



Case reference: 60325
Level 2 provider: Technology and Communications Limited
Type of service: Fixed Line Entertainment Service
Level 1 provider: N/A
Network operator: Telecom 2 Limited

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

BACKGROUND

Between 15 December 2014 and 17 July 2015, PhonepayPlus received 111 complaints from consumers in relation to the Recorded Football Stars entertainment service (the “**Service**”) operated by Technology and Communications Limited (the “**Level 2 provider**”) on the following premium rate numbers (“**PRN(s)**”): 0913660 (010-011, 109, 178-179, 262, 276, 338, 349 and 403); 09136661 (000, 002-009) and 09136662 (000-009). The Network operator was Telecom 2 Limited. Consumers engaging with the Service dialled one of the PRNs to listen to a recording of football player quotes at a cost of £1.53 per minute. According to the Level 2 provider the Service was promoted on banner advertisements on both digital desktop and mobile applications (“**Apps**”) via a third party advertiser. Consumers engaged with the Service by clicking on the banner advertisements which generated a call from the consumers’ handsets.

The Service was registered with PhonepayPlus on 1 December 2014 and began operation on 15 December 2014. The Level 2 provider temporarily ceased promoting the Service on 22 July 2015 until all matters relating to the investigation had been concluded.

Complaints

Complainants routinely stated that the PRN was automatically dialled from their handset after they inadvertently clicked on an in-app banner promoting the Service. The Executive noted that the most commonly mentioned App among complainants was the popular dating app, Grindr.

Extracts from a sample of complainants’ accounts can be found below:

“I was using Grindr, a chat app on my iPhone. Grindr often has pop up adverts which require the user to close the pop up window. On this occasion an ad popped up and there must have been a button on it for me to dial the number on the ad or something because totally without my consent the number was being dialled by my phone. I was charged £3 for the call and as mentioned above I did not dial the number or request the call myself. It came seemingly automatically from a pop up ad in Grindr.”

“The number above its linked to an advert pop up on one of my iphone apps, and when accidently pressed it calls straight away to this number. there is no pop up asking if you want to call this number. I've accidently pressed it twice as its very near the back button on the app I use. It charges premium rate which should be banned. Can you please investigate why it should ring through straight away from pressing the advert? It should have a pop up asking to call the number.”

“On 14 March 2015 at 18:13 I was using the Echofon for Twitter app and tried to close an advert for "Best Football Quotes" by touching the "x" at the top of the ad. Instead of closing, it caused



my phone to call a premium rate number without warning. This showed up on my bill has having cost £2.08. I feel this is fraud as I was tricked into calling the number instead of closing the ad.”

“Banner ad inside game that child accidentally clicked on. The game is freeflow for iphone 5 No warning was received about the phone making a call, no cost of any call was displayed. We disconnected the call immediately, but a call was still registered with the network. We were billed 2.083 for a 2 second call. O2 have credited the cost of the call, but wanted to make you aware of this practice as it could cost people huge bills if children click on it by accident.”

Monitoring submitted by the Level 2 provider

The Level 2 provider submitted the following explanation of how the Service operated in response to the initial direction to provide information from the Executive:

“The football star recorded service is advertised via a large number of digital desktop and mobile applications. The consumer clicks on the banner advertising when they do this a popup then appears the consumer is then asked if he/she wants to call the service from the mobile devise, the consumer has the option to either click to call or to cancel, if they choose cancel the applications closes. [sic]”

Examples of promotional material provided by the Level 2 provider are contained in **Appendix A**.

The Level 2 provider submitted two videos of monitoring journeys that were conducted on 23 May 2015. Both monitoring journeys were conducted on a website rather than within an App, and indicated that consumers would have been able to select “cancel” after selecting the banner advertisement should they not have wished to engage with the Service and incur charges. An image from the monitoring of the Service submitted by the Level 2 provider is contained in **Appendix B** and shows that an alert was displayed on the screen as a means of checking whether the consumer wished to dial the PRN (the “**iOS Alert**”).

Monitoring by the Executive

The Executive monitored the Service on 25 March 2015 after seeing a pop-up banner for the Service in a popular iPhone Operating System (“**iOS**”) Twitter app called Echofon.

The Executive pressed on the banner advertisement shown in the first screenshot in **Appendix C**, the second screenshot was shown for approximately 1 second and the PRN was then dialled automatically, as shown in the third screenshot.

The Executive did not experience the iOS Alert that was present in the monitoring submitted by the Level 2 provider. Dialling was initiated without further interaction from the user and accordingly there was no opportunity to cancel the call before it connected and charges were incurred.

