

## Tribunal meeting number 199

**Case reference:** 72142  
**Level 2 provider:** TijaMobile Ltd  
**Type of service:** Glamour video subscription service  
**Level 1 provider:** Zamano Solutions Limited; Veoo Ltd  
**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

The case concerned a glamour video subscription service operating on shortcodes 85878, 88150, 82999 and 82445 (the “**Service**”). The Level 2 provider for the Service was TijaMobile Ltd (the “**Level 2 provider**”). The Level 2 provider had been registered with Phone-paid Services Authority since 3 September 2012.

The Level 1 provider for Service shortcode 85878 was Zamano Solutions Limited (“**Zamano**”). The Level 1 provider for Service shortcodes 88150, 82999 and 82445 was Veoo Ltd (“**Veoo**”).

The Service was stated to be a glamour video subscription service charged at £3 per week. The Level 2 provider confirmed that the Service commenced operation in April 2013. Zamano confirmed that the Service commenced operation on shortcode 85878 on 17 November 2013. Veoo confirmed that the Service commenced operation on shortcode 88150 in March 2013, on shortcode 82999 on 14 February 2015 and that the Service commenced operation on shortcode 82445 on 22 August 2015.

The Executive noted from message logs supplied by the Level 2 provider that users of the Service opted in to the Service on shortcode 85878 and that some Service users migrated to Service shortcodes 88150, 82999 and 82445. Further, the Executive noted that the partial user migration from shortcode 85878 to shortcodes 88150, 82999 and 82445 was staggered over a period of time.

The Level 2 provider supplied the following summary of the promotion and operation of the Service:

*“This service is intended to operate using Full Online GVI, the user sees an advertisement and then clicks on the banner which then takes them through a landing page that requests they enter their mobile number, once the user enters their mobile number they are sent a pin number, the user is then asked to enter the pin number. Once they enter their pin number the user is subscribed and sent a free welcome message.”*

*The promotional material and user flow supplied by the Level 2 provider was as follows:*

- User sees Banner on the Mobile Internet*
- User Clicks on Banner*
- User is directed to the following page*

**7 DAYS FREE ON ALL VIDEOS**



**kinkymobile**  
MOVIES FOR MOBILES

**UNLIMITED MOVIE DOWNLOADS**

**ALL VIDEOS FREE FOR 7 DAYS**  
Simply enter your mobile number below

07

**CLICK SUBMIT**

18+ Subscription video service the first 7 days are free thereafter it will cost £3.00 per week or until you text STOP to 85878.  
Customer helpline: 08000148874. 18+

**TERMS AND CONDITIONS**  
This is a subscription service. Your first 7 days are FREE, thereafter using this service will cost you £3 per week. You can unsubscribe from this service at any time by texting stop to 85878 or by calling our customer service number on 08000148874. By subscribing to this service you have opted in to receive 3rd party marketing promotions for services similar to this one, if you do not wish to receive such messages you can opt out by sending stop to 85878. This service is provided by Tija Mobile, if you have any questions or queries regarding this service please call our customer support team on 08000148874 or you can email us on [tjmobile@tjmobile.com](mailto:tjmobile@tjmobile.com).

- User enters mobile number
- User is then sent a pin number and is asked to enter the pin number

**7 DAYS FREE ON ALL VIDEOS**



**kinkymobile**  
MOVIES FOR MOBILES

**UNLIMITED MOVIE DOWNLOADS**

**YOU WOULD HAVE RECEIVED A PIN NUMBER BY TEXT**  
Simply enter pin number below

**NOW CLICK TO VIEW VIDEOS**



VIEW



VIEW

**MOST DOWNLOADED**

- Once User enters pin number they are sent a free welcome message and can access content until they send stop. The user is charged at £3 per week.

## Summary of complaints

The Executive had received 285 complaints since 9 March 2015. Complainants variously alleged that the Service charges were unsolicited. Extracts from a sample of complainants' accounts can be found below:

*"I keep getting charged 2.50 from this site which i have never used, i want to stop all messages. i dont know what they are from or why i recieve them, but i want them to be stopped as i don't wish to have this service. I have been charged 2.50 four times in the last month for something i do not use." [sic]*

*"This is not a service as such I just started receiving these messages out of the blue, I have no idea if a service is supplied, this seems to be a scam."*

*"I am not aware what the promotion is as I have not signed up to anything. I did not sign up to this, I am a woman and have no interest in kinky mobile. I was not even aware I was being charged for these messages. I assumed it was spam and followed advice not to reply to the spam message then I got my mobile bill for September and I had been charged £15 for the messages. I have also been charged £6 in August."*

*"I have NEVER joined this service the textes just started to arrive and for the last 4 Saturdays I have been billed for them a £2.50 a time. I have had been billed 4 times so far." [sic]*

*"I have not signed up to any such service so I presume they have obtained my number or just tried it in the hope it could be charged. I have been charged weekly for £3 each occasion with a total of £15. the number that has billed me is 85878 and it belongs to a company called zamano according to Vodafone." [sic]*

*"Every week this number has been taken or charging £3 for a text since 26th Feb 2016. I don't know where it's came from or who it's for but I can confirm I have never authorised this company or service to do this. How can I claim the money back as it has been taken without my autorisation." [sic]*

*"I keep getting charged 2.50 from this site which i have never used, i want to stop all messages. i dont know what they are from or why i recieve them, but i want them to be stopped as i don't wish to have this service. I have been charged 2.50 four times in the last month for something i do not use." [sic]*

## Complainant text message logs

As part of the standard request for information process, the Level 2 provider had at 12 October 2016 supplied text message logs for 263 out of the 273 complaints received. The Executive noted from text message logs supplied by the Level 2 provider that:

- there was a high failure rate of chargeable Service messages following the purported consumers opt-in; and
- the delivery status for Service messages was unclear.

In these message logs, failed messages occurred from the date of the complainants' purported opt-in. The failed messages were later followed by successfully delivered chargeable messages. Of the 263 message logs received, all but six logs indicated a 100% message failure rate immediately after the purported opt-in. For these logs, chargeable messages were only successful some months after the purported opt-in.

The message logs supplied by the Level 2 provider from March 2015 to August 2015 showed unsuccessful messages with the status 'FAILED' and 'SENT'. The message logs supplied by the Level 2 provider from September 2015 onwards showed unsuccessful messages with the status 'SENT'.

In light of the high number of failed messages identified by the Executive in the complainants' text message logs, on 22 July 2016 the Executive contacted 242 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 the screenshots shown above and asked whether they recalled viewing and/or interacting with it or a similar service promotion. As at the 12<sup>th</sup> October 2016, the Executive had received responses to the questionnaire from 97 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?	89 respondents confirmed	89 respondents confirmed
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 pay-as-you-go respondents advised they did not always have £3 credit on his mobile phone. 3 pay-as-you-go respondents advised they always had more than £3 credit on their mobile phone .	1 respondent did not respond to this question.
Please advise whether the mobile phone that received the chargeable messages was regularly switched off and/or had no mobile signal	86 respondents advised their mobile phone was not regularly switched off and/or had no mobile phone signal.	7 respondents did not respond to this question 1 respondent advised they were unsure

for long periods of time (i.e. for more than several days)?	3 respondents advised their phone was switched off and/or they had no mobile signal for long periods of time	
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.	83 respondents advised they had not transferred between mobile companies 4 respondent advised they had transferred between mobile companies.	10 respondents did not respond to this question. Of the 4 respondents who had transferred between mobile companies, 2 reported having bad signal.
Please advise if you recall viewing and interacting with the attached, or a similar, promotion?	84 respondents advised that they did not view / interact with the Service promotion.	9 of the respondents either did not respond or comment on the promotional material. 2 respondent advised that they had viewed the promotion. 1 respondent advised that they may have seen the promotion, but did not interact with the Service 1 respondent advised that they viewed the promotion after following a URL on a message but did not interact with the Service.

