

Tribunal meeting number 206/ Case 3

Case reference:	91942
Level 2 provider:	Mobigo Ltd (UK)
Type of service:	Adult Video Subscription Service
Level 1 provider:	Tap2Bill Limited (formerly trading as Wireless Information Network Ltd) and IMImobile Europe Limited
Network operator:	All Mobile Network operators

This case was brought against the Level 2 provider under Paragraph 4.5 of the Code of Practice

Background

Between 24 June 2015 and 12 September 2016, the Executive received 5 complaints concerning an adult video subscription service, charged at between £1.50 and £8.00 per week (the “**Service**”). The Level 2 provider for the Service was Mobigo Ltd (the “**Level 2 provider**”). Consumers opted-in to the Service via PayforIt and Service shortcode 83463 was used for the free spend reminder messages and for consumers to opt-out of the Service. The Level 1 provider for the Service was Tap2Bill Limited (formerly trading as Wireless Information Network Ltd) and IMImobile Europe Limited (the “**Level 1 provider**”).

The Level 1 provider stated that the Service had operated between 28 November 2014 and 14 December 2015, when the Level 1 provider suspended it.

The service

The Executive requested information from the Level 2 provider in relation to the Service on 11 March 2016, 1 April 2016 and 14 September 2016, but the Level 2 provider failed to respond. The Executive contacted the Level 1 provider for information in relation to their role in the provision of the Service. The information they provided to the Executive included its testing of the Service conducted on 23 February 2015. The screenshots demonstrated that a consumer was required to perform a number of actions in order to subscribe to the Service, including entering their mobile number into the Service website and entering a code (keyword) into the webpage before subscription to the Service commenced.

Monitoring of the Service conducted on 13 December 2015 was conducted from a third party compliance monitoring company (the “**Third Party**”) and provided to the Phone-paid Services Authority (the “**PSA**”) by the Level 1 provider. It revealed that consumers could be opted-in to the Service without the need to take the steps outlined in the consumer journey captured by the Level 1 provider during its testing of the Service. It found that a consumer could be subscribed to the Service by attempting to view a video and it had used “iframe masking” to hide the subscribe command.

The monitoring showed that the Third Party was searching an unrelated free adult video streaming/download website where a banner advertisement for the Service appeared, although it was not apparent that it related to the Service or a premium rate service. By clicking on the banner advertisement (**Appendix A**) the Third Party was directed to the Service landing page (**Appendix B**). The Third Party selected a video under “Chose your Video” section and the screen buffered while the video appears to load. The Third Party pressed the play button and the video began to load (**Appendix C**). The video did not play but a text message was received notifying the Third Party that it had been subscribed to the Service at a cost of £4.50 per week.

The Executive was advised from the Mobile Network operator EE that the monitoring evidenced that the Level 2 provider had used iframe masking in order to subscribe consumers to the Service. “Iframe masking” or “clickjacking” as it is also known is a malicious technique of misleading a web user into clicking on something that differs from what the user believes they are clicking on. A clickjacked web page consists of different layers/pages. A layer that the web user can see and a layer that is hidden. The web user clicks on visible buttons/links, when they are actually performing actions on the hidden layer. In the case of the monitoring of the Service, a video play button was clicked on the visible page. However, in reality, a video was not played and instead a subscription to the Service had been initiated. The Executive had created a visual representation of the iframing, where the visible layer had been made transparent and the hidden layer had been made visible (**Appendix D**).

Summary of complaints

Complainants variously alleged that they had not consented to the Service charges. A sample of complainants accounts are below:

“I am unaware of what the service is add [sic] I have not used it. Unclear what the service provides. I did not agree to any service. I am being billed weekly, despite my requests to cancel. I have been billed £18”

“Consumer - Realised Charges in August
EE Informed to Contact - 03330030589 - 24/8/16
Contacted Mobigo - Informed charges have Stop
Consumer does not know how he has authorised charges
Provider could not inform further information”

The Investigation

In accordance with the transitional arrangements set out at paragraph 1.8 of the PSA Code of Practice (14th Edition), the Executive conducted this matter as a Track 2 procedure in accordance with paragraph 4.5 of the Code of Practice (14th Edition).

The Executive sent a Warning Notice to the Level 2 provider on 7 February 2017 with a deadline for a response of 21 February 2017. Within the Warning Notice the Executive raised the following breaches of the PSA Code of Practice (the “Code”):

- Rule 2.2.1– Provision of information
- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.3.3 – Consent to Charge
- Paragraph 4.2.5 - Failure to disclose requested information

The Tribunal considered the confirmations of delivery of the Warning Notice by post and email to the Level 2 provider, and was satisfied that the Executive had made all reasonable attempts to inform the Level 2 provider of the proceedings. On 21 April 2017, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full:

- The complainants’ accounts;
- Correspondence from EE;
- Correspondence between the Executive and the Level 2 provider (including directions for information);
- Correspondence between the Executive and Level 1 provider sharing the monitoring evidence of the Service from the Third Party;
- Revenue Information for the Service;
- PSA Guidance on “Promoting Premium Rate Services” (13th Edition of the Code) and on “Consent to Charge” (13th Edition of the Code);
- The Warning Notice dated 7 February 2017, including attachments;

Submissions and Conclusions

Alleged Breach 1

Rule 2.2.1 of 13th Edition of the Code– “Consumers of PRS must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”

1. The Executive asserted that the Level 2 provider had breached rule 2.2.1 of the Code as key information which would likely affect a consumer’s decision to subscribe to the Service was not provided prior to a subscription being initiated.

The Executive relied on the content of the PSA’s Guidance on “Promoting Premium Rate Services” (the “**Guidance**”)

The Guidance states:

“Paragraph 2 - Setting out key information and promoting transparently

Paragraph 2.1

There is a vast range of different types of PRS. Each of these may need to give slightly different information to a consumer within their promotions, in order to ensure consumers have all the information they would reasonably need before purchasing.

Paragraph 2.2

In addition, there are a range of different types of promotional material, ranging from promotions that are self-contained (such as a print-based advert, inviting a consumer to call or text an access number), to promotions that have a number of components that lead a consumer toward a purchase. An example of this would be a text message with a link to a mobile website, where the consumer subsequently makes purchases using a secure payment method. In this latter case, there would be a number of steps between the first promotion and a purchase. This results in a number of stages at which a provider can act to ensure consumers were aware of all information necessary to make a decision to purchase, prior to any purchase.

Paragraph 2.3

Because of this complexity, PhonepayPlus recommends that providers familiarise themselves with the entire contents of this Guidance and especially the parts relevant to the promotional mechanics they use. However, as a basic starting point, the following information is considered key to a consumer's decision to purchase any PRS, and so should be included in promotional mechanics for any PRS:

- Cost
- Brand information
- Product or service information
- How it is delivered or used
- How it is paid for – one off payment, recurring charges etc
- How to get help where necessary”

The monitoring journey recorded by the Third Party on 13 December 2015 showed that the Service was promoted using banner advertisements (**Appendix A**). The Executive noted that no information regarding the Service or the Level 2 provider was displayed on the banner advertisement. The Executive submitted that the promotional material for the Service did not contain sufficient information for the consumer to make an informed decision about whether to subscribe to the Service.

The monitoring journey recorded by the Third Party also confirmed that a subscription to the Service could be initiated when there was an attempt to play a video (**Appendix D**). The Executive submitted that the Code requires that consumers are fully and clearly informed of all the relevant information before any purchase is made. The screenshots at **Appendix A-D** demonstrate that at no point prior to the subscription being initiated was any information relayed to the consumer that it was a premium rate service.

Accordingly, the Executive submitted that the Level 2 provider had failed to fully and clearly inform consumers of all the information likely to influence their decision to purchase before any purchase was made, and therefore it had acted in breach of rule 2.2.1 of the Code.

During the Tribunal, the Executive was asked to explain the delay between being notified of the issue with the Service and the service of the Warning Notice. The Executive explained that the delay had been unfortunate but it was due to the Investigations team's involvement in a large number of other cases which had taken priority as they concerned issues where there was ongoing consumer harm.

Upon questioning, the Executive could not confirm whether it was possible to enter the Service through a consumer journey that was Code compliant. The Executive explained that the Service had been suspended before it could conduct its own monitoring and accordingly, it was not able to say whether there was a legitimate route to the Service.

1. The Level 2 provider did not provide a response to the Warning Notice.
2. The Tribunal considered the Code and all the evidence before it.

The Tribunal noted that it was being asked to consider evidence conducted by the Third Party who had been monitoring on behalf of a Mobile Network operator. The Tribunal were of the view the evidence was clearly explained, presented in a well-understood format, recorded with time stamps and on the basis of all the information the Tribunal had before it, it accepted that the evidence was credible. Further, the evidence was unchallenged by the Level 2 provider. Taking this into consideration, the Tribunal was willing to accept the monitoring evidence.

The Tribunal was satisfied that the promotions that had been viewed in the monitoring conducted by the Third Party on 13 December 2015 did not fully and clearly inform consumers of all the information likely to influence the decision to purchase, including the cost, before any purchase was made. Accordingly, the Tribunal upheld a breach of rule 2.2.1 of the Code.

Decision: UPHELD

Alleged Breach 2

Rule 2.3.1 of the 13th Edition of the Code – “Consumers of premium rate services must be treated fairly and equitably”

1. The Executive asserted that the Level 2 provider had breached rule 2.3.1 of the Code as consumers could initiate a subscription to the Service incurring a charge without their knowledge.

The Executive relied on the monitoring conducted by the Third Party, as set out in the background section of this decision above. The journey recorded showed that a consumer searching the internet, intending only to watch free adult videos, could unwittingly be subscribed to the Service. The Level 1 provider advised the Executive

that 170 people subscribed to the Service between 8 and 14 December 2015 through the promotion captured in the monitoring by the Third Party. The Level 1 provider advised that if the harm was not limited to this promotion alone, the number of consumers that were potentially affected was 455. The Executive acknowledged that it could not confirm the number of consumers directly affected by the journey captured in the monitoring.

The Executive noted that the journey captured by Third Party did not follow the stated method of entry. Based on how the Service was stated to operate, the consumer must take a number of active steps in order to subscribe to the Service. These included a consumer entering their MSISDN on the Service landing page. The Executive submitted that these steps, if implemented, are designed to ensure that a consumer knowingly initiates a subscription to a premium rate service through their actions. However, in the journey captured by the Third Party, the action that initiated the subscription was an attempt by the consumer to view what purports to be a free video on the Level 2 provider's website, and not an acceptance of the charges for a premium rate service. At no point during the journey was the consumer alerted to the fact that they were engaging with a premium rate service or given the choice as to whether they wished to subscribe to the Service. The Executive submitted that a consumer would only become aware that a subscription to the Service had been initiated when they received a confirmation message on their handset. By this point the consumer would have already been charged.

Accordingly the Executive submitted that the treatment of consumers had not been fair and equitable, and that a breach of rule 2.3.1 of the Code had therefore occurred.

2. The Level 2 provider did not provide a response to the Warning Notice.
3. The Tribunal considered the Code and all the evidence before it. As stated in the Tribunal's determination above under the rule of 2.2.1 of the Code, the Tribunal accepted the monitoring evidence supplied by the Third Party. The Tribunal determined that the Service had not treated consumers fairly and equitably, as consumers had not been told that they would be engaging with a premium rate service and incurring charges by clicking on a video, before they had incurred those charges. Accordingly, the Tribunal upheld a breach of rule 2.3.1 of the Code.

Decision: UPHELD

Alleged Breach 3

Rule 2.3.3 of the 13th Edition of the Code – “Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code as:
 - Key information was not provided that would enable a consumer to provide their consent to be charged; and

- Consumers could be unwittingly subscribed to the Service and therefore be charged without their consent.

The Executive relied on the content of the PSA Guidance on Consent to Charge (the “**Guidance**”)

The Guidance states:

“Paragraph 1.1

Premium rate services allow a charge to be generated to a consumer’s phone bill, whether pre-paid or post-paid as part of a contract with an originating network, directly and remotely. A major concern then is that they can be charged without having requested or consented to any purchase.

Paragraph 1.2

It is important to understand the need for transparency when establishing any consent to charge a consumer via PRS payment. The key service information necessary to comply with rule 2.2.4 of the PhonepayPlus Code of Practice must be presented clearly and with suitable proximity and prominence. This is to ensure any action on the consumers part reflects a genuine intention to consent to the charges triggered by the action.”

As noted in the alleged breach of rule 2.2.1, key information which would likely affect a consumer’s decision to subscribe to the Service was not provided prior to a subscription being initiated. The fact that it was not made clear that a subscription service was being offered, let alone that it was charged at a premium rate, meant that a consumer entering the Service via this route would not have given their informed consent to be charged.

As noted in the alleged breach of rule 2.3.1, consumers could initiate a subscription to the Service without intending to do so, and incur a charge. The monitoring conducted by the Third Party indicated that a consumer could trigger a subscription to the Service through the act of trying to view a free video. The Executive asserted that the pressing of a video play button on a website could not be viewed as giving consent to be charged for a premium rate subscription service.

For the reasons given above, the Executive submitted that a breach of rule 2.3.3 of the Code had occurred.

2. The Level 2 provider did not provide a response to the Warning Notice.
3. The Tribunal considered the Code and all the evidence before it. As stated in the Tribunal’s determination above under the rule of 2.2.1 of the Code, the Tribunal accepted the monitoring evidence supplied by the Third Party. The Tribunal concluded that consumers had clearly not been made aware that there was a chargeable Service on offer, and further that by clicking on a video would initiate a subscription to a premium rate service. Further, the Tribunal commented that it was clear that the use of

iframing/clickjacking was a particular technological method that had been used with the intention of deceiving consumers into being charged without their knowledge. Accordingly, the Tribunal was satisfied that consumers that entered the Service via this route would not have given their informed consent to the charged. The Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

Alleged Breach 4

Paragraph 4.2.5 of the 13th Edition of the Code - “A party must not fail to disclose to PhonepayPlus [Phone-paid Services Authority] when requested any information that is reasonably likely to have a regulatory benefit in an investigation.”

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.5 of the Code on the basis that it had failed to respond to directions for information. The Executive wrote to the Level 2 provider on 11 March 2016 with a direction requiring the Level 2 provider to supply information, pursuant to 4.2.3 of the Code (13th Edition). The direction required provision of the following information:
 - How the Service was intended to operate
 - A complete consumer journey into the Service and details of the different methods of opting in to the Service
 - How the Service was promoted

In the context of the matters under investigation, the Executive was of the view that prompt answers to the above queries would plainly have been likely to have had a regulatory benefit. The Level 2 provider failed to respond to the direction for information dated 11 March 2016.

On 1 April 2016, the Executive sent an email to the Level 2 provider to chase a response to the previous direction for information. Again, the Level 2 provider did not respond to this request for information from the Executive.

On 14 September 2016, the Executive sent a final email to the Level 2 provider requesting a response to the direction for information. No response was received from the Level 2 provider.

The Executive submitted there had been a breach of paragraph 4.2.5 on the basis that the Level 2 provider had failed to provide information when directed to do so, that was reasonably likely to have had a regulatory benefit.

2. The Level 2 provider did not provide a respond to the Warning Notice.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted that the Level 2 provider had failed to provide key information about the Service and it was satisfied that having been formally directed to disclose this information to the Executive on a number of occasions, it had been given plenty of opportunity to do so.

Further, the Tribunal was satisfied that the information requested was reasonably likely to have a regulatory benefit to the investigation. Accordingly, the Tribunal upheld a breach of paragraph 4.2.5 of the Code.