On 21 May 2015 the Executive issued a direction to the Level 2 provider to supply information, including a copy of the monitoring report. The Level 2 provider submitted the following information in relation to the missing iOS Alert:

“As we already told to PP+ it is important to understand that we are buying ad through blind platform without knowing where it is exactly ([third party advertisers]) the main part of the applications and mobile website, show automatically the popup after the first click but we have no



way of knowing what the publisher puts in place or not. So the problem showed in the video, is not generated from our site, but is it from the developer and application/mobile website side.

- Regarding the last point, we identified since the complaint increase some Apps and mobile website that to do show [sic] the popup like GrindR, and ask our partners [third party advertiser] to blacklist this application and mobile website;

- But we ask our partner [third party advertiser] to give some Apps and mobile website where the ad is, to show you that the pop is there, but I want you to know that we are unable to manage the activation or deactivation of the popup”

The Executive noted that the Apple developer’s website stated the following:

“The tel URL scheme is used to launch the Phone app on iOS devices and initiate dialling of the specified phone number. When a user taps a telephone link in a webpage, iOS displays an alert asking if the user really wants to dial the phone number and initiates dialling if the user accepts. When a user opens a URL with the tel scheme in a native app, iOS does not display an alert and initiates dialling without further prompting the user.”

For the purposes of this case, the Executive did not contest the Level 2 provider’s explanation that the iOS Alert did not appear due to the coding of the App on which the Level 2 provider advertised its Service.

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 17 July 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.1 – Fair and Equitable Treatment
- Rule 2.2.5 – Pricing Prominence
- Rule 2.2.1 – Provision of information likely to influence the decision to purchase

The Level 2 provider responded to the breach letter on 31 July 2015. On 3 September 2015 the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants’ accounts;
- The Executive’s monitoring of the Service conducted on 25 March 2015;
- The monitoring of the Service conducted on 23 May 2015 which was submitted by the Level 2 provider;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider’s responses including supporting documentation);
- PhonepayPlus Guidance on “Promotions and promotional material”;
- The breach letter of 17 July 2015 together with the Level 2 provider’s response and accompanying letter for the attention of the Tribunal Chair; and
- Informal representations made for and on behalf of the Level 2 provider by an external consultant and a representative of the Network operator during the Tribunal hearing.



SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.1

“Consumers of premium rate services must be treated fairly and equitably.”

1. The Executive submitted that the Level 2 provider treated consumers unfairly and inequitably because, in the absence of any built-in safeguards to minimise the risk of inadvertent connection to the Service, it was likely that consumers could access the Service unintentionally and incur a charge.

Consumers' complaints

The Executive relied on the content of all the complainants' accounts. Specifically, in addition to the complaints set out in the “Background” section, the Executive noted the following complaints:

“consumer saying he has down loaded [sic] a free app on his phone which is called "grindr" it's a dating app

consumer saying there are a lot of free adverts attached to this app

the adverts have premium rate numbers

consumer saying that there is no warning

consumer saying that the numbers can easily be automatically dialled”

“When you touch the advert (intentionally or otherwise) it connects you to a recording. App - Grindr. I was charged £2.08 for a call I had no intention of making - happened because accidentally touched the screen in the wrong place, and the placing of the ad on the screen (right at the bottom) makes it difficult not to.”

“I want to complain about this company's advertising method. They had an advert on the bottom of an app, (The app is Grindr) and this app often automatically clicks adverts for people. (At least on iPhone) This seems to be an issue with this app, as experienced by many people that I know. However, upon the auto-clicking of this advert, it dialled the premium rate number, and despite my hanging up within 3 seconds, (and the call shows as cancelled on my phone, because it was not long enough to be considered a call) I was charged over £2.”

As set out in the background section of this document, during the monitoring conducted by the Executive on 25 March 2015 the PRN was dialled automatically when it selected the banner advertisement in the Echofon app. The Executive noted that this finding was consistently supported by the complainants' accounts. Complainants specifically referred to the PRN automatically dialling after selecting the banner advertisement in the following apps:

- Grindr (dating app)
- Scramble (game)
- Minesweeper (game)
- Skout (football information app)
- Echofon (social media)
- Freeflow (game)
- Growlr (dating app)
- Words with Friends (game)
- Snapchat (social media)



- Solitaire (game)
- Scramble with Friends (game)
- GameCircus (game)
- Hooks (notifications app)
- Your Move Words (game)
- Flashlight (torch app)
- Looney Toons (game)

The Executive noted that the Level 2 provider stated that it had, “identified since the complaint increase some Apps and mobile website that to do [sic] show the popup like GrindR”.