### Previous Track 1 procedure

The Level 2 provider had a prior informal dealing with the Phone-paid Services Authority. On 7 January 2015, the Level 2 provider was sent a Track 1 action plan in respect of a breach of rule 2.3.3 of the Code, as the Level 2 provider accepted that it did not hold robust verification to establish consumers' consent to be charged until January 2015. On 14 January 2015, the Level 2 provider confirmed that it had implemented the required actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge.

The breach allegations raised in this case relied upon evidence gathered from complainants who first contacted the Executive after the Track 1 procedure was finalised.

### Interim measures in place

On 18 August 2016 the Code Adjudication Panel (“**CAP**”) considered an application by the Executive for the imposition of interim measures. Accordingly, in respect of the Service, it was decided to impose a Withhold on the Service revenue. This decision is included at **Appendix A**.

## **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 12<sup>th</sup> October 2016 with a deadline for response of 26 October 2016. Within the Warning Notice the Executive raised the following breaches of the PSA Code of Practice (the “**Code**”):

- Paragraph 4.2.4 – Provision of false information to the Phone-paid Services Authority (13th Edition)
- Rule 2.3.3 – Consent to charge (12th and 13th Editions)

On 8 December 2016, the Tribunal 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, and the previous complaint resolution procedure);
- Correspondence between the Executive and the Level 1 providers;
- Correspondence between the Executive and the Verifier;
- Correspondence between the Executive and a third party verifier;
- Complainant questionnaire responses;
- Complainant message logs from the Level 2 provider;
- PSA Guidance on “Consent to Charge”
- Revenue statistics for the Service;
- The Warning Notice dated 12<sup>th</sup> October 2016, including attachments;
- The Level 2 providers’ response dated 7 November 2016; and
- An email from the Level 2 provider dated 7 December 2016.

## **Preliminary Issue**

The Level 2 provider had made a late submission via email on 7 December 2016. The Tribunal considered the email to be making representations regarding sanctions in the event that the breaches were upheld, and not to be admitting the breaches (noting the Level 2 provider's stated position on the issue of liability in its response to the Warning Notice). The Executive did not object to the admission of these representations. Having considered all the circumstances, including the length and content of the material submitted, the Tribunal exercised its discretion in the interests of justice to admit this material.

## Submissions and Conclusions

### Alleged Breach 1

**Paragraph 4.2.4 – “A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to Phone-paid Services Authority (either by inclusion or omission)”**

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.4 of the Code because message logs supplied by the Level 2 provider were false and misleading, as chargeable Service messages described as ‘failed’ or ‘sent’ in the Level 2 provider message logs were not sent (or attempted to be sent) to complainants.

The Executive relied on correspondence exchanged with the Level 2 provider, the Level 1 providers, the Verifier, 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 Phone-paid Services Authority following the Track 1 procedure spanned the period between March 2015 to August 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 all message logs as occurring between August 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 significantly later than the purported date of Service opt-in.

As set out in the ‘Background’ section above, the Executive noted that the complainant text message logs supplied by the Level 2 provider typically showed several months of unsuccessful Service messages prior to the issuing of successfully charged Service messages. The Executive understood, from the explanation of the logs supplied by the Level 2 provider, that those consumers who had only received ‘failed’ or ‘sent’ messages following their opt-in would not have been charged.

The Executive noted from the message logs supplied by the Level 2 provider that the Service messages were variously described as ‘FAILED’, ‘BILLED’, ‘SENT’ or ‘ACCEPTED’. The Executive sought clarification on the meaning of the aforementioned statuses and received the following response:

*“Failed – message fails to reach its destination and delivery receipt reflects this incident.*

*Billed – messages successfully reaches its destination and it is reflected by delivery receipt.*

*Sent – on a balance of probability messages fails to reach its destination and lack of delivery receipt reflects this incident*

*Accepted - on a balance of probability messages reaches its destination but it is not mobile users' handset, delivery receipt reflects this occurrence"*

The Executive noted from the Level 2 provider's response that messages listed as 'SENT', and 'ACCEPTED' were pending, as a positive message delivery receipt / response had not been received from its aggregator, meaning that the messages had not been received by consumers. This was also reflected in the text message logs provided by Zamano. The Executive noted further that messages listed as 'FAILED' were unsuccessful as a negative message delivery receipt / response had been received from its aggregator. This was however not reflected in the text message logs provided by Zamano.

A summary of three example message logs is provided below:

Level 2 provider message log for mobile number \*\*\*\*\*7450

The Executive noted that the provided log shows that the initial opt-in to the Service occurred on 6 September 2014. The subscription confirmation message stated:

*"FreeMsg: Welcome to Kinkymobile for £3.00 per week, you can unsub by sending stop to 85878 any time. Help? 08000148874 SP TijaMobile"*

The Executive noted that following the above entry in the message log and prior to 2 May 2015, the status of all chargeable Service messages are listed as either 'FAILED' or 'SENT'. The first Service message listed as 'BILLED' occurred after the Service had migrated from Zamano to Veoo was delivered on 2 May 2015, almost eight months after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*4654

The Executive noted that the provided log showed that the initial opt-in to the Service occurred on 17 August 2014. The subscription confirmation message stated:

*"FreeMsg: Welcome to Kinkymobile for £3.00 per week, you can unsub by sending stop to 85878 any time. Help? 08000148874 SP TijaMobile"*

The Executive noted that following the above entry in the message log and prior to 5 May 2015, the status of all chargeable Service messages were listed as either 'FAILED' or 'SENT'. The first Service message listed as 'BILLED' was delivered on 5 May 2015, almost nine months after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*3416

The Executive noted that the provided log showed that the initial opt-in to the Service occurred on 6 September 2014. The subscription confirmation message stated:

*"FreeMsg: Welcome to Kinkymobile for £3.00 per week, you can unsub by sending stop to 85878 any time. Help? 08000148874 SP TijaMobile"*

The Executive noted that following the above entry in the message log and prior to 22 August 2015, the status of all chargeable Service messages were listed as 'SENT'. The first Service message listed as 'BILLED' was delivered on 22 August 2015, almost a year after the purported opt-in date.

The Executive also relied on further examples of message logs supplied by the Level 2 provider which contained unsuccessful 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.

