Tribunal meeting number 145 / Case 1

Case reference: **18137**
Level 2 provider: **Moblix Media Limited (UK)**
Type of Service: **Voucher subscription - "Free(b)Friday"**
Level 1 provider: **IMImobile Europe 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 11 February 2013 and 6 February 2014, PhonepayPlus received 52 complaints from consumers in relation to a premium rate SMS voucher subscription service, which operated under the brand name "Free(b)Friday" (the "**Service**"). The Service was operated by the Level 2 provider Moblix Media Limited on the shared premium rate shortcode 84222. The Level 1 provider was IMImobile Europe Limited. The Service began operation in October 2009 and is currently operational.

The Service costs £1.00 per SMS message (up to a maximum of two SMS messages per month). The Level 2 provider asserted that consumers subscribe to the Service by entering their mobile number (MSISDN) into an online form on the Service website and then sending a keyword to the Service shortcode. Subscribers receive chargeable SMS messages containing the details of how to claim vouchers for free goods and services including, retail vouchers, food, drinks and cinema tickets.

According to the Level 2 provider, the Service was primarily promoted via word of mouth and Facebook.

The majority of complainants stated that they had received unsolicited, reverse-billed SMS and that they had not engaged with the Service.

Examples of complainant accounts include:

> "I became aware that I was being charged for this service after checking my Vodafone bill. I never subscribed to this or any other premium text services, neither online, by text, by telephone, or otherwise, and have never agreed to being charged to receive texts from the provider, neither explicitly or implicitly. The provider has been "sending" premium rate text information services to me, at my cost, without my knowledge or agreement. I have no idea how this provider obtained my telephone number."

> "I don't really know where and how these scammers got my number, they have been charging me 1-2 pounds a month for several months now and I just realised it this month. I did not subscribe to any of their service at all and I am 100% certain of that."

> "Received 5 separate text messages about restaurant deals which cost me £5 in total. I did not sign up to this service. When I called Moblix to confront them about charging me for unwanted services, they offered to send me a cheque and said that a system error had caused my number to be on their message service. They assured me that it wasn't a scam, which did not convince me otherwise. I waited 2 weeks for the cheque which didn't arrive. They do not return calls and do not pick up their 'customer service' line…It is a disgrace that a company can send text messages to randomised numbers and receive £1 or more for each mobile number that their system randomly lands on. And

when someone complains and catches them out they offer a cheque, which they have no intention of sending and do not pick up their customer service line."

"I don't know what sort of promotion for the service that it [sic]. I have never knowingly signed up to it and never used it. I was completely unaware that I was being charged."

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 7 February 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.3 – Consent to charge
- Rule 2.2.5 – Pricing prominence and proximity
- Rule 2.2.1 – Information likely to influence the decision to purchase
- Paragraph 4.2.5 – Failure to disclose information

The Level 2 provider responded on 21 February 2014. On 6 March 2014, and following informal representations, 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 breached rule 2.3.3 of the Code for the following reasons:

   i) Some consumers who did not complete the required double opt-in were subscribed to the Service and therefore did not consent to be charged;
   ii) There was no evidence of consent to charge in relation to consumers who were subscribed to the Service via a third party list; and
   iii) The Level 2 provider failed to provide evidence of consent to charge for a significant number of complainants.

   The Executive relied on the content of the PhonepayPlus Guidance on "Privacy and consent to charge". 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 the consumer's communication bill is properly verifiable...By 'properly verifiable', we mean a clear audit trail that categorically cannot have been interfered with since the record…was created."

   Paragraph 2.9

"It is more difficult to verify where a charge is generated by a consumer browsing the mobile web, or by using software downloaded to their device. In these circumstances, where the consumer may only have to click on an icon to accept a charge, the MNO has no record of an agreement to purchase, and so robust verification is not possible through an MNO record alone."

Paragraph 2.10
"In both of the instances set out above, we would expect providers to be able to robustly verify consent to charge...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 relied on the content of all the complainants' accounts. Examples of the complainant's accounts include:

"The provider has been "sending" premium rate text information services to me, at my cost, without my knowledge or agreement. I have no idea how this provider obtained my telephone number."

"I have no idea what the service is however I have received a number of text messages which have charged me 86p + VAT totalling £6 and I have not signed up to the service."

"I never asked for this service never heard of it and I don't want to be charged for something I didn't ask for."

"The texts were unsolicited and charged £1.03 for each sms received. This is a completely unacceptable practice to charge without any sign up or warning in the text itself."

Monitoring

The Executive monitored the Service on 19 December 2013. The Executive entered its contact details into the online form on the Service landing page (**Appendix A**). The Executive then viewed a webpage that displayed the following message:

> "Welcome to Free(b) the coolest site for FREE STUFF. We've sent you a text just to confirm your mobile number is legit, follow the instructions on the text and you're in. Don't forget tell your mates! The more numbers the more Free(b)'s. Remember every Free(b) is worth WAY MORE than the cost of the text…"

At the same time, the Executive received an SMS message that instructed the Executive to respond to the shortcode with the keyword "FREEB" to subscribe to the Service (**Appendix B**). The Executive followed the instructions and subscribed to the Service (**Appendix C**). On 10 January 2014, the Executive received its first voucher offer via an SMS message (**Appendix D**). As instructed, the Executive visited the Service website and entered the voucher code along with the contact details using the link provided but the Executive did not receive the voucher.

