

## Tribunal meeting number 183 / Case 1

**Case reference:** 64721  
**Level 2 provider:** Virtual Rainbow Limited (UK)  
**Type of service:** Girly Vidz (formerly 'My UK Babes') glamour video subscription service  
**Level 1 provider:** Zamano Solutions Limited (Ireland); Veoo Ltd (UK)  
**Network operator:** All Mobile Network operators

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

**BACKGROUND**

The case concerned a glamour video subscription service, charged at £3 per week, under the brand name Girly Vidz (formerly 'My UK Babes') operated on dedicated shortcodes 78311 and 86211, and shared shortcodes 82999 and 81321 (the "**Service**").

The Level 2 provider for the Service was Virtual Rainbow Limited (the "**Level 2 provider**"). The Level 2 provider had been registered with PhonepayPlus since 14 January 2015. The Level 1 provider for Service shortcode 78311 and shortcode 81321 was Zamano Solutions Limited ("**Zamano**"). The Level 1 provider for Service shortcodes 82999 and shortcode 86211 was Veoo Ltd ("**Veoo**").

Between 9 February 2015 and 8 March 2016, the Executive received 243 complaints concerning the Service. Complainants variously alleged that the Service charges were unsolicited.

**The Service**

The Service was stated to be a glamour video subscription service charged at £3 per week. The Executive understood that consumers entered the Service via a wireless application protocol ("**WAP**") opt-in. As at 8 March 2016, the Service was currently operational.

The Level 2 provider stated that the Service commenced operation on 10 February 2015. Prior to the Level 2 provider's involvement in the provision of the Service, the provider of the Service was a third party individual ("**the Second Service Provider**"). Prior to the Second Service Provider's involvement in the provision of the Service, the Level 2 provider was a third party company ("**the First Service Provider**"). The Second Service Provider had been the sole director of the First Service Provider.

The Executive noted from complainant message logs supplied by the Level 2 provider that users of the Service opted in to the Service on Zamano shortcode 81321. Those users were then in turn migrated to Zamano shortcode 78311. Some users were then migrated to Veoo shortcodes 82999 or 86211. The Executive noted that the partial user migration from shortcode 78311 to shortcodes 82999 and 86211 was staggered over a period of time.



The Level 2 provider supplied the following example consumer journey into the Service:

“Step 1 – Customer clicks on a banner advert online while browsing the web on their phone.

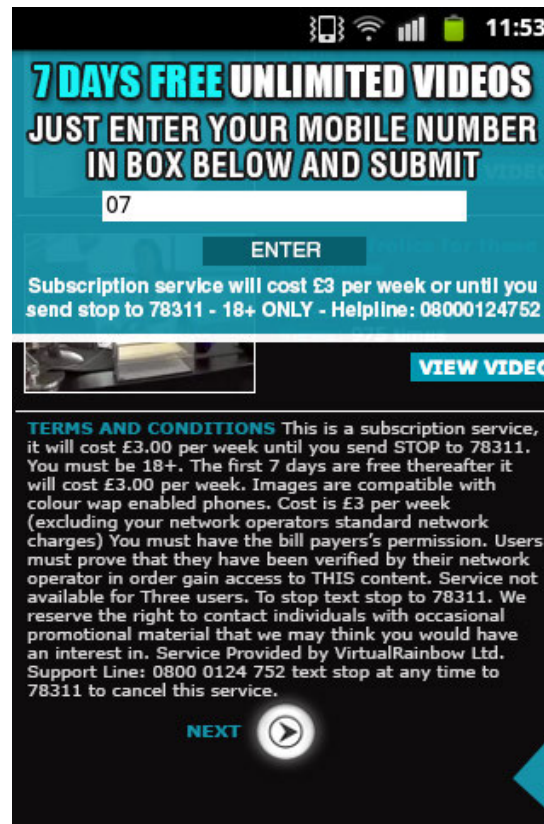
[Screen shot one]



Step 2 - Once clicked the customer is redirected to our landing page, which is hosted by Go Verify It.

[Screen shot two]

[Screen shot three]



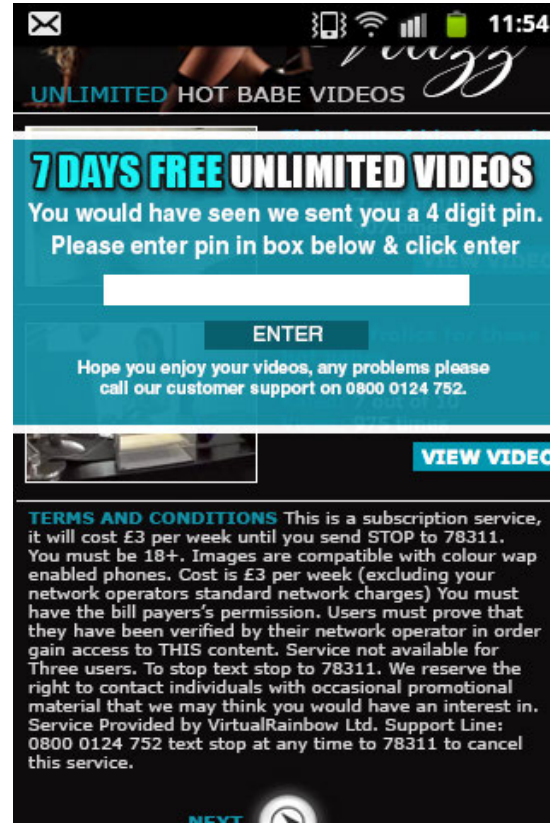


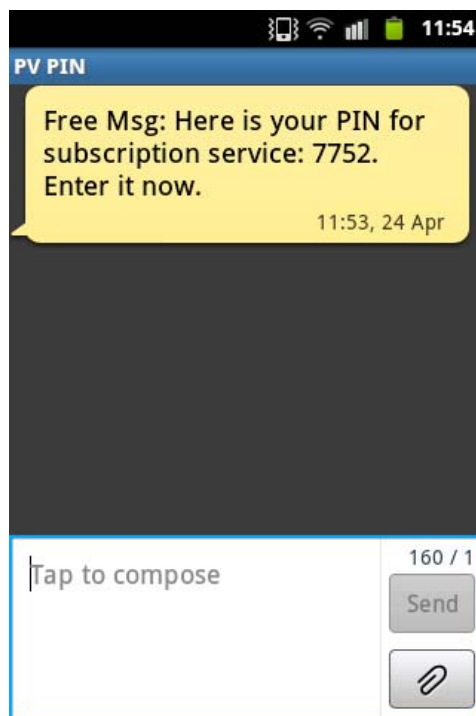
Step 3 - Once the customer has read the terms and conditions and understand all costs involved with the service they are asked to enter their mobile number into the box provided above. Once entered the page changes and requests a pin which is sent to the customer by Go Verify It.

[Screen shot four]



[Screen shot five]

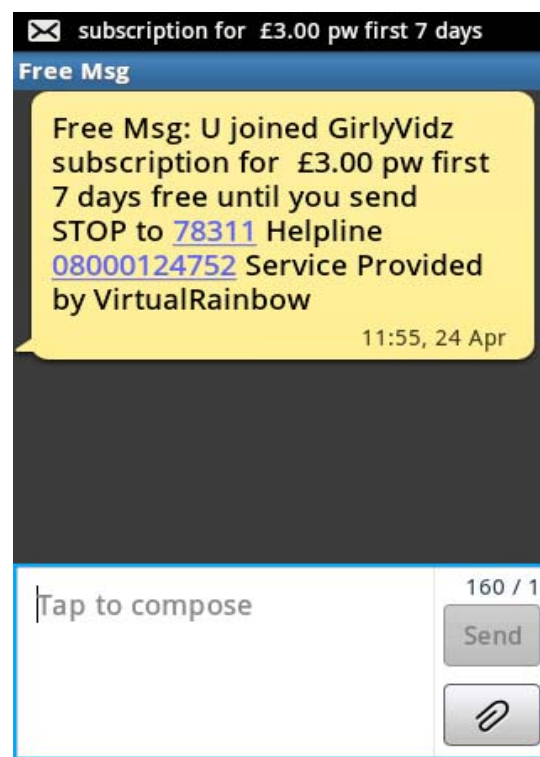




Step 4 – Once the customer enters the pin that they receive onto the website Go Verify It inform us that the customer has subscribed to the service. The customer is then directed to our content page where they can view content immediately and a free join message is sent out.”

[Screen shot six]

[Screen shot seven]



**Summary of complaints**

The Executive received 243 complaints concerning the Service in the period from 9 February 2015 to 8 March 2016. Complainants variously alleged that the Service charges were unsolicited. A sample of complainant accounts is set out below.