Decision: UPHELD

SANCTIONS

Representations on sanctions made by the Executive

1. The Executive submitted that the following sanctions were appropriate:
 - a formal reprimand;
 - a fine of £175,000;
 - a prohibition on the Level 2 provider from providing or having, any involvement in, any premium rate service for a period of five years; and
 - a requirement that the Level 2 provider 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 provider evidence to PhonepayPlus that such refunds have been made.

based on a preliminary assessment of breaches 1, 2, 3 and 4 as “very serious”.

The Level 2 provider did not make any representations on sanctions.

Initial overall assessment

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

Rule 2.2.1 – Provision of information

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

- The nature of the breaches, was likely to severely damage consumer confidence in premium rate services;
- The Service sought to generate revenue through an intentionally misleading promotional mechanic of iframing/ clickjacking and it was clearly designed with the specific purpose of generating revenue streams; and
- The Service failed to provide any pricing information in promotional material which contained the means of access to the Service.

Rule 2.3.1 – Fair and equitable treatment

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

- The nature of the breaches, was likely to severely damage consumer confidence in premium rate services;
- The Service sought to generate revenue through an intentionally misleading promotional mechanic of iframing/ clickjacking and it was clearly designed with the specific purpose of generating revenue streams

Rule 2.3.3 – Consent to charge

The initial assessment of the breach of rule 2.3.3 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of the breaches, was likely to severely damage consumer confidence in premium rate services;
- The Service sought to generate revenue through an intentionally misleading promotional mechanic of iframing/ clickjacking and it was clearly designed with the specific purpose of generating revenue streams

Paragraph 4.2.5 – Failure to disclose information

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

- The nature of the breaches was likely to severely damage consumer confidence in premium rate services; and
- The Level 2 provider had deliberately and without good reason provided no response to directions to provide information.

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

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating or mitigating factors:

The Level 2 provider’s evidenced revenue in relation to the Service in the period from November 2014 to January 2016 was in the range of Band 4 (£100,000- £249,999).

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed

Having regard to all the circumstances of the case, including that there was some overlap between the breaches of the Code raised, the Tribunal decided to impose the following sanctions:

- a formal reprimand;

- a fine of £250,000;
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of five years, starting from the date of publication of this decision, or until payment of the fine and the administrative charges, whichever is the later; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made.

Administrative charge recommendation:

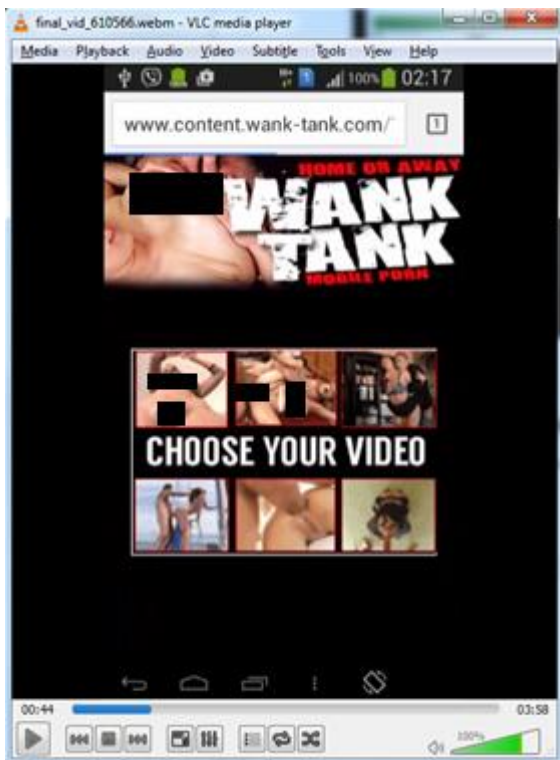
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Appendices:

Appendix A - A screenshot showing the banner advertisement for the Service:



Appendix B - a screenshot of the Service landing page:



Appendix C – a screenshot of the video that was selected to play which initiated the subscription:



Appendix D – a visual representation created by the Executive to demonstrate iframing:



A consumer clicks on a video play button which is on the visible layer. However, in reality they are interacting with the hidden layer which subscribes the consumer to the Service