Admissions

On 17 January 2014, The Executive submitted a list of MSISDNs to the Level 2 provider and requested evidence of how it was able to robustly verify consent to charge for each of the MSISDNs provided**.** The Level 2 provider responded on 24 January 2014 with the following admission:

> "This investigation has shown us that the double opt-in has malfunctioned in some cases; by this we mean that the mobiles have been added to the service ahead of the MO-based confirmation from the handset."

When questioned further on the extent of the issue, the Level 2 provider was unable to confirm when the malfunction first began or how many consumers had been affected. In the absence of evidence to support the Level 2 provider's assertion that the issues regarding consent to charge were as a result of a "malfunction", the Executive did not accept the Level 2 provider's account.

Following correspondence with the Level 1 provider, the Executive was notified that the Level 2 provider had previously purchased MSISDNs from a third party. When the Executive requested information in relation to this the Level 2 provider stated:

> "The only external party we have worked with is [name redacted]; we initially used them as a trial – for this reason no contract was in place. We have tried multiple times to contact them and have since discovered that they have gone into administration."

The Level 2 provider also stated that the third party:

> "[W]as tasked to deliver a direct to consumer marketing campaign by way of keyword and shortcode. We were advised that all MSISDNs were opted in via 84228 – the data was sample checked."

The Executive noted that the Level 2 provider did not provide any evidence which established consent to charge for the consumers who were affected by the alleged "malfunction" or those whose MSISDNs were allegedly purchased from a third party. Given the lack of evidence available to support any of the Level 2 providers' assertions, the Executive submitted that the issues regarding consent to charge demonstrated systematic failures. Further, in light of the complainant accounts, it was likely that some of these consumers did not consent to the charges incurred.

Specifically, the Executive identified a number of message logs (approximately 14% of complainants) which showed that consumers were subscribed to the Service

even though they did not respond to the message containing the keyword. One particular log showed that the consumer did not reply to the SMS message containing the keyword, yet a subscription confirmation message was sent to the consumer over five months later. The Executive asserted that consumers who were sent an SMS message instructing them to reply with the keyword but who chose not to respond had not consented to being charged for the Service. This related to seven of the 50 complainants for which message logs were available (14%).

Additionally, the Executive noted that one complainant referred to having been informed by the Level 2 provider that his number had been added to the system in error:

> "When I called Moblix to confront them about charging me for unwanted services, they offered to send me a cheque and said that a system error had caused my number to be on their message service."

In summary, the Executive asserted that it was clear from the complainant message logs, that seven complainants were subscribed to the Service without sending the required MO SMS. As a result of this and the complainant's account set out above, the Executive stated that at least eight complainants were charged without their consent. Further, the Executive noted that the Level 2 provider should have been aware of the "malfunction" on 30 April 2013, when the initial Request for Information was issued. However, the issue was not rectified until 20 January 2014. As a result and in the absence of evidence to the contrary, the Executive asserted that the issues regarding consent to charge existed over an extended time period, constituted systemic non-compliance and were likely to have affected a significant number of consumers.

Evidence of consent to charge

The Executive noted that only four of the 50 complainant message logs included an MO containing the keyword from the consumer. As only 8% of complainants went through the double opt-in process, and in the absence of any evidence to the contrary, it appeared that the issue was widespread. Further, the Executive noted that five of the message logs where the double opt-in process was not functioning related to subscriptions starting in late 2009, the earliest being 3 October 2009.

The Executive did not accept the Level 2 provider's submission that the problem was due to a technical malfunction, as it did not provide any evidence to substantiate this claim. Further, the lack of information submitted in relation to the MSISDNs allegedly purchased from a third party demonstrated that there was a lack of effective systems or processes in place to ensure compliance with rule 2.3.3 of the Code. Accordingly, the Executive asserted that some consumers did not consent to incur charges and further, or in the alternative, the Level 2 provider did not have a sufficiently robust system in place to provide evidence of consent to charge and had therefore breached rule 2.3.3 of the Code.

2. The Level 2 provider accepted that some complainants had been opted-in to the Service without completing the double opt-in process. However, it stated that this was a limited problem and had occurred due to an intermittent technical issue.

The Level 2 provider acknowledged that the examples referred to by the Executive demonstrated that some complainants were opted–in to the Service without completing the double opt-in process and therefore in error. The Level 2 provider

stated that it had discovered the malfunction as a result of the investigation and had communicated this to the Executive on 24 January 2014.

The Level 2 provider commented that notwithstanding the opt-in error, the complainants had been sent a monthly subscription reminder SMS which detailed that the Service was subscription based, the cost, method of termination and the customer service contact number. It asserted that its records showed that none of the affected complainants had contacted it to query the cost of the Service. Nonetheless, the Level 2 provider stated that it had contacted each of the complainants and had successfully refunded 39 of them (and given them an additional £5 voucher). Attempts to refund the remaining complainants had failed. The Level 2 provider queried whether there were a total of 50 or 52 complainants, as it had only received details of 50 complainants from the Executive.

The Level 2 provider supplied a detailed list that it stated evidenced that refunds had been paid to some complainants. The Level 2 provider submitted that this information proved that the complainants had entered their information into the Service website and that it had proactively contacted and refunded the complainants (where possible).

