Code Compliance Panel

Tribunal Decision

Tribunal Sitting Number 147 / Case 1

Case reference: **17679**
Level 2 provider: **iSMS Solutions OU (Estonia)**
Type of service: **Anonymous SMS message**
Level 1 provider: **OpenMarket Limited (UK) and Fortumo OU (Estonia)**
Network operator: **All Mobile Network operators**

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

BACKGROUND

The Level 2 provider, iSMS Solutions OU, trading as "SMS Gang" operated an anonymous SMS message service, (the "**Service**") on the premium rate shortcodes 82772 and 88080. Consumers were charged £3.00 to send 18 anonymous SMS messages or £5.00 to send 30 anonymous SMS messages. The Level 1 provider OpenMarket Limited was contracted with the Mobile Network operators for the provision of the premium rate shortcodes. OpenMarket Limited was contracted with another Level 1 provider, Fortumo OU, which was directly contracted with the Level 2 provider. The exact period the Service operated is unknown. However, Fortumo OU stated that the Level 2 provider had originally operated a different service from around November 2010 and appeared to have switched to an anonymous SMS message service on an unknown date. The Service was suspended by Fortumo OU, following correspondence with PhonepayPlus.

PhonepayPlus received no complaints from consumers. Concerns regarding the operation of the Service were uncovered as a result of monitoring conducted by the PhonepayPlus Research and Market Intelligence Team ("**RMIT**").

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

- Rule 2.5.5 – Avoidance of harm (fear, anxiety, distress or offence)
- Paragraph 3.4.1 – Registration of an organisation
- Paragraph 4.2.5 – Failure to disclose information

The Level 2 provider did not provide a response to the breach letter. Although, on 1 April 2013, the Level 2 provider responded once to correspondence from PhonepayPlus. On 3 April 2014, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
Rule 2.5.5
"Premium rate services must not induce and must not be likely to induce an unreasonable sense of fear, anxiety, distress or offence."

1. The Executive submitted that the Level 2 provider had breached rule 2.5.5 of the Code as the Service allowed consumers to send anonymous SMS messages which had the potential and/or were likely to induce an unreasonable sense of fear, anxiety, distress and/or offence in others.

   On 27 November 2012, the RMIT monitored the Service by accessing the Service website (**Appendix A**). It was invited to select a method of payment in order to send anonymous SMS messages. The RMIT selected the "Fortumo mobile Payment" option and a pop-up appeared on screen that invited the RMIT to select either "18 SMS for £3.00" or "30 SMS for £5.00". The RMIT selected "18 SMS for £3.00" and a further pop-up appeared that requested that the RMIT enter its mobile number (**Appendix B**).

   Following this, the RMIT was presented with a pop-up directing it to, "Please send a SMS containing TXT to number 88080" (**Appendix C**). Once this had been completed the RMIT was presented with a screen that confirmed that the payment had been successful and provided a PIN code. The RMIT used the "Spoof SMS Service" to send anonymous SMS messages to a monitoring phone. The RMIT was required to enter the mobile number where the SMS was to be sent to, a description of the "sender", the PIN code and the content of the SMS message to be sent (**Appendix D**).

   The Executive noted that the RMIT was able to enter any message, mobile number or "sender". For example, the Service allowed the RMIT to describe the "sender" as "Mum" in an SMS message that stated, "Your dad is dying, you need to book a flight as quick as possible!" (**Appendix E**). The Executive asserted that this was likely to give any potential recipient the impression that it was from his or her "Mum". In addition, the RMIT was able to send an SMS message that stated, "I'm gonna f**king kill you!" The Executive asserted that the content of both of these SMS messages was likely to induce a sense of fear, anxiety and/or offence.

   In addition to the messages detailed above, the RMIT sent a further eight anonymous SMS messages using the Service including the SMS messages outlined below:

   - From "999"
     "POLICE ALERT: Please evacuate your building as there is a bomb alert on your road. Please call 0913xxxxxxx immediately for instructions".
   - From "Halifax"
     "Your bank details have been changed for security. Please text your name, sort code, and acc. number to 0706xxxxxxx to get your new details".
   - From "Asda"
     "You have won a years worth of shopping. Please call 0913xxxxxxxx or send CLAIM to 89235".
   - From "Vodafone"
     "Please install an urgent security update for your handset by follwing [sic] this link http://vodafone.vodasecurity.co.uk/a17289agh".
   - From "John Frump"
     "I made your wife pregnant".