“Every Friday I am billed but I have not subscribed to any service. I require a full refund and a cessation of this occurrence immediately.”

consumer said that he has not interacted with any services  
consumer said that he has not subscribed to any services or requested it  
consumer said that he has not entered his number into anything  
consumer said that he does not know how the company have obtained his number  
consumer said that he has tried to contact the company via the number his mno gave him but can not get through to anyone to speak to  
consumer said that he does not watch videos on his phone and did not ask for the services.  
consumer said that he has sent stop to the short code but it did not work

“Am being billed without having asked for or ever receiving a service.”

“I did not subscribe to this service so I do not know why or how my number had been set up for this?

On the bills attached I have been charged:

Bill date - 26/12/2015

18/12/15 - £2.50

25/12/15 - £2.50

Total £5 plus vat

Bill date - 26/01/2016

01/01/16 - £2.50

08/01/16 - £2.50

15/01/16 - £2.50

23/01/16 - £2.50

Total £10 plus vat

The number is shows on the bill is 70038334 and the number via text is 73811

From your online tool it says it is the following company:

Virtual Rainbow LTD

...

I would like my money refunded to me for all the above charges which by the look of it have been weekly since the middle of December.

I believe the service has been stopped now by doing what my service provider told me to do on line.”



"The company is spamming my phone with pornographic messages and charging £2.50. two charges in December and January.

Emailed the company but received no response. They are sending offensive pornographic messages and charging me for it.  
I have never signed up for this service.

"You have charged me, again, £2.50, for a service I have not used. I have contacted EE to complain and they have advised me to contact PhonePayPlus to complain.

On January 2nd 2016 you charged £2.50 to [REDACTED]. I have not used your service. this is the second time you have done this.

Please advice on what the charge was for and how to receive a refund." " [sic]

#### **Complainant text message logs**

As part of the standard request for information process, the Level 2 provider supplied text message logs for 228 out of the 243 complaints received. The text message logs supplied by the Level 2 provider generally showed that:

- Complainants purportedly opted-in to the Service in the time period July – October 2014 (the "**Opt-in Period**");
- There was a high failure rate of chargeable Service messages following the Opt-in Period on Service shortcodes supplied by Zamano, variously listed as 'ACCEPTED', 'SENT' or 'FAILED';
- Message logs supplied by the Level 2 provider after September 2015 generally only listed failed Service messages as 'SENT' and not 'ACCEPTED' or 'FAILED'; and
- The delivery status for Service messages was unclear.

In the Level 2 provider message logs, failed Service messages generally occurred from the date of the complainant's purported opt-in. The failed Service messages were later generally followed by successfully delivered chargeable messages.

An example log can be seen at **Appendix A**.

#### **Complainant responses to Executive questionnaire**

In light of the high number of failed messages identified by the Executive in the complainants' text message logs provided by the Level 2 provider, which the Executive had noted were not generally shown in logs provided by the Level 1 provider, and the possible explanations offered by the parties in the value chain for the failed messages, on 2 March 2016 the Executive contacted 236 complainants (the total number of complaints received by PhonepayPlus about the Service as at that date) with the following series of questions:

"Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go?

If the mobile phone that was charged is pay-as-you-go, please advise whether you regularly / always had more than £3 credit on your mobile phone?



Please advise whether the mobile phone that received the chargeable messages was regularly switched off and/or had no mobile signal for long periods of time (i.e. for more than several days)?

Please advise whether you transferred your mobile number between mobile telephone companies in the six months before you received the chargeable text messages? If yes, please confirm if you experienced long periods with no signal and/or difficulty in sending and receiving text messages.”

In addition the complainants were sent a copy of Screen Shots One to Three (as shown as above) and asked whether they recalled viewing and/or interacting with it or a similar service promotion.

As at 11 March 2016, the Executive had received responses to the questionnaire from 83 complainants. Below is a breakdown of the complainant responses:

Question	Response	Comments
Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go?	75 respondents confirmed they were on contract 2 respondents confirmed they were on pay-as-you-go 6 respondents did not respond to this question	1 respondent commented that they had been on pay-as-you go, but have recently moved to contract
If the mobile phone that was charged is pay-as-you-go, please advise whether you regularly / always had more than £3 credit on your mobile phone?	2 respondents advised they kept more than £3 credit on their pay-as-you-go mobile phone	
Please advise whether the mobile phone that received the chargeable messages was regularly switched off and/or had no mobile signal for long periods of time (i.e. for more than several days)?	69 respondents advised that their phone was not regularly switched off and/or did not have mobile signal for long periods of time 6 respondents advised that their phone was switched off and/or they had no phone signal for extended periods of time 8 respondents did not respond to this question	



Please advise whether you transferred your mobile number between mobile telephone companies in the six months before you received the chargeable text messages? If yes, please confirm if you experienced long periods with no signal and/or difficulty in sending and receiving text messages.	71 respondents advised that they had not transferred between mobile companies  2 respondents advised they had transferred between mobile telephone companies  10 respondents did not respond to this question	
Please advise if you recall viewing and interacting with the attached, or a similar, promotion?	75 respondents advised that they had not viewed / interacted with the promotional material  8 respondents did not respond to this question	

#### Previous complaint resolution procedure in respect of the Service operated by the First Service Provider

On 11 December 2014 the Executive issued a set of required actions (the “**Action Plan**”) under the Track 1 procedure to the First Service Provider. Within the Action Plan the Executive alleged a breach of rule 2.3.3 of the PhonepayPlus Code of Practice (the “**Code**”) for the failure of the First Service Provider to hold robust evidence which verified opt-ins to the Service. On 12 January 2015 the sole director of the First Service Provider responded to the Action Plan advising he had implemented the Action Plan and engaged the services of a third party verifier. Within his response he stated “*we can confirm that we will be operating wap services using the full online robust version of GVI.*”

Following the director’s acceptance of the Action Plan it came to light that the Service had been novated to the director on 10 July 2014, and that the First Service Provider had dissolved on 22 July 2014. The Executive contacted the Second Service Provider on 23 January 2015 and suggested that, while the Executive would not be enforcing the Action Plan, the Second Service Provider continue to provide refunds to complainants. On 3 February 2015 the Second Service Provider confirmed that he would continue to offer refunds to complainants.

The alleged breaches of the Code raised in this case rely on evidence gathered from complainants who first contacted the Executive after the Track 1 procedure was finalised.

While the Executive noted that the Action Plan was not issued to the Level 2 provider, in its letter received by the Executive on 2 March 2016 the Level 2 provider stated:



*“We were in communication with the [ Second Service Provider ] when the Track 1 Action plan was received which also confirmed to us that, in order to continue marketing services we would need to operate an online version of Go Verify It which we can confirm that we did.”*

The Executive understood that the Level 2 provider was therefore aware of the Action Plan and the breach of rule 2.3.3 outlined in the Action Plan.

### **The investigation**

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (13<sup>th</sup> Edition).

The Executive sent a breach letter to the Level 2 provider on 4 April 2016. Within the breach letter the Executive raised the following breaches of the PhonepayPlus Code of Practice (the "**Code**"):

- Paragraph 4.2.4 – Provision of false information to PhonepayPlus
- Rule 2.3.3 – Consent to charge
- Paragraph 3.4.1 – Failure of a provider to register with PhonepayPlus

The Level 2 provider responded on 25 April 2016. On 12 May 2016, the Tribunal, having heard informal representations made on behalf of the Level 2 provider, reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses including supporting documentation);
- Correspondence between the Executive and the previous service providers, including a Track 1 action plan;
- Correspondence between the Executive and the Level 1 providers, including message logs for complainants;
- Correspondence between the Executive and the Verifier, including message logs for complainants;
- Correspondence between the Executive and a third party verifier;
- Complainant message logs from the Level 2 provider; and
- The breach letter of 4 April 2016 and the Level 2 provider's response of 25 April 2016 including attachments.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH 1**

#### **Paragraph 4.2.4 – Provision of false information to PhonepayPlus**



"A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission)."

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.4 of the Code as message logs supplied by the Level 2 provider were false. The Executive relied on correspondence exchanged with the Level 2 provider, correspondence exchanged with the Level 1 providers, complainant accounts (which are referenced in the 'Background' section above), complainant questionnaire responses and text message logs.

The Executive noted that the complaints received by PhonepayPlus following the Track 1 procedure spanned the period February 2015 to March 2016. Further, it noted from complainant text message logs supplied by the Level 2 provider that the apparent opt-in date for those complainants was consistently shown in nearly all complainant message logs as occurring between July 2014 and October 2014 regardless of when the complaint was received. Yet in the complainant message logs, the date of the first successfully charged Service message was generally significantly later than the purported date of Service opt-in.