The Level 2 provider asserted that it had been advised by its technical provider that the technical issue was an intermittent one. As a result, it was not aware of it until the investigation and therefore it was unable to confirm the exact number of consumers affected. The Level 2 provider explained that significant changes had been made to its technical infrastructure which would mean that it was no longer reliant on third party technical support and the issues should not reoccur.

In relation to the third party consent to charge opt-ins, the Level 2 provider stated that it had only worked with the third party on a trial basis. As part of the trial, the third party had been, "tasked to deliver a direct to consumer marketing campaign by way of keyword/shortcode." It asserted that it had been advised that all MSISDNs were opted-in and the data was sample checked. In addition, it stated that the data had been checked by the Level 1 provider. In light of the issues that had arisen as a result of the trial, the Level 2 provider stated that it would not use any third parties in future and that it had carried out a full data cleansing exercise on the data provided by the third party (which required subscribers to opt back in to the Service).

During lengthy and detailed informal representations, the Level 2 provider reiterated its written submissions. In addition, the Level 2 provider gave an overview of its background. It stated that it thought that premium rate services were a great way to communicate and had the idea of combining this with vouchers. Originally in 2009, it took the idea to a large retailer and used the Service to drive footfall into retail stores from its list of mostly 18-35 year olds. It stated that it approached retailers to create vouchers and had provided a diverse range of opportunities including free curry, coffees and cinema tickets (some of which were valued in excess of the £5 average value of vouchers provided by the Service). It accepted that the Service did not send vouchers automatically to subscribers' phones, however it said that it provided a "generous" timeframe for consumers to claim the vouchers online. It stated that the voucher claim rate varied significantly (from approximately 5-50%) and that there was no average claim rate.

The Level 2 provider stated that "free(b)" was "just" the brand name and that clearly the Service was not free. However, it stated that where a consumer subscribes, vouchers for free goods and services are provided (and not discount vouchers). It

added that the Service had a marketing function and that voucher availability often coincided with advertising campaigns.

The Level 2 provider stated that the Service was promoted largely by word of mouth and Facebook. It encouraged subscribers to tell their friends about the Service on the basis that the greater the number of subscribers, the better the rewards it could offer. It stated that it had previously used a third party to expand its list. However, it had not been an especially positive experience and the list of subscribers had now been cleansed. The Level 2 provider stated that from memory it had obtained approximately 30,000 (or just under) subscriber opt-ins from the third party over a few months. The third party marketed the Service to its own marketing list and provided opt-in details of those who subscribed to the Level 2 provider. It reiterated that, notwithstanding the issues that arose, it had sample checked the data and passed the list to the Level 1 provider.

In relation to the technical issue which resulted in the intermittent failure of the double opt-in, the Level 2 provider stated that it was a small company of three people, which did not initially have in-house technical expertise. However, it had brought the technical operation of the Service in-house. This had involved employing a technical expert and evaluating the existing backend of the technical system, creating a new system and conducting extensive pre-testing. It stated that this had taken an extended time period but that it now had robust, reliable and complex back end systems. It added that it had not suspended the Service during this period as, amongst other reasons, it did not know how extensive the technical issues were and had experienced difficulties communicating with the technical provider. It added that, given the intermittent nature of the fault (which it said was demonstrated by the Executive being required to double opt-in to the Service during monitoring), it still had no idea of the extent of the problem. It stated that the problem had first been brought to its attention in April 2013 and although testing did not identify any issues, it was clear from some subscriber logs that the double opt-in process had malfunctioned. The Level 2 provider said that it had approximately 60,000 subscribers through the previous back end system but did not know how many consumers had completed the double opt-in process. However, all subscribers had received subscription reminder messages which contained full key Service details.

The Level 2 provider accepted that, with hindsight, it could have done more to investigate and that it had been “technically naïve”. However, it asserted that it now had advance in-house technical resource and that its subscriber list now only contained “quality data”.

The Level 2 provider stated that customer service was critical to it and that it was prepared to, “look after the brand”. It added that it had a generous refund policy, which in some cases even extended to consumers who had previously claimed vouchers.

The Level 2 provider commented that it had received compliance advice in relation to the Service from the Executive in 2009 and 2011. It believed that the website which, it submitted had changed very little since 2009, had been checked and it was therefore surprised that some of the breaches had been raised. However, it accepted that some parts of the advice regarding the content of Service messages had not been fully implemented but assured the Tribunal that this was an oversight and the outstanding changes would be made immediately.

The Level 2 provider noted the Executive's comment that it had not received a voucher that it had claimed. The Level 2 provider explained that it was confused as, according to the message log for the Executive's phone, the message containing the voucher offer had "failed @ operator" and therefore should not have been delivered. However, it noted that the Executive had provided a screenshot showing the message. It added that it would investigate this with the Level 1 provider.

The Level 2 provider accepted the revenue figures provided by the Level 1 provider and stated that any discrepancy with the figures it provided was due to the more limited time period for the figures it had provided.

In summary, the Level 2 provider stated that it had a good business model that was beneficial to consumers and retailers but that it had suffered a "hiccup". However, where it had found issues it had refunded consumers.

3. The Tribunal considered all the evidence before it, including the Level 2 provider's written submissions and the oral clarification provided during informal representations.