In order to obtain further clarification, the Executive contacted the Level 1 providers, Zamano and Veoo, for a sample of the complainant message logs held by them. The logs supplied by the Level 1 provider Zamano did not match the logs supplied by the Level 2 provider, in particular they did not show a purported opt in on Service shortcode 85878 followed by a series of unsuccessful messages, as was shown in the Level 2 logs. The text message logs supplied by Veoo only confirmed successful chargeable Service messages where the Service had migrated to Veoo.

In order to obtain further clarification on the message failure issue, the Executive contacted Mobile Enterprise Ltd (the "Verifier") which has access to mobile data held by the Mobile Network operator Vodafone Limited ("Vodafone"). The Verifier was sent a sample of 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 30 message logs supplied by the Verifier that generally the first message log entry occurred on the same date that successfully charged Service messages were shown within the Level 2 provider messages logs, and that no failed messages were shown in the period immediately after the purported opt-in. For example the Verifier log for \*\*\*\*\*7450 listed the first Service message on 4 May 2015, and the Verifier log for \*\*\*\*\*4654 listed the first Service charge on 5 May 2015.

The Executive noted that the Verifier had confirmed that all messages sent from the Service shortcode that charged or attempt to charge the consumer would appear in its text message logs

### **Level 2 provider responses**

Furthermore, the Executive directed the Level 2 provider to provide an explanation for the high failure rate of chargeable Service messages. On 25 April 2016 the following response was received from the Level 2 provider:

*"The reason why chargeable messages would sometimes fail has been of strictly technical nature associated with message transmission credentials. Such messages would on most occasions fail to be delivered to aggregator and this is why on most occasions we did not receive*

*delivery receipt from aggregator. We continuously put strongest efforts to eliminate such transmission failures and we note the gradual improvement. As far as more detailed explanation is required taking into account purely technical approach, we are happy to provide it however we are not certain which approach is required or appropriate in the circumstance of this letter. Please note messages can also even fail to reach network or mobile user but we are sure that aspect (and any other aspect associated) of how mobile services operate is known to PhonepayPlus.”*

The Executive sought further clarification from the Level 2 provider regarding this explanation and asked what action it took to investigate the issue. On 19 May 2016 the Executive received the following responses:

*“Thank you for providing your explanation why the Service messages may be routinely failing. The following explanation was provided as a possible reason:*

*“The reason why chargeable messages would sometimes fail has been of strictly technical nature associated with message transmission credentials.”*

*i. Please elaborate on this explanation and provide evidence to support your answer.*

*Please find the following report, I asked a member of development team to provide an answer. Please note it is an attempt to elaborate on purely specialist topic and it was requested to transform it into layman terms for your convenience. Nevertheless, if at any point you still seek for more details, please do not hesitate to specify your question and part needing clarification:*

- Service premium messages are being sent ‘one-by-one’, unlike bulk sends*
- As a result, each time a new tcp connection is required to be opened*
- Such new connection can either be successful or fail*
- If the tcp connection fails, it could not be re-established (retransmission timer)*
- This is a case for subsequent tcp connection for affected users as communication between our and aggregator api’s is corrupted*
- It results in subsequent message failure*
- After the retransmission timer hits set amount of seconds (specific for given transmission settings), it uses that value for retransmission that has to be retransmitted.*
- This can cause long delays for a client to time-out on a slow link.*
- As with any technical machinery and technology as a whole, systems are prone to imperfections and this is the very common example that can be found in any textbook or technical support forums where providers or users encounter issues of such nature*

*ii. Please advise what action you took to investigate transmission failure issues. Please provide evidence including any correspondence / documents to support your answer.*

- Subsequently, system maintenance has been upgraded to eliminate corrupted communication*
- System maintenance is handled internally since it is not a 3rd party end point*
- Any new occurrence of corrupted tcp connection is converted into an alert*
- Subsequent scheduled attempt is subject to communication re-instating process*

- If it's successful, premium charges re-commence
- If it's unsuccessful, an attempt to re-instate communication is carried out alongside scheduled attempts until a limit of 120 days is reached
- We noted limited occurrences of longer limit however it only refers to subscribers joining service prior to extended set of upgrades to system maintenance procedures, we however continue the upgrading processes"

Considering the above response the Level 2 provider was directed to provide further clarity on its explanation and to confirm the date on which it first realised that TCP / transmission failure issues were resulting in messages failures. On 21 June 2016 the Executive received the following responses:

*"Please explain the following paragraphs in more detail:*

- *If the tcp connection fails, it could not be re-established (retransmission timer)*
- *After the retransmission timer hits set amount of seconds (specific for given transmission settings), it uses that value for retransmission that has to be retransmitted.*
- *This can cause long delays for a client to time-out on a slow link.*

*Retransmission timeouts (RTOs) result in serious network stalls and performance degradation. RTO occurs when the sender is missing too many acknowledgments and decides to take a time out and stop sending altogether. After some amount of time, usually at least one second, the sender cautiously starts sending again, testing the waters with just one packet at first, then two packets, and so on. As a result, an RTO causes delay on network. Unfortunately these delays pile up to very high (counted in hours) delays. RTOs add up to significant problems for network and application performance.*

*i. Please confirm the date(s) on which you first realised that TCP connection issues were resulting in message failures.*

*We began to see the pattern once the preliminary investigation was highlighting high failure rates for affected customers. Unfortunately, it was not noted with satisfactory alert when we were required to provide call logs due because this task is carried out by Support Team, not IT Team. Call logs were being pulled as they were recorded by database and the status of messages was regarded as technical details not affecting the information that was required to be provided to PhonepayPlus since the heavier weight was put on customer care for these tasks.*

Furthermore, the Executive noted that the Level 2 provider had stated that it had upgraded its system to eliminate corrupted communication. Consequently, the Level 2 provider was directed to confirm the date of this system upgrade and to provide documentary evidence to support its answer. On 21 June 2016, the following response was received:

*"Please confirm the date that the 'system maintenance' was 'upgraded to eliminate corrupted communication'. Please provide documentary proof to support your answer.*

The upgrade process has been a long term and time occupying task on our agenda. If only we could provide the exact date or time, we would happy to assist, but as we have stated above, the awareness of the exact issue can be regarded as dating back to April once we noted a pattern or in fact it was an outcome of Executive enquiring on this matter. The mitigating factor in this matter is that it was not a routine pattern. Technical issues have been an accompanying factor for any system based on handshakes between servers and databases where communication is prone to transmission latency and network congestion.

ii. You have stated that an alert is created for any new occurrence of a corrupted TCP connection. Please provide documentary proof to support this.

Please see example alert log display which is monitored by our Team:

Source Type	Source	Alert	Most Recent
Device	D	Network Congestion	Wed Jun 15 13:22
Device	Device	Slow Web Response Time	Wed Jun 15 13:22

Furthermore, the Executive noted that the Level 2 provider stated that it had implemented measures that would ensure that no further attempts would be made to bill a user after a period of 120 days. As a result of this statement, the Executive sought further clarification on these measures. On 21 June 2016, the following responses were received:

i. You have confirmed that in most cases, attempts to re-instate communication would not continue after a 120 day limit. Please provide examples of text message logs where this has occurred over the last 12 months.