The Executive asserted that it was not sufficient for the Level 2 provider to rely solely on a technical feature of some consumers’ devices to act as a safeguard against accidental connection to the Service. This was particularly the case given that the Level 2 provider would have no control over the reliability of the iOS Alert and, in any case, the Apple developer’s website explained that “when a user opens a URL with the tel scheme in a native app, iOS does not display an alert and initiates dialling without further prompting the user”. It was therefore entirely foreseeable that the iOS Alert would not always appear when an in-app banner advertisement was selected.

The Executive further stated that there was no requirement for Apple or any given application to prompt users before dialling a number as generally removing this step provided consumers with a more fluid user journey. However, where consumers were being charged immediately upon the call connecting, in order to ensure consumers are treated fairly, the Executive asserted that the Level 2 provider should have implemented its own safeguards to prevent consumers from inadvertently accessing the Service and incurring charges, or alternatively should not have promoted the Service in a way that risked consumers inadvertently accessing the Service. This was particularly the case where the Apps in which the Service was advertised encouraged frequent tapping or contained icons/buttons that were very close to the banner ad. Accordingly, and following the receipt of numerous complaints regarding auto-dialling, the Executive submitted that the Level 2 provider should have conducted its own monitoring and taken preventative action to prevent further consumer harm.

In summary, the Executive submitted that the Level 2 provider acted in breach of rule 2.3.1 of the Code as, when consumers clicked on an in-app banner, a PRN was dialled automatically, which resulted in consumers inadvertently incurring charges.

During informal representations the Executive also commented that certain versions of the banner ad, such as the one monitored by the Executive and shown at Appendix A, contained a cross that enabled consumers to close down the banner ad, however the Executive further commented that evidence from its monitoring of the Service, together with evidence from the monitoring submitted by the Level 2 provider, showed that it was possible to inadvertently dial one of the Service PRNs by tapping on any other part of the banner ad, and not only the section marked “Click-Call”.

The Executive further confirmed during informal representations that its case was centred around harm that had occurred to consumers of iOS/Apple devices.

Accordingly the Executive submitted that the Level 2 provider did not treat consumers fairly and equitably.



2. The Level 2 provider did not accept that it was in breach of rule 2.3.1 of the Code.

The Level 2 provider generally argued that the Executive had failed to give sufficient recognition of the Level 2 provider's attempts to rectify and address the issues raised. The Level 2 provider commented generally that the decision to proceed to a Track 2 investigation was dubious and the alleged breaches raised by the Executive could have been addressed and rectified more speedily via the Track 1 procedure.

The Level 2 provider further commented that, from very recent discussions held between PhonepayPlus and industry stakeholders, it was fully aware that PhonepayPlus now recognised that there were two types of breach; the first being where a provider had deliberately attempted to defraud consumers for financial gain and avoid its regulatory obligations; and the second, where a provider had inadvertently breached the Code. The Level 2 provider accordingly requested, should the Tribunal decide after lengthy consideration to uphold the alleged breaches of the Code, that such breaches be considered inadvertent and not deliberate.

The Level 2 provider additionally generally commented that it had offered solutions at various stages of the investigation to the Executive but it asserted that they had either been declined or ignored. The Level 2 provider asserted that the initiation of suggestions and solutions were not the actions of a company that was seeking to avoid its obligations or cause consumer harm, and that this should have been honestly reflected within the Executive's assessment of potential mitigating factors.

With reference to the specific alleged breach of rule 2.3.1 of the Code, the Level 2 provider stated that the Executive's accusation was linked to the fact that the Level 2 provider did not use any safeguards to treat users fairly and equitably, and minimise the risk of inadvertent connection to the Service. The Level 2 provider stated that it had not made any deliberate attempts to deceive consumers. As detailed from January to May 2015 [the main complaint period], 111 user complaints were registered against the Service, which represented around 0.05% of over 217,000 calls to the Service during that period. During informal representations the Level 2 provider further commented that this percentage was well below the threshold of 0.5% that it stated had previously been communicated by PhonepayPlus as an acceptable level of complaints by users of a premium rate service. The Level 2 provider accordingly asserted that its low complaint rate of 0.05% clearly showed that inadvertent dialling of a Service PRN was already minimised, and even if the Level 2 provider continued to increase its measures to reduce it, the average call duration of 25 seconds showed that the majority of calls were intentional, and that inadvertent connection, with a really low duration of 1 to 5 seconds, only occurred in a minority of calls.

