when the competition ended nearly six months after Christmas

The Level 2 provider stated that in each of its competitions the prize draw took place every six months. The message logs indicated that complainants, who received the promotional message for the "WIN £500 Xmas shopping voucher" promotion, did so on 20 and 21 December 2011.

The Executive asserted that a competition to "WIN Xmas shopping vouchers" that was promoted less than five days before Christmas day was likely to create the impression that it was either an instant prize win, or a prize that could be won in close proximity to Christmas Day.

During correspondence, the Level 2 provider confirmed that the draw date for the competition was six months later, therefore the earliest date on which a consumer could win the prize was 20 June 2012. The Executive asserted that complainants in receipt of the message were treated unfairly as the competition was marketed to consumers less than five days before Christmas 2011 and as such, the Level 2 provider was likely to benefit from consumers' assumptions that the prize was intended to be awarded before Christmas 2011.

Reason five: No evidence was provided to demonstrate that the competition prizes existed.

Despite a number of requests by the Executive, the Level 2 provider did not provide any evidence that the prizes on offer existed (or were purchased or dispatched to prize winners).

When evidence of the prizes and proof of purchase was initially requested in February 2012, the Level 2 provider stated that, as the Services were very new and the competitions had not concluded, the prizes had not yet been purchased.

Following a second request by the Executive on 2 May 2012, the Level 2 provider stated that shopping vouchers and Champions League final tickets had been, "paid as a regular wire transfer" and that receipts showing proof of purchase for an iPad and an iPhone were on their way to its office. However, the Executive noted that it had not received any evidence of the purchases.

The Executive asserted that on a balance of probabilities, there were no prizes and therefore consumers were treated unfairly and inequitably. The Executive submitted that the whole purpose of a consumer entering the Service would be to win a prize and, given that no prizes were available, consumers were not treated fairly or equitably.

In light of the all the above five reasons, the Executive submitted that a breach of rule 2.3.1 of the Code had occurred.

2. The Level 2 provider did not provide a response to the breach letter that was sent on 25 February 2014. In response to the breach letter of 8 June 2012, the Level 2 provider accepted the breach in part. The Level 2 provider accepted that it should not have stated that certain answers were incorrect when they were correct.

   Further, in relation to consumers being sent two questions within seconds of each other, the Level 2 provider accepted this had happened but stated that it was the fault of TxtNation Limited, as it had sent the same Mobile Originating ("**MO**") message more than once. It explained that TxtNation Limited had experienced technical difficulties which were rectified swiftly once they had been notified. As a result of this malfunction, the Level 2 provider had built in protection on its platform to ensure that no more than one MO could be "offered per msisdn per 20 seconds".

   In relation to the competition prizes, the Level 2 provider stated that it had offered to provide the Executive with a photograph of the prizes containing proof of the date the photograph had been taken but this had not been acceptable. The Level 2 provider explained that the competitions were global and it was not possible to send all the prizes to the Executive and on to the winners within the time frame. The Level 2 provider asserted that it was impossible to provide the Executive with prizes that had already been given to the winners. Some prizes such as the Champions League tickets had already been distributed to the winner.

   In relation to the Service messages, which the Executive had alleged were not clear, the Level 2 provider submitted that the WAP push messages had been referred to on the website. It queried why the Executive had not followed the link in the message.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written submissions in response to the first breach letter which was sent on 8 June 2012. The Tribunal noted all five reasons advanced by the Executive and the admission from the Level 2 provider in respect of reason one.

The Tribunal found that consumers had not been treated fairly and equitably as a result of the following five reasons:

i) Some consumers who had correctly answered a question were told that the answer was incorrect (and therefore did not receive the correct points entitlement).
ii) A number of complainants were sent two questions within seconds of each other resulting in confusion regarding which message to respond to.
iii) Some Service messages did not make it clear that they had been sent in relation to the Service.
iv) Promotional text messages were sent in December for an "Xmas shopping voucher" competition when the competition did not end until the following summer.
v) No evidence was provided to demonstrate that the advertised prizes existed.