This is the measure to remedy the issue recently implemented therefore it is designed to work the way it is described. We are aware of the 120 opt out rule and we agree this is the correct course of action.

ii. You have also stated that where the 120 day has been exceeded ('longer limit'), it has been due to subscribers joining the service prior to an 'extended set of upgrades to system maintenance procedures'. Please confirm the details of these particular upgrades (i.e. what changes were made) and confirm the dates they had taken place.

A cap has been put on system and it is an automatic action taken by database safeguard to stop attempt on such particular number. It was implemented within the general system upgrade and its particular have been summarised in above points.

Considering the above response, the Level 2 provider was directed to confirm the date that these measures were implemented and provide documentary evidence to support its answer. On 26 July 2016, the following responses were received:

*“Please confirm the date that this measure was implemented. Please include documentary proof to support your answer.*

*We were able to find an example that clearly presents the implemented measure. Please note that once the pattern was detected and reported, the subscription ceased for this user and won't be reinstated unless user subscribes again, of course. On the attached logs for subscription that employed a trial remedy measure we noted that all messages apart from join message were unable to complete their journey correctly. Where we recorded NO SUCCESS status, we read that message could not reach user (= for various reasons ended its way alongside delivery chain). Furthermore we had status where we could see FAILED ATTEMPT status – by these means we were informed that message could not reach Level 1 provider. Monitoring system highlighted this subscriber to us during monthly checks and Staff member took a decision to stop the subscription. No more messages were attempted to be sent to user after 6 July. In addition, PORT NOT REACHED status informed us that due to continuous message failures (for various reasons), subscriber was highlighted as suitable for inspection due to cap installed, and, as a consequence, the service was stopped as a precaution.*

*In response to the direction for information the following was stated:*

*“You have also stated that where the 120 day has been exceeded ('longer limit'), it has been due to subscribers joining the service prior to an 'extended set of upgrades to system maintenance procedures'. Please confirm the details of these particular upgrades (i.e. what changes were made) and confirm the dates they had taken place. A cap has been put on system and it is an automatic action taken by database safeguard to stop attempt on such particular number. It was implemented within the general system upgrade and its particular have been summarised in above points.”*

*i. Please confirm the date this cap was implemented. Please include documentary proof to support your answer.*

*Our Team suggested that the general plan to increase system efficiency and quality was composed at the end of December'15/ early January 2016. It was however extended every month adding new tasks and the safeguard in question was introduced in the first quarter of 2016, tested during weeks and still fluently improved as ongoing agenda.*

The Executive submitted that the Level 2 provider had failed to provide evidence or documentation to support its explanation for the high failure rate of chargeable service messages shown in the logs it provided to the Executive, or to support its account of the steps it took to address the message failures, or to explain the discrepancies between its logs and the Level 1 provider logs. This was despite having been explicitly directed to provide such evidence, documentation or correspondence on several occasions. The Executive submitted that in particular, the Level 2 provider had:

- Failed, when asked, to provide evidence to demonstrate that the service was affected by TCP connection issues.
- Failed, when asked, to provide evidence (including any correspondence/documents) showing what actions it took to investigate transmission failure rates.
- Failed, when asked, to confirm the date(s) on which it first realised that TCP connection issues were resulting in message failures.
- Failed, when asked, to provide documentary proof that the 'system maintenance' was 'upgraded to eliminate corrupted communication' and failed to confirm the date on which this occurred.
- Failed, when asked, to provide documentary proof of the measures it had implemented to ensure that no further attempts would be made to bill a user after a period of 120 days.
- Failed, when asked, to confirm the date this "120 day" measure had been implemented.
- Failed, when asked, to confirm the details or precise dates of an 'extended set of upgrades to system maintenance procedures' which the Level 2 provider stated had resulted in some subscribers being messaged in excess of the 120 day limit.

The Executive therefore asserted that the Level 2 provider had failed to provide a credible explanation, supported by evidence or documentation, for the failed chargeable service messages appearing on the logs supplied to the Executive or for the discrepancies between the Level 1 provider logs and Level 2 provider logs. The technical issues described by the Level 2 provider would, in the view of the Executive, lead to sporadic failures of messages across many MSISDNs rather than the continuous failure of all messages to certain MSISDNs across a lengthy period of time. The logs provided by the Level 2 provider showed such continued message failures in 257 of the 263 cases with, in some cases, failed message patterns spanning a period of almost 20 months.

In addition, the Executive submitted that where documentation had been provided, this had on occasion not supported the Level 2 provider's account. For example, the message log supplied by the Level 2 provider to evidence the 120 day rule cap appeared to show attempts to bill being capped at around 70 days. The Executive submitted that this called into question the credibility and accuracy of this aspect of the Level 2 provider's account.

In addition, the Executive noted that the Level 2 provider stated that it became aware of the problem with failed messages being sent to consumers when the Executive's enquiries brought this to its attention in April 2016. Therefore, as of April 2016, if the Level 2 provider had made the changes to its system that it described to the Executive, it would have been able to detect, and therefore potentially remedy, any technical communication faults that would have resulted in failed messages. However, the Executive noted from some of the more recent text message logs supplied by the Level 2 provider that unsuccessful messages were still occurring well into in the third quarter of 2016.

#### Level 1 provider responses

The Executive had also made enquiries to Zamano and Veoo regarding the high failure rate of chargeable Service messages. Although Veoo provided a response, the majority of failed messages occurred on the Zamano shortcode. The responses from Zamano and Veoo are located below.

Zamano response:

*"The Level 2 provider has supplied text message logs showing interaction between complainant mobile numbers and the Service. Having reviewed the message logs the Executive notes that there is a high failure rate for chargeable Service messages in a significant proportion of the message logs supplied (see attached logs). Please advise why chargeable Service messages appear to be routinely failing.*

*Zamano's logs do not show any interaction between the service and the two provided MSISDNs \*\*\*\*\*7106 and \*\*\*\*\*0782.*

The Executive noted that Zamano did not provide an explanation as to why messages appear to be routinely failing. Following receipt of the Level 2 provider's explanation of various statuses of the Service messages (variously described as 'FAILED', 'BILLED', 'SENT' or 'ACCEPTED'), the Executive sought clarification from Zamano on whether it would have a record of these attempts to bill the consumer.

*"The Level 2 provider has provided the following descriptions in relation to the status of messages received:*

***"Failed – message fails to reach its destination and delivery receipt reflects this incident.***

***Billed – messages successfully reaches its destination and it is reflected by delivery receipt.***

***Sent – on a balance of probability messages fails to reach its destination and lack of delivery receipt reflects this incident***

***Accepted - on a balance of probability messages reaches its destination but it is not mobile users' handset, delivery receipt reflects this occurrence"***

*i. Please confirm if the delivery receipt referred to in the above descriptions is sent by the Level 1 provider.*

*The Level 1 provider can send a "Delivery receipt" only if this has been received from the mobile operator after a message has been deemed to have successfully or unsuccessfully delivered to a customer's handset. This is relevant here under the "Failed" and "Billed" descriptions. The Level 1 provider can send an "acknowledgement", sometimes also referred to as receipt, only if it has properly received and accepted a message from an L2 provider and it appears that that is what is being referred to here under the "Sent" and "Accepted" descriptions."*

The Executive noted that Zamano stated that "The Level 1 provider can send a "Delivery receipt" only if this has been received from the mobile operator after a message has been deemed to have successfully or unsuccessfully delivered to a customer's handset. This is relevant here under the "Failed" and "Billed" descriptions." The Executive understood, given

the explanations of the 'FAILED' status by the Level 2 provider and Zamano, that Zamano would have a record of messages described as 'FAILED' on the Level 2 provider message logs. The Executive noted that this however was not the case.