The Level 2 provider provided responses to the various accusations included within the complaints:

Position of the advert to encourage the involuntary click

The Level 2 provider stated that it did not decide the position of the advert within each application / mobile website. The Level 2 provider further stated that each publisher decided to place the ad wherever they wanted within their apps / mobile website, by coding it. The Level 2 provider further stated that it (or its third party advertiser) could not be aware of the position of each ad and it was only notified of the ad format, but not its position (i.e. top, middle or bottom). Moreover, in order to prevent and reduce the involuntary clicks on the creatives [the term used by the Level 2 provider when referring to banner ads], the Level 2 provider stated that it had



decided to stop the diffusion of full screen ads, and only promote the product through simple banners.

Small cross on the banner

The Level 2 provider referred to a version of the banner ad which contained the image of a cross which suggested that certain banner ads could be removed. The Level 2 provider stated that this cross was not managed on its side and that its creative, which it had provided to the Executive in the format that was also presented to third party advertisers, did not have any such cross integrated. The Level 2 provider further stated that this kind of tool, (the ability to close down the banner ad) was fully chosen by each publisher by coding their application / mobile website. The Level 2 provider stated that it was not notified of each publisher integration, and it could not be aware of this kind of tool. The Level 2 provider further stated that, at this time, Echofon for Twitter was the only application that was adding this kind of cross on the banner, and that this was why it asked all of its third party advertisers to blacklist the app immediately upon receipt of the detailed complaint that referenced the cross.

The lack of iOS Alert when clicking on the banner ad.

The Level 2 provider stated that, as explained previously, it could not know which publisher was using the iOS Alert or not. The Level 2 provider stated that the main body of publishers were displaying the iOS Alert in an aim to protect their audience, and this was reflected in the low percentage of complaints compared to calls made to the Service, which appeared to be at around 0.05%. The Level 2 provider stated that it was otherwise technically impossible for it to set up its own safeguards in order to be sure that the iOS Alert was displayed. The Level 2 provider asserted that it had checked this with Apple and noted that no technical solution was available.

The Level 2 provider stated, and further clarified during informal representations, that it could not control the way in which the Service was advertised as it used blind networks which prevented it from knowing where the Service was advertised. The Level 2 provider also stated that it was buying display inventory via thousands of blind applications, blind mobile websites and blind ad networks and, as a result of these volumes, it could not even attempt to test its publishers on its own. This was also particularly difficult on account of the Level 2 provider's location in China which prevented it from testing UK publishers. The Level 2 provider did however state that it could stipulate the criteria for its banner ads that were sent to advertisers.

The Level 2 provider gave the following details of measures it took to prevent consumer harm:

- The Level 2 provider noted that each time it launched a campaign with a third party advertiser, it would provide details of its guidelines that clearly asked the third party advertiser to blacklist the publishers that were not displaying the iOS Alert before dialling.
- The Level 2 provider further stated that, according to its own creatives, it was also doing its best to avoid any misunderstanding by the users. All of the Level 2 provider's creatives contained the button "click – call" instead of a simple "click" in order to notify the user that a PRN was behind the banner after clicking upon it.

The Level 2 provider further stated that, because its preventative measures were technically limited, it had engaged in a number of measures that were actioned after launching the ad campaign:



- After dialling a PRN, but before the Service commenced, the Level 2 provider included a pre-call pricing announcement (the “**Pricing Announcement**”) in order to remind the user that he/she had dialled a PRN. During informal representations the Level 2 provider also stated that the Pricing Announcement, which lasted ten seconds, was free to hear and charges were not incurred until after it was concluded.
- The Level 2 provider stated that it was refunding all consumers that contacted it to make a complaint. During informal representations the Level 2 provider further stated that, of the 86 complaints previously notified to it by PhonepayPlus, all had been contacted by the Network operator and 58 had responded and been offered refunds.
- The Level 2 provider stated that as soon as it was notified by complainants of a publisher that was not respecting its guidelines (i.e. by failing to provide an iOS Alert or by using a closing cross) it would immediately send an email to all its third party advertisers in order to ask them to specifically blacklist the publisher involved in the application and/or mobile website. In addition, the Level 2 provider stated during informal representations that subsequent testing of the banner ads in certain apps took place following notification of the problems identified by the Executive and this testing revealed that the problem had been resolved.
- The Level 2 provider further stated that, if the issue raised was new and not listed in its guidelines it would add these new issues to its guidelines and send an update to all of its third party advertisers.