The Tribunal noted that the Level 2 provider accepted that it had experienced a technical fault between at least April 2013 to January 2014, which had resulted in some consumers being opted-in to the Service without them completing the double opt-in process by sending an MO message. The Tribunal said that given the fundamental nature of the obligation to ensure that a consumer consents to all charges, it was concerned that the Level 2 provider had not completed a full audit of all consumer opt-ins to ascertain the full extent of the technical failure.

The Tribunal did not accept the Level 2 provider's submission that as it had the personal details of consumers which had been entered via the website it had valid evidence that they had consented to receive charges. The Tribunal further noted that merely being in possession of a consumer's personal details did not constitute "robust evidence" of consent to charge as required by the Code. Further, the consistent complainant accounts appeared to indicate that a significant number of consumers who had purportedly provided their personal details did not consent to incur charges.

The Tribunal also noted that some of the complainants' logs showed a large time period (up to five months) between the date when the Service was apparently "web initiated" and the date charges started.

Accordingly the Tribunal concluded that an unknown, but significant number of consumers who had not completed the MO opt-in process had not consented to receive charges in breach of rule 2.3.3.

Further, the Tribunal noted that the Level 2 provider stated that it had obtained approximately 30,000 consumer opt-ins to receive charges from a third party provider who it had a trial relationship with, but no written contract. The Level 2 provider had subscribed these consumers to the Service but accepted that it did not have robust evidence of consent to charge these consumers. In December 2013 the Level 2 provider conducted an audit and cleansed its list of subscribers to ensure that it only continued to charge those who it had a valid opt-in for, but some of these consents were obtained after consumers had incurred charges. The Tribunal commented that the Level 2 provider's actions in subscribing these consumers to its list without robust evidence of consent to charge were reckless at best and a breach of rule 2.3.3 of the Code.

Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code for the three reasons advanced by the Executive.

Decision: UPHELD

ALLEGED BREACH 2
Rule 2.2.5
"In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service."

1. The Executive asserted that the Level 2 provider acted in breach of rule 2.2.5 as pricing information relating to the Service was not prominent or proximate to the means of access to the Service.

The Executive relied on the content of PhonepayPlus Guidance on Promotions and promotional material (the "Guidance"). The Guidance states:

Paragraph 2.2
"As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion)."

Paragraph 2.10
"Lack of prominence, or proximity, most often takes place online (both web and mobile web), where the price is provided in small print elsewhere on the page from the call to action."

Paragraph 2.14
"The use of colour (see immediately below) also needs to be considered, as this could affect the need for close examination, regardless of font size."

Paragraph 2.15
"There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity."

The Executive monitored the Service, as outlined above in paragraph one of the breach of rule 2.3.3. The Executive noted that the pricing information on the Service landing page was located in a block of text above the subscription form (**Appendix A**).

The Executive noted that a button marked "DO IT NOW" button was the means of access to the Service, where consumers did not enter the Service through the double opt-in process (92% of complainants).

The Executive submitted that the pricing information on the Service landing page was not prominent as it was buried in a block of text on a busy webpage. Additionally, the Executive submitted that the pricing information was not sufficiently proximate to the means of access to the Service.

In light of the above, the Executive submitted that a breach of rule 2.2.5 of the Code had occurred as the pricing information was not sufficiently prominent or proximate to the means of access to the Service, which in addition to other factors, was likely to have resulted in consumers not realising that they would incur premium rate charges. Accordingly, the Level 2 provider was in breach of rule 2.2.5 of the Code.

2. The Level 2 provide denied that a breach of rule 2.2.5 of the Code had occurred. It stated that it believed the display of the pricing information in a white text on a black background was clear and easy to read.

The Level 2 provider explained that on 11 and 12 April 2011, it had had discussions with the Executive about the Service. It added that while the Executive had some recommendations (which were immediately implemented), there was no mention of the website being non-compliant. Further, the "look and feel" of the website landing page had changed very little since the start of the Service in 2009. The Level 2 provider added that on 3 October 2009, compliance advice from the Executive did not highlight any concerns with the display of the pricing information.

The Level 2 provider stated that it had made a change to the landing page so that the final sentence of the paragraph of the text read, "Join free(b) for £2 per month until you send STOP to 84222. Each free(b) is worth WAY MORE." The Level 2 provider asserted that this change was to ensure that consumers were fully informed of the cost of the Service.

The Level 2 provider noted the Executive's assertion that the "DO IT NOW" button was the means of access to the Service, where consumers did not go through the double opt-in process. It stated that it had acknowledged that there had been an issue with the double opt-in process leading to some consumers being entered into the service in error. The Level 2 provider highlighted that some of the screenshots used by the Executive were from an old version of the Service website which was no longer active. The Level 2 provider submitted that it had put a considerable amount of time and effort into resolving the issues with the double opt-in. It believed that significant improvements had been made to the website. It provided screenshots of the opt-in process and stated that the box containing the information outlined on **Appendix A** was no longer present. Once a consumer had entered their details and selected the "DO IT NOW" button, a consumer would now be presented with a webpage containing a pop-up (**Appendix E**). At a similar time, a consumer would receive a SMS message containing the keyword and the pricing information. It also supplied screenshots of the revised Service webpages. The Level 2 provider drew attention to the improvements it had made to its "check/balance" claiming process which was evidenced with screenshots of the Service webpages.