The Executive sought clarity from the Level 2 provider on why unsuccessful messages were not reflected in Zamano's text messages logs and on the 23 August 2016, the following response was received:

***"Failed – message fails to reach its destination and delivery receipt reflects this incident."***

*i. The explanation above suggests that a delivery receipt would have been received from the Level 1 provider, yet this does not appear to be supported by the text message logs supplied by Zamano. Please explain this discrepancy.*

*A discrepancy can only be explained when and where there are examples of this, is the executive suggesting that we give an explanation of something without any examples or proof? There is no relevance in this question other than to prolong this preliminary investigation, it is clearly mentioned in our interim measures reply that "The replies to the Executive's requests for information were not clear and not supported by evidence" we are unable to provide this when questions are asked that have no supporting evidence."*

The Executive noted that the Level 2 provider has stated that it cannot provide an explanation on the above discrepancy without 'examples or proof' of the issue. Considering the discrepancies in the text message logs and the explanations provided by the Level 2 provider and Zamano, the Executive submitted that the message logs supplied by the Level 2 provider must be incorrect.

#### Veoo response

*"The Level 2 provider has supplied text message logs showing interaction between complainant mobile numbers and the Service. Having reviewed the message logs the Executive notes that there is a high failure rate for chargeable Service messages in a significant proportion of the message logs supplied. Please advise why chargeable Service messages appear to be routinely failing.*

*There appears to be only two attached text message logs provided to Veoo. The first for \*\*\*\*\*7106, and the second for \*\*\*\*\*0782.*

*You will see from attachment **Tija MSISDN log requests** that \*\*\*\*\*0782 has no failed messages. Regarding \*\*\*\*\*7106- there appears to only be one failed message on the 5th April 2015 which notes 'network time out'. The reason for this failure is because we would not have received a delivery report back from the mobile network within the specified timeframe and thus the message would not be delivered. Possible reasons for this can vary from the handset being powered off, or a lack of coverage etc."*

Although routine message failures did not seem to occur on Veoo's shortcodes, the Executive also sought clarification from Veoo on whether the message delivery receipts

referred to by the Level 2 provider would have been supplied by the Level 1 provider. The following response was received:

*"The Level 2 provider has provided the following descriptions in relation to the status of messages received:*

***"Failed – message fails to reach its destination and delivery receipt reflects this incident.***

***Billed – messages successfully reaches its destination and it is reflected by delivery receipt.***

***Sent – on a balance of probability messages fails to reach its destination and lack of delivery receipt reflects this incident***

***Accepted - on a balance of probability messages reaches its destination but it is not mobile users' handset, delivery receipt reflects this occurrence"***

*i. Please confirm if the delivery receipt referred to in the above descriptions is sent by the Level 1 provider.*

*When an L2 connects to the Veoo API, they are given a specific list of message delivery statuses and error failure messages.... These are the only message statues that will be passed to the client. Veoo is not able to comment on the L2's interpretation of the received statu[s]es.*

The Executive noted that although Veoo confirmed that message deliveries are sent to a Level 2 provider, it cannot confirm how this information may be interpreted by a Level 2 provider.

#### **Additional Level 2 provider responses**

Separately, as referenced in the Background, the Executive noted that the text message logs supplied by Level 2 provider from September 2015 onwards include chargeable Service messages with the status 'SENT', and not as previously 'FAILED' and 'SENT'. These were also followed by the issuing of successfully charged Service messages some months later. As was the case with text message logs displaying 'FAILED' and 'SENT' messages, the Level 1 provider log did not match the Level 2 provider's log.

The Executive sought clarity on why the aforementioned logs displayed the status 'SENT' as opposed to 'FAILED' and 'SENT'. On 19 May 2016 the following response was received:

*"Yes, we have changed the wording to reflect the way system was updated. It was a part of system maintenance process and, had a problem of clarity been highlighted to us earlier, we would be happy to confirm this was a case. In other words, it was only a change of descriptive parameters and confusion was by all means unintentional."*

Considering the response, the Executive sought an explanation on what prompted this change, to confirm the date it had taken place and to provide documentary evidence to support its answer. On 26 July the following response was received:

*"A report has been requested from my Team however it is very difficult to provide a documentation because it might have been an informal and internal direction that was issued*

*by Team - to Team. I stressed the importance to keep records of essential updates for future reference and it was highlighted that it is very important to have a proof of date when the update to script was implemented and should we manage to find one, it will be notified to Executive straight away.”*

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 or the supplied logs were manually altered, the Executive understands 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 considered the removal of ‘FAILED’ statuses prior to mid-September to be a separate example of the message logs being altered by the Level 2 provider.

The Executive submitted that the Level 2 has not provided any credible explanation, supported by evidence or documentation, for the failed chargeable service messages appearing on the logs supplied to the Executive. Furthermore, the Level 2 provider was asked to provide dates and evidence of any action taken to address the message failure issue, but has not done so. The Executive therefore concluded that there has not been a message failure issue and that Service messages listed in the Level 2 provider message logs were not sent (or attempted to be sent) to complainants.

The Executive was asked by the Tribunal if it was aware of any possible explanation for the high message failure rate beyond what was in the evidence. The Executive understood that the Level 1 provider would have a record of message attempts if the consumer’s phone was off or had no credit. The Executive stated that there were various issues which could have disrupted communications between the Level 1 provider and the Level 2 provider, such as a virus, network coding, or a system failure. The Executive confirmed it had seen similar message failure patterns in logs of other providers who contracted with the same Level 1 providers. The Executive however noted the nature of the failures (being consistent failures over a long period of time in respect of 257 specific consumers), and that the Level 2 provider hadn’t mentioned any specific issues, or provided evidence (such as correspondence) to show they had happened.

Accordingly, the Executive submitted that the complainant message logs provided by the Level 2 provider purportedly showing consumers’ opt-ins to the Service were false. The Executive noted from the previous Track 1 procedure that the Level 2 provider accepted that it did not have robust verification prior to 14 January 2015. The Track 1 procedure was created in part to address the issue of consent to charge that had occurred during the third and fourth quarters of 2014. The Executive noted however that it continued to receive complaints about consent to charge well into the third 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 arose only in a limited period, and that the scope of such a breach was confined to a lack of independent third party verification, as opposed to a wider allegation of unsolicited charges.

In light of the evidence provided by Zamano, Veoo and the Verifier, the Executive considered that the message logs supplied by the Level 2 provider were incorrect, and 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 the Phone-paid Services Authority 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 commented as follows.

It considered that its only fault was insufficiently clear explanation of the matter or perhaps insufficient technical knowledge on the Executive's end. The Level 2 provider noted that this was a complex area of interpretation and understood it had an ultimate opportunity to guide the Executive and Tribunal on the correct interpretation of its service, its aspects and nature.