The Level 2 provider stated that the alleged breach of rule 2.3.1 of the Code should not be upheld as it was acting to prevent inadvertent connection to the Service by (i) using guidelines for its publishers, (ii) stopping full screen ads, (iii) providing a “click – call” button and (iv) a Pricing Announcement. The Level 2 provider emphasized that it was doing as much as it could, but it stated that it could not technically do more such as, among any other additional safeguards, forcing the iOS Alert to appear, or receiving automatic notifications of those who were not displaying it.

The Level 2 provider further stated that it was seeking to compensate for its lack of technical power by adopting other post-Service access measures including refunding all unsatisfied users and blacklisting all the publishers named by complainants.

During informal representations the Level 2 provider further commented that the Executive’s case appeared to be limited to the Apple operating system, and in particular the iPhone 4. The Level 2 provider further commented that no testing had been conducted by the Executive on devices that utilised the Android platform which functioned differently from that of Apple devices. The Level 2 provider accordingly submitted that, as the Executive’s case was limited to the iPhone 4, it could be assumed that there were no issues regarding Android devices and as such there was no evidence of widespread consumer harm. The Level 2 provider later commented that the issue was not necessarily exclusive to the iPhone 4, but was a separate issue concerning software within the Apps where the Service banner ads were displayed. The Level 2 provider further commented that the matter had been addressed by blacklisting the responsible Apps that were known to have caused issues.

The Level 2 provider further accepted as a valid point that the issues in this case could have been resolved if the Service banner ads had initially redirected consumers to a Service website which contained further information about the Service, and did not immediately dial a PRN.



The Level 2 provider further clarified that, in addition to the 111 complaints received by PhonepayPlus, there had been a number of direct complaints to the Network operator which increased the total number of complaints to around 200.

3. The Tribunal considered the Code, the Level 2 provider's written submissions and informal representations, the complainant records and all other evidence before it. The Tribunal noted the Level 2 provider's argument during informal representations that the Executive's case focused exclusively on a technical problem with the iPhone 4, which implied that there were no concerns with the appearance of an equivalent to the iOS Alert on other devices. The Tribunal determined however that the Executive's silence with respect to other devices could not be interpreted as confirmation that the problem was limited to the iPhone 4. The Tribunal also acknowledged and accepted the Executive's confirmation during informal representations that its case concerned all devices using Apple's iOS, and not just the iPhone 4. The Tribunal also noted that, notwithstanding the scope of the Executive's case, Apple products were popular and represented a sizeable portion of the smart-phone market. The Tribunal further noted that the Level 2 provider did not appear to have deliberately set out to treat consumers unfairly, however the decision to rely solely on the appearance of the iOS Alert as the only means of safeguarding against inadvertent access to the Service (which was a device feature that was entirely outwith the control of the Level 2 provider) was nevertheless reckless. The Tribunal further noted from the monitoring videos provided by both the Executive and the Level 2 provider that it was possible to click anywhere on the banner ads, and not just on the area marked "Click-Call" in order to dial a Service PRN. The Tribunal considered that, in light of this feature, consumers were particularly at risk of incurring a charge, and notwithstanding the Level 2 provider's arguments with respect to the Pricing Announcement, it was not clear that consumers would avoid incurring a charge by ending the call before the end of that announcement. Accordingly, for the reasons raised by the Executive the Tribunal upheld a breach of rule 2.3.1 of the Code.

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 submitted that the Level 2 provider acted in breach of rule 2.2.5 of the Code as pricing information relating to the Service was not sufficiently prominent.

The Executive relied on the PhonepayPlus Guidance on Promotions and Promotional material. The Guidance stated:

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.”

During informal representations the Executive noted that, in addition to the paragraphs of the Guidance highlighted above, the following paragraph of the Guidance was relevant with respect to whether pricing was considered legible and visible:

“Font size and presentation

2.13 Pricing information should be presented in a horizontal format and be easily legible in context with the media used. It should be presented in a font size that would not require close examination by a reader with average eyesight. In this context ‘close examination’ will differ for the medium, whether on a static webpage, a fleeting TV promotion, in a publication, or on a billboard where you may be at a distance or travelling past at speed”.

Consumers’ complaints

The Executive relied on the content of all the complainants’ accounts. Specifically, in addition to the complaints set out in the “Background” section, the Executive noted the following complaints:

“Consumer says she was using an app called Scramble

Consumer says she accidentally clicked an ad in the app and then locked her phone

Consumer says she heard voices from her phone and realised a number had been dialled

Consumer hung up and then checked her call charges and had been charged £6 for the call

Consumer says there was no pricing information or warning that a number would be called”

“consumers 13 year old son was on snap chat app on his phone consumer saying his son is not even in to football the user is saying that a advert pop up and he tried getting rid of it and all of a sudden it started calling the 0913 number the user does not remember seeing any pricing information the user think it was a advert for a game, but then he is not sure the son has a iphone 5”

The Executive selected the banner shown within the first screenshot at Appendix C when it monitored the Service on 25 March 2015 on an iPhone 4s. The Executive noted that the screen size of iPhones varied slightly between the different models. The diagonal measurement of the screen was 3.5 inches for the iPhone 4s, 4 inches for the iPhone 5s and 4.7 inches for the iPhone 6.