As set out in the 'Background' section above, the Executive noted that it was common for complainant text message logs supplied by the Level 2 provider to show several months of failed chargeable Service messages prior to the issuing of successfully charged Service messages. The Executive understood that complainants whose message logs only listed failed Service messages following their opt-in would not have been charged. A summary of four example message logs was provided:

Level 2 provider message log for mobile number \*\*\*\*\*068

The Executive noted that the Level 2 provider message log stated that the initial opt-in to the Service occurred on 10 August 2014. The subscription confirmation message listed in the message log on 10 August 2014 18:01 stated:

"Free Msg: U have joined myUKbabes video service for £3.00 per week until you sent STOP to 81321 Helpline 02476998891 Service Provided by [name redacted]"

The Executive noted from the message log supplied by the Level 2 provider that the delivery statuses of the chargeable Service messages were variously described as 'FAILED', 'ACCEPTED' or 'BILLED'. The Level 2 provider provided the following information regarding the delivery status of the chargeable Service messages:

*"The status failed is a confirmation that the message has not reached the customers handset, in the more recent months we updated our system to prevent messages automatically being set to failed after a certain period of time regardless if we have received a delivery receipt response from the aggregator or not. This was to prevent customers potentially being over billed as our system would read the message as failed a potentially allow the rebilling scheduler to kick in and attempt to bill the customer a second time. We have now updated our*



*system so that if we do not receive a response from the aggregator the billing message status will remain as sent until a delivery receipt is received. The status accepted occurs when we have sent a billing message and the aggregator has accepted the message although we have not received a response, again in the more recent months we have discontinued this delivery status to simplify our rebilling scheduler. The status billed occurs when the aggregator confirm that the customer has received the billing message and credit has been deducted from their mobile phone.”*

The Executive noted that following the subscription confirmation message entry in the message log, the status of all chargeable Service messages from Service shortcodes 81321 and 78311 were listed as either ‘FAILED’ or ‘ACCEPTED’. The first chargeable Service message listed as ‘BILLED’, sent from Service shortcode 78311, occurred on 1 March 2015, some six months and 20 days after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*851

The Executive noted that the Level 2 provider message log stated that the initial opt-in to the Service occurred on 10 August 2014. The subscription confirmation message listed in the message log on 10 August 2014 at 13:55 stated:

“Free Msg: U have joined myUKbabes video service for £3.00 per week until you sent STOP to 81321 Helpline 02476998891 Service Provided by [name redacted]”

The Executive noted from the message log supplied by the Level 2 provider that the delivery status of the chargeable Service messages were described as ‘FAILED’, ‘ACCEPTED’ or ‘BILLED’.

The Executive noted that following the subscription confirmation message entry in the message log, the status of all chargeable Service messages from Service shortcodes 81321 and 78311 were listed as ‘FAILED’ or ‘ACCEPTED’. The first chargeable Service message listed as ‘BILLED’, sent from Service shortcode 78311, occurred on 22 February 2015, some six months and 12 days after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*806

The Executive noted that the Level 2 provider message log stated that the initial opt-in to the Service occurred on 30 August 2014. The subscription confirmation message listed in the message log on 30 August 2014 at 14:15 stated:

“Free Msg: U have joined myUKbabes video service for £3.00 per week until you sent STOP to 81321 Helpline 02476998891 Service Provided by [name redacted]”



The Executive noted from the message log supplied by the Level 2 provider that the delivery statuses of the chargeable Service messages were described as 'FAILED', 'ACCEPTED' or 'BILLED'.

The Executive noted that following the subscription confirmation message entry in the message log, the status of all chargeable Service messages from Service shortcodes 81321 and 78311 were listed as 'FAILED' or 'ACCEPTED'. The first chargeable Service message listed as 'BILLED', sent from Service shortcode 81321, occurred on 29 November 2014, some two months and 30 days after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*296

The Executive noted that the Level 2 provider log stated that the initial opt-in to the Service occurred on 20 September 2014. The subscription confirmation message listed in the message log on 20 September 2014 stated:

"Free Msg: U have joined myUKbabes video service for £3.00 per week until you sent STOP to 81321 Helpline 02476998891 Service Provided by [name redacted]"

The Executive noted from the message log supplied by the Level 2 provider that the delivery statuses of the chargeable Service messages were variously described as 'FAILED', 'BILLED' or 'SENT'.

The Executive noted that following the subscription confirmation message entry in the message log, the status of all chargeable Service messages from Service shortcodes 81321 and 78311 were listed as either 'FAILED' or 'SENT'. Further, the Executive noted that the first chargeable Service message listed as billed occurred on 13 June 2015, which was issued from Service shortcode 78311, some eight months and 24 days after the purported opt-in date.

The Executive also relied on a number of other examples of message logs supplied by the Level 2 provider which contained failed chargeable Service messages in the period immediately after the consumer's purported opt-in, followed by successfully delivered chargeable messages a significant period of time later.

Referring to the Background section above, the Executive noted that the Level 2 provider logs fell into two categories; (i) message logs which listed Service shortcodes supplied by Zamano only (shortcodes 81321 and 78311), and (ii) message logs which listed, in addition to the above Zamano Service shortcodes, shortcodes supplied by Veoo (shortcodes 82999 or 86211).

The Executive directed the Level 1 providers to supply a sample of 56 complainant message logs. Although the message logs provided by the Level 2 provider listed a purported opt-in on Service shortcode 81321, followed by a series of failed messages, the

Executive noted that message logs supplied by Zamano did not corroborate the vast majority of the failed Service message entries listed immediately after the Opt-in Period listed in the Level 2 provider message logs.

For example, in the message log supplied by Zamano for mobile number \*\*\*\*\*068 the first chargeable Service message was listed on 1 March 2015; the message log also did not contain any failed chargeable Service messages.

In the message log supplied by Zamano for mobile number \*\*\*\*\*851 the first chargeable Service message was listed on 22 February 2015; the message log also did not contain any failed chargeable Service messages.

In the message log supplied by Zamano for mobile number \*\*\*\*\*806 the first chargeable Service message was listed on 29 November 2014; prior to this date the message log did not contain failed chargeable Service messages.

In the message log supplied by Zamano for mobile number \*\*\*\*\*296 the first chargeable Service message was listed on 13 June 2015; prior to this date the message log did not contain failed chargeable Service messages.

In order to obtain further clarification on the message failure issue, the Executive contacted Mobile Enterprise Ltd (the “**Verifier**”) the authorised analytics partner which has access to mobile data held by the Mobile Network operator Vodafone Limited (“**Vodafone**”). The Verifier was sent a sample of 38 Vodafone complainant mobile numbers and was requested to supply message logs showing the interaction between the Service and the complainants’ mobile numbers.

The Executive noted from the message logs supplied by the Verifier that generally the first chargeable Service message occurred on the same date that successfully charged Service messages were shown in the Level 2 provider messages logs, and further, that failed messages were not listed in the period after the purported opt-in. For example the Verifier message log for mobile number \*\*\*\*\*296 listed the first chargeable Service message on 13 June 2015.

The Executive noted that the Verifier had confirmed that all messages sent from the Service shortcode that charge or attempt to charge the consumer would appear in its text message logs. Similarly, Zamano had confirmed that chargeable messages (attempted and successful) would appear in its text message logs, save where attempts to charge consumers are unsuccessfully transmitted to it (as noted in the ‘Background’ section above, the unsuccessfully charged Service messages shown in the Level 2 provider’s logs were largely confined to the period when Service shortcodes were supplied by Zamano; unsuccessfully charged Service messages were generally not a feature of the Service when it was supplied by Veoo). In light of this, the Executive asserted that the failed



attempts to send the chargeable Service messages (as shown on the Level 2 provider's message logs) did not occur.