A full summary of the Level 2 provider's oral submissions provided in informal representations is set out above in relation to the alleged breach of rule 2.3.3.

3. The Tribunal considered the evidence including the Level 2 provider's written and oral submissions. The Tribunal noted that where a consumer was subscribed to the Service without completing the double opt-in process, the Service website homepage contained the means of access to the Service. The Tribunal found that the pricing information on the Service homepage, whilst proximate to the means of access to the Service, was not sufficiently prominent in the context of the whole page and the repeated use of the word "free" and "free(b)". The Tribunal commented that in the context of these references to "free" and "free(b)", the pricing information needed to be more prominent so as to clearly draw to the consumer's

attention to the fact that the Service was not free. Although the Level 2 provider said that it had sought compliance advice in 2009, the Tribunal noted the questions raised by the Level 2 provider were only in relation to the subscription initiation and reminder messages, and not in relation to the homepage and it had therefore not received compliance advice on this issue from the Executive.

Taking into account the homepage as a whole, The Tribunal upheld a breach of rule 2.2.5 of the Code on the basis that the pricing information was not sufficiently prominent. In addition, and although not part of the alleged breach, the Tribunal commented that it hoped that the Level 2 provider would adapt pricing information wording to ensure that it is clear that the Service is subscription based.

Decision: UPHELD

ALLEGED BREACH 3
Rule 2.2.1
"Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.

a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious."

1. The Executive submitted that the Level 2 provider had breached rule 2.2.1 for the following reasons:

   i) Promotions stated that consumers would receive two vouchers per month when this was often not the case.
   ii) Consumers were told that they would be sent "vouchers straight to your mobile" when this was not always the case.
   iii) The repetitive use of the word "free" resulted in consumers not being clearly informed of the cost of the Service.
   iv) Promotional material did not contain the name of the Level 2 provider.

   Reason one - Promotions stated that consumers would receive two vouchers per month when this was often not the case.

   The Executive noted that the Service was promoted on the basis that consumers would receive two vouchers per month at £1 per message. The Executive analysed the complainant's message logs and noted that consumers were charged sporadically as often they did not receive a charge for a number of months. When questioned on this, the Level 2 provider stated:

   "The cost of membership is no more than £2 per month; members are not always charged the full £2 each month – this is very much dependant on the offers that are available."

   The Executive asserted that the number of vouchers consumers would receive was a key term and accordingly it would have influenced a consumer's decision to subscribe.

   Reason two – Consumers were told that they would be sent "vouchers straight to your mobile" when this was not always the case.

The Service landing page stated, “Simply sign up below and we’ll send you 2 free(b) vouchers”. The Executive submitted that a consumer was likely to believe that they would receive vouchers directly to their handset. However, in reality the Service operated by sending a SMS message to a consumer’s MSISDN of voucher availability. In order to obtain a voucher, a consumer would have to register for the voucher on the Service webpage within the time frame specified. Vouchers were then sent to consumers at a later date, which could be for an extended period of time.

The Executive submitted that the ease of obtaining vouchers was information that was likely to influence the decision to purchase. However, the information was not fully and clearly communicated to consumers before they incurred charges.

Reason three - The repetitive use of the word “free” was likely to result in consumers not being clearly informed of the cost of the Service.

In addition to the breach of rule 2.2.5, the Executive noted that the Service name is “free(b)”. The Executive commented that there is no absolute bar on the use of the word “free” to promote a premium rate service. However, the Executive submitted that the word “free” is likely to indicate to consumers that there is no cost involved. Therefore, where the word “free” is used in the promotion of a premium rate service, the Level 2 provider must ensure that consumers are fully and clearly informed of the cost of the Service. This includes ensuring that consumers are not confused into the belief that the Service is “free”.

The Executive noted that the Service landing page:

i. Contains multiple references to the Service name “Free(b)”’;
ii. States, “GET FREE STUFF TO YOUR MOBILE”. When in reality consumers had to incur charges to obtain vouchers.

The Executive asserted that the cumulative effect of the repetitive use of the word “free” (over ten times on the Service landing page alone), was likely to encourage consumers to sign up in the mistaken belief that the Service was free. The Executive added that the Level 2 provider had chosen to use a brand name which contained the word “free” and therefore it should have ensured that enough was done to rebut the assumption that the Service was free.

In conclusion, the Executive asserted that whether a service is free or not is clearly information which is likely to influence the decision to purchase; as a result of the use of the word “free” consumers were/are not fully and clearly informed that the Service is not free.

Reason four - Promotional material did not contain the name of the Level 2 provider.

The Executive noted that the Level 2 provider's name was not displayed on any of the Service webpages which promote the Service. It was contained in the Service Terms and Conditions. However, a consumer had to click the “down” arrow over 45 times and go through approximately five/six A4 pages of terms (when the text had been converted to Arial size 11) to view the Level 2 provider’s name.

The Executive submitted that as a result, and in breach of rule 2.2.1(a), promotional material for the Service does not contain the name of the Level 2 provider of the relevant premium rate service and is not otherwise obvious.

Accordingly, and for the four reasons advanced, the Executive asserted that the Level 2 provider had breached rule 2.2.1 and/or 2.2.1(a) of the Code.