The Executive further noted that the size of the text on the banner could also be seen in the videos submitted by the Level 2 provider (as seen in the screenshot in Appendix B) which appeared to have been conducted on an iPhone 5. The Executive noted that both iPhone 4 and iPhone 5 models have the same screen width and only the height differs. Therefore the banner would have been the same size on both of these models.

The Executive submitted that, as the banner was the means of access to the Service (i.e. clicking on the banner resulted in immediate connection to the Service), the pricing information contained within it had to comply with the requirements of rule 2.2.5 of the Code, and in particular, it had to be prominent and clearly legible. The Executive submitted that pricing on the



banner advertisement was not sufficiently prominent nor clearly legible when viewed on an iPhone or similar device. The pricing was in a small font which was almost impossible to read on an iPhone screen. The Executive also noted that the text appeared to be in a very low resolution when compared with the Twitter feed viewed on the Echofon app (the first screenshot of Appendix C) which further decreased the visibility and clarity of the pricing information.

The Executive noted that the price was not present anywhere other than on the promotional banners, regardless of whether there was an iOS Alert.

While the Executive appreciated that the available space on banner ads was limited, the Executive asserted that if a provider chose to promote a service by making it accessible on a click-to-call basis from the banner advertisement, such a provider still needed to take steps to ensure that consumers were fully aware of the cost of the service before engaging with it. The Executive accordingly asserted that if it was not possible to make pricing sufficiently prominent on the banner advertisement, the Level 2 provider should consider making the advert a link to the Level 2 provider's website where pricing information could be made available on a full screen before consumers decided to make a purchase. During informal representations the Executive clarified that it was not asserting that it was impossible to have a banner ad that contained all of the information required under the Code.

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 nor clearly legible which resulted in consumers not realising that they would incur premium rate charges.

2. The Level 2 provider did not accept that it was in breach of rule 2.2.5 of the Code.

The Level 2 provider commented that the Executive relied on a "number of prior adjudications" relating to Pricing Prominence and Proximity, but noted that it had failed to provide any evidence of a previous adjudication for a similar alleged breach. The Level 2 provider further stated that the reliance on what constitutes "prominent" or "proximate" under rule 2.2.5 was entirely subjective and there were no specific rules about the display of pricing information (such as proportion and the resolution) to assist with understanding of the size of font that would be acceptable. The Level 2 provider further stated that if PhonepayPlus had initially advised it to increase its pricing prominence, it would of course have respected that and made changes.

The Level 2 provider accordingly asserted that it did its best to respect this rule and commented that:

- The price was written on the banner (within the promotion, as requested).
- The price was written just under the call to action button (and was accordingly proximate to the call to action, as requested).
- The price was written in white on black or a darker coloured background and in bold, in order to increase the visibility.
- The price was written in the same size as the PRN itself, and represented 22% of the height of the banner, and 43% of its width.

The Level 2 provider said the following about the two consumer complaints that were quoted in the Executive's submissions:



- The first complaint reflected a lack of attention from the user. The complainant dialled the Service and then locked her phone herself, and only then realised that she had dialled a number. The Level 2 provider submitted that it could do everything it could to prevent the risk of inadvertent access to the Service, but it could not prevent this kind of action, due entirely to the user's utilisation of her own phone.
- The second complaint clearly reflected a lack of precision. The Level 2 provider asserted that, while the user said that it did not remember seeing any pricing information, such information was on all of the Level 2 provider's creative banners. The Level 2 provider noted that the complainant thought the Service banner was an advert for a game, but was not sure. The Level 2 provider also noted that the complainant had previously talked about Snapchat, and commented that it did not display any banner ads within its apps. The Level 2 provider further stated that the complainant had possibly loaned his phone to his son and was clearly not sure of what he did with it to access the Service.

The Level 2 provider commented that consumers who called the Service 'inadvertently' would not have stayed on the phone for long and incurred more cost. The Level 2 provider further noted that consumers would have known what they were doing and would absolutely have heard the Pricing Announcement at the start of the call.