The Level 2 provider submitted that no single statement or even a single word had an aim to be false or misleading. The Level 2 provider submitted that logs it provided were true because all messages in question were attempted to be sent. Not reaching their destination or even the intermediary Level 1 provider was not and cannot be a feature that would determine the log record to be false. The Level 2 provider submitted that logs would have been false if it had attempted to conceal these failed messages, ignored them as they did not reach recipients, and not included the unsuccessful messages into logs. One may say "they did not exist if they didn't reach the destination" and it appeared that the Executive would prefer to follow this philosophy because the Level 2 provider was now accused of providing false information by listing non-delivered messages that do not exist on Verifier or Level 1 provider logs. The Level 2 provider submitted that these messages did not exist for both intermediaries, aggregator and network, but did exist for TijaMobile. The Level 2 provider submitted that there was no falseness and no misleading information.

The Level 2 provider noted the complaint period, and submitted that complaints were handled by its dedicated customer support continuously without exception. The Level 2 provider submitted that complaints have always been a part of every business where a relation between a trader and customer is concerned. The Level 2 provider submitted that a responsible business that follows the rules of fair play would always aim to sort out complaints to consumers' satisfaction, and TijaMobile was not any exception to this rule. The Level 2 provider submitted that it was therefore highly difficult for it to understand why the occurrence of complaints that did not note any sudden spike or unlikely pattern was listed as a reason for the Warning Notice. The Level 2 provider

submitted that it would be criticized if the Executive noted consumers' complaints were not addressed. The Level 2 provider submitted that it had always addressed consumer complaints and submitted that the Executive seemed to follow a philosophy of reverted values.

The Level 2 provider stated that it did not understand why the Executive used the word 'apparent' for opt in dates. The Level 2 provider stated that opt in dates were not something that can be 'apparent'. They occurred at certain moment in time, were specific for each subscriber. The Level 2 provider stated that, a physical act of joining a mobile service was a factual occurrence, not anything that can be specified as 'apparent'.

The Level 2 provider noted the statement made by Executive that successful billing for a fraction of affected users took place significantly later than the purported (sic!) opt in date. The Level 2 provider's view was that this sounded like an accusation which ignored every single explanation provided to the Executive which provided the reasons for technical issues. The Level 2 provider submitted that it was very much unfair to not take into account or consideration its attempt to guide the Executive through complex aspects of mobile services and their nature. The Level 2 provider submitted that it attempted to deliver both professional and descriptive answers when requested.

The Level 2 provider submitted that it was slightly difficult to comment on message statuses that have been employed by the Executive. The Level 2 provider stated that it had been a victim of inconsistent delivery statuses, technical problems with transmissions and their failures, which were so difficult to overcome for any business operating 'online'. The Level 2 provider stated that the entire history of service operation and measures undertaken to remedy the issues had been presented to the Executive on numerous occasions, repeated many times during extended correspondence. The Level 2 provider stated that all its time spent on replies appeared to be pointless when it read that it had not provided answers that would satisfy the Executive and fit the scenario that seems to be pre-determined. The Level 2 provider submitted that, reading a long list of actions it failed on, it became apparent that the Executive was biased and decided to follow a default scenario when the fault should fit the case not the other way round. The Level 2 provider submitted that the Executive's reverted value philosophy was having a huge negative impact in its belief in a fair regulatory outcome of the case.

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

Having considered the Executive's evidence, including in particular the nature of the complaints, the type and nature of the discrepancies between the Level 2 provider's logs and the Level 1 provider and Verifier logs, the relevant correspondence and the absence of a credible explanation supported by reliable evidence 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 false message logs which it had submitted to the Executive.

The Tribunal then gave consideration to the potential technical reasons for message failure which had been put forward by the Level 2 provider, and gave consideration as to whether this explanation credibly explained the pattern of discrepancies shown in the message logs.

The Tribunal noted that the Level 2 provider had failed when given the opportunity, to provide supporting evidence of its explanation. The Tribunal noted that the Level 2 provider had, for example, not provided reliable evidence to demonstrate that the service was in fact affected by TCP connection issues (which explained the consistent discrepancies shown), or evidence showing what actions it took to investigate transmission failure rates, or evidence of the 'system upgrade to eliminate corrupted communication' (including when this occurred).

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 Tribunal noted in particular that the Level 2 provider had not given an explanation as to why the Level 1 provider logs did not show certain "FAILED" messages, when the evidence they had supplied suggested that the Level 1 provider should have a record of such messages.

The Tribunal did not consider that the Level 2 provider had supplied evidence which was sufficient to show that the issues it had identified as being responsible for the discrepancies between the Level 2 provider's logs and the Level 1 provider (and Verifier) logs in respect of the complainants had in fact occurred and explained the discrepancies seen. The Tribunal considered that the pattern of consistent message failure for specific consumers was not credibly explained by the Level 2 provider's explanations.

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 were false (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 provided false and misleading information to the Executive. Accordingly, the Tribunal upheld a breach of paragraph 4.2.4 of the Code.

## **Decision: UPHELD**

### **Alleged Breach 2**

**Rule 2.3.3** – "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 have been charged without their consent for the following reasons:
  1. Robust evidence of consent to charge was not held for complainants;
  2. The complainant message logs supplied by the Level 2 provider purporting to show consumers' opt-in to the Service were false.

The Executive relied on the content of the Phone-paid Services Authority Guidance on 'Privacy and consent to charge' (the "**Guidance**"), correspondence exchanged with the Level 2 provider, complainant accounts (which are referenced in the 'Background' section above), complainant questionnaire responses (which are referenced in the 'Background' section above) and complainant text message logs.

#### Reason 1 - Robust evidence of consent to charge was not held for complainants

The Executive noted that the message logs supplied by the Level 2 provider showed that all complainants for whom the Executive had been supplied a message log, had opted-in to the Service via the WAP route. The Executive submitted that the Level 2 provider was required to hold robust consent to charge evidence for the WAP opt-ins. The Executive noted that the Guidance makes it clear that all charges must be robustly verifiable. Although Guidance is not binding on providers, where a provider fails to follow Guidance there is an expectation that it will take equivalent alternative steps to ensure that it fulfils the Phone-paid Service Authority's expectations (and compliance with the Code).

In response to a direction from the Executive, the Level 2 provider confirmed on 25 April 2015 the following:

*"All of our services transferred all of our services over to the full version of GoVerifyIt in January 2015." [sic]*

In response to questioning by the Tribunal, the Executive confirmed its understanding was that where the "full" version of GVI was used, this involved the consumer receiving a PIN in a text message which they then entered into a providers' web form as part of the procedure to subscribe, and that the verifier would retain a record of the PIN sent. However the Executive understood the system used in respect of the complainants was the "offline" version, and submitted that this did not provide robust evidence of consent.

The Executive noted from the complainant message logs that all complainants appeared to have purportedly opted-in to the Service before January 2015 and therefore fell into the period where the Level 2 provider had admitted it had no robust evidence of consent to charge.

The Executive noted that the Level 2 provider had previously confirmed that it used ETX (UK) Ltd ("**ETX**") to verify Service opt-ins via its consumer consent verification service ("**GoVerifyIt**").