2. The Level 2 provider denied that a breach of the Code had occurred and addressed each of the Executive's reasons in turn.

Reason One - Promotions stated that consumers would receive two vouchers per month when this was often not the case

The Level 2 provider stated that it had previously notified the Executive that the cost of Service was no more than £2 per month but consumers are not always charged the full £2 every month as the cost is dependent on the offers that are available. Where no offers are available consumers do not incur any costs.

Reason two – Consumers were told that they would be sent "vouchers straight to your mobile" when this is not always the case.

The Level 2 provider explained that secure mobile-based vouchers are in their infancy and limited in their availability. It stated that where it is able to send secure mobile-based vouchers, it will do so and where no mobile vouchers are available, vouchers are printed, processed and sent to consumers via post (at an additional cost to the Level 2 provider).

The Level 2 provider asserted that where the voucher offers are sent to consumers by SMS message, consumers are given clear instructions as to the offer available and how to claim. In addition, it asserted that the time limit to claim was fair and reasonable.

The Service had worked in exactly the same way since it started in 2009. It reiterated that during that time compliance advice had been sought and the concerns were not raised by the Executive.

Reason three - The repetitive use of the word "free" is likely to result in consumers not being clearly informed of the cost of the Service.

The Level 2 provider acknowledged that the website referred to the word "free" a number of times. However, it stated that in all instances the word "free" was in relation to the brand name "free(b)". At no point on the website does the word "free" appear independently of the service brand name.

The Level 2 provider again highlighted that previous discussions with the Executive dating back to 2009 did not raise this issue as a concern.

In light of the concerns now raised by the Executive, the Level 2 provider stated that it had made the following changes:

- amended the main heading on the website to read "GET FREE(B) STUFF TO YOUR MOBILE";
- added text to the "About" webpage that reads "Join free(b) for £2 per month until you text STOP to 84222. Each free(b) is worth way more";
- updated the "Contact" page with an additional email address to contact the Customer Service team.

Furthermore, it added that consumers are sent free subscription reminder messages every month which clearly state their membership, the cost per month and how to terminate the Service.

During informal representations, the Level 2 provider added that "Free(b)" was "just" the brand name and that clearly the Service was not free. However, where a consumer subscribes, vouchers for free goods and services are provided (and not discount vouchers). It added that the use of the brand name was "clever marketing", which had been subsequently used by other companies. However, the Level 2 provider accepted that others who use the phrase do not use it in conjunction with a paid service.

Reason four - Promotional material did not contain the name of the Level 2 provider.

The Level 2 provider queried the definition of "promotional material" and what is required to comply with the Code, as the Level 2 provider's name is included on the main webpages. It confirmed that the Service was only promoted via the website or by other consumers' recommendations.

The Level 2 provider acknowledged that the terms and conditions on Service webpage did not clearly state its name as the provider of the Service. However, it stated that since notification of the concern, it had made the appropriate changes.

As set out in relation to the breach of rule 2.3.3 of the Code, the Level 2 provider also provided clarification of its written submissions in informal representations.

3. The Tribunal considered all the evidence before it, including the submissions of both the Executive and the Level 2 provider. The Tribunal noted that subscribers received a maximum of two voucher offers per month but that this was not consistently clear in promotional material. Further, the Tribunal found that although promotional material on the Service website stated that subscribers receive, "vouchers straight to your mobile", in fact consumers only receive *offers* of vouchers directly to their mobile phone. In order to obtain vouchers, subscribers are required to login to the Service website, within a time period of approximately three days, and request the vouchers. Vouchers are then dispatched by post or, where available, electronically. Consequently, the Tribunal found that consumers were not always fully and clearly informed of the number of voucher offers per month and that vouchers are not sent automatically to subscribers' phones.

The Tribunal noted the repeated use of the brand name "free(b)" and the word "free" in promotional material for the Service. The Tribunal commented that it was likely that most consumers would think that "free(b)", notwithstanding the use of text speak instead of the full word, "freebie", was a noun and not a brand name. The Tribunal noted that the use of the word "free" in any context in relation to a premium rate service was likely to result in, at best, ambiguity regarding the cost of a service, and at worst, was likely to confuse consumers into the belief that the service was "free". Consequently, the Tribunal found that as a result of the repeated and often unqualified use of "free(b)" and the use of the word "free", consumers were likely to be misled into believing the Service was free.

The Tribunal determined that the number of voucher offers per month, the ease of obtaining the vouchers and whether the Service was free were likely to influence the decision to purchase and therefore, for the reasons advanced by the Executive, upheld a breach of rule 2.2.1 of the Code.

In addition, the Tribunal noted that the Level 2 provider's name was only provided deep within the Service terms and conditions (after scrolling down with at least 45

clicks) and was not displayed on any of the Service webpages which promoted the Service. Accordingly, the Tribunal upheld a breach of rule 2.2.1 of the Code (specifically rule 2.2.1(a)) for this reason.

Decision: UPHELD

ALLEGED BREACH 4
Paragraph 4.2.5
"A party must not fail to disclose to PhonepayPlus when requested any information that is reasonably likely to have a regulatory benefit in an investigation."

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.5 as details and/or evidence relating to the "technical malfunction" of the double opt-in (which was not accepted by the Executive) was not supplied when requested.