   The Executive noted that there was no evidence of a filter in place to prevent offensive content being included within the anonymous SMS messages. However, it also noted that the RMIT had sent some SMS messages that included the name of a large money transfer provider but the messages had not been delivered. Despite this, the Executive submitted that the SMS messages that had been delivered demonstrated that the Level 2 provider did

not have controls in place to mitigate or prevent the likelihood of SMS messages that caused fear, anxiety, distress and/or offence being sent. The Executive submitted that this was especially true as the SMS messages sent by the RMIT demonstrated that the Service had the potential to be used to facilitate potentially criminal activity.

Further, the Executive submitted that the receipt of anonymous SMS messages and/or messages which disguised the true identity of the sender (especially when they contained content similar to that sent by the RMIT) had the potential and/or were likely to induce an unreasonable sense of fear, anxiety, distress and/or offence.

In summary, the Executive asserted that the Service had the potential and/or was likely to cause harm or offence to members of the public. Accordingly the Executive submitted that the Level 2 provider had acted in breach of rule 2.5.5 of the Code.

2. The Level 2 provider did not provide a response to the breach letter. Before the breach letter was sent, the Level 2 provider gave one response to a direction for information on 1 April 2013. It stated that it had started, "an international messaging project," but it had not been fully aware of the UK premium rate service industry requirements. It stated that it had worked in the premium rate field in other countries for several years but had not been subject to any similar regulations. It stated that it had previously dealt with the Level 1 provider Fortumo OU and had not encountered any problems. It added that it had been notified of Fortumo OU's concerns and asserted that it had immediately suspended the Service.

3. The Tribunal considered all the evidence before it. The Tribunal commented that, as a result of the "anonymous" nature of the Service, it was unsurprised that there had been no complaints to PhonepayPlus. The Tribunal noted that the RMIT had been able to send "spoof" SMS messages, some of which appeared to have been sent from an individual or company known to the recipient. The Tribunal commented that the "spoof" SMS messages appearing to be from known individuals, such as "Mum", were of particular concern as the recipients were more likely to take the content of the SMS messages seriously and therefore had the potential to cause greater harm.

The Tribunal considered the content of all the messages sent by the RMIT using the Service. It found that the content of the SMS messages was likely to cause a sense of fear, anxiety, distress and/or offence. The Tribunal noted that the RMIT had attempted to send an SMS message which contained a reference to a money transfer service but it was not delivered. The Tribunal commented that whilst this SMS message had failed, a number of SMS messages which contained potentially or actually harmful content had been delivered. The Tribunal found that based on the monitoring of the Service and in the absence of an explanation from the Level 2 provider, the Service did not appear to have sufficient filters and checks in place to prevent SMS messages being sent that could cause harm or offence to the general public.

The Tribunal concluded that there was nothing to prevent the Service being misused in the manner demonstrated by the Executive. On that basis, the Tribunal determined that it was likely that the Service would be misused and likely that the Service would induce an unreasonable sense of fear, anxiety, distress or offence and accordingly, and for the reasons detailed by the Executive, the Tribunal upheld a breach of rule 2.5.5 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
Paragraph 3.4.1
"Before providing any premium rate service all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus..."

1. The Executive noted that the Level 2 provider was not registered with PhonepayPlus at the time the Service operated and as such it had acted in breach of paragraph 3.4.1 of the Code.

   The Executive noted that since 1 September 2011 all providers must register their organisation with PhonepayPlus prior to providing any premium rate service and the registration must be renewed annually. The Level 2 provider began operating a premium rate service on the Service shortcodes from around November 2010, yet it only registered as an organisation with PhonepayPlus on 10 January 2013 (after the Level 1 provider had suspended the Service).

   The Executive noted that the Level 2 provider operated the Service from at least 27 November 2012 (the date of the monitoring of the Service) until 10 December 2012 (when the Service was voluntarily suspended by the Level 1 provider).