The Executive noted from a previous Track 1 procedure that the Level 2 provider had agreed to use GoVerifyIt to verify opt-ins. The Track 1 action plan dated 7 January 2015 included a consent to charge breach for the Level 2 provider's WAP and MO opt-in services.

The Executive submitted that the Level 2 provider had charged consumers in the period after 14 January 2015 whilst knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers. At the time the charges were made, the Level 2 provider was aware that it did not hold the required robust third party verification of consent to charge for consumers who opted-in (if in fact they did opt-in) prior to that date.

Reason 2 – Complainant message logs supplied by the Level 2 provider purporting to show consumers' opt-in to the Service were false.

As noted in the alleged breach of paragraph 4.2.4, the Executive asserted that the complainant message logs supplied by the Level 2 provider, which purport to demonstrate that consumers opted-in to the Service in a period when the Level 2 provider did not have operational robust verification of consent to charge, were false.

As noted in the alleged breach of paragraph 4.2.4, the Executive requested that Zamano provide message logs for a sample of complainants. Of the 36 message logs requested six showed no transactions at all. Of the 30 logs that showed chargeable messages only three logs corresponded with the message logs provided by the Level 2 provider. The other 27 message logs showed the first charges occurring some months after the purported opt-in date. This was also supported by the text message logs provided by the Verifier, where the majority did not contain failed / unsuccessful chargeable Service messages from shortcode 85878 immediately after the purported opt-in. Given the absence of failed / unsuccessful chargeable Service messages immediately after the purported opt-in in the message logs supplied by Zamano and the Verifier, the Executive asserted that the entries in the Level 2 provider's complainant message logs must therefore be false.

As referenced earlier in the alleged breach of paragraph 4.2.4, the Level 2 provider provided reasons why the Service messages may be routinely failing. However, taking into account the responses received from the Level 2 provider, Veoo and Zamano, and the responses to the complainant questionnaire, the Executive asserted that no credible explanation had been provided as to why almost all initial Service messages from shortcode 85878 were shown as not billed on the Level 2 provider logs, but not shown at all on Zamano's logs.

In addition, the Executive noted that the Level 2 provider had not provided sufficient evidence to demonstrate that issue(s) had occurred on its system. The Level 2 provider was asked to provide evidence of any action it had taken to investigate the consistent message failure issue but had not done so. The Executive therefore concluded that there had not been a message failure issue and that Service messages listed in the Level 2

provider message logs were not sent (or attempted to be sent) to complainants. Accordingly, the Executive submitted that as the complainant message logs provided by the Level 2 provider purportedly showing consumers' opt-ins to the Service were false, there is no robust evidence of opt-in to the Service by consumers and no robust evidence that the complainants consented to Service charges.

As noted in the alleged breach of paragraph 4.2.4, 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 the consent to charge breach arose only in a limited period, 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.

In response to questioning by the Tribunal, the Executive was unable to state whether the individual complainants in this case had also been charged by the Service prior to the Track 1 procedure being concluded; however it could confirm that the complaints for the case had been made after the closure of the Track 1 procedure and related to charges applied after the closure of the Track 1 procedure. The Executive noted that 257 out of the 260 complainant message logs provided showed no successful messaging prior to an initial charge occurring after the closure of the Track 1 procedure.

For the reasons set out above the Executive asserted that the Level 2 provider did not have consent to charge complainants and was unable to provide evidence which established that consent. Accordingly, the Executive submitted that the Level 2 provider has acted in breach of rule 2.3.3 of the Code.

2. The Level 2 provider denied the alleged breach. The Level 2 provider expressed its disappointment that, having adhered to the Track 1 Plan in full and implemented online verification hosted by a third party, it was now facing an aftermath of this historic, positively concluded case and under investigation for the same reason, again. The Level 2 provider submitted that, should such legal philosophy be followed by authorities, no one would ever be certain that a repeated accusation is impossible even if the initial case or trial was finished and closed, and that this created a danger of distrust in authorities let alone regulators so common for dictatorial states, and should not be something experienced in modern thriving society.
3. The Tribunal considered the Code and all the evidence before it.

The Tribunal noted the consumer complaints, which in summary, stated that the consumers had not consented to be charged for the Service. 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). There was no evidence to undermine or controvert the absence of consent.

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. Accordingly the alleged breach of charging without consumer consent had occurred after the Track 1 procedure had been concluded, and so the alleged breach did not duplicate the previous Track 1 procedure.

The Tribunal found that, at the time the charges were made, the Level 2 provider had been aware that it did not hold the required robust third party verification of consent to charge for the consumers it had charged, but had not made any attempt to obtain robust evidence of their consent before charging them.

Consequently, for both of the reasons advanced by the Executive, 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**

## SANCTIONS

### Representations on sanctions made by the Executive

1. The Executive submitted that the following sanctions were appropriate:

- a formal reprimand
- 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.
- a fine of £500,000; and
- a requirement that the Level 2 provider make refunds, within three months, to all consumers who have used the Service for the full amount spent, regardless of whether or not they have claimed a refund, and provide evidence to PSA that such refunds have been made.

based on a preliminary assessment of breaches 1 and 2 as "very serious".

2. The Level 2 provider submitted that, in the event the breaches were upheld, the following sanctions would be appropriate:

- a formal reprimand
- 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.
- a fine of £200,000; and
- a requirement that the Level 2 provider make refunds, within three months, to all consumers who have used the Service for the full amount spent, regardless of whether or not they have claimed a refund, and provide evidence to PSA that such refunds have been made.

The Level 2 provider submitted that a fine of £500,000 was an extortionate measure without a precedent and would simply put the company out of business. The Level 2 provider stated that due to extremely unfair and non-business-friendly regulation it planned to withdraw from any business in the United Kingdom. This was a very difficult decision for it but facing this regulatory treatment it felt it had no choice. The Level 2 provider submitted that a fine of £500,000 would prevent it from exploring new markets. The Level 2 provider stated that it trusted that the Tribunal was capable of a fair decision in this case which was in line with previous adjudications that it was familiar with.

The Level 2 provider submitted that the Executive had not come back with feedback on its proposed settlement, nor explained the reasons behind lack of will for cooperation towards

bringing the case to a closure. The Level 2 provider submitted that it had been ready to accept a monetary fine being almost the maximum set by the regulator for a provider found in breach of the Code of Practice (£200,000 or £250,000 should it be discussed and mutually agreed), however it did not get an opportunity to reach a settlement with the regulator.

The Level 2 provider submitted that it had had hardly any cooperation from the Executive during the several long months of the case, and that the case could have been solved via Track 1 procedure, with all available benefits to the consumer. Instead of such a straightforward, money and timesaving solution, a prolonged investigation did not conclude towards a closure, and questions asked were repeated or simply wandered near or around points already clarified. For all these reasons the Level 2 provider stated it had had a disappointing experience with the regulatory framework and did not feel that representation was a procedure designed to benefit a Level 2 provider. The Level 2 provider submitted that it was counting on a fair judgement followed by a fair outcome different from sanctions proposed by Executive, noting that precedent was a principle of justice.