Furthermore, the Executive directed the Level 2 provider to provide an explanation for the apparent high failure rate of chargeable Service messages. On 2 March 2016 the following response was received from the Level 2 provider:

*“Once a customer has subscribed to our service our systems billing mechanism kicks and the customer is added to what is known on our system as a billing scheduler. The billing scheduler functions work by checking the customer is an active subscriber on our system and ensures that the customer has not unsubscribed from our service. The billing scheduler will also locate the specific campaign that the customer has subscribed to and generate a WAP pin for the customer to view our content which is unique to each customer it then will check the customers network which is picked up when the subscription is activated and send our a billing message based on the parameters set on the campaign that the customer is subscribed to. Once the billing message has been sent the billing scheduler will then listen for a response from the specified aggregator in the campaign for a delivery receipt response and update that status that the billing message appears on our system accordingly. There is various different reasons that a billing message could fail for example the customers mobile number could be switched off our out of service at the time the billing message is sent, the customer could also be out of credit or there could be a breakdown in communication between our system, the aggregators system and the networks system which would cause a message to fail. There also could be a technical breakdown on our side when the billing scheduler is in operation although this is very rarely the case.” [sic]*

In addition to seeking an explanation for the apparent high failure rate of Service messages listed in the Level 2 provider's message logs, the Executive also made enquiries with the Level 2 provider regarding the various message statuses listed in its message logs. On 2 March 2016 the Level 2 provider stated:

*“The status failed is a confirmation that the message has not reached the customers handset, in the more recent months we updated our system to prevent messages automatically being set to failed after a certain period of time regardless if we have received a delivery receipt response from the aggregator or not. This was to prevent customers potentially being over billed as our system would read the message as failed a potentially allow the rebilling scheduler to kick in and attempt to bill the customer a second time. We have now updated our system so that if we do not receive a response from the aggregator the billing message status will remain as sent until a delivery receipt is received. The status accepted occurs when we have sent a billing message and the aggregator has accepted the message although we have not received a response, again in the more recent months we have discontinued this delivery status to simplify our rebilling scheduler. The status billed occurs when the aggregator confirm that the customer has received the billing message and credit has been deducted from their mobile phone.”*



The Executive also made enquiries with Zamano and Veoo regarding the apparent high failure rate of chargeable Service messages shown within the Level 2 provider's message logs. Although Veoo provided a response, most of the failed messages occurred on the Zamano shortcodes, and therefore it was not able to provide a comprehensive response on the issue. The response from Zamano is below.

**“Executive**

*“The Executive notes that the Level 2 provider has provided a number of scenarios explaining why Service messages may fail. Please confirm whether a Service message sent to a consumer that fails for one of the above reasons would be recorded by Zamano and in turn appear in its logs (as a failed message).”*

**Zamano**

*“Some but not all of the above service messages would be recorded by Zamano. For example, if the connection between the Level 1 and Level 2 platforms is corrupted messages would not reach Zamano's platform although the Level 2 Provider would log them as being sent. Also, failed messages would not appear on Zamano's system if the firewall settings do not fit the API connections, or if there are issues with incorrect integration settings and other technical issues within the network.”*

**Executive**

*“In addition to responding to the above question, please provide a copy of all correspondence entered into with the Level 2 provider in relation to Service message failures.”*

**Zamano**

*“Zamano contacted Virtual Rainbow in 2015 about failed messages; please find attached “Zamano Mail.pdf”.”*

The Executive noted that the email exchange referred to between Zamano and the Level 2 provider occurred on 15 July 2015, after the Executive contacted Zamano on 6 July 2015 regarding the high failure rate of Service messages shown within the Level 2 provider's message logs, and was several months after complaints started to be received.

The Executive noted Zamano's comments in relation to *“if the connection between the Level 1 and Level 2 platforms is corrupted”, “if the firewall settings do not fit the API connections” and “if there are issues with incorrect integration settings and other technical issues within the network”*. However, the Executive noted that when questioned about the unsuccessful Service messages the Level 2 provider stated that *“there also could be a technical breakdown on our side when the billing scheduler is in operation although this is very rarely the case”* and did not provide any further specific details of issues occurring on its systems which would interrupt the transmission of Service messages to the Level 1 provider.



The Executive noted that, when questioned on the status of unsuccessful Service messages, the Level 2 provider confirmed that 'ACCEPTED' Service messages were messages which had been accepted by the aggregator [Level 1 provider], 'FAILED' Service messages were messages that the Level 2 provider had received "confirmation that the message has not reached the customers handset", and that 'SENT' Service messages, following an update to its systems, denoted "if we do not receive a response from the aggregator the billing message status will remain as sent". Despite this, the Executive noted that complainant message logs supplied by Zamano did not show 'ACCEPTED', 'FAILED' or 'SENT' Service messages in the period immediately after the Opt-in Period. The Executive noted Zamano's confirmation that where attempts were made to charge complainants (which were transmitted by the Level 2 provider to Zamano) which failed, those attempts would be listed in its message logs.

The Executive submitted that the Level 2 provider had not provided any credible evidence to prove that technical issue(s) which affected each of the complainants actually did occur on its system. Further, the Executive noted the lengthy period of unexplained but consistent message failure shown in the Level 2 provider logs. The Executive therefore submitted that the possible explanations for the failed messages provided by the Level 2 provider could not be correct.

Further, the Executive referred to the complainant accounts, and the complainant responses to the Executive's questionnaire, both of which are referenced in the 'Background' section above. The Executive considered that it was highly unlikely that the complainant accounts, and those complainants who responded to the complainant questionnaire stating that they never interacted with the Service website, were unfounded.

As referenced in the 'Background' section above, the Executive had noted that text message logs supplied by the Level 2 provider from mid-September 2015 onwards included chargeable Service messages with the status 'SENT' instead of Service messages with the status 'FAILED'. These were also followed by the issuing of successfully charged Service messages some months later. The Executive had questioned the Level 2 provider on the absence of 'FAILED' Service messages in its message logs supplied after mid-September 2015. On 2 March 2016 the Level 2 provider stated:

*"As explained above in recent months we have updated our system to prevent messages automatically being set to failed after a certain period of time regardless if we have received a delivery receipt response from the aggregator or not."*

The Executive noted the above explanation from the Level 2 provider, which the Executive understood would result in message logs not featuring 'FAILED' Service messages from September 2015. However the Executive considered the purported changes to the Level 2 provider's systems would only account for the removal of 'FAILED' Service messages prior to September 2015 if the system change also retrospectively altered existing log information. The Executive understood the effect of the change to be that if the same log





had been requested by the Executive before September 2015, it may have contained different entries. The Executive submitted that no reasons had been supplied by the Level 2 provider for why this change needed to be made. The Executive considered the removal of 'FAILED' statuses prior to mid-September to be an example of tampering with message logs on the part of the Level 2 provider.

In response to queries from the Tribunal about the conduct of the consumer questionnaire, the Executive confirmed that the consumers it had contacted had given their permission to be contacted in the course of their complaints. The Executive confirmed that the questions asked were based on the potential reasons for message failures which were supplied by the Level 2 provider. The Executive's view had been that it was appropriate to investigate if these explanations might be substantiated. The Executive stated that the promotional material sent was that which it had been supplied by the Level 2 provider, and since the complaints had stated they hadn't opted into the Service, the Executive's view had been that it was appropriate to investigate if the consumers did recall interacting with this material or similar material. The Executive accepted that there was a risk that some consumers may take into account the nature and the wording of this question when responding, but noted that consumers who had complained had done so on the basis that they had not interacted with the Service, and had given their consent to be contacted further about their complaint.

The Executive noted the response (referenced in the 'Background' section above) received by the Executive on 12 January 2015 to the Track 1 Action Plan, in which the Second Service Provider asserted that "We can confirm that we will be operating wap services using the full online robust version of GVI". The Level 2 provider confirmed it was aware of the Action Plan issued in respect of the Service. The Track 1 Action Plan was issued, in part, to address the issue of consent to charge that had occurred during 2014. The Executive noted however that it continued to receive complaints about consent to charge well into the first quarter of 2016. The Executive's view was that by inserting failed messages into logs and creating artificial opt-in dates in the period prior to closure of the Track 1 procedure, the Level 2 provider had attempted to persuade the Executive that a consent to charge breach of the Code arose only in the Opt-in Period from July - October 2014 (prior to its operation of the Service), and that the scope of such a breach was confined to a lack of independent third party verification, as opposed to a more serious allegation of unsolicited charging.

In light of the evidence provided by Zamano and the Verifier, the Executive considered that the message logs supplied by the Level 2 provider were incorrect, and that the Executive had been provided with false information.

The Executive asserted that, for all the reasons stated above, the Level 2 provider had provided false or misleading information to PhonepayPlus during the Executive's investigation into the Service. Accordingly, the Executive asserted that the Level 2 provider had breached paragraph 4.2.4 of the Code.



2. The Level 2 provider denied the alleged breach. The Level 2 provider stated that the Executive had merely assumed that it had falsified its message logs. The Level 2 provider asserted that it was abundantly clear that the Executive did not have a thorough understanding of how the industry worked. The Level 2 provider asserted that the Executive had simply pieced together individual non-specific pieces of evidence and thrown them together as evidence for this case.