The Level 2 provider further stated that, in order to compensate for the risk of inadvertent connection, it was refunding all the end users that sent the Level 2 provider a complaint, without analysing any evidence within those complaints.

The Level 2 provider further noted the Executive's comment that the text on the banner ads appeared to be in a very low resolution when compared with the Twitter feed viewed on the Echofon app, and that this further decreased the visibility and clarity of the pricing information. In response to this, the Level 2 provider sought to explain the way in which it worked with its third party advertisers:

- The Level 2 provider stated that, when it launched a campaign, the third party advertiser would receive its guidelines, PRN, and creative. With respect to these materials the Level 2 provider asserted that it sent many sizes of creative, and provided a screenshot from an iPhone 6 that was intended to show the difference between the Level 2 provider's two types of creative (high and standard resolution).
- The Level 2 provider further stated that a really low proportion of their publishers were requesting the high resolution banner, but that it could not know which ones did, and which ones did not. As a preventative measure, the Level 2 provider stated that its guidelines asked publishers to use the high resolution creative as much as possible. However, now that the Level 2 provider was aware that the size of the price was too small, it had immediately worked on a new creative which it had already sent to third party advertisers in order to update the creative on all the mobile campaigns.

The Level 2 provider continued by stating that it wished to declare that it never received any document that showed the guidelines that it had to follow to generate its creative (such as Spot Radio [sic], digital banners, mobile banners, video content, magazine printing). It accordingly asserted that:

- It only received advice from the Network operator after the campaign went live and in order to adapt the creative (such as the customer phone number, inclusion of a "Click-Call"



button instead of just a “Call” and bigger pricing dimensions). During informal representations the Level 2 provider further clarified that any discussions concerning pricing prominence would have taken place prior to the launch of the Service.

- Any advice given was always applied within 24 hours.

During informal representations the Level 2 provider additionally commented that PhonepayPlus guidance suggested that pricing needed to be at least 50% of the size of the premium rate number. The Level 2 provider accordingly argued that, as the pricing information on the banner ads was displayed in a font that was larger than the premium rate number, it was sufficiently prominent for the purposes of rule 2.2.5 of the Code.

3. The Tribunal considered the Code, Guidance, the Level 2 provider’s written submissions and informal representations, and all other evidence before it. The Tribunal noted that, while pricing information on the banner ads was proximate to the means of access to the Service, it was not prominent as, contrary to the above Guidance, the small font size rendered the pricing information illegible without close inspection of the banner. The Tribunal noted assurances from the Level 2 provider that premium rate charges did not start to run until after completion of the Pricing Announcement which was recited at the start of the call. The Tribunal noted however that the Pricing Announcement was only likely to be useful to consumers who had intended to make a call as pricing information was recited within the first five seconds of the recorded announcement, and could therefore be missed by consumers who were not intentionally dialling a PRN. The Tribunal further determined that, in order to comply with outcome 2.2 of the Code, consumers were not only required to be fully and clearly informed of all information likely to influence the decision to purchase before any purchase was made, they also had to be given an opportunity to make the decision to purchase prior to incurring charges. When considering this the Tribunal noted that connection to the recorded football star quotes took place immediately following recital of the Pricing Announcement, and as such, even where pricing information had been heard, consumers had virtually no opportunity to then take time to decide whether they wished to connect to the Service and incur premium rate charges. Having considered all of these points the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH 3

Rule 2.2.1(a)

“Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made. (a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious.”

1. The Executive submitted that the Level 2 provider acted in breach of rule 2.2.1(a) of the Code as the promotional material did not contain the name of the Level 2 provider.

The Executive noted that the Level 2 provider’s company name, Technology and Communications Limited, was not displayed on any of the banner advertisements used to promote the Service.



The Executive requested the full terms and conditions for the Service in the initial direction to provide information dated 16 March 2015, however, the Level 2 provider did not provide any terms and conditions in its response. Therefore, it appeared that the only information available to consumers was the information included on the banner advertisements.

The Executive accordingly submitted that, as a result, and in breach of rule 2.2.1(a) of the Code, promotional material for the Service did not contain the name of the Level 2 provider of the Service and nor was the information otherwise available to consumers.

2. The Level 2 provider admitted that it was in breach of rule 2.2.1(a) of the Code. It commented that it did not know that it had to display on the creatives the company name “Technology and Communications Limited”.

The Level 2 provider stated that it would ask its creative team and its traffic team to generate new creatives to send to its third party advertiser. The Level 2 provider further stated that this alleged breach could have been avoided if PhonepayPlus had advised it of the issue, whereby it would have made the change as soon as possible.