   Therefore the Executive asserted that the Level 2 provider was not registered under the Code for the whole period the Service had operated and had acted in breach of paragraph 3.4.1 of the Code.

2. The Level 2 provider did not provide a response to the breach letter. The Level 2 provider provided a single short response in correspondence prior to the breach letter being sent, which is detailed above under paragraph two of the alleged breach of the rule 2.5.5 of the Code.

3. The Tribunal considered all the evidence before it and noted that the Level 2 provider was not registered as an organisation with PhonepayPlus until 10 January 2013 (after the Service had been suspended by the Level 1 provider). The Tribunal also noted that whilst the Level 2 provider had not confirmed the Service's period of operation, the monitoring identified that the Service had been operating from at least 27 November 2012. Further, there was evidence from the Level 1 providers that the Level 2 provider had operated a premium rate service prior to 12th edition of the Code coming into force. Consequently, the Tribunal found that the Level 2 provider had operated at least one premium rate service prior to fulfilling its registration requirements with PhonepayPlus. Specifically, the Tribunal found that the Level 2 provider had failed to register as an organisation as required by paragraph 3.4.1 of the Code. Accordingly, the Tribunal upheld a breach of paragraph 3.4.1 of the Code.

Decision: UPHELD

ALLEGED BREACH 3
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 it had not disclosed details relating to the Service, which were likely to have a regulatory benefit to the investigation.

During the investigation, the Executive directed the Level 2 provider to provide information about the Service on multiple occasions. The information requested included revenue information, the Service terms and conditions, how the Service was promoted, dates of operation, contracts, price points, shortcodes, whether prior permission had been sought, confirmation of the value chain, a list of directors and details of any steps taken to limit consumers sending harmful content within the SMS messages.

The Level 2 provider responded to one of the directions on 1 April 2013 stating that it had started "an international messaging project" but it had not been fully aware of the UK premium rate service industry requirements. It stated that it had worked in the messaging field in other countries for several years but that it had not been subject to any similar regulations. It stated that it had previously dealt with the Level 1 provider Fortumo OU and had not encountered any problems. It asserted that when it was notified of Fortumo OU's concerns it immediately suspended the Service.

Following the Level 2 provider's response, the Executive it contacted the Level 2 provider to reiterate that it still required a response to the original direction for information. The Executive did not receive a response from the Level 2 provider. The Executive attempted to contact the Level 2 provider a further four times but it did not receive a response nor a non-delivery email receipt.

The Executive submitted that the Level 2 provider had been made fully aware of the investigation, it had been directed to provide information and notified of the requirement to provide a response.

The Executive stated that the direction for information included questions relating to the operation, content and promotion of the Service and the corporate structure of the Level 2 provider. It asserted this information would have had a clear regulatory benefit to the investigation. Further, without the information the extent of the investigation had been limited.

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

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

3. The Tribunal considered all the evidence before it, including the brief response from the Level 2 provider prior to the breach letter being sent. The Tribunal took the view that the Level 2 provider had been given a number of opportunities to provide the information requested by the Executive and the short response provided by the Level 2 provider was inadequate. Further, the Tribunal noted that the information requested would clearly have been of benefit to the investigation. The Tribunal commented that it was disappointed that the Level 2 provider had not provided the requested information as this is a fundamental requirement of the regulatory process. Accordingly, the Tribunal concluded that the Level 2 provider had failed to disclose to PhonepayPlus when requested information that is reasonably likely to have a regulatory benefit in an investigation and therefore upheld a breach of paragraph 4.2.5 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.5.5 – Avoidance of harm (fear, anxiety, distress or offence)

The initial assessment of rule 2.5.5 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- Significant cases have the potential for substantial harm to consumers and the potential to cause a loss in consumer confidence in premium rate services.

Paragraph 3.4.1 – Registration of an organisation

The initial assessment of paragraph 3.4.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The non-registration of the organisation demonstrates a degree of negligence, recklessness or intentional non-compliance with the Code.

Paragraph 4.2.5 – Failure to disclose information

The initial assessment of paragraph 4.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The failure to disclose information demonstrates a degree of intentional non-compliance with the Code.

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

Final overall assessment

The Tribunal did not find any aggravating or mitigating factors.

The Level 2 provider's revenue in relation to the Service was towards the lower end of Band 5 (£1 - £5,000).

The Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions imposed

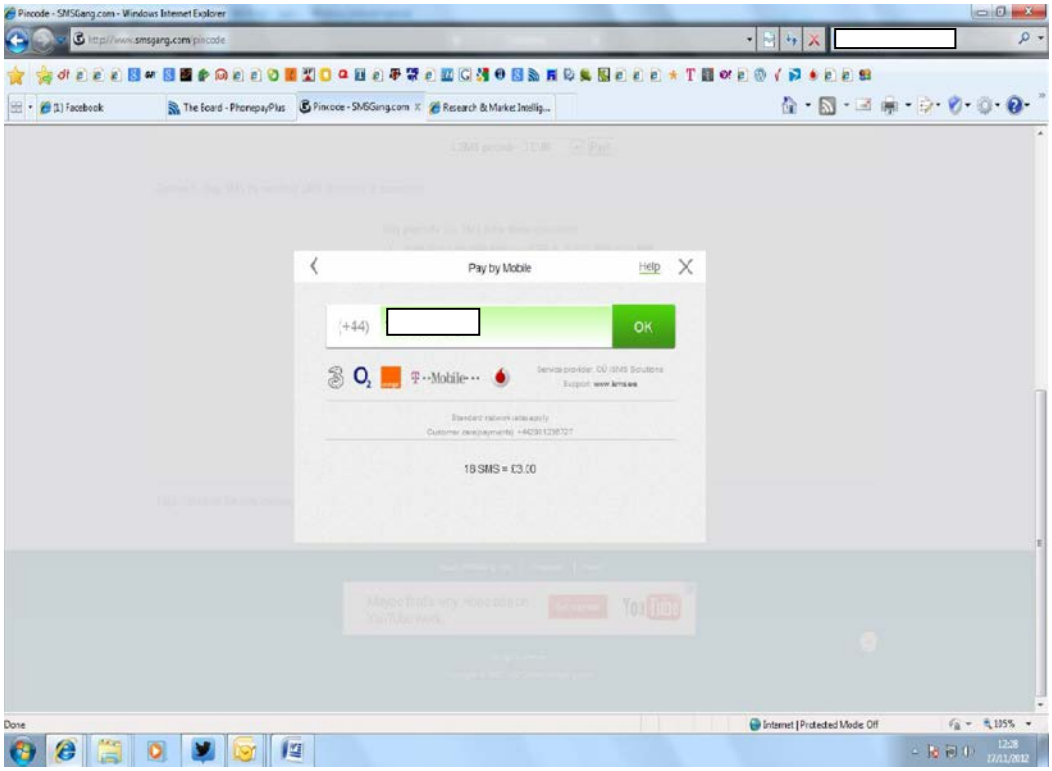
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand; and
- a fine of £5,000.