   During correspondence, the Level 2 provider submitted that the double opt-in process had "malfunctioned" in some cases, which had resulted in consumers being added to the Service without sending an MO confirmation. The Executive requested the following information in relation to the alleged malfunction:

   1. Evidence of the technical malfunction or verification of the malfunction from a third party;
   2. When the malfunction first occurred; and
   3. The number of consumers who were affected.

   The Executive stated that given the serious and important nature of the "malfunction", the Level 2 provider should have been able to provide correspondence contemporaneous to the "malfunction" to support the fact that the "malfunction" had occurred and documentation to show the action it had taken to assess the seriousness of the "malfunction", notify others in the value-chain and assess and/or address consumer harm.

   However, the Level 2 provider stated that it was unable to provide substantive answers to the Executive's questions above and also was unable to provide any of the supporting evidence requested (or otherwise). The Level 2 provider stated that the problem was "an intermittent one" and "the majority of issues seem to have been mid and end of 2012" but that it was "unable to confirm total numbers of affected people".

   The Executive asserted that it was reasonable to expect that the Level 2 provider would have been able to provide some of the following details/evidence:

   - A full explanation of how the malfunction occurred.
   - Evidence of internal investigations.
   - Copies of correspondence with external technical experts.

   The above information would have given the Executive insight into the scope of the problem and the overall level of consumer harm.

   Accordingly, the Executive submitted that a breach of paragraph 4.2.5 of the Code occurred as the information was not provided that would have had a regulatory benefit to the investigation.

   In addition, the Executive stated that it had generally found the Level 2 provider to be, uncooperative and obstructive. The Level 2 provider consistently responded

with short answers without any supporting evidence and had on the whole, provided little assistance to the investigation.

2. The Level 2 provider did not accept that it had failed to disclose information to the Executive and strongly refuted the allegation that it had been uncooperative and/or obstructive.

The Level 2 provider explained that it previously had limited in-house technical expertise and for this reason it relied heavily on third parties for technical support. Once it discovered there was a potential issue with the double opt-in process, it ascertained from the third parties that there had been a fault in the system. It was advised that it was an intermittent fault and stated that it was for this reason that more detail of the occasions that it had occurred was not possible.

The Level 2 provider stated that, in hindsight, it may have been naive in accepting the explanation from the third parties. However since then, it stated that it had made significant progress in improving the systems. It had embarked on a nine month process of recruiting an in-house technical team, working towards fixing the double opt-in malfunction and ensuring that it was future proofed. It stated that it now has complete control of the technical functions.

The Level 2 provider adamantly denied that it had been uncooperative and obstructive during the investigation for the following reasons:

- Throughout the investigation, it stated that it had provided as much detail as it could in a timely manner.
- In response to the Executive's request for information, it provided message logs for the 46 complainants and additional useful information, which went above and beyond what it was asked to supply.
- Throughout the early stages of the investigation, it stated that it was in regular contact with the Executive yet it received no feedback or information regarding the current status of the investigation from the Executive. It responded to the Executive on 10 May 2013 and seven months passed before a further information request was received from the Executive.
- It acknowledged that it had been unable to provide full supporting evidence to the Executive but there were reasons for this.

The Level 2 provider submitted that it takes customer service very seriously and takes pride in the way all queries are handled and responded to, whether the queries are from consumers, the Mobile Network operators, the Level 1 provider or PhonepayPlus. It stated that it offers a 100%, no questions asked refund to any consumer who contacts it in relation to the Service. It added that it had evidence of positive feedback from consumers. To summarise, it stated that to be accused of being "uncooperative and obstructive", was something that it takes very seriously and it welcomed an opportunity to understand how it had been perceived in such a way.

During informal representations, the Level 2 provider stated that it had received no communication from the Investigations team between April and December 2013. It added that the first it knew of many of the allegations was when it received the breach letter. It strongly denied a breach of paragraph 4.2.5 of the Code and asserted that it had consistently provided information in excess of that which was requested.

2. The Tribunal considered the evidence before it. The Tribunal noted that the breach of paragraph 4.2.5 of the Code had been properly raised by the Executive. However, taking into account the Level 2 provider's representations, and on the basis that a breach of the second limb of rule 2.3.3 of the Code had already been upheld (which related to failure to provide robust evidence of consent), the Tribunal determined that it was not appropriate in all the circumstances to uphold a breach of paragraph 4.2.5 of the Code.

Decision: NOT 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 criteria:

- The nature of the breach and/or scale of actual and potential consumer harm is likely to severely damage consumer confidence in premium rate services.
- The breach demonstrates fundamental non-compliance with the Code in respect of a high revenue generating service.

Rule 2.2.5 – Pricing prominence and proximity

The initial assessment of rule 2.2.5 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- Given the fundamental nature of the obligation to ensure pricing information is sufficiently prominent it will generally justify the imposition of a high seriousness rating. However in this instance, although the pricing information was not sufficiently prominent it was proximate to the means of access to the Service.

Rule 2.2.1 – Information likely to influence the decision to purchase

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

- The breach had a clear detrimental impact, directly or indirectly, on consumers and the breaches had a clear and damaging impact and/or potential impact on consumers.
- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.

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

Final overall assessment

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

- Numerous prior adjudications and communications have been published concerning both consent to charge and pricing prominence.
- The Level 2 provider was first notified of concerns regarding consent to charge in April 2013. However, it did not cleanse its database until December 2013 and the technical problems were not fully rectified until January 2014.