The Level 2 provider concluded by stating that it felt aggrieved that this investigation had been made formal and it would have preferred to rectify the issues raised by the Executive immediately should it have received any specific advice. The Level 2 provider emphasised that it was committed to honouring all of its regulatory and compliance responsibilities. During informal representations the Level 2 provider reiterated its admission of the above breach of rule 2.2.1(a) of the Code and commented that it wished to continue to operate in the premium rate industry. The Level 2 provider apologised for the issues that had occurred in this investigation.

3. The Tribunal considered the Code, relevant correspondence, the Level 2 provider’s written submissions and informal representations, and all other evidence before it. The Tribunal noted that the Level 2 provider had admitted it had breached rule 2.2.1(a) of the Code. The Tribunal commented that the Level 2 provider ought to have researched the regulatory landscape concerning the operation of premium rate services in the UK before launching the Service and accordingly upheld a breach of rule 2.2.1(a) of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.3.1 – Fair and Equitable Treatment

The initial assessment of rule 2.3.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service had a direct and clear detrimental impact on consumers.
- The nature of the breaches meant that the Service would have damaged consumer confidence in premium rate services.
- The Service had the potential to generate higher revenues as a result of the breaches.



- The Service had been operated in a way that demonstrated a degree of recklessness in respect of non-compliance with the Code.
- The Service generated revenues through a recklessly non-compliant promotion that treated consumers unfairly.
- The Service harmed consumers through the use of third parties to promote a function of the Service without effective due diligence, control or monitoring.

Rule 2.2.5 – Pricing Prominence

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

- Service pricing was not clearly legible.

Rule 2.2.1 – Provision of information likely to influence the decision to purchase

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

- The Service failed to supply adequate details relating to the Level 2 provider.

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

Final overall assessment

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

- There had been one other prior adjudication under the Code relating to fair and equitable treatment of consumers regarding "Click-to-Call" banner advertisements within Apps, which the Level 2 provider ought to have considered prior to launching the Service.

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

- The Level 2 provider took steps to end the breaches and remedy the consequences in a timely fashion by suspending the Service pending the outcome of PhonepayPlus' investigation.
- The Level 2 provider proactively refunded consumers in an effort to relieve consumer harm caused.
- The Level 2 provider cooperated with PhonepayPlus during the course of the investigation as it admitted that it was in breach of rule 2.2.1(a) of the Code and demonstrated willingness to operate the Service in a compliant manner in the future.

The Level 2 provider's evidenced revenue in relation the Service was in the range of Band 3 (£250,000 - £499,999).

Having taken into account the circumstances of the case, 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:

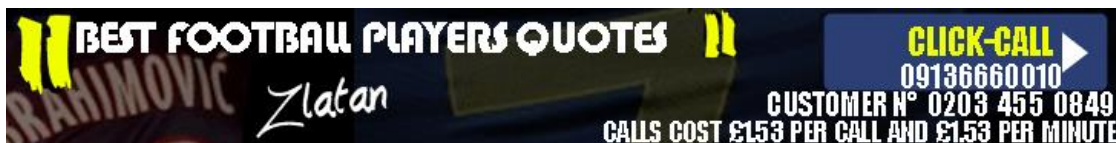
- a formal reprimand;
- a fine of £60,000;
- a requirement that the Level 2 provider submits all Service promotional material that is intended for publication to PhonepayPlus for compliance advice for a period of one month from the date of this decision. Such advice is to be sought within two weeks of the date of publication of this decision and thereafter implemented by the Level 2 provider within two weeks of such advice being provided (subject to any extension of time agreed with PhonepayPlus) to the satisfaction of PhonepayPlus; 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:

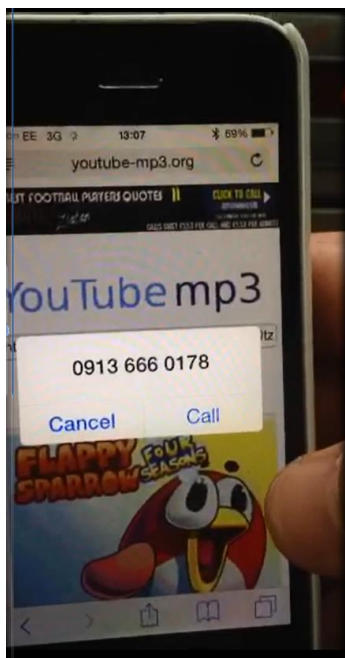
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Appendix A – Sample Banner Ads



Appendix B – Screenshot of the monitoring of the Service submitted by the Level 2 provider





Appendix C – Screenshots of the Executive’s monitoring of the Service