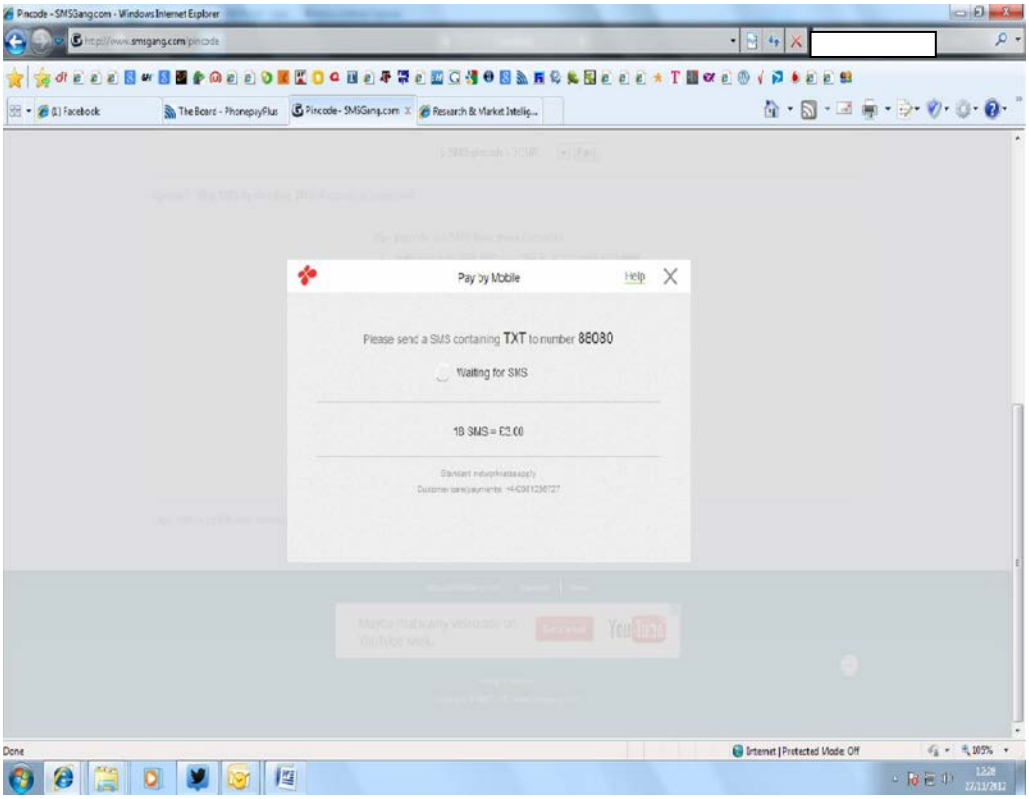
Appendices

Appendix A – A screenshot of the Service webpage:

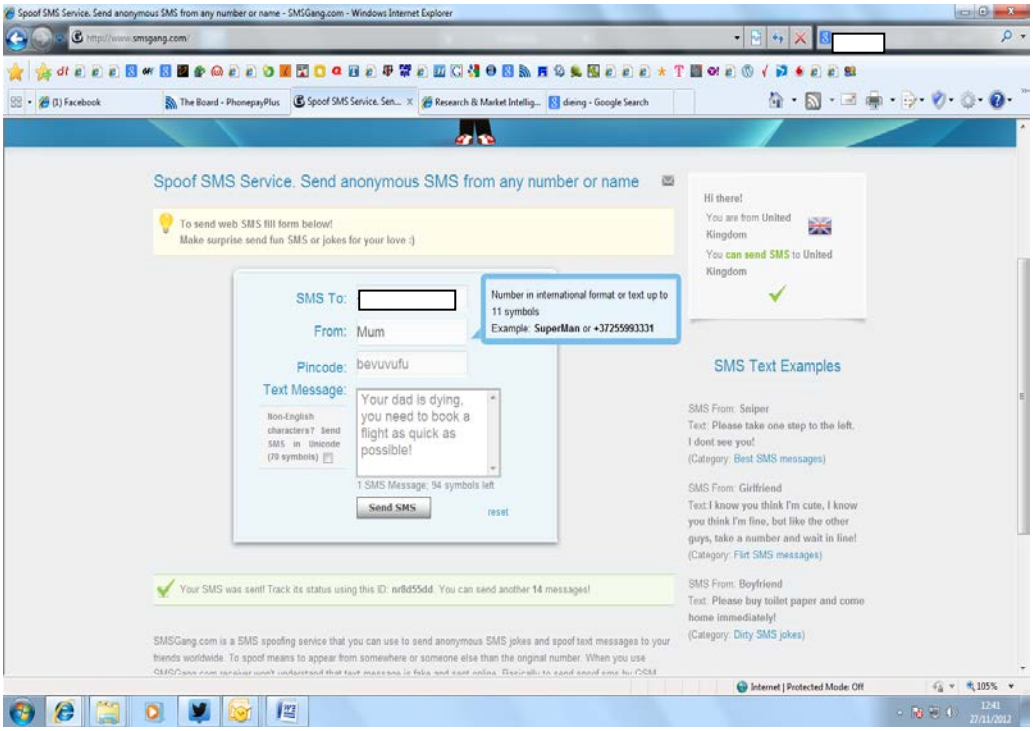
Appendix B - A screenshot of the MSISDN entry webpage:



Appendix C – A screenshot of a Service webpage including the keyword to opt-in to the Service:



Appendix D – A screenshot of the Service webpage to send an anonymous SMS message:



Appendix E – A screenshot of an SMS message sent and received by the RMIT using the Service: