Code Compliance Panel

Tribunal Decision

PhonepayPlus

Tribunal meeting number 165 / Case 1

Case reference: 49454
Level 2 provider: Plus Telecom Ltd (UK)
Type of service: "08 Buster" – call routing service
Level 1 provider: Oxygen8 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 9 July 2014 and 20 March 2015, PhonepayPlus received 184 complaints from consumers in relation to a call routing subscription service (the "**Service**") operated by the Level 2 provider, Plus Telecom Ltd (the "**Level 2 provider**"). The Service enables consumers to call 08 numbers by calling an 0300 number first and accordingly the call costs would be included within consumers' inclusive call minutes. The Service operated under the brand name "08 Buster" on the premium rate shortcodes 80371 and 80182. Consumers were given free access to the Service for the first seven days and were then charged £1.50 per week. The Service commenced operation on 1 June 2014 and it continues to operate, although promotion of the Service was suspended in December 2014.

The Service was promoted by sending promotional SMS messages to consumers. Consumers subscribed to the Service by sending a mobile originating SMS message to one of the premium rate shortcodes. In response, consumers received a SMS message containing the 0300 number that a consumer could call to access the 08 number they wished to contact.

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 1 April 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 - Misleading
- Rule 2.4.2 - Consent to market

The Level 2 provider responded on 17 April 2015. On 30 April 2015, after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;
- A sample of the complainants' message logs provided by the Level 2 provider;
- A sample of the complainants' message logs provided by the Level 1 provider;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses including supporting documentation);
- Third party website screenshots;

- PhonepayPlus Guidance on "Promotions and promotional material" and "Privacy and Consent to Charge";
- The breach letter of 1 April 2015 and the Level 2 provider's response of 17 April 2015 (including supporting documentation);
- Further complainant message logs provided by the Level 2 provider; and
- Correspondence between the Executive and the Level 2 provider's legal representatives dated 29 April 2015.

Complaints

Complainants stated that they had received unsolicited marketing messages and/or they believed the messages they had received had originated from their Network operator and they would not be charged for the Service.

Extracts from a sample of complainants' accounts included:

> "Consumer says she received a text message that she thought it was from her newtwork [sic] provider Virgin. The text message informed consumer that she could have 0845, 0844 if she replied YES to the service. Consumer says she did thinking that it was indeed her network provided, consumer says she was not aware of subscribing to any PRS or paying £4.50 per week."

> "I received a text from 80371 saying: IMPORTANT: Currently calls to 0800, 0845 and 0870 numbers from your mobile cost up to 50p per minute. To be able to call them using your bundled minutes reply YES. I assumed it was from my mobile provider (talkmobile) and did so. The response was: Do not forget that you can now call 08 numbers using your bundled minutes, saving you up to 50p per minute. Call 03009001900 first. I get this message every week and have just discovered I am being charged £1.25 a time for what talkmobile describes as Text Info Service and I have found from the internet are reversed charge calls. So far, this has cost me £7.50. I have texted STOP to 80371, but would like to get my £7.50 refunded. I did not authorise these reverse charge calls."

> "I received a text which made out it was from my service provider. No mention that it was another company. The message mentioned my bundle which also made me believe it was from 02. There was no mention of charges for the service. This has been billed on every bill since September. So far this month £2.50 last month £5.00. Obviously there are 3 other months bills in which I need to look back on to confirm the amounts charged. The message should have been clear that it was not from my service provider and it should have also informed me of charges. The wording as pasted above made it appear to be a free service from my service provider. I contacted O2 today to find out what the charges were and have been informed of this issue. I have then sent a message of stop to the number as advised by 02."

PRELIMINARY ISSUE

The Tribunal referred to the correspondence received from the Level 2 provider's legal representative on 29 April 2015 in which concerns had been raised about the manner in which the Executive had presented the Level 2 provider's responses to the breach letter in the Tribunal's case bundle. The Tribunal confirmed that it had read the Level 2 provider's response as set out in full in the annex to the case report, and the Tribunal members had also been re-sent the Level 2 provider's response on 29 April 2015. If the Level 2 provider remained concerned, the Tribunal invited the Level 2 provider to review its position carefully, consider taking further legal advice, and make an application to adjourn the hearing and/or reconvene the hearing before a different panel if

it so wished. The Level 2 provider, having had time to consider the matter, declined to make any application and stated that it was content for the hearing to continue.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
Rule 2.3.2
"Premium rate services must not mislead or be likely to mislead in any way."

1. The Executive asserted that the Level 2 provider had acted in breach of rule 2.3.2 of the Code as promotional messages for the Service misled consumers into believing that:

   a) the messages had originated from their Network operators; and
   b) the Service on offer was free.

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

   Paragraph 3.1

   "If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, an important term or condition likely to affect their decision to use the service."

   Paragraph 3.4

   "Promotions that do not make it clear and prominent that the service they are promoting will be charged using a subscription mechanic are likely to be found in breach of the PhonepayPlus Code of Practice. Where there is a subscription, then the frequency of billing should be made clear (see the Service-Specific Guidance Note on 'Subscription services' for further information)."

   Paragraph 3.5

   Promotions should not state that a service is free of charge, or imply such, when the service, in fact, carries a charge. An example would be promotional material which promoted a PRS, stating something along the lines of:

   "No credit card needed. Just a short call to hear your password."

   In addition to the complaints set out in the "Background" section, the Executive relied on all the complainants' accounts but particularly noted the following:

   "Supposedly they offer the chance to use the bundled minutes in your contract to make calls to 08 numbers. I received this message, believing it was from my mobile operator. The message simply asked if I was interested in using my bundle minutes to dial 08 numbers. There was no mention of any charge. Since then I have been charged £1.25 per week."

"Two texts received in quick succession. I have no knowledge of the company and did not agree to my number receiving text messages. They are offering access to certain telephone numbers. This is a service I have not requested. I am careful about who has my telephone number and I have never signed up for texts on this number. The second one appears to be representing itself as my service provider but I do not believe it is them. I did not agree to this text service. I have just received the text and I have not responded. This should mean that I am not charged. First one Get access to non geo numbers for £1.50 a week. Service by 08Buster. Second one Currently calls to 0800,0845 and 0870 numbers from your mobile cost up to 50p a minute. To get them inclusive of your bundled minutes reply YES."

"A service claiming that 08 numbers are not included in my minutes. No detail of cost was mentioned in the text and was made to look like this was from my service provider. Complete daylight robbery-this is criminal in my opinion and should be closed down immediately. They have taken me for over £15."

"IMPORTANT. Currently calls to 0800, 0845 and 0870 numbers from your mobile cost up to 50p per minute. Get them included in your bundle reply with the word YES. I received a text which made out it was from my service provider. No mention that it was another company. The message mentioned my bundle which also made me believe it was from 02. There was no mention of charges for the service. This has been billed on every bill since September. So far this month £2.50 last month £5.00. Obviously there are 3 other months bills in which I need to look back on to confirm the amounts charged. The message should have been clear that it was not from my service provider and it should have also informed me of charges. The wording as pasted above made it appear to be a free service from my service provider. I contacted O2 today to find out what the charges were and have been informed of this issue. I have then sent a message of stop to the number as advised by 02."

In response to a direction for information, the Level 2 provider stated that it promoted the Service by sending two SMS messages and it provided the content of the messages:

SMS message 1 ("SMS 1")

"Get access to non-geo numbers for only £1.50 per week! Text YES to 80182 to join 08Buster.com. Service by 08Buster. Text STOP to stop. Help: 03333100600"

SMS message 2 ("SMS 2 v1")

"Currently calls to 0800, 0845 and 0870 numbers from your mobile cost up to 50p a minute. To get them inclusive of your bundled minutes with 08Buster reply YES"

In addition, the Executive noted from the complainants' message logs that the Level 2 provider had also sent alternative versions of the second SMS message, which were as follows:

"IMPORTANT. Currently calls to 0800, 0845 and 0870 numbers from mobiles cost up to 50p per minute. To use your bundled minutes with 08Buster reply with YES" (**"SMS 2 v2")**

"Currently calls to 0800, 0845 and 0870 numbers from your mobile cost up to 50p per minute. To call them using your bundled minutes with 08Buster reply YES" ("**SMS 2 v3**")

"Currently calls to 0800, 0845 and 0870 numbers from your mobile cost up to 50p per minute. Get them inclusive of your bundled minutes reply with the word YES" ("**SMS 2 v4**")

PhonepayPlus

From reviewing the complainant message logs, the Executive noted that SMS 2 v4 had been sent to 22 of the complainants. This included 6 complainants who had received SMS 2 v4 after 19 November 2014.

The Executive asserted that all versions of SMS 2 misled consumers into believing that the messages had originated from their Network operators, and the Service on offer was free, as a result of the following:

- There was insufficient information within the SMS messages to identify that they originated from the Level 2 provider;
- Consumers did not understand that SMS 2 was related to SMS 1; and
- There was no reference to the fact that the Service was a premium rate service charged on a weekly subscription basis and it did not include any pricing information for the Service.

There was insufficient information within the SMS messages to identify that they originated from the Level 2 provider

The Executive particularly noted the complaints received, which reported that many consumers believed they were receiving SMS messages from their Network operator. In addition, SMS 2 v4 did not contain a reference to the name of the Service. The Executive asserted that SMS 2 v4 was likely to mislead a consumer, as it did not provide a consumer with sufficient information to explain that the SMS message had been sent from someone other than their Network operator. Given the nature of Service, the Executive submitted that it was especially important that promotional messages made this clear.

The Executive noted that the Service was named in SMS 2 v 1-3. However, it submitted that this was likely to be understood by a consumer to be the name of the Service, not the name of the Level 2 provider that was providing the Service. In the absence of any other information identifying the Level 2 provider as the sender of the SMS message, a consumer was likely to be under the impression that the message had been sent by their Network operator.

Consumers did not understand that SMS 2 was related to SMS 1

The Executive acknowledged that SMS 2 was not sent in isolation and that it was intended to be read in conjunction with SMS 1. However, it submitted that based on the contents of SMS 2 and the evidence of the complainants, it was often not apparent to consumers that the two promotional SMS messages were related and promoting the same premium rate service.

The Executive noted that SMS 1 referred to “non geo” numbers. This description of the numbers was not used in SMS 2. The Executive submitted that it would not be apparent to consumers reading SMS 2 that the “non geo” numbers referred to SMS 1 were, in fact the “0800, 0845 and 0870” referred to in SMS 2. While both SMS messages were promoting the same Service, the terminology used in each SMS message was different and accordingly the Executive submitted that this was likely to further mislead consumers into believing that the SMS messages were unconnected.

In addition, the Executive submitted that where SMS 1 and SMS 2 v1-3 were read together, consumers may connect the two SMS messages as both messages make reference to the name of the Service. However, the Executive noted that this was not the case with SMS 2 v4, as it did not contain any reference to the name of the Service. Accordingly, the Executive submitted that a consumer may not establish the connection between the two SMS messages.

The Executive noted there was no obvious prompt within the promotional SMS messages to link the two SMS messages. The Executive suggested that wording such as "Text 1 of 2" and "Text 2 of 2" could have been used to remedy this concern. However, no such wording was used. Accordingly, the Executive submitted that consumers viewing any version of SMS 2 in isolation were likely tobe led into subscribing to the Service based on its contents alone. Consequently, the Executive submitted that SMS 2 was misleading.

The Executive accepted that there was no Code prohibition on the use of more than one text message to promote a service. The Executive understood there would also be a limitation on the number of characters available per SMS message, and there was no Code requirement to label multiple promotional texts as "Text 1 of 2" and "Text 2 of 2". The Executive confirmed that its case was based on the content of the messages and how they were likely to be understood in the context in which they were received by consumers.

There was no reference to the fact that the Service was a premium rate service charged on a weekly subscription basis and it did not include any pricing information for the Service

The Executive acknowledged that SMS 1 clearly stated the costs of the Service. However, it noted that SMS 2 made no mention of the cost of the Service and it was not clear from SMS 2 that the Service was a subscription premium rate service. The consumer was only told that they were required to reply with the word "Yes".

The Executive asserted that consumers viewing SMS 2 in isolation or not making the connection with SMS 1 were likely to be misled into believing that the Service was free. Accordingly, the Executive submitted that the omission of key information from all versions of SMS 2 was misleading.

The Executive asserted that, in sending SMS 2, the Level 2 provider failed to provide key information that was likely to affect a consumer's decision to use the Service. For the reasons outlined above, the Executive submitted that SMS 2 was misleading and in breach of rule 2.3.2 of the Code.

During the Tribunal hearing, the Tribunal referred the Executive to the Level 2 provider's response to the breach letter, and queried what discussions had been held between the Executive and the Level 2 provider regarding making the Service compliant. The Executive stated that the Level 2 provider had discussed the Service with a member of the PhonepayPlus Complaint Resolution team and the Level 2 provider had been advised that it should contact PhonepayPlus' Industry Services team for compliance advice on the Service. It understood that the Level 2 provider had not contacted the Industry Services team. The Executive stated that it had not given pro-active compliance advice during the complaint period but had outlined its concerns to the Level 2 provider in the course of its investigation.

2. The Level 2 provider denied that a breach of rule 2.3.2 of the Code had occurred and stated that it believed that a connection would be made between the two promotional SMS messages that were sent to consumers.

   In relation to the first allegation made by the Executive regarding confusion with the Network operator, the Level 2 provider stated that in all cases, it provided the name "08Buster" in the promotion. The promotion comprised two marketing SMS messages; the first contained all the regulatory information, including the Level 2 provider's name and pricing information, and the

second provided relevant "market information", which it explained was the current cost of calling 08 numbers.

The Level 2 provider submitted that of all the consumers who signed up to the Service, 100% received SMS 1 which contained the name "08Buster" (as verified by delivery receipts). In addition, its name was also provided in SMS 2, in all but SMS 2 v4. The Level 2 provider submitted that:

- SMS 2 v4 was only used at the start of its promotional campaign. When it became aware that consumers may potentially find the message misleading (on 30 October 2014) it immediately revised the content.
- Fewer than 10% of overall promotion recipients received SMS 2 v4.
- Only 22 of the complainants cited by the Executive received SMS 2 v4.
- In almost all cases (96%), SMS 2 was sent within two minutes of SMS 1 (and in the majority of cases, within one minute) and there was no question of consumers receiving SMS 2 v4 (which omitted its name) after any delay.
- In no instance was it possible for a consumer to view only SMS 2 v4, as consumers were only sent SMS 2 after it received confirmation of their receipt of SMS 1.

The Level 2 provider submitted that the name "08Buster" was sufficiently distinct and specific for consumers to make an informed decision (and link the two SMS messages). The Level 2 provider submitted that it could not have foreseen the Executive's argument that the name "08 Buster" could have been taken as the brand name of the Service rather than the name of the provider. It submitted that it was unfair and unreasonable for the Executive to advance this argument.

The Level 2 provider submitted that all of the relevant information that was likely to affect a consumer's decision to accept a future recurring charge was prominent in SMS 1, which was sent immediately before SMS 2. The Level 2 provider stated that as both SMS messages were sent out in quick succession the Level 2 provider believed it was unlikely that consumers would not link the two SMS messages and would read SMS 2 in isolation.

The Level 2 provider submitted that in addition to this, the following free initiation message was sent out to consumers 24 hours prior to any charged messages being sent out:

"FreeMsg U have subscribed to 08buster for £1.50 every 7 days until you send STOP to 80182. Help 03333 104 450."

The Level 2 provider submitted that from 3 December 2014, it had voluntarily added this SMS message into the Service flow, and therefore any consumers joining after this date received two information SMS messages informing them of pricing and subscription information prior to any charges being incurred.

The Level 2 provider submitted that consumers also received the following spend reminder SMS message every 30 days:

"08Buster is £1.50 per week until you send STOP to 80371. You can contact customer services on 03333100600."

The Level 2 provider submitted that if consumers had not been aware of the pricing information at the start, they would have been aware as soon as they received the above message and

could have contacted the Level 2 provider directly to stop the Service or to discuss any concerns.

The Level 2 provider submitted that many complainants had identified SMS 2 as being related to SMS 1 in that the Executive's own evidence (the complainants' accounts) in some cases supported the fact that consumers linked the SMS 2 with SMS 1.

The Level 2 provider submitted that the promotion comprised both SMS messages and taken together they complied with the Code requirements. It further submitted that it was unfair and unreasonable to take SMS 2 in isolation, as if it was sent independently of SMS 1, in the absence of any specific Code requirement to suggest that this was non-compliant. The Level 2 provider submitted that the Code states that promotional materials must contain the name of the Level 2 provider except where otherwise obvious and it submitted that it had complied with that requirement.

The Level 2 provider submitted that SMS 2 was not sent until it had received confirmation of receipt of SMS 1, thereby ensuring consumers received both messages thus limiting the scope for consumer harm. The Level 2 provider submitted that the reason it waited for the delivery receipt was to eliminate any risk of consumers only receiving SMS 2. Therefore, it could categorically state in every case that all consumers had received pricing information. The Level 2 provider explained that SMS 2 was sent in quick succession and there was no period of delay. Having checked its records, it confirmed that at least 96% of all consumers received both SMS messages within two minutes, with over half receiving both in one minute.

In relation to the allegation of lack of key information, the Level 2 provider reiterated its submission that the promotion comprised two text messages sent in quick succession. The Level 2 provider submitted that, whilst SMS 2 did not contain the pricing information, this was included in SMS 1, sent to every consumer. The Level 2 provider submitted that the decision to send two messages was based upon a desire to inform, not mislead; the first was intended to provide all the regulatory information and the second was to provide details of the current cost of calling 08 numbers. The Level 2 provider submitted that it could not provide all this information in one SMS message, and it could not see how a consumer could make an informed decision without both messages.

The Level 2 provider submitted that it had decided to promote the Service across two SMS messages because there was a 160 character limit on the length of messages and this left it with very few characters in which to promote the Service. The Level 2 provider submitted that the suggestion that SMS 2 should have repeated the information contained in SMS 1 defeated the object of an additional text with separate information.

The Level 2 provider submitted that it could not have foreseen the interpretation that the absence of a "prompt" (e.g. "Text 1 of 2" and "Text 2 of 2") would be considered misleading. It stated that, in context, it honestly and reasonably believed that the two SMS messages were sufficiently connected. The Level 2 provider submitted that it would have willingly adjusted the Service had it been aware of the Executive's concerns. The Level 2 provider stated that it had requested advice from the PhonepayPlus Complaint Resolution team during the early stages of the investigation so that it could make appropriate changes. It submitted that had it been given the advice at that stage, it would have made changes which would have been better for consumers.

The Level 2 provider explained that it had analysed the complaints received by the Executive and it had identified 24% of those complainants stated that they thought the second SMS

message was from the Network operator. Accordingly, the Level 2 provider stated that it incorrect for the Executive to state that the majority of complainants were confused about where the promotional SMS originated from. The Level 2 provider provided a detailed commentary on a number of the complaints to highlight that it believed that the complainants were aware of the name of the Service and the pricing information. The Level 2 provider was asked if it had any evidence to show that the remainder of consumers understood where the SMS messages had come from. The Level 2 provider did not supply any evidence but submitted that it had a sophisticated customer service system and it had never been made aware, save through the Executive, that consumers were not linking the two SMS messages. It submitted that consumers were aware of the Service name and aware that they were being charged. The Level 2 provider submitted that the complainant with the highest spend on the Service had been subscribed for a total of 32 weeks and had used the Service access numbers 17 times in this period for a total of 67 minutes. Most customer enquiries were because consumers did not understand the access number system. The Level 2 provider stated that, taking into account consumer feedback, it had taken pro-active steps to amend SMS 2 to ensure that the Service name was present.

During informal representations, the Level 2 provider confirmed its written submissions. It described the Service as a valuable service, which sought to address the prohibitively high cost of 08 numbers. It highlighted that usage of the Service was unlimited. If consumers made at least a few calls each week to 08 numbers using the Service they would get value from it. In addition, the Service included a free trial period of seven days. To date over 200,000 calls had been made to the Service access number, by approximately 40,000 users of the Service (as subscribed from time to time). The Tribunal asked the Level 2 provider if it had any evidence of typical usage by a subscriber, but the Level 2 provider did not have this data available at the time.

The Level 2 provider was asked if it had any evidence to demonstrate that consumers had read SMS 1, as well as confirming it had been delivered. The Level 2 provider did not supply any evidence but submitted that the majority of consumers viewed the SMS messages on a smartphone and would be able to see both SMS' on their screen at the same time.

The Level 2 provider was asked if there was any reason that the pricing information was present in SMS 1 but not SMS 2. The Level 2 provider submitted that the pricing information was still proximate to the means of access to the Service. It stated that the reason the regulatory information was included in SMS 1 was so that it could confirm it had been delivered before sending SMS 2.

The Level 2 provider was asked why it had decided to refer to the premium rate numbers as "non-geo" in SMS 1 but to refer to them as "08" numbers in SMS 2. The Level 2 provider stated it had not been intentional to describe the numbers differently and with hindsight, it accepted the phrase "non-geo" should probably not have been used in that context.

In relation to the fact that from 24 November 2014 SMS 2 v4 was still being sent to some consumers, the Level 2 provider explained this was because the SMS messages had been pre-loaded into those specific campaigns prior to the decision to amend the promotional message. In support of its submission, the Level 2 provider supplied the Tribunal with a log showing a consumer had subscribed to the Service in mid-November and received another version of SMS 2.

The Level 2 provider explained that the Service was also promoted through a website promotion. It stated that the majority of opt-ins were generated by the SMS campaign with

approximately 30% generated by website promotion. Initially it was intended that there would be one shortcode for web promotions and one shortcode for SMS promotions but this was not adhered to strictly.

The Level 2 provider stated that it would have happily adjusted the “08 Buster” terminology had it been aware of any potential confusion.

The Level 2 provider submitted that the case should have been dealt with by the Track 1 procedure. The Level 2 provider submitted that it had demonstrated its willingness to make changes to the Service, and it had co-operated with the Executive’s initial investigation. The Level 2 provider stated that on several occasions it had requested information about the Executive’s concerns so that it could make changes to improve the service and reduce the potential for consumer harm. The Level 2 provider admitted that it had not contacted the Industry Services team when the Complaints Resolution team suggested that they do so, but instead at that point had decided to cease promotion of the Service.

The Level 2 provider stated that some of the consumer complaints cited in support of the breach were inaccurate, for instance when a complainant stated they had been charged £4.50 a week or had not received charging information. The Level 2 provider referred the Tribunal to the message logs it had submitted in support of its response to show consumer interactions with the Service.

The Level 2 provider explained that it was not a large company. It had ten members of staff, all of whom had been employed at least six years. The Level 2 provider submitted that it had received positive feedback from the majority of consumers. Most consumers were informed and intelligent and did opt out of the Service if they were not using it (though the Level 2 provider did not have any figures available at the time to show what percentage of consumers opted out). The Level 2 provider submitted that it operated a consumer helpline and consumers did contact them if they were confused. The Level 2 provider submitted that it operated a pro-active “no quibble” refund policy for when it received consumer complaints, and that it contacted consumers who were referred to it by the Executive to offer a refund.

The Level 2 provider submitted that it had been trading for 14 years without any previous issues. The Level 2 provider did not want the Service to generate complaints. As a result of this investigation, it had sought legal advice, it had appointed its Head of Sales to oversee compliance matters, and it had joined an industry group in February. It intended that these steps would assist in ensuring ongoing compliance with the Code.

3. The Tribunal considered the Code and all the evidence before it, including the Level 2 provider’s written and oral submissions. The Tribunal noted that the identity of the sender of the promotional SMS messages was not clear in all promotional SMS messages. It considered that consumers had not been provided with sufficient information to understand that “08Buster” was a chargeable service which was not provided by their Network operator. The Tribunal concluded that consumers were likely to be misled by all versions of SMS 2 and it commented that the risk of being misled was higher in respect of SMS 2 v4, which did not contain the name of the Level 2 provider or the Service at all.

   The Tribunal noted that the evidence provided by the complainants provided clear evidence that consumers had been misled by the promotional SMS messages, as a significant number of complainants stated that they believed the messages had originated from their Network operator. In addition, the Tribunal noted the use of the language “with 08Buster” on SMS 2 v1,

2 and 3. It found that this phrase in context did not make it clear that the Service was provided by a third party.

The Tribunal found that it was not sufficiently clear that the two SMS messages were linked. It noted that the use of the words "non-geo" in SMS 1 was different to the terminology in SMS 2. The Tribunal commented that as SMS 2 did not contain pricing information, the promotion relied on consumers reading SMS 1 in conjunction with SMS 2 to be fully informed of all key information. The Tribunal having found that it was not sufficiently clear that the two promotional SMS messages were linked, considered that only including pricing information in SMS 1 was not sufficient. Accordingly, the Tribunal found that it was not made clear to consumers that the Service was a subscription premium rate service for which they would be charged £1.50 per week.

The Tribunal did not find that the Level 2 provider had intentionally misled consumers. However the Tribunal were satisfied that the steps taken by the Level 2 provider, including the content of SMS 2, were not sufficient to ensure that consumers considered the information stated in SMS 1 in conjunction with the information contained in SMS 2. For all the reasons detailed above, the Tribunal found that the promotion of the Service had misled and was likely to mislead consumers into believing that the promotion for the Service had originated from the their Network operator and that the Service on offer was free. Accordingly, the Level 2 provider had acted in breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
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 asserted that the Level 2 provider had acted in breach of rule 2.4.2 of the Code as it had used data obtained from marketing lists supplied by third parties. The third parties had not obtained consumers' "hard opt-in" to be contacted by the Level 2 provider, as required. Accordingly, the Level 2 provider had contacted consumers by sending marketing SMS messages without their consent.

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

   Paragraph 4.2

   "Consumers have a fundamental right to privacy – enshrined in law, through the Privacy and Electronic Communications Regulations 2003 ('PECR'). In the UK, the Information Commissioner's Office ('ICO') is the body charged directly with enforcing PECR. We work closely with the ICO in order to define what constitutes acceptable and auditable consent to marketing. We may refer cases to the ICO, when appropriate, but will also treat invasions of consumers' privacy through paragraph 2.4 of the PhonepayPlus Code of Practice."

   Paragraph 4.3

"PECR's provisions on consent (which apply to all marketing relating to a premium rate service by virtue of rule 2.1 of the Code) in summary are that:

- Where there is no explicit consent, the marketer must have obtained the individual's details through a sale, or negotiations for a sale, and the individual must have been given the opportunity to refuse such marketing, when their details were collected (a practice known as 'soft' opt-in);
- Soft opt-in marketing materials must relate to that marketer's products or services and only concern similar products to the individual's initial purchase, or area of interest (e.g. it would not be appropriate to promote adult services to someone who had only previously purchased ringtones);
- Soft opt-in consumers must be given a simple means of opting out at the time of initial purchase, and in each subsequent promotion; and
- Where soft opt-in conditions are not met a positive action signifying consent must be obtained from consumers after clear information about the intended activity has been provided. For example, where the individual's details are to be passed to third parties, they must be clearly informed of this, and positively confirm their acceptance (a practice known as '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 5.6

"…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 5.10

"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 5.12

"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."

In addition, the Executive noted the definition of consent for the purposes of the Privacy and Electronic Communications Regulations 2003 is elaborated upon in the Information Commissioner's Office's Guidance on "Direct Marketing". This Guidance states:

"The key points are that for consent to be valid, it must be:

- freely given – the individual must have a genuine choice over whether or not to consent to marketing. Organisations should not coerce or unduly incentivise people to consent, or penalise anyone who refuses. Consent cannot be a condition of subscribing to a service or completing a transaction.
- specific – in the context of direct marketing, consent must be specific to the type of marketing communication in question (e.g. automated call or text message) and the organisation sending it. This is discussed further below.
- informed – the person must understand what they are consenting to. Organisations must make sure they clearly and prominently explain exactly what the person is agreeing to, if this is not obvious. Including information in a dense privacy policy or hidden in 'small print' which is hard to find, difficult to understand, or rarely read will not be enough to establish informed consent.
- an indication signifying agreement – consent must be a positive expression of choice. It does not necessarily have to be a proactive declaration of consent – for example, consent might sometimes be given by submitting an online form, if there was a clear and prominent statement that this would be taken as agreement and there was the option to opt out. But organisations cannot assume consent from a failure to opt out unless this is part of a positive step such as signing up to a service or completing a transaction. For example, they cannot assume consent from non-response to an email, as this would not be a positive indication of agreement…"

The Executive relied on all the complainant accounts and particularly noted the following:

"I did not request to be contacted and it did not state that I was being charged to receive texts about things I never requested nor wanted. I have so far been charged £7.50 for things I do not want."

"I received an unsolicited text message and replied yes assuming the message was from my mobile phone provider. I have been charged £1.25 every Saturday since. So far this has cost me £16.25. Obviously this will start to add up if these messages do not stop."

In response to an initial direction to the Level 2 provider to supply information, the Level 2 provider stated that it had used data obtained by a third party provider (the **"Third party provider"**) to promote the Service. The Level 2 provider supplied a contract between the Third party provider and the Level 2 provider for the provision of numbers for marketing. In addition, the Level 2 provider stated that the complainants had interacted with the Service after they had opted in to receive data from one of four third party websites, which it provided the details of.

The Executive noted that the Guidance clearly states that where individuals' data is shared with third parties a hard opt-in is required. Therefore, for the Level 2 provider to ensure that it had complied with the Code, when it purchased marketing information it should have requested and obtained robust evidence that each consumer had positively confirmed their acceptance to have their details passed on to third parties, and that the terms of such acceptance was sufficient to comply with the Code. The Executive submitted that it expected opt-ins to be robustly verifiable in the event of complaints, where a hard opt-in is used to market to consumers who have not previously purchased from a provider.

In a subsequent direction to supply information, the Level 2 provider was asked to confirm what information was provided by the Third party provider to prove that consent had been given by consumers to receive marketing from third parties. The Level 2 provider stated:

> "The data is collected through a number of channels including web forms and surveys. In each case we are able to see the opt-in terms and conditions of each individual campaign and ensure that it is compliant."

The Executive sought clarification regarding the above statement and asked the Level 2 provider to confirm what steps it took to ensure that the terms of the opt-in were compliant for the campaign/services found on the four third party websites. The Level 2 provider stated:

> "As well as opt-in time/date stamp we also require a URL to be provided with each MSISDN. Once we receive the URL we can visually check the site to ensure consumers are made aware that they may receive promotional offers from third parties."

As part its request, the Executive requested that the Level 2 provider supply documentation to evidence the steps it took to ensure that the terms of the opt-in were compliant. The Level 2 provider did not provide any evidence to support its assertion.

Accordingly, the Executive sought to ascertain the steps a consumer would take to opt-in / consent to receive third party marketing, in order to understand whether the consumer had provided valid consent for marketing. The Executive captured screenshots of the third party websites using the website "Wayback Machine", which is a digital archive of the World Wide Web and enables users to see archived versions of webpages across time. The Executive used Wayback Machine to review the contents of each of the third party websites at a date close to when the Level 2 provider started its promotion of the Service.

Website one

The Executive noted that consumers were required to complete a web form to register with the website and enter competitions. To complete the registration process, consumers were required to tick a box agreeing to the following declaration:

> "By entering this competition you agree to the Terms & Conditions and Privacy Policy. You also agree to receive information by post, telephone, email & SMS from [us] and third parties listed in our Data Collection Notice. You can opt-out from these communications at anytime"

The Executive noted that there was no option to sign up to the website without giving consent to third party marketing. The Executive submitted that this was not valid consent as it did not meet the requirement that "consent must involve a positive step beyond mere purchase of the service by the consumer".

Website two

The Executive noted that the registration page of this website contained a link to a privacy policy on a separate page, but there was no indication on the face of the registration page that ticking the box marked "accept terms & condition" would sign a consumer up to third party marketing. Within the Terms and Conditions, the following acceptance terms could be found:

"By registering with [us] or by accessing content that is found on that web site, you are assumed to have read and agreed to the terms and conditions set out here. It may occasionally be necessary to alter the general Terms and Conditions of this site. If this happens you will be notified on the homepage.

By registering with [us] you are electing to be contacted by [us] via phone or email so we can send you information about our products and services. You can unsubscribe from information and/or the newsletter at any time simply click on the unsubscribe link when you receive an email or newsletter from us."

The Executive noted that registration to website two included an agreement to receive marketing from website two. However, there was no mention that the consumer's details may be passed on to third parties for marketing purposes. The Executive obtained the following information contained in the Privacy Policy:

"The information collected will be used to contact you with further details of [us] and associated third parties services or to send details of future offers or information. It may also be used for research purposes. This contact may come in the form but not limited to email, phone, or post.

You can inform [us] at any time if you no longer require such information to be sent.

Third Party Disclosure: From time to time may pass your details to other carefully selected organisations. You can choose not to have your details disclosed to third parties by emailing [email address]"

As there was no option to sign up without providing consent to third party marketing, the Executive submitted that consumers had not provided valid consent as it did not meet the requirement that "consent must involve a positive step beyond mere purchase of the service by the consumer".

Website three

Consumers applying for loans on website three were presented with the following statement prior to submitting their application:

"Important – Please read
Please click to indicate that you have read and agree to our terms and conditions and privacy policy.
By submitting this application form, you will be indicating your consent to receiving email marketing messages from us and our trusted partners unless you have indicated an objection to receiving such messages by ticking the box to the right."

The Executive noted that the statement required consumers to take a positive step to deny consent and it did not state that consumers may receive messages directly to their phone by text. Accordingly, the Executive submitted that the statement was not sufficient and therefore consumers did not provide valid consent.

Website four

The Executive explained that in the case of website four, there were no archive pages available on the Wayback Machine and therefore the screenshots obtained by the Executive were from the date they were captured (23 February 2015).