The Level 2 provider cited as an example of this that the Executive had stated:

*“The Executive notes the above explanation from the Level 2 provider, which the Executive understands would result in message logs not featuring ‘FAILED’ Service messages from September 2015... no reasons have been supplied by the Level 2 provider for why this change needed to be made.”*

when in fact there was a reply to this question which stated that the reason for this change was to remove the possibility of a number receiving too many messages. The Level 2 provider had stated that its systems rebilling scheduler would attempt to send additional billing messages if the delivery receipt that it did or did not receive was incorrect, and it could not take the risk of sending too many billable messages. Accordingly the Level 2 provider asserted that the Executive had simply presented parts of the case that suit them.

The Level 2 provider stated that PSMS messages fail on a regular basis. The Level 2 provider stated that this can be due to a number of reasons, most commonly an intermittent breakdown in the connections between the Level 2 provider, the Level 1 provider, the MNO, and the customer’s handset itself. The Level 2 provider listed some other issues it had faced - as messages were sent sequentially (one message must complete before another can be sent), minor delays in the data transfer can add up to significant delays in the script completion. In such cases the script can time-out or even self-terminate if outside the allowed delivery window. The Level 2 provider stated that self termination is normal behaviour and messages are flagged as failed if a message was outside the allocated delivery window. The Level 2 provider stated that it had noticed this becoming more frequent and decided to take action in order to resolve this issue, which involved re-evaluating the delivery window, altering when the scripts would run, batching billing schedulers together, running scripts in parallel etc. The Level 2 provider stated that it found that some of these would prevent the script from self terminating and others would simply just make the situation worse. The Level 2 provider stated that trial and error had shown them that specific combinations of these techniques worked well and it was now very uncommon for a script to self terminate or otherwise.

The Level 2 provider stated that a billing script will time out when the script itself has reached its execution limit. The Level 2 provider stated that this can happen when a script has been running (for example) for more than three hours. This was a fail-safe to prevent a billing script from interfering with other billing scripts. The Level 2 provider stated that script time-outs was an abnormal behaviour, as when the scripts are running they are using up



server resources. The Level 2 provider stated that when one of the scripts had been running for a long period, this gave the impression that there has been a problem with the script and if another billing script was to begin during this process, then it may cause the new billing script to slow down also. The Level 2 provider stated that when the billing script timed out, the message status was not flagged as failed, but instead the message status would continue to appear as sent. The Level 2 provider stated that when a billing cycle began, the data for the messages was prepared in advance on the system by the billing scheduler to speed up the billing script process, and this was an attempt to prevent the scripts from self-terminating or timing out. The Level 2 provider stated that the billing scheduler prepared the billing messages by checking if the customer was an active subscriber on its system, locating the specific campaign to which the customer has subscribed, and generating a subscription PIN based on the parameters of the campaign. The Level 2 provider stated that it then pulls the customer's network which was picked up when the customer subscribed to the Service. The Level 2 provider stated that once this information was compiled, the billing script would then begin sending the information to the Level 1 provider.

The Level 2 provider stated that if a script was to time out or self terminate then the billing message would not reach the Level 1 provider. Depending on the method of failure (normal or abnormal termination), the Level 2 provider stated that the messages might find themselves in FAILED or SENT status. The Level 2 provider stated that with abnormal termination, the scripts were unable to complete the updates to FAILED status.

Further, the Level 2 provider stated that it had examined the customer complaints and discovered multiple customers claiming that they have received charges on their phone bill but never received a message on their handset. The Level 2 provider stated that whilst it had never come across this as an issue in any of its own testing, it had contacted Zamano and Veoo to discuss this possibility. The Level 2 provider stated that Veoo confirmed that they had encountered issues with customers who are on the networks '3' and 'T-Mobile' although Zamano confirmed that they had never come across an issue like this. The Level 2 provider submitted that this showed that there were inconsistencies in specific networks and Level 1 providers and also demonstrated that there were problems with the delivery of PSMS messages throughout the industry and not just with its services.

Referring to the evidence that the Executive had supplied, the Level 2 provider submitted that it was absurd. The Level 2 provider submitted that the Executive could not rely on the complainant questionnaire responses as fact because customers have been seen to provide false information when they placed their initial complaint with PhonepayPlus, such as stating that they had been unable to contact the Level 2 provider when in fact they had. The Level 2 provider submitted that the complainant questionnaire should be removed from the case as there was no way to tell if the information supplied by the customers was in fact true and also because the questionnaire had no real relevance in terms of the questions it asked as there were so many variables before a message hit the handset.



The Level 2 provider stated that it had contacted Zamano to discuss the inconsistencies between the message logs that were provided by Zamano and its own logs. The Level 2 provider stated that Zamano had confirmed that if a message was sent but never reached their platform then the message would not show in their message logs and in turn would not show in the Verifier's message logs. The Level 2 provider submitted that the Verifier's logs should be removed from the case as they were not relevant in any way, noting that if for the reasons stated above a message fails then it will not have reached the Verifier's network, and that this was the case for the numbers provided, and so it was common ground that the messages will not show on the logs.

The Level 2 provider submitted that the Executive should take into account that the issue of messages failing was in fact an issue that the previous service provider had, and it had merely inherited these issues. The Level 2 provider submitted that due to the complexity of such operations, not all technical problems can be foreseen. The Level 2 provider submitted that once the issues had been noticed and confirmed as abnormal termination, steps were taken to resolve the problems in a timely manner.

In informal representations, the Level 2 provider made very detailed and extensive submissions reiterating matters stated in its formal response. In addition, the Level 2 provider elaborated on the information already provided, as follows. In the circumstances of this case, the Level 2 provider was permitted to make these submissions over an extended period of time.

The Level 2 provider submitted that the Executive had generally misunderstood the evidence, and had willfully misunderstood its operations. The Level 2 provider submitted that it appeared that the Executive had presented evidence which was arbitrarily put together, citing the example given above in its written submission. The Level 2 provider reiterated that it categorically would not allow too many billable messages to customers as this was unethical and would risk exposing customers to double charging.

The Level 2 provider submitted that premium SMS messages failed on a regular basis. This was one of the biggest operational difficulties it faced and it did not want this to happen. The Level 2 provider submitted that this problem could only be remedied once it had happened, and it could identify the problem to remedy it. The Level 2 provider, in response to a query about when the work was done, stated that it had been done over a period of a few months up to September 2015, in the summer of 2015, but it was also an ongoing task.

The Level 2 provider cited as an example when a script has been running for more than four hours, the billing script will time out when the script itself has reached its execution limit. This was a fail-safe to prevent a billing script from interfering with other billing scripts.

The Level 2 provider stated, in relation to the steps it had taken to prevent message failures, that it had now found a combination of techniques which worked well and it was currently uncommon for a script to self-terminate. The Level 2 provider hoped that the

Tribunal and Executive would appreciate that it had gone to a lot of effort to improve the Service.

In response to queries from the Tribunal as to why some consumers (for example, MSISDN \*\*\*\*\*903) seemed to be experiencing only failed messages for a period of (in that case) 13 months, the Level 2 provider stated that while the bulk of its work on this was complete, it was ongoing and there were issues meaning a few examples got through the gap. In response to a query from the Tribunal as to whether the Level 2 provider was saying that for such consumers its server was not communicating with the Level 1 provider for 13 months, the Level 2 provider stated that these things were flagged to it in different ways, but since three billed messages were worth £9, it wouldn't do this on purpose. The Level 2 provider stated there was some kind of issue in the transmission string for this incident. The Level 2 provider submitted that what it had inherited was a bit of a mess and it had worked very hard to make it better.

The Level 2 provider submitted that the Executive relied on extremely flimsy and unreliable evidence, and stated that it was disappointed that the Executive had ignored its thorough response and certain aspects of the evidence. The Level 2 provider submitted that there was no actual evidence to show it had falsified its logs and that this was not something it would want to do – it had provided the exact message logs from its server.

The Level 2 provider referred to the document it had supplied analysing the inconsistencies in consumer complaints referred to by the Executive as against its own records compiled by its call centre, in relation to consumers who stated they had not been able to contact the Level 2 provider, when they had been able to do so. The Level 2 provider stated that in many cases consumers had contacted it after speaking to PhonepayPlus. The Level 2 provider stated that consumers who contacted it were offered a refund on a “no questions asked” basis. The Level 2 provider stated that its call centre operated in normal office hours, and customers could leave a voicemail outside these hours. However consumers had frequently cited this as “no response”. For instance, the user on MSISDN \*\*\*\*\*009 had left a voicemail with the Level 2 provider and then complained to PhonepayPlus two hours later, and was contacted by the Level 2 provider at 2.21pm the same day and provided with an apology and a full refund. The Level 2 provider also cited four further examples of consumers who had contacted it after contacting PhonepayPlus first. The Level 2 provider stated that each of these customers, when they were contacted, had their complaints resolved in the usual way. The Level 2 provider submitted it had not been given a fair chance to deal with these consumers before they complained to PhonepayPlus.

In relation to the consumer questionnaire, the Level 2 provider submitted that its director was a PhD researcher in Social Sciences and used to carry out questionnaires on sensitive matters, and from this perspective commented that the methodology used by the Executive in its questionnaire was awful, invited bias and presented a highly unethical proposal to consumers. The Level 2 provider submitted that the questionnaire was insensitive and potentially harmful, as it almost compromises a consumer's privacy and leads them to



provide false information in response. The Level 2 provider noted that the response rate was approximately a third, from a base group who had already complained. This inevitably led to self-selection of a special interest group of those most agitated with the Service, or those who were potentially embarrassed due to the nature of the Service. This led to response bias. The Level 2 provider submitted that it would have been more balanced to send a questionnaire to a control group from its thousands of satisfied customers. The Level 2 provider submitted that the biggest ethical issue was with the final question, which was arguably an invasion of privacy and led to unreliable evidence being produced, as the question asked if consumers recalled interacting with similar promotional material. The Level 2 provider submitted the questionnaire should have been solely targeted at the Level 2 provider's services, and the phrasing of the question was so ill-put that the Executive might as well have asked if the user had ever clicked on pornographic content in their entire web-browsing life. The Level 2 provider submitted that the Executive had neglected that the information was highly sensitive, private and potentially embarrassing given the nature of the Service. The Level 2 provider submitted that this was not a question the Executive or the Tribunal would like to be asked, and naturally none of the respondents said they had interacted with such material. The Level 2 provider submitted that the research was unprofessional and wouldn't pass any ethics committee and was not to University level. The Level 2 provider submitted that the questionnaire should be disregarded due to its flawed methodology, inappropriate content and lack of real relevance.

In relation to the discrepancies between the logs, the Level 2 provider submitted that as a matter of scientific fact it was simply impossible for the logs of the Level 1 provider or Verifier to show messages which were sent by the Level 2 provider but never received by the Level 1 provider. The Level 2 provider submitted that if a message failed for the reasons stated above, it simply could not have reached the Verifier's network. The Level 2 provider submitted that what looked like inconsistencies were simply messages not reaching the Verifier. The Level 2 provider therefore asked that the Tribunal disregard the Verifier's evidence, as it was not relevant and did not indicate that it had altered its logs in any way.

In response to queries from the Tribunal, the Level 2 provider confirmed its position was that the series of "sent" and "failed" messages had not reached the Level 1 provider, and so there was no inconsistency in the logs. The Level 2 provider referred to its previous written explanation of the meaning of the statuses "sent", "failed", "billed" and "accepted" and confirmed that these were accurate. The Level 2 provider reiterated that the status "accepted" occurred when it had sent a billing message and the aggregator had accepted the message, although it had not received a response. In response to queries from the Tribunal, the Level 2 provider confirmed that "accepted" messages should show on Zamano's logs.

The Level 2 provider stated that it had become clear that "accepted" was not that useful to it as a status, and had been discontinued when the delivery status terms became more

unified. The Level 2 provider stated that it had unified the terminology so that there wouldn't appear to be aberrations, as it wanted to keep it consistent.

In response to queries from the Tribunal about why the technical issues it had given as examples would affect every message sent to certain individual consumers for a significant period, the Level 2 provider stated that this was difficult to answer. The Level 2 provider stated that messages failed all the time and simply sometimes failed to reach their destination. The Level 2 provider said that for instance this week its director had had difficulty getting messages through from his own handset. The Level 2 provider accepted that there was an extent to which it could not answer this question. The Level 2 provider thought it was a technical issue with the Service which it had inherited. The Level 2 provider stated it was very very hard for it to figure out why messages were failing and how to fix it, but the important thing was it was able to resolve the consumers' issues.

In relation to the failures at the level of the consumers' handset, the Level 2 provider stated that it did not consider this to be a primary factor in this case, and it was more interested in fixing its systems at its end, but handset failures could not be discounted as a potential reason for message failures.

In relation to the change in logs seen from September 2015, the Level 2 provider stated that this was simply a change in terminology which arose from updates. The Level 2 provider submitted that the change did not result from the alteration of its records. The Level 2 provider stated that the changes were to unify the "sent" and "failed" statuses, making its system more robust and making it easier to identify problems, thus reducing the opportunity for accidental consumer harm.

The Level 2 provider reiterated that in its systems update it had unified the terms "sent" and "failed", so that it couldn't misread the entries, and knew they had failed. The Level 2 provider submitted that it was continually updating its systems, and it had found that before September 2015 it was getting inaccurate information from its system. The work on the system had been ongoing prior to then and it had continued to work on this since, so that all logs showing the "failed" status were to be marked as "sent."

In response to a query from the Tribunal about whether the Level 2 provider was aware of the failures when it took over the Service, the Level 2 provider submitted that they were a small proportion of messages sent for the Service, and that they may have shown as "sent" rather than "failed." The Level 2 provider submitted there was an ongoing problem relating to unsent messages, which was to do with the updating of operational scripts, not individual consumers, and that any consumers affected by this were refunded and apologised to. The Level 2 provider stated that it had been improving its systems and follow up on customer care, and had for instance redefined all "failed" messages as "sent."

The Level 2 provider also submitted that there was a wider problem with the hierarchy of the complaints procedure being circumvented, with PhonepayPlus acting as the front line



complaints handler, which was not their remit. The Level 2 provider submitted that therefore the amount of complaints was not representative of the extent of any problem. The Level 2 provider submitted that this approach didn't give them an opportunity to provide customer care, which inhibited their ability to satisfy the consumer's needs, and meant the matters still stood as complaints even after they were resolved. The Level 2 provider stated that it was familiar with reports of bad (or chargeable) complaint handling by other providers which resulted in online forums where consumers were encouraged to go straight to the regulator. The Level 2 provider stated that in its terms and conditions, before the PIN entry, it very clearly stated it had free customer services.

The Level 2 provider argued that this put them at a disadvantage, and disregarded recent Which? guidance that consumers first contact the service provider, then the Mobile Network Operator, before contacting the regulator. The Level 2 provider asked PhonepayPlus to review what they advise consumers, and ask them to leave two working days before contacting the regulator if they have left a voicemail with a service provider. The Level 2 provider submitted that this would result in better consumer outcomes, as consumers may have been embarrassed about Service use or not remember opting in.

The Level 2 provider submitted that the Service now ran a double failsafe on opting in, where consumer had to put in a phone number, then a PIN from GoVerifyIt, so it was not possible to opt someone in without their consent.

3. The Tribunal considered the Code and all the evidence before it, including the submissions made before and during informal representations.

The Tribunal considered the Level 2 provider's submissions regarding the "consumer questionnaire" evidence. The Tribunal noted the Executive's evidence that these complainants gave their consent to be further contacted in regards to their complaint. The Tribunal considered that it was appropriate for the Executive to make investigations into the possible reasons for message failures which were suggested by the Level 2 provider, to check if these were supported by evidence. Nevertheless, the Tribunal considered that there was some force in some of the arguments submitted by the Level 2 provider about the design of the questionnaire, which could reduce the weight which the Tribunal would give to the evidence. However, in light of the evidence from the Level 1 providers that if billing messages from the Level 2 provider had failed between the Level 1 provider and the consumer for the possible reasons given by the Level 2 provider, then they would still appear on the Level 1 provider's logs, it was unnecessary for the Tribunal to rely on the evidence from the Questionnaire. The evidence from the Level 1 provider was clear, concise and reliable.

The Tribunal considered the Level 2 provider's submissions regarding complainants who had contacted PhonepayPlus before contacting the Level 2 provider. Whilst complainants should be encouraged to contact Level 2 providers with their complaints, the Tribunal did not find that evidence from consumers who had not been able to immediately get a





resolution from the Level 2 provider, and so had contacted PhonepayPlus, was unreliable. The Tribunal noted that complainants had stated that they had not consented to the charges, and the Level 2 provider had not provided robust evidence of their consent. Further, whilst it was not necessary to decide whether there had been any breaches of complainants' rights to privacy, the Level 2 provider's submissions in relation to this issue lacked sound legal foundation. The complainants had consented to participate in the investigative process as part of the Executive's complaints procedure.

Having considered the Executive's evidence, including in particular the nature of the complaints, the discrepancies between the Level 2 provider's logs and the Level 1 provider and Verifier logs, and the relevant correspondence (including statements from the Level 1 providers about what types of failed messages would appear in their logs), the Tribunal found that there was a compelling body of cogent evidence to show, on a balance of probabilities, that the Level 2 provider had produced inaccurate message logs which it had submitted to the Executive.

The Tribunal then considered whether the material submitted by the Level 2 provider explained the discrepancies between the logs produced by the Level 1 providers and the Level 2 provider, and undermined the case which had been advanced by the Executive.

The Tribunal accepted that if Level 2 providers sent messages to a Level 1 provider but the messages never reached their platform, then those messages would not show in the Level 1 provider's message logs and in turn would not show in the Verifier's message logs. The Tribunal did not consider that this alone was sufficient to explain the pattern shown in evidence of consistent message failure over lengthy periods for specific consumers, nor the discrepancies between the logs of the Level 2 provider and Level 1 provider, such as "accepted" messages which were only present on the Level 2 provider's logs.

The Tribunal gave consideration to the potential technical reason for message failure which had been put forward by the Level 2 provider. The Tribunal considered that a possibility of scripts terminating in the way the Level 2 provider had described on an intermittent basis for short periods, did not credibly explain the pattern of consistent message failure over lengthy periods for specific consumers, nor was this pattern credibly explained by any other reasons put forward by the Level 2 provider.

Whilst the Tribunal recognised that the complainants represented only a small percentage of the Level 2 provider's customer base, the Tribunal would expect a provider to have identified a pattern of consistent message failure for specific consumers rather than allowing it to carry on for a lengthy period. Whilst the content of the complainant logs when the Level 2 provider had inherited the Service had not been in evidence, the Tribunal noted that the message failures were also shown as occurring in the period when the Level 2 provider was responsible for the Service. The Tribunal noted that the Level 2 provider must have been aware of the pattern of ongoing failed messages in the logs when it was providing them to the Executive. The Tribunal understood that the successful delivery of



chargeable messages was fundamental to the Level 2 provider's business model and to the successful operation of its systems, and it appeared implausible to the Tribunal that the Level 2 provider would not have sought to robustly investigate the extent of any such problem once it had become aware of it, and to promptly resolve it.

The Tribunal considered that the Level 2 provider had been given ample opportunity to provide sufficient evidence to substantiate its submission that the discrepancies were due to a technical reason, but it had not done so. The Level 2 provider had not explained why "accepted" messages appeared on its logs but not the Level 1 provider's logs.

The Tribunal did not consider that the Level 2 provider had supplied any evidence or credible supposition which was sufficient to show that the issue in relation to script termination (or any other technical issue) had caused the discrepancies between the Level 2 provider's logs and the Level 1 provider (and Verifier) logs in respect of the complainants.

Therefore, having had regard to the facts of the case, the Tribunal did not consider that the Executive's case that the reason for the inaccuracy of the logs provided by the Level 2 provider was that they had been falsified (the burden of proving such remaining on the Executive on the balance of probabilities) was undermined by the material submitted by the Level 2 provider.

Consequently, the Tribunal was satisfied, on the balance of probabilities, for the reasons advanced by the Executive, that the Level 2 provider had knowingly provided false and misleading information to the Executive. Accordingly, the Tribunal upheld a breach of paragraph 4.2.4 of the Code.

The Tribunal expressed concern at the Level 2 provider taking action which retrospectively changed the stated delivery receipt status for messages which had been sent prior to September 2015, and then supplying these logs to the Executive. In light of its above findings, the Tribunal did not make any separate adjudication in this respect.

**Decision: UPHELD**

**ALLEGED BREACH 2**

**Rule 2.3.3 – Consent to Charge**

"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 consumers had been charged without their consent and the Level 2 provider had been unable to provide evidence which established that consent.



The Executive asserted that, as per the alleged breach of paragraph 4.2.4, complainant message logs supplied by the Level 2 provider, which purported to demonstrate that consumers opted-in to the Service in a period prior to the Action Plan being issued to the First Service Provider, when robust verification of consent to charge was not in place, were false.

The Executive noted that the Verifier had provided 37 message logs to the Executive, 36 of which did not contain failed chargeable Service messages dating from the Opt-in Period (one message log showed charges predating the Opt-in Period). Correspondence with the Verifier suggested that attempts to deliver chargeable Service messages which failed would appear in its message logs. Given the absence of failed chargeable Service messages in the Verifier's message logs, the Executive asserted that the entries in the Level 2 provider's complainant message logs must therefore be false.

As previously noted, the Executive had directed Zamano to provide message logs for 56 complainant mobile numbers, of which message logs were supplied for 48 mobile numbers. The Executive understood that where Zamano did not supply a message log, it was because no data was held on its systems for that particular mobile number, despite the corresponding Level 2 provider message logs for the five complainant mobile numbers, for which Zamano had no data, listing attempts to charge the mobile numbers via a Zamano shortcode. The Executive noted that, for the remaining 48 mobile numbers, none of the message logs supplied by Zamano corresponded with those supplied by the Level 2 provider (i.e. that the message logs supplied by Zamano did not contain failed chargeable Service messages dating from the Opt-in Period).

As previously noted, the Level 2 provider had provided an explanation why Service messages may fail to successfully charge a consumer. However, taking into account the response received from Zamano (referenced above) and the responses to the complainant questionnaire, the Executive asserted that no credible explanation had been provided as to why the Level 2 provider logs show Service messages to complainants were failing after the purported Opt-in Period, but these failures were not shown in the Level 1 provider logs.

The Executive submitted that by inserting failed Service messages into message logs, thereby creating artificial opt-in dates in the period prior to the issuing of the Track 1 Action Plan, the Level 2 provider had attempted to persuade the Executive that the consent to charge breach arose only in a limited period prior to its operation of the Service, and that the scope of the breach was confined to a lack of independent third party verification rather than a more serious allegation of unsolicited charges.

Moreover, in any event the Executive noted that the Level 2 provider had charged consumers in the period after 12 January 2015 whilst knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers. The Executive submitted that, as it was aware of the Track 1 Action Plan, the Level 2 provider was aware at the time it charged consumers that the First Service Provider had not



obtained the required robust third party verification of consent to charge for consumers who opted-in (if in fact they did opt-in) prior to the date of the Action Plan.

For the reasons set out above the Executive asserted that the Level 2 provider did not have consent to charge complainants. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.3 of the Code.

2. The Level 2 provider denied the alleged breach. The Level 2 provider referred to submissions it had made in response to the alleged breach of paragraph 4.2.4 of the Code.

The Level 2 provider submitted that the previous Track 1 procedure did not request that the First Service Provider remove subscribers who had not opted into the Service via a robust method. The Level 2 provider submitted that it was its understanding that from the 12 January onwards all opt ins to these services must be through a robust opt in method, which it could confirm it had adhered to. The Level 2 provider submitted that since it had taken over the Service, there had been no new subscribers which had not been verified by GoVerifyIt.

The Level 2 provider submitted that the Executive had no evidence to prove that it had falsified its message logs or altered customers' opt-in dates and this was because there was no evidence and the allegation was not true – the Level 2 provider stated that it had provided exactly as requested the exact message logs that were found on its server.

In informal representations, the Level 2 provider reiterated matters stated in its formal response, and referred to the representations made in relation to the alleged breach of paragraph 4.2.4 of the Code.

3. The Tribunal considered the Code and all the evidence before it.

The Tribunal referred to its previous findings regarding breach of paragraph 4.2.4. The Tribunal found that there was no reliable evidence that complainants referred to in this case had consented to be charged for the Service by opting in to the Service (prior to the conclusion of the Track 1 procedure, or at all).

The Tribunal noted the Level 2 provider's response and submissions, including that the Track 1 Action Plan had not required the First Service Provider to remove subscribers who had not opted-in to the Service via a robust method. The Tribunal noted that the Level 2 provider had been aware of the Action Plan, and its terms which set out the reasons for the Action Plan being issued, when it took over the Service. The Tribunal noted that the complainants in this case had contacted the Executive in relation to charges which they had started receiving after the conclusion of the Track 1 procedure and after the Service had novated to the Level 2 provider. The Tribunal noted that the Level 2 provider had charged consumers in the period after 12 January 2015 whilst knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers.



Accordingly the breach of charging without the Level 2 provider holding evidence of consumer consent had occurred after the Track 1 procedure had been concluded and the novation had taken place. The Tribunal considered that the requirement to hold robust and verifiable evidence of consent before charging consumers was an ongoing requirement imposed by the Code (whether it was required by an Action Plan or not). The Tribunal did not consider that the Level 2 provider's response and submissions provided a defence or an adequate explanation for why the Level 2 provider had charged consumers without holding robust evidence of their consent.