### **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 the Phone-paid Services Authority (PSA)**

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 the Phone-paid Services Authority;
- The nature of the breach was likely to severely damage consumer confidence in premium rate services; and
- The breach demonstrated fundamental non-compliance with the Code in respect of a high revenue generating service

#### **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;
- The case had a clear and highly detrimental impact on consumers;
- The nature of the breaches, and/or the scale of harm caused to consumers, was likely to severely damage consumer confidence in premium rate services; and
- Consumers had incurred an unnecessary cost

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 took into account the following aggravating factor:

- The Level 2 provider had previously been subject to a Track 1 procedure, which had included requirements regarding consent to charge.

The Tribunal did not find any mitigating factors. The Tribunal noted that the Level 2 provider had failed to provide evidence to support its assertions that mitigating factors applied (including for provision of refunds). The Tribunal also noted that, even if it had not made a finding that the logs supplied were false, it would be of the view that the possibility of some connectivity issues was foreseeable and providers should be able to take prompt steps to rectify such issues.

The Level 2 provider's evidenced revenue in relation to the Service in the period from March 2015 to September 2016 was in the range of Band 1 (over £1,000,000).

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

The Tribunal paid regard to the Level 2 provider's representations regarding sanctions, and a fine sanction in particular. The Tribunal considered that in this case a fine in excess of the amount the Level 2 provider had suggested was justified and proportionate. In reaching this conclusion, the Tribunal took into account the seriousness of the case, the Level 2 provider's Service revenue (which was well in excess of the Band 1 threshold), and the prevalence of similar breaches upheld by recent Tribunals, of which the Level 2 provider appeared to have been aware, which suggested that a substantial fine was necessary to deter such conduct. The Tribunal noted that the type of conduct it had found proven here was now widespread and undermined public confidence in the premium rate phone industry, was doing very serious harm to consumers, and those providers who observed the industry codes of conduct. The Tribunal noted that it had dealt with a number of glamour video cases where the pattern of behaviour and breaches were similar to the present case. The Tribunal wished to make it clear to all the providers engaged in the provision of this particular type of service (glamour video subscription service) that conduct of this type, involving deliberate falsification of documents and manipulation of consumers, will result in severe sanctions, which, depending on the circumstances, may be significantly greater than those imposed in past or present cases, including total amounts of fines and other sanctions.

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

- a formal reprimand;
- a fine of £500,000;

- 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;
- a requirement that the Level 2 provider submit to a compliance audit of its procedures for ensuring that consumers (including existing subscribers) were not charged unless the Level 2 provider held robust evidence of those consumers' consent to be charged. The audit is to be carried out by a third party approved, and to a standard prescribed, by the PSA, and the costs of such audit are to be paid by the Level 2 provider. The audit must be completed and the recommendations implemented within a period specified by the PSA; 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:**

**100%**

**The decision of a previous Tribunal on 18 August 2016 to impose interim measures is attached at Appendix A.**

## Appendix A

### Application for interim measures pursuant to Code of Practice paragraph 4.6

Case ref:	72142
Service:	“Kinky Mobile” glamour video subscription service
Level 2 provider:	TijaMobile Ltd
Level 1 provider:	Zamano Ltd; Veoo Ltd
Cost:	£3 per week
Shortcodes:	85878, 88150, 82999 and 82445

**Tribunal number: 191**

### Adjudication

- The Tribunal has paid full regard to the material supplied by the Executive. In respect of the material submitted by the Executive, the Tribunal noted in particular:
  - a) 243 complaints had been received about the Service after the last procedure against the Level 2 provider, the latest being on 19 July 2016;
  - b) There was a history of previous enforcement action against the Level 2 provider for charging consumers without having robust evidence of their consent;
  - c) The nature of the apparent breaches referred to by the Executive, including their submissions on the lack of robust third party verification of consent for charges, and lack of veracity of message logs provided by the Level 2 provider;
  - d) The replies to the Executive’s requests for information were not clear and not supported by evidence, particularly on technical matters;
  - e) The Level 2 provider stated that it often changed message providers to take advantage of best available prices;
  - f) The Level 2 provider had refused to supply bank statements when directed to do so; and
  - g) The information in the Debt Collection Withhold Assessment.
- The Tribunal has paid full regard to the representations provided by the Level 2 provider. In respect of the material submitted by the Level 2 provider, the Tribunal noted in particular:
  - a) The Level 2 provider did not appear to have addressed that it was still charging consumers without holding adequate evidence of their consent;
  - b) The Level 2 provider appeared to acknowledge that they had not been complying with their own requirements on service message flows to consumers, which if true would demonstrate at the least that they had been incompetent in technical matters;
  - c) The Level 2 provider’s submission that the proposal to impose interim measures was unfair because it was an established company. The Tribunal considered that this submission was outweighed by the evidence regarding the Level 2 provider continuing to charge consumers without consent after a previous enforcement procedure, and the lack of available evidence of its present financial standing;

- d) The Level 2 provider did not appear to have properly engaged with the process, in that it had not adequately addressed both of the apparent breaches cited by the Executive, and had not supported its submissions with evidence (including technical evidence, or evidence of its financial standing).
- The Tribunal has paid regard to the Supporting Procedures, including the factors set out at paragraph 80 and paragraph 91.

Having considered the evidence before it, the Tribunal has made the following determinations:

- 3) At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there does appear to be sufficient evidence that could support a breach of Code of Practice rule 2.3.3 and Code of Practice paragraph 4.2.4.
- 4) The Tribunal does consider that the Level 2 provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. The Tribunal notes in particular:
  - a) The Level 2 provider is a company based in the UK with a 6 year trading history and no immediate breach history, however;
  - b) The Tribunal takes into account the Executive's comments in its Debt Collection Withhold Assessment regarding:
    - i) the Level 2 provider's lack of up-to-date published filed accounts;
    - ii) that a notice of dissolution had been recently filed at Companies House, (although dissolution had since been suspended and cancelled)
    - iii) the Level 2 provider's compliance history, including the prior informal dealing in January 2015;
    - iv) the potential seriousness of the breaches, and service revenue, which could result in a higher level of fine;
  - c) The Level 2 provider's refusal to provide bank statements to the Executive, and the lack of any evidence of cash in hand, and other assets which could not easily be disposed of.
- 5) The Tribunal is satisfied that PhonepayPlus has made reasonable endeavours to notify the Level 2 provider of its initial findings and the proposed interim measures.
- 6) Noting the previous cases referenced by the Executive, the Tribunal considers that the estimated fine is a reasonable assessment at this stage of a sanction which may be imposed by a Tribunal in due course, noting the volume of complaints, service revenue, and nature of the apparent breaches. The Tribunal considers that the measures set out below are appropriate and proportionate to take in the circumstances of this case.
- 7) Accordingly, the Tribunal hereby directs that:
  - a) PhonepayPlus is authorised to direct a withhold of up to £269,000.

- b) The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum authorised in this decision.
- c) The Executive is given discretion to vary the total directed to be withheld downwards in the event that it is provided with alternative security which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course are paid.
- d) Such interim measures are to be revoked upon the case being re-allocated to Track 1 or otherwise discontinued without sanction.

**ROBIN CALLENDER SMITH**  
**18 AUGUST 2016**