The Executive noted that the application process required the consumer to tick a box agreeing to the following statement:

> "By checking the box, I agree to [our] privacy policy and to receive relevant, financial email offerings from [us]. By signing up, you are indicating your consent to receive marketing communications via post, email, SMS and telephone. You can opt out of receiving marketing materials at any time by following our opt-out instructions"

The Privacy Policy (which appeared on a separate page) outlined how a consumer's information may be used. This included:

> "marketing purposes such as sharing your information with third party advertisers, partners and associates"

The Executive submitted that consumers engaging with website four could not be considered as providing valid consent, as consumers could not submit the application without first agreeing to receive marketing. In addition, the marketing statement on the application page failed to include a statement that consumers may receive marketing from third parties. The Executive asserted that the statements on website four were not sufficient and therefore consumers did not provide valid consent.

Separately, the Executive noted that in the case of two complainants, the Level 2 provider had sent marketing messages to the consumers six months after the claimed opt-in for marketing was given. By way of explanation, the Level 2 provider stated:

> "When we receive the numbers we ensure the opt-in for each mobile number was gathered within the last 6 months. Once this is confirmed the list is uploaded into our system and a pre-determined number of messages are sent out each day until each mobile number has received a promotional message. Unfortunately it would appear that during this sending process some of the opt-ins have fallen outside the six month period. We have now updated our system to check the opt-in date for each mobile number at the actual point of sending a promotional message to ensure any numbers that have an opt-in that is no longer valid are removed."

In respect of these two examples, the Executive submitted that the Level 2 provider would not have had valid consent to market to these consumers in any event, because their apparent opt-ins were gathered more than six calendar months before the marketing was sent.

The Executive explained to the Tribunal the basis on which it selected the sample of MSISDNs which had been opted in to marketing. This could be a random sample of complainants, but at the point when the investigation was first initiated, this was likely to have been based simply on all complainants to date.

Consequently, the Executive submitted that the Level 2 provider had not provided robustly verifiable evidence that a hard opt-in had been obtained when it acquired marketing data and

therefore consumers had been contacted without their valid consent. Accordingly, the Executive submitted that the Level 2 provider had breached rule 2.4.2 of the Code.

2. The Level 2 provider denied that a breach of rule 2.4.2 of the Code had occurred and stated that it understood that the use of data lists supplied by a third party was permitted subject to certain controls. It believed that it had conducted sufficient checks on the Third party provider that it had obtained the data from.

   To support its assertions, the Level 2 provider supplied data that it had obtained from the Third party provider which contained the complainants' MSISDNs, name, opt-in date and time and the date of the promotion. The Level 2 provider also stated that two of the complainants had been included on a list provided by the Third party provider which contained the complainants' full name, address, gender, age, IP address, date and time stamp and URL.

   Further, the Level 2 provider supplied a copy of a standard questionnaire that it submitted to all companies it entered into an agreement with for the supply of marketing lists. The agreement demonstrated that the Third party provider had been requested to confirm that an opt-in had been obtained for the MSISDNs, they were able to provide full verifiable opt-in data, and that it was giving permission to the Level 2 provider to use the data. In addition, it requested that the Third party provider provide an example of the wording the consumer viewed before consenting to receive third party marketing.

   In relation to the websites that the data had come from, the Level 2 provider addressed each website in turn. The Level 2 provider submitted that in respect of websites one and two, the basis for claiming that the hard opt-in provided by consumers was "not valid consent" was not made out, as in neither case were consumers purchasing a good or service: consumers provided their personal data in return for free benefits.

   The Level 2 provider submitted that website one had provided a high level of compliance, as consumers were required to expressly consent to third party marketing and then separately to click the sign-up button. The Level 2 provider submitted that links to the terms and conditions, the privacy policy and the data collection notice were provided in the body of the opt-in. The Level 2 provider submitted that website one's data collection notice listed certain major retailers under the heading "Telecommunications". A separate heading was used for premium rate services. The Level 2 provider submitted that all these companies rely on the opt-in wording on the sign up page as their means of complying with the Privacy and Electronic Communications Regulations 2003 ("**PECR**").

   The Level 2 provider stated that website two required consumers to tick a box to consent to the terms and conditions (which included third party marketing) and then separately to click on a "Start Now" button. The Level 2 provider submitted that the privacy policy quite clearly referred to "third parties" in connection with future marketing.

   In relation to websites three and four, the Level 2 provider accepted that they were less robust, although both contained marketing statements on the sign-up page and links to the terms and conditions. In relation to website four, the Level 2 provider stated that whilst the opt-in statement did not include reference to third parties, this was clearly provided in the privacy policy. The Level 2 provider asserted that only a small number of complainants signed-up via these websites.

   The Level 2 provider accepted that the marketing to two of the complainants fell outside the recommended six month period. It stated that this occurred on only two occasions and further

that in both cases the period was not significantly longer than six months (being seven months).

Generally, the Level 2 provider asserted that the Executive's stance was unreasonable and disproportionate as the quality of the opt-ins was comparatively high when considered against industry-wide standards. It submitted that it conducted due diligence on its marketing partners by checking for a history of breaches with the Information Commissioner's Office ("**ICO**") and the Direct Marketing Association, and it ensured that agreements were in place including a non-disclosure agreement and a consent to market agreement. It always obtained a sample of the data, the URL of the webpage and a date and time stamp. It performed a check of the website and periodical ongoing checks of the website from time to time (although it accepted that it did not retain evidence of these checks). When consumers contacted the Level 2 provider, it randomly checked with consumers to confirm if they remembered signing up via the website. As far as the Level 2 provider was aware there were no instances of a consumer not recalling being on the relevant website.

The Level 2 provider submitted that it did not send spam and it only promoted the Service to the lists bought from selected third party providers, as this was a requirement of the data supplier. As far as the Level 2 provider was aware consumers had consented to receive marketing.