In respect of reasons one and two, the Tribunal commented that consumers were not treated fairly and equitably as their chance of success was negatively impacted for reasons outside of their control. In relation to the Christmas promotions, the Tribunal commented that consumers were likely to have entered as a result of the reasonable inference that they could potentially win a prize within a short time period (when this was not the case). In respect of the last reason, the Tribunal found that this was particularly serious example of treating consumers unfairly, as the lack of evidence of competition prizes indicated, on the balance of probabilities, that no prizes existed and as such there was no value to the Services.

In light of the five reasons detailed above the Tribunal concluded that a breach of rule 2.3.1 of the Code had occurred.

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 acted in breach of rule 2.2.1(a) of the Code as SMS messages for the Services did not contain the name of the Level 2 provider.

   The Executive noted that SMS messages were sent to consumers encouraging them to use the Services and were promotions for the Services. Examples of the promotional messages complainants received included:

   "Reply OK to 64888 and WIN a £500 grocery shopping voucher! Reply OK now to WIN! (Info: +442033180464. 2 sms at £1.50 per question + £3,00 signup fee"

   "Hi [name], reply OK and WIN a £500 grocery shopping voucher!
   (Info: 12sms.mobi. 2sms at £1.50/question)"

   "Hi [name], reply OK and WIN a £500 X-Mas grocery shopping voucher!

(Info: +442033180464. Subscription £4.50/week. Send Stop to cancel).”

The Executive noted the name of the Level 2 provider was not included in any of the above promotional SMS messages. Therefore, the Executive asserted that consumers were not fully and clearly informed of the identity of the Level 2 provider, especially as the Service webpage referred to the brand name 12SMS Ltd.

In light of the above, the Executive submitted that a breach of rule 2.2.1(a) of the Code has occurred.

2. The Level 2 provider did not provide a response to the breach letter of 25 February 2014. In response to the breach letter of 8 June 2012, it stated that JJP Mobile B.V. was not the Level 2 provider and therefore its identity was not included in the promotional SMS messages.

3. The Tribunal considered the Code, the Guidance and all the evidence before it, the Code, including the Level 2 provider's written submissions in response to the breach letter of 8 June 2012 and the content of the promotional messages. The Tribunal found that the SMS messages encouraged consumers to use the Services and as such they were promotions for the Services. The Tribunal noted that the promotional SMS messages did not contain the name of the Level 2 provider. Further, it noted that the Code requires all promotional material to contain the name of the Level 2 provider. In light of this, the Tribunal concluded that a breach of rule 2.2.1(a) of the Code had occurred.

Decision: UPHELD

ALLEGED BREACH 4
Paragraph 4.2.4
“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission).”

1. The Executive asserted that a breach of paragraph 4.2.4 of the Code had occurred as the Level 2 provider had knowingly made false representations to PhonepayPlus that it was not the Level 2 provider.

   The Executive relied on the information detailed in the background section above regarding the identity of the Level 2 provider and the representations made by the Level 2 provider. The Executive noted that the Level 2 provider specifically stated in its response to the initial breach letter that 12SMS LTD was the Level 2 provider. The Executive asserted that, on the basis of the facts presented within the background, the Level 2 provider attempted to circumvent its obligations under the Code by knowingly providing false and misleading information in support of an assertion that a fictional company, 12SMS LTD, was the Level 2 provider.

   In light of the above, the Executive submitted that a breach of paragraph 4.2.4 of the Code had occurred.

2. The Level 2 provider did not provide a response to the breach letter of 25 February 2014. In respect of the breach letter of 8 June 2012, it stated that no false or misleading information was ever sent to the Executive. Further, some requests for information from the Level 2 provider had been unclear and caused confusion. It alleged that it had not received the full email request from the Executive and accordingly it had contacted the Executive directly in

an attempt to resolve the matter. It added that this had expedited the investigation rather than frustrating it.

3. The Tribunal considered the Code, the Guidance and all the evidence before it. The Tribunal noted that initially the Level 2 provider had not stated that it was not the Level 2 provider. However, in its response to the first breach letter of 8 June 2012, it stated that it was not the Level 2 provider. Further, it had also noted that the Level 2 provider had made oral submissions through its CEO, Mr Joost Verpoort, at the Tribunal on 5 July 2012 where it had continued to assert that it was not the Level 2 provider. As a direct result of those submissions, the Tribunal of 5 July 2012 had been adjourned for further investigations in relation to the identity of the Level 2 provider. The Tribunal commented that it accepted the Executive's conclusion that JJP Mobile B.V. was the Level 2 provider, therefore it found that the Level 2 provider had knowingly misled the Tribunal on 5 July 2012 and the regulator by making false representations, which included stating:

   i) that it was not the Level 2 provider;
   ii) that a separate corporate entity called 12SMS LTD existed;
   iii) that 12SMS LTD's registration number was 514296485; and
   iv) that 12SMS LTD was sold to an unidentified third party.

   The Tribunal found that not only had the Level 2 provider knowingly misled the regulator during the investigation, the CEO of the Level 2 provider had attended a Tribunal hearing on 5 July 2012, asserted that it was the Level 1 provider and misled a Tribunal. The Tribunal found that misleading a Tribunal was a particularly serious matter when the CEO, Mr Joost Verpoort, must have known (and, the Tribunal found, did know) what the true identity of the Level 2 provider was – namely that JJP Mobile B.V. was the Level 2 provider. Accordingly, the Tribunal concluded that the Level 2 provider had knowingly misled both the Executive and the Tribunal and had provided false information in an effort to circumvent regulation. In coming to its decision on this breach, the Tribunal found that there was a compelling body of cogent evidence to support its conclusions on this breach and the conduct of the CEO, Mr Joost Verpoort.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.4.2 – Consent to market

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

- Serious cases have a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact or potential impact on consumers.
- The cost incurred by consumers may have been higher, and the Services had the potential to generate higher revenues, as a result of the breach.
- The Services had been operated in such a way that demonstrates a degree of negligence and recklessness non-compliance with the Code.

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:

- Consumers incurred an unnecessary cost and the Service was incapable of providing any purported value.
- The breach demonstrates fundamental non-compliance with the Code in respect of high revenue generating Services and/or a scam.

Rule 2.2.1(a) – Provision of information regarding the identity of the Level 2 provider

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 criteria:

- Serious cases have a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact or potential impact on consumers.
- The Services had been operated in such a way that demonstrates a degree of negligence and/or reckless non-compliance with the Code.

Paragraph 4.2.4 – Provision of false or misleading information

The initial assessment of paragraph 4.2.4 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider was deliberate and contrived in supplying inaccurate and misleading information which had a detrimental impact on the investigation and caused considerable delay to the enforcement procedure.

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

Final overall assessment

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

- The Level 2 provider made a deliberate and concerted attempt to mislead the Executive and the Tribunal as a result of a number of false representations which included:
  - that it was not the Level 2 provider;
  - that a company called 12SMS Ltd was in existence;
  - that 12SMS LTD's registration number was 514296485; and
  - that 12SMS LTD was sold to an unidentified third party.

In light of the overlap with the breach of paragraph 4.2.4 of the Code, the Tribunal did not attach any additional weight to it.

The Tribunal did not find not mitigating factors.

The Level 2 provider's revenue in relation to the service was in the range of Band 3 (£100,000 - £250,000).

Having taken into account the aggravating 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 £250,000;
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of eight years (starting from the date of publication of the decision), or until payment of the outstanding fine and total administrative charges, 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.

In making the decision, the Tribunal considered that a prohibition on the Level 2 provider for eight years was appropriate taking account of the particular circumstances of this case. In particular, the Tribunal noted that the Level 2 provider had deliberately misled and provided inaccurate information to a regulator, during the course of the investigation and the adjudicatory process, which was a very serious matter and required a prohibition for an extended period of time. The conduct of the Level 2 provider resulted in a considerable delay in proceeding with the case as well as additional time and cost of the further investigation into the identity of the Level 2 provider. This conduct justified a departure from previous cases where shorter periods of prohibition had been imposed.

Administrative charge recommendation: 100%

In making its recommendation regarding the administrative charge to be paid by the Level 2 provider, the Tribunal took the specific conduct of the Level 2 provider into account. Particularly, that the further enquiries which were undertaken by the Executive were the direct consequence of the Level 2 provider's deliberate misleading of the Executive and that the matter would have been resolved before the Tribunal of 5 July 2012.