Consequently, for the reasons advanced by the Executive, on the balance of probabilities, the Tribunal was satisfied that the Level 2 provider had not provided evidence which established consumers' consent to be charged for the Service, and that consumers had been charged without their consent. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH 3**

**Paragraph 3.4.1 – Failure to register with PhonepayPlus**

"Before providing any premium rate service all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus subject only to paragraph 3.4.3 below."

1. The Executive asserted that the Level 2 provider was not registered with PhonepayPlus for a period of time when the Service was operational and was accordingly in breach of the obligation set out in paragraph 3.4.1 of the Code.

The Executive noted that:

- i. From 1 September 2011, all Level 2 providers must register (or re-register if they had previously been "registered" under Code 11) with PhonepayPlus prior to providing any premium rate services.
- ii. Code 12 registration must be renewed annually (paragraph 3.4.6 of the Code).
- iii. PhonepayPlus fully publicised registration Code 12 requirements, both to individual Network operators and providers and Industry wide, prior to September 2011 and on an on-going basis since that time. The current requirements are clearly outlined on the PhonepayPlus website (<http://www.phonepayplus.org.uk/for-business/register-or-renew-your-registration-with-phonepayplus>).

The Executive noted that the Level 2 provider had operated the Service from 23 December 2014, as confirmed by Zamano. In addition, according to the novation agreement between the Second Service Provider and the Level 2 provider, the effective date of the novation was listed as 23 December 2014.



The Executive noted that the Registration Scheme database showed that the Level 2 provider registered with PhonepayPlus on 14 January 2015.

The Executive submitted that therefore, for three weeks and one day the Level 2 provider was not registered on the Registration Scheme as required by the Code.

The Executive submitted that the Registration Scheme provides details of all PRS providers operating in the UK and is in place to benefit consumers, by giving them information about providers which operate premium rate services (for example customer care telephone numbers), to benefit PRS providers by assisting them with their due diligence, and to assist PhonepayPlus in taking targeted enforcement action at providers causing consumer harm. Providers which therefore failed to register with the Registration Scheme undermined the ability of the Registration Scheme to achieve these goals.

Accordingly, the Executive submitted that the Level 2 provider acted in breach of paragraph 3.4.1 of the Code.

2. The Level 2 provider denied the alleged breach. The Level 2 provider stated that the Second Service Provider had paid his registration appropriately. The Level 2 provider stated that the novation agreement was in place but the traffic was not migrated from the Second Service Provider until all internal due diligence had been finalised. This included registering the Level 2 provider on the PhonepayPlus website and it was not until then that the traffic was migrated to the Level 2 provider's platform. The Level 2 provider asserted that there was no breach here as there had always been a responsible person to be contacted at all stages, and submitted that the Executive should supply evidence that it had actually provided the Service prior to 31 January 2015.

In informal representations, the Level 2 provider reiterated matters stated in its formal response. In addition, the Level 2 provider elaborated on the information already provided. The Level 2 provider stated that it had done all its due diligence including registering as a provider with PhonepayPlus on 14 January 2015, and traffic was not migrated until 31 January 2015.

In response to questioning from the Tribunal, the Level 2 provider accepted that the Service continued to operate from 23 December 2014 to 30 January 2015, but stated that the Service was in fact operated by the Second Service Provider in that period. The Level 2 provider asserted that the novation did not constitute commencement of services, and there was no evidence that it had provided the Service prior to 31 January 2015. The Level 2 provider asserted that Zamano would confirm that it had not commenced service provision until 31 January 2015 if asked. The Level 2 provider asked for the alleged breach to be dismissed.

3. The Tribunal considered the Code and all the evidence before it.



The Tribunal noted the Level 2 provider's statement that, notwithstanding the fact that the novation of the Service to the Level 2 provider had taken effect on 23 December 2014, the Second Service Provider operated the Service until 30 January 2015. The Tribunal noted that this appeared to be supported by the fact that the Service name changed on the logs after this point.

The Tribunal noted that the Second Service Provider had been enabled to provide the Service, and receive Service income, by virtue of an agreement with Zamano. The Tribunal noted that the effect of the novation agreement with Zamano was that the Level 2 provider, as of 23 December 2014, assumed all the rights and obligations of the Second Service Provider, and undertook to perform the agreement and be bound by it as if the Level 2 provider had been a party to it in place of the Second Service Provider. In the absence of further evidence from the Level 2 provider, it was unclear what legal basis allowed the Second Service Provider to undertake provision of the Service in the intervening period.

The Tribunal noted that logs showed that Service billing had occurred in the period from 23 December 2014 to 30 January 2015.

Having considered the evidence, the Tribunal considered that the Level 2 provider was involved in the provision of the Service in the period from 23 December 2014 to 14 January 2015. Accordingly, the Tribunal was satisfied that the Level 2 provider had failed to register with PhonepayPlus, as it was required to do, in this period. However the Tribunal considered that, having had regard to the submissions made by the Level 2 provider, no more than a minimal further sanction in respect of this breach would be appropriate.

#### **Decision: UPHELD**

#### **SANCTIONS**

##### **Initial overall assessment**

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

##### **Paragraph 4.2.4 - Provision of false information to PhonepayPlus**

The initial assessment of paragraph 4.2.4 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider deliberately supplied false and misleading information to PhonepayPlus.

##### **Rule 2.3.3 – Consent to charge**

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

- The Level 2 provider charged consumers without having reliable evidence of consent to charge; and
- The case had a clear and highly detrimental impact on consumers.

#### Paragraph 3.4.1 – Failure to register with PhonepayPlus

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

- The Level 2 provider negligently failed to comply with a PhonepayPlus requirement, being registration of the organisation.

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

- There was evidence that some complainants had been refunded by the Level 2 provider; and
- In respect of the failure to register, the breach was for a short period and given the circumstances of the service novation as explained by the Level 2 provider, there was no consumer harm which arose from this breach.

The Level 2 provider's evidenced revenue in relation to the Service in the period from February 2015 to December 2015 was in the range of Band 2 (£500,000 to £999,999).

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, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £250,000;
- a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service; 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%**



APPENDIX A

MSISDN - [REDACTED]			
OPT IN			
SHORTCODE	DATE	UNIQUE PIN	
81321	10/08/2014 18:01	3b9b63a97	
FREE MT MESSAGES			
SHORTCODE	WHEN SENT	STATUS	MESSAGE
81321	10/08/2014 17:58	SENT	http://myukbabes.com/enter/?membe [REDACTED]
			Free Msg: U have joined myUKbabes video service for £3.00 per week until you send STOP to 81321 Helpline [REDACTED] Service Provided by [REDACTED]
81321	10/08/2014 18:01	SENT	
81321	27/08/2014 18:13	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
81321	27/09/2014 18:39	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
81321	27/10/2014 19:39	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
81321	27/11/2014 18:23	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
81321	27/12/2014 18:17	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
81321	27/01/2015 19:35	SENT	Free Msg: U are subscribed to myUKbabes video service for £3 per week until you send STOP to 81321. Helpline [REDACTED]
78311	31/01/2015 22:24	SENT	FreeMsg:UR subscription is changing shortcode from 81321 to 78311 for £3.00 per week SP now Virtual Rainbow text stop to 78311 to stop. Need Help? 08000124752
78311	27/02/2015 19:43	SENT	Free Msg: U are subscribed to GirlyVidz for £3.00 per week until you send STOP to 78311. Helpline 08000124752 Service Provided by Virtual Rainbow
78311	27/03/2015 18:04	SENT	Free Msg: U are subscribed to GirlyVidz for £3.00 per week until you send STOP to 78311. Helpline 08000124752 Service Provided by Virtual Rainbow
78311	27/04/2015 18:32	SENT	Free Msg: U are subscribed to GirlyVidz for £3.00 per week until you send STOP to 78311. Helpline 08000124752 Service Provided by Virtual Rainbow
PREMIUM MT MESSAGES			
SHORTCODE	WHEN SENT	STATUS	MESSAGE
81321	10/08/2014 18:02	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	10/08/2014 18:02	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	17/08/2014 13:12	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	17/08/2014 13:12	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	24/08/2014 14:12	ACCEPTED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	24/08/2014 14:12	ACCEPTED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	31/08/2014 14:11	ACCEPTED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	31/08/2014 14:11	ACCEPTED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	07/09/2014 14:46	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	07/09/2014 14:46	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	14/09/2014 18:20	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]
81321	14/09/2014 18:20	FAILED	http://myukbabes.com/enter/?member=3ede803a2 TEXT STOP TO 81321 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL [REDACTED]