The Level 2 provider submitted that the Executive's use of the "Wayback Machine" website as evidence of a breach of the Code was not an appropriate replacement for actual monitoring. The Level 2 provider submitted that the website was unable to provide a complete picture of the history of a website and therefore could not accurately demonstrate what a consumer would have seen on a site at any given day. Further, it submitted that the web pages relied upon by the Executive did not comprise evidence of the webpages actually viewed by the complainants or any other users of the Service.

The Level 2 provider submitted that, whilst it accepted that the Code required compliance with PECR, this allegation of breach of the Code was the natural domain of the ICO. It highlighted that the ICO is committed to the principles of good regulation. In this case, the Level 2 provider submitted that there was a low volume of complaints, and the consent gained via third parties, whilst not perfectly in-line with the Guidance, represented at least a genuine attempt to gain consumer approval and require positive action by the consumer. In light of this, it submitted that this matter was not one which the ICO would have been likely to pursue, and therefore it was unfair, unreasonable and disproportionate for the Executive to do so.

During informal representations, the Level 2 provider confirmed its written submissions and in addition submitted that it believed that in the circumstances of the case, particularly in light of its co-operation with the Executive, it would have been more appropriate to deal with the case by way of the Track 1 procedure. The Level 2 provider stated that it had been advised to contact a compliance adviser who would conduct a risk assessment and control audit to ensure that their procurement and use of data were fully compliant in the future.

The Level 2 provider submitted that to the extent that there has been any breach of rule 2.4.2 of the Code, the breach could only be considered to be of a technical nature and so minor as not to warrant a formal sanction. The Level 2 provider submitted that in the world of "big data", keeping track of opt-ins was not always straight-forward and it tried to keep on top of this as it was not in its interest to have consumers on a marketing list who were not happy to be there. The Level 2 provider submitted that in order to act proportionately the Executive should pursue breaches only against those who seek to transgress the regulations.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written and oral submissions.

   The Tribunal noted the Level 2 provider's submissions regarding the ICO's procedures. The Tribunal determined that it had jurisdiction to adjudicate on the alleged breach pursuant to the Code and that it was reasonable and proportionate for it to do so.

   The Tribunal noted that the Level 2 provider had not provided sufficient evidence of consumers' hard opt-in to consent to marketing. The Tribunal considered that reliance on statements by a third party marketing list provider was not a defence to a breach of rule 2.4.2 of the Code and if providers were to use third party marketing lists, the Code is clear that the user of that data must ensure that consumers are not contacted without their consent. However, the Tribunal accepted that the Level 2 provider had conducted some due diligence on the third party provider and had made some efforts to obtain evidence of consent, albeit that not all of the steps were documented.

   The Tribunal noted the evidence from complainants that stated that they had been contacted without their consent. It also noted that the Level 2 provider had admitted that it had not ensured in respect of two complainants that each number marketed to had a valid opt-in gathered no more than six calendar months ago.

   In the absence of any credible evidence to the contrary supplied by the Level 2 provider, the Tribunal found that the evidence of the websites procured from the Wayback Machine website was the best evidence available to it. The Tribunal considered that in order to be valid, consent must be freely given and cannot be a condition of subscribing to a service. The Tribunal considered that in order to be valid, consent must be informed and therefore including information in a dense privacy policy which is hard to find, difficult to understand or rarely read, will not be enough to establish informed consent. The Tribunal considered that consent must involve a positive step by the consumer and therefore using a pre-checked tickbox would not be sufficient for this purpose. The Tribunal considered that opt-ins obtained via the four websites as shown on the Wayback Machine website was not sufficient evidence of consent.

   The Tribunal found that the Level 2 provider had contacted consumers without having a valid consent from those consumers. Accordingly, the Level 2 provider had acted in breach of rule 2.4.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.3.2 - Misleading

The initial assessment of rule 2.3.2 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service is capable of providing purported value to consumers, however the breach was likely to generate considerably inflated revenues for the Service;

- The breach of the Code had or was likely to have had a material impact on consumers and showed potential for substantial harm to consumers;
- Insufficient care was taken in the promotion of the Service, meaning that consumers were not aware of key information regarding the Service including the identity of the provider of the Service; and
- The nature of the breach is likely to have caused a drop in consumer confidence in premium rate services.

Rule 2.4.2 - Consent to market

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

- The Service is capable of providing purported value to consumers, however the breach was likely to generate considerably inflated revenues for the Service;
- The breach of the Code had or was likely to have had a material impact on consumers and showed potential for substantial harm to consumers;
- The Service had used consumers' personal information when they had not been informed of the purpose for which their personal information would be used; and
- The nature of the breach is likely to have caused a drop in consumer confidence in premium rate services.

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

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not identify any aggravating factors.

The Tribunal took into account the following two mitigating factors:

- The Level 2 provider stated that it had taken some steps in advance to mitigate consumer harm by conducting some due diligence when contracting with third party data suppliers, and adding an additional Service message; and
- The Level 2 provider stated that it had taken steps to address the breaches once it had become aware of the concerns, which included changing SMS 2 v4, ceasing promotion of the Service, and proactively refunding complainants.

The Tribunal commented that it welcomed the Level 2 provider's confirmation that it was now seeking third party advice on the Service and had put in place new procedures to ensure ongoing compliance. The Tribunal viewed this as indicative that it was taking compliance with the Code seriously and trusted that this would minimise the risk of breaches of the Code in future.

The Level 2 provider's revenue in relation to the Service was in the range of Band 2 (£500,000 - £999,999).

Having taken into account the circumstances of the case and the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

Sanctions imposed

Having regard to all the circumstances of the case, including the Level 2 provider's mitigation, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £40,000;
- a requirement that the Level 2 provider remedy the breaches of rule 2.3.2 and 2.4.2 of the Code, before recommencing promotion of the Service, and produce evidence to the satisfaction of PhonepayPlus within 14 days from the date of the first promotion; 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.

Administrative charge recommendation: **100%**