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

- The Level 2 provider stated that it had moved its technical resource in-house. It had also conducted a complete overhaul of its backend systems, which had resulted in all technical issues being addressed.

In addition, the Tribunal noted the following factors (which were not considered mitigating factors):

- The Level 2 provider stated that it had a generous refund policy, which included providing refunds to some consumers who had benefitted from the Service by claiming vouchers. It reported that it had attempted to refund all complainants (and had successfully refunded 39 of them). It had also provided a £5 voucher, "by way of apology for the system error". However, the Tribunal considered that the Level 2 provider had not taken steps to proactively refund all affected consumers (for example by making enquiries into the full scale of the "system error".
- The Level 2 provider had made a number of changes to the Service website and Service messages to improve compliance with the Code. However, the Tribunal noted that it did not consider the proposed changes to be wholly compliant.
- The Level 2 provider reported that it had taken an unexpectedly long period of time to recruit suitable technical support.
- The Executive provided compliance advice in relation to the Service in 2009 and 2011. However, the Executive was not asked to – and did not - comment on the issues raised in the breach of rule 2.2.5 and 2.2.1 of the Code (albeit the 12th edition of the Code was not in force prior to September 2011).

The Level 2 provider highlighted that it sent all consumers subscription reminder messages and, therefore, the cost of the Service and the method of termination were clearly communicated. The Tribunal commented that subscription reminder messages are an important requirement of the Code but that they do not cure non-compliance with pre-subscription Code obligations.

Further, the Tribunal noted that, although the Executive raised initial concerns in April 2013, there was an extended period of non-communication on the Executive's part between April and December 2013 (save for periodic requests for information as new complaints were received). The Tribunal commented that it understood that internal enquiries had been undertaken and procedures had been put in place to ensure that providers are updated on the progress of investigations at regular intervals. Further, the Tribunal added that it considered that the Level 2 provider had co-operated to the level expected, albeit the Level 2 provider had failed to provide evidence in support of its assertions regarding consent to charge.

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 and mitigating 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:

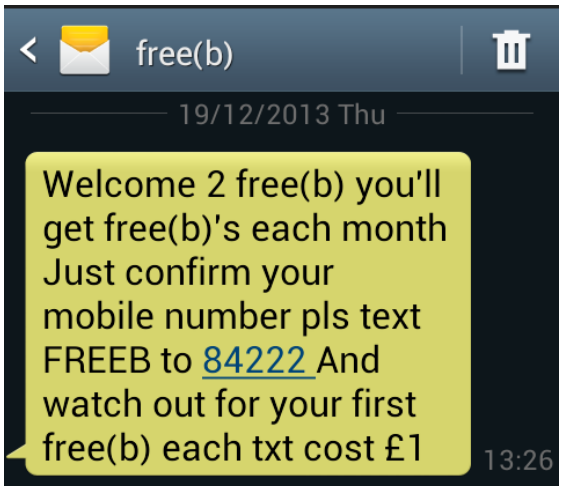
- a formal reprimand;
- a fine of £100,000;
- a requirement that the Level 2 provider seeks compliance advice for the Service within two weeks of the date of publication of this decision and thereafter implement the advice to the satisfaction of the Executive within two weeks; and,
- a requirement that 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 light of the overall seriousness rating of very serious, the Tribunal considered the imposition of a higher fine, but determined that in all the circumstances of the case, a fine at the mid-end of the guideline range was appropriate.

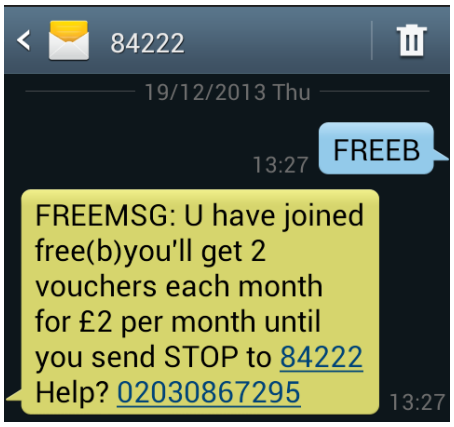
Appendices

Appendix A - A screenshot of the Service landing page:

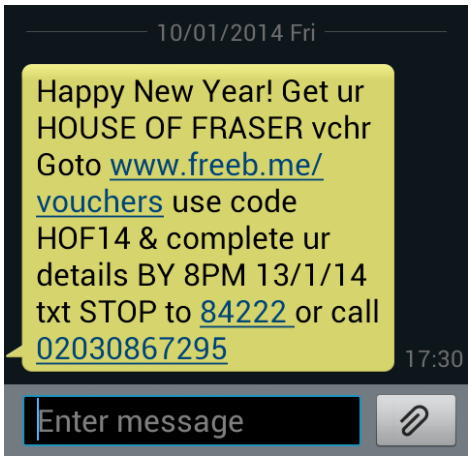
Appendix B - A mobile screenshot of a subscription opt-in SMS message from the Service containing the keyword:



Appendix C - A mobile screenshot of the subscription initiation SMS message to the Service:



Appendix D - A mobile screenshot of a voucher offer SMS message:



Appendix E – A screenshot of the revised Service webpage provided by the Level 2 provider: