



Tribunal meeting number 180 / Case 2

Case reference: 71959
Level 2 provider: Cellso Limited (UK)
Type of service: “Cellso-babes” glamour video subscription service
Level 1 provider: Zamano Solutions Limited (Ireland); Veoo Limited (UK); Fonix Mobile Limited (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

The case concerned a glamour video subscription service, charged at £3 per week, operating on dedicated shortcode 80027, and shared shortcodes 66033, 88150, and 82999 (the “**Service**”).

The Level 2 provider for the Service was Cellso Limited (the “**Level 2 provider**”). The Level 2 provider was incorporated in the UK on 12 October 2012 and was first registered with PhonepayPlus on 22 March 2013. The Level 1 provider for Service shortcode 66033 was Zamano Solutions Limited (“**Zamano**”). The Level 1 provider for Service shortcode 80027 was Fonix Mobile Limited. The Level 1 provider for Service shortcodes 82999 and 88150 was Veoo Ltd (“**Veoo**”).

Between 9 February 2015 and 22 January 2016, the Executive received 158 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 Level 2 provider had confirmed that the Service commenced operation on 11 October 2013 and was currently operational. Zamano had confirmed that the Service commenced operation on shortcode 66033 in October 2013. Veoo had confirmed that the Service commenced operation on shortcode 82999 in February 2015 and on shortcode 88150 in May 2013. Fonix had confirmed that the Service commenced operation on shortcode 80027 in November 2014.

The Executive noted from message logs supplied by the Level 2 provider that users of the Service opted in to the Service on shortcode 66033 and that some Service users were migrated to either Service shortcode 82999, 88150 or 80027.

Consumers subscribed to the Service via WAP opt-in. The Level 2 provider had provided the following summary and consumer journey for the promotion and operation of the Service:

“The Cellso Babes WAP service operates in the following way:

The customer is browsing the web on their mobile device and come across one of our banners.



(i). The customer then clicks on the banner if they are interested in the service and is then redirected to our landing page where the customer can read all of the terms and conditions of our service* and if they are still interested in the service the customer can begin the process of subscribing by entering their mobile number into the box provided on the landing page (ii). At this stage the customer is then redirected to our pin entry page (iii) and is also sent a free message on their phone (iiii), which contains the pin that they must enter in on the site in order to complete subscription. Once entered the customer is now subscribed to the service and is given immediate and unlimited access to the content (iiiiii) and also receives a free message which confirms that the customer is now subscribed to the service(iiiiii).


*The terms and conditions of this service are as follows:

This is a subscription service. First 7 days Free then costs £3 per week until you send stop to 66033. This service is provided by Cellso Ltd. You can contact us at any time on 02033933695. You must have the bill payers permission to use this service and be over 16 years of age. By subscribing to this service you accept that you may receive promotional material of a similar nature from us or our partners you can opt out of marking my sending stop to 66033.

(i)



(ii)



7 DAYS FREE ACCESS TO ALL VIDEOS
cellso-babes
HOT GIRL MOBILE VIDEOS

ENTER YOUR MOBILE NUMBER BELOW
07

CLICK TO VIEW VIDEOS

YOU MUST BE OVER 18 TO USE THIS SUBSCRIPTION SERVICE WHICH COSTS £3.00 PER WEEK UNTIL YOU SEND STOP TO 66033 YOU CAN CONTACT US ANYTIME ON 02033933695

USE OF THIS SERVICE 18+ ONLY

This is a subscription service costing £3.00 per week until you send stop to 66033. This service is provided by Cellso Ltd. You can contact us at any time on 02033933695. You must have the bill payers permission to use this service and be over 16 years of age. By subscribing to this service you accept that you may receive promotional material of a similar nature from us you can opt out of marketing by sending stop to 66033.



hot brunette babe

CLICK to VIEW



blonde milf


CLICK to VIEW



brunette babe stripping outside

CLICK to VIEW

(iii)



7 DAYS FREE ACCESS TO ALL VIDEOS
cellso-babes
HOT GIRL MOBILE VIDEOS


sexy babe

CLICK to VIEW

WE SENT YOU A 4 DIGIT PIN - ENTER IT BELOW

CLICK TO VIEW VIDEOS

YOU MUST BE OVER 16 TO USE THIS SERVICE



hot babe in red thong

CLICK to VIEW



hot brunette babe

CLICK to VIEW



blonde milf

CLICK to VIEW



brunette babe stripping outside

CLICK to VIEW

(iiii) Message From PV PIN – Message Content = Free Msg: Here is your PIN for Cellso-Babes Video Subscription service: ****. Enter it now. Enjoy!



Complaints

The Executive had received 158 complaints concerning the Service since 9 February 2015. Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

"I for one know I haven't signed up for this, thought nothing of the messages and simply deleted them. Checked my bill and discovered I have been getting charged for them! In my last bill I was charged for £12.50 worth of these messages, noticed them about late last year but thought nothing of them. I am going to email them requesting a. a refund and b. to be taken off their mailing list. Absolutely livid. Contacting Vodafone tomorrow evening to see if they can block the number"

"I don't know how the service is promoted as i never subscribed to anything. 2 weeks ago I got a text encouraging me to go to an adult website. I ignored it as it was unsolicited, and the advice from orange is not to reply to unsolicited texts incase they try to charge you for a service. Now I find I have been charged 2.50 per text. I never subscribed to this service. I don't know how they got my number"

"I received an unwanted text entitled "Celesto babes" or similar some months ago. I therefore blocked the number. I did not ask for such messages or services. I had no idea I was being charged until I contacted my service provider on 20th September 2015 because of unknown charges. My bill was not itemised and so I was surprised to find out I have been regularly charged £3.00 by 66033. In the last 2 months this has occurred on 6 occasions. I believe it may have been happening before this period but can not find out."

"I noticed £3 charges on my vodafone account but do not recognise them. Vodafone said it's premium texts. i have never ever sent text messages to premium number or signed up for anything like this. Now I'm being charged for this and I did not ask for it!"

"I have never signed up for this or any other premium service but am being charged fraudulently I can't find out the billing details but I have received two messages which seem to have cost about £3 each"

Complainant text message logs

During the preliminary investigation, the Level 2 provider was issued with requests for text message logs for all the complainants. 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.



The Executive noted that the complainants' message logs showed numerous failed messages from the date of the complainants' purported opt-in followed by successfully delivered chargeable messages.

An example message log can be found at **Appendix A**.

Previous complaint resolution procedures

On 7 January 2015, as part of a Track 1 procedure, the Level 2 provider accepted a Track 1 action plan in respect of a breach of rule 2.3.3 and 2.4.2 of the Code, as the Level 2 provider accepted that it did not hold robust verification to establish consumers' consent to be charged, or consent to market. On 14 January 2015, the Level 2 provider confirmed that they had implemented the actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge. The Level 2 provider confirmed that full robust verification via GoVerifyIt went live in December 2014.

The allegation of a breach of the Code with respect to this Track 2 investigation relied on evidence gathered from complainants who first contacted the Executive after the Track 1 procedure was finalised.

The investigation

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

The Executive sent a breach letter to the Level 2 provider on 22 January 2016. Within the breach letter the Executive raised the following breach of the PhonepayPlus Code of Practice (the "Code"):

- Rule 2.3.4 – Undue delay

The Level 2 provider responded on 12 February 2016. On 3 March 2016, the Tribunal, having heard informal representations made on behalf of the Level 2 provider, reached a decision on the breach 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 Level 1 providers;
- Complainant message logs from the Level 2 provider and a Level 1 provider;
- PhonepayPlus Guidance on 'The avoidance of undue delay'; and



- The breach letter of 22 January 2016 and the Level 2 provider's response of 12 February 2016.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.4 – Undue delay

“Premium rate services must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged.”

1. The Executive asserted that the Level 2 provider had breached rule 2.3.4 of the Code, as logs showed that consumers had opted-in to the Service but had consistently not received messages which were required to access the Service content, and had not received Service content for a significant period of time. Accordingly, the provision of the Service was unduly delayed.

The Executive relied on the content of PhonepayPlus Guidance on ‘The avoidance of undue delay’ (the “**Guidance**”). The Guidance states:

“What constitutes undue delay

Paragraph 1.1

Once a consumer has chosen to engage with any type of premium rate service, the service should either offer prompt engagement with the service itself, or the service goods purchased should be promptly delivered (pay-for-product services), where this is possible.

Products not being delivered in a timely fashion (pay-for-product, including SMS)

Paragraph 1.17

Services that sell goods or products through the use of premium rate services as their payment mechanism must ensure that those products are delivered promptly where it is possible to do so, once a consumer has chosen to engage with the service. An example of where this may not be possible might be a situation where tickets have been purchased for an event and those tickets were not due to be printed until several months afterwards. We would expect consumers to be clearly informed.

Paragraph 1.18

Where digital services are concerned, we would expect ‘products’ to be delivered promptly, unless there is a staggered delivery system being used. Providers should note that, in the event of an investigation, we may ask for evidence of delivery dates and times, as well as any other relevant information.”

The Level 2 provider was directed to provide message logs for all complainants. After conducting an analysis of the message logs, the Executive noted that the logs showed that all complainants had opted-in to the Service via the WAP route. The opt-in date was consistently shown as occurring between August 2014 and September 2014. Yet in a number of complainant message logs, the date of the first successfully charged Service message was, in the majority of the message logs, significantly later than the purported date of Service opt-in. The chargeable Service messages included the means of access to the Service content. A summary of two example message logs are provided below:

Level 2 provider message log for mobile number *****655

The Executive noted that the Level 2 provider's message log for the above MSISDN showed that the initial opt-in to the Service occurred on 9 August 2014. The subscription confirmation message stated:

"FreeMsg:U have subscribed to Cellso-Babes video downloads for £3.00 per week until u send stop to 66033 Service provided by Cellso Need Help? 02033933695. 16+"

This was then followed by a Service message which stated:

"<http://cellso-babes.com/?cso=b1cfd6b41> TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695"

The Executive noted that the Service message contained a link to the Service. "<http://cellso-babes.com/?cso=b1cfd6b41>". The Executive had asked the Level 2 provider to confirm whether the link contained in the Service message was the sole means for a consumer to access the glamour content. The Executive noted that the Level 2 provider confirmed this was the case:

"This is correct, consumers are provided with access to the content of our services by a link contained in a chargeable message."

The Executive noted from the message logs supplied by the Level 2 provider that the status of the chargeable Service messages were variously described as 'FAILED', 'BILLED' or 'SENT'. The Executive had asked the Level 2 provider for clarification regarding the messages listed as 'SENT', and noted that the Level 2 provider had responded:

"SENT – Message has been sent and we are currently waiting on and end receipt to say wither the message has failed or billed. Messages that are SENT are not retried as the likelihood of this message being billed is negligible."

The Executive had contacted the Level 1 provider, Zamano, for the corresponding message log for MSISDN *****655. The Executive noted that all the Service messages listed as SENT for the period after the initial opt-in until 21 February 2015 had all failed to be delivered.



The Executive noted that the first Service message described as 'BILLED' which was successfully delivered to MSISDN *****655 was on 22 February 2015, 29 weeks after the purported opt-in date.

Level 2 provider message log for mobile number *****227

The Executive noted that the Level 2 provider's message log for the above MSISDN showed that the initial opt-in to the Service occurred on 6 September 2014. The subscription confirmation message stated:

"FreeMsg:U have subscribed to Cellso-Babes video downloads for £3.00 per week until u send stop to 66033 Service provided by Cellso Need Help? 02033933695. 16+"

This was then followed by a Service message which stated:

"http://cellso-babes.com/?cso=365e5db4f TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695"

The Executive noted that the status of the above messages and every other message that followed until 13 June 2015 were described in the Level 2 provider logs as 'FAILED' or 'SENT'. The corresponding Level 1 provider message log for MSISDN *****227 indicated that all messages listed as 'SENT' up until 13 June 2015 had failed to be delivered. The Executive noted that the first chargeable Service message listed as 'BILLED' which was successfully delivered to MSISDN *****227 was on 20 June 2015, 39 weeks after the purported opt-in date.

Given the nature of the Service and its promotion, the Executive submitted that consumers would expect to receive their first content within less than an hour of subscribing, and at regular intervals thereafter.

Out of the 158 complaints logged, the Executive had received 155 logs from the Level 2 provider in response to requests for information. The Executive's analysis of the complainant message logs revealed that of the 155 complainant logs, 147 complainants had not initially been successfully sent Service messages following their opt-in to the Service, prior to the later issuing of charged Service messages.

During the investigation, the Executive also directed the Level 1 providers to supply message logs for a sample of complainants. The Executive noted that generally the Level 1 provider's complainant message logs were the same as the message logs provided by the Level 2 provider, and showed that numerous complainants opted-in to the Service but did not receive links to the content requested until a much later date.



The Executive directed the Level 2 provider to provide an explanation for the high failure rate of chargeable Service messages. On 21 September 2015, the following response was received from the Level 2 provider:

“Messages could be failing for a number of reasons E.G. customers phone switched off, customer is out of credit, network time out etc.”

The Executive had further directed the Level 2 provider to confirm when and how it first became aware of the failed message issue. On 27 October 2015, the following response was received from the Level 2 provider:

“We first became aware of this in December 2014 as we discovered that our end of year statistics were not matching projections. At this point we began investigations to determine the source of the issue - our side, aggregator side or network side. We discovered that most of the problems occurred with customers who subscribed to marketing campaigns after July 2014 which is when we changed the code for our network look up tool. Previously we have been performing network lookups for UK only, and handling with 0x prefix. Once our system was updated to allow worldwide lookups, the country prefix (44) became necessary to identify which region customers are located. Unfortunately, our system continue to assume UK lookups and handled the customer with the wrong (0x) prefix. This was only the case for marketing campaigns created after mid July 2014 as these contained the new code changes for the network look up tool. We can confirm that all issues with our network look up tool have since been corrected and we have since began the process of correcting the networks of the customers which subscribed to our service from July 2014 to December 2014 by performing manual network lookups as the network lookups that took place on the subscription of these customers were corrupted due to the code changes.”

In addition, the Executive asked the Level 2 provider to confirm what steps it had taken to remedy the problem upon discovering the issue. The Level 2 provider confirmed the following:

“Once we determined the source of the issue in December 2014 we had our IT team correct the code of our network lookup tool. Once corrected we noticed that the network lookups that took place on the new marketing campaigns created after mid July 2014 where corrupted which meant that we had to begin the process manually looking up the networks of these subscribers which seems to have remedied the problem.”

The Executive noted that on assessment of the complainant logs, there were 25 instances where the first chargeable message was received over 12 months after the purported opt-in and seven instances where the logs showed no successful chargeable messages at all.

The Executive also made enquiries to Zamano and Veoo regarding the high failure rate of chargeable Service messages. The responses from Zamano and Veoo are set out below.



Zamano's response

"Once a text message has left Zamano's message gateway its delivery to the customer's mobile phone is out of our control. Primary causes of failed message delivery include:

- i. The customer's phone has gone out of range or has ran out of power*
- ii. The customer is out of mobile credit*

Additionally if routing information stored against a certain mobile number is incorrect for some reason (e.g. following a port between operators) the message may not be routed to the correct mobile operator."

Veoo response

Veoo explained that messages were failed for reasons such as:

- Veoo's platform did not receive a final delivery status of the messages within the set validity period of therefore these messages have been marked as an "error".
- Message failed due operator returning "subscriber is blocked"

The Executive asserted that it was clear that the Level 2 provider was aware of messages failing from December 2014, yet it did not take sufficient action to remedy the problem (promptly or at all), and failed messages continued to be issued.

In response to questioning by the Tribunal, the Executive confirmed that it had obtained Level 1 provider logs for further MSISDNs, but had only provided two in the case evidence as examples. Based on the example logs which showed that messages which the Level 2 provider recorded as "SENT" had not been received by consumers, the Executive submitted that the Tribunal could conclude the same was true for other "SENT" messages.

In response to questioning by the Tribunal, the Executive confirmed that the Level 2 provider's logs showed that all complainants had opted in to the Service in or before December 2014.

The Executive also noted that some consumers had started to receive billed messages prior to December 2014 (for example *****889) which cast doubt on the Level 2 provider's explanation that the message failures were as a result of a technical issue which it had resolved in December.

In response to questioning by the Tribunal, the Executive clarified that its understanding was that the consumer accessed the Service by virtue of having received links in chargeable messages, but because these messages failed they did not receive access to the Service, which (based on the message logs), included the "7 days free" access mentioned in the promotional material. Based on a comparison between the Level 1



provider and the Level 2 provider logs, the Executive's understanding was that an initial non-chargeable message with a link to the Service was sent to consumers but there was no verification that this message was received and it did not appear in the Level 1 provider's logs; and that subsequent chargeable messages contained different links to the Service but Level 1 provider logs confirmed these were not delivered. The Executive noted that the Level 2 provider had stated in response to a direction for information that consumers solely accessed the Service by links contained in chargeable messages. The Executive therefore submitted that provision of the Service was unduly delayed.

The Executive noted from the complainant accounts that the majority of complainants stated that they did not opt-in in to the Service. In light of this, the Executive had initially investigated whether there was a breach of the Code requirement that Level 2 providers must have consent to charge consumers. However, in light of the third party log evidence held by the Executive, and the conclusions of previous PhonepayPlus Tribunals on similar evidence in other matters, the Executive did not for the purposes of this case seek to challenge the Level 2 provider's statement that these complainants did in fact opt-in to the Service, and proceeded in reliance on this statement.

The Executive understood that consumers that received failed messages following their opt-in would not have been charged. Notwithstanding this, the Executive submitted that the Code and Guidance was clear that once a consumer has chosen to engage with a premium rate service, the service offered should be provided promptly. The Executive submitted that the outcome that consumers are treated fairly and equitably was not achieved where there was a delay in Service provision. The Executive submitted that consumers who did not receive the desired content promptly were likely to seek equivalent content elsewhere, and would therefore no longer wish or expect to receive the Service. The Executive submitted that the consumer complaints demonstrated that consumers were not expecting to receive the Service at the time billing for it commenced.

The Executive submitted that the failure to send the billable messages also deprived consumers of a reminder of how to opt-out of the Service at the outset, and at regular intervals thereafter, as required by the Code.

The Executive submitted that the undue delay had therefore caused consumer harm.

Consequently, on the basis of the information provided in the Level 1 and Level 2 providers message logs which appear to demonstrate that complainants opted in to the Service, but did not demonstrate that consumers received messages which were required to give them access to the Service, the Executive asserted that the provision of the Service was unduly delayed after the consumer had done what was reasonably necessary to connect with the Service. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.4 of the Code.



2. The Level 2 provider denied the alleged breach. The Level 2 provider stated that when a customer subscribed to its Service, they had to go through various steps prior to even receiving a message from it. The Level 2 provider stated that first of all, a customer had to click on one of its banner adverts prior to viewing its landing page. Once done, the customer then viewed all of the terms and conditions and decided if the service was for them or not. The Level 2 provider stated that if the customer decided they wished to proceed with the subscription, they then had to enter their mobile number into the MSISDN box provided. The next step was the customer receiving a free WAP push message to their handset which the customer had to open and verify the subscription by clicking “enter” on the WAP page. The Level 2 provider stated that both the landing page and WAP page were verified using “offline GVI” at the time. The Level 2 provider stated that once the subscription service was activated, the customer was given immediate access to the content of the Service via the WAP page, and the customer was then also sent a join message and 15 seconds later a billing message, which also gave the customer access to the content.

The Level 2 provider supplied a link to a sample of the content that a customer would see as soon as they subscribed to the Service. The Level 2 provider stated that once a customer has gone through all the steps outlined above, they were immediately redirected to the WAP page where all of the content of the Service could be viewed and downloaded for the customer’s pleasure. The Level 2 provider stated that this was also viewed prior to receiving any messages from it as the customer was redirected to this page as soon as they had confirmed the subscription. The Level 2 provider stated that the weekly content messages that customers receive as part of the billing messages was a copy of the page shown at the link, which the customer had already viewed as soon as they subscribed to the Service.

The Level 2 provider asserted that in this instance, there had been no undue delay as when the customer subscribed to its Service, they obtained instant access to the content offered via the WAP page immediately after any customer subscribes to the Service.

The Level 2 provider asserted that the Executive was attacking it with an accusation that it deliberately meant to delay its service. The Level 2 provider submitted that claims that it had deliberately denied customers from receiving content messages were ludicrous, as to do this would also be denying itself revenue and as a company it simply would not be able to survive if this were the case.

The Level 2 provider stated that it had been working to resolve the issue since it discovered the problem with messages being SENT and FAILED. The Level 2 provider stated that messages failing to be delivered to customers is not an unusual practice within the industry, as there were so many factors to take into consideration once a billing message was dispatched. The Level 2 provider gave as examples “customer’s phone is switched off,” “customer has no signal,” “customer is out of credit,” “network parameters are incorrect”, and many more which both Zamano and Veoo had confirmed to be an issue. The Level 2



provider stated that whilst it had the issue with its Network Look Up Tool which contributed to the messages being undelivered, it believed that in some cases messages will fail without any apparent reason, and this was due to the many steps a message must go through before being delivered to a customer's handset. The Level 2 provider stated that if even one of these steps did not connect, a message will fail resulting in loss of revenue to all parties involved be it the network, Level 1 provider or Level 2 provider.

The Level 2 provider stated that once it became aware of the issue of messages showing as SENT and FAILED, it worked tirelessly to resolve the issue as quickly and efficiently as possible. The Level 2 provider stated that once its IT team located the issue causing the problem, they corrected the code as quickly as possible and it began the process of resolving the corrupted network codes on all of the subscribers it received from July 2014.

The Level 2 provider stated that this was not an issue that could have been resolved overnight due to the amount of money involved with such a task. The Level 2 provider stated that it had already maxed out its marketing budget to get these subscribers, and now it had an additional cost of resolving the networks to finally start receiving revenue from the subscribers.

The Level 2 provider stated that it had learned that since customers were being sent monthly reminders reminding them that they are a part of the Service, its customers had the opportunity to opt out of the Service at any point throughout the subscription by either contacting its support team or by texting "stop." The Level 2 provider stated that all of this was outlined in the monthly reminder messages that every customer was sent. The Level 2 provider cited the example of *****655. The Level 2 provider stated that this consumer was sent a total of 9 monthly reminder messages notifying him that he was a subscriber to the Service and asserted that the consumer had confirmed this in his complaint to PhonepayPlus by referring to this message:

FreeMsg:U are subscribed to Cellso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Cellso Need Help? 02033933695.

The Level 2 provider submitted that this customer was reminded that he was a part of the Service on a regular basis. The Level 2 provider stated that once it received this consumer's complaint on 11 May 2015, its customer support team immediately contacted the customer and resolved the issue for him. The Level 2 provider stated that the customer was issued with a full refund of all charges, as per its company policy.

In informal representations, the Level 2 provider confirmed that the consumer journey it had provided to the Executive post-dated the Track 1 procedure and so was not the journey which the complainants would have experienced, though it was similar. The journey which it had supplied showed the procedure which now involved them using online GoVerifyIt to provide PINs to consumers.



Prior to the Track 1 procedure, the consumer journey was different in that, firstly, there was not a free 7 day trial period. Secondly, at that time the first text message with a link to the second landing page was sent by the Level 2 provider, rather than its third party verifier. This message was sent after a consumer entered their MSISDN on the first landing page, which they would have seen after following a banner advertisement. The link generated was unique to that consumer. Thirdly, the second landing page did not invite a consumer to enter their PIN in a box, but instead repeated the Service terms and conditions and contained a button which consumers could click to confirm their subscription. Once a consumer had clicked that button, their subscription was initiated and was recorded on the Level 2 provider's systems. Clicking that button also triggered the sending of chargeable messages approximately 15 seconds later.

The Level 2 provider submitted that after this point, and until the subscription was terminated on its systems, a customer could view and download all the Service content by following the WAP push link which they had sent with the first text message. The Level 2 provider stated that they had decided to put all their content on the landing page, in order to keep customers interested.

The Level 2 provider was questioned about its prior statement to the Executive that consumers were provided with access to the Service solely by means of a link contained in a chargeable message, as this appeared to contradict what the Level 2 provider was now saying. The Level 2 provider stated that the information it had provided had been incorrect, and that it had misunderstood the question.

The Level 2 provider stated that the consumer did not need to take any further action in relation to the subsequent confirmation messages (which the Executive stated had failed) in order to initiate/continue their subscription. The Level 2 provider confirmed that such messages would continue to be generated automatically even if the consumer never accessed the site via the WAP push link again.

The Level 2 provider stated that it would be able to see what use individual consumers had made of the Service (what they viewed, clicked and downloaded) as it kept records of this. This tracking worked for all but one or two models of handset. The records were kept solely on the Level 2 provider's own systems. The Level 2 provider had not however provided these records prior to the Tribunal.

The Level 2 provider was questioned about the discrepancy between its logs and the Level 1 provider's logs, namely that the first text message contained a WAP-push link was not present on the Level 1 provider log. The Level 2 provider stated that this was because at the time when it had set up the Service, it was having a problem with 10 minute delay from the Level 1 provider which was losing it customers, and so it switched the messaging provision for these messages from the Level 1 provider to an offshore provider of bulk terminating messages.



The Level 2 provider accepted that the corrupted code issue to which they had referred would have affected the “freemsgs” sent by the Level 1 provider, but stated that this issue should not have affected the bulk messages which contained the WAP-push link, and indeed the consumer’s handset must have been on and receiving messages at that time because they were viewing the Level 2 provider’s website. The Level 2 provider stated that as far as they were aware the sending of bulk reminder messages should not be affected; the Level 2 provider would look into this with the Level 1 provider.

The Level 2 provider accepted that it would have been able to identify if chargeable messages were succeeding or not based on the money it was receiving, and confirmed it was not challenging the accuracy of the Level 1 provider logs.

The Level 2 provider accepted that it had not really looked into the issue of messages failing for a long period of time. The Level 2 provider stated that when it had first discovered the problem it had to do manual network lookups (HLR) which was a long and costly process, so they had broken it down week by week, prioritising those customers who used the Service all the time and then dealing with MSISDNs in random batches. The Level 2 provider stated that its IT team had explained the situation in December 2014 and as far as they were aware they had fixed that problem within a week, but this error (which related to how a marketing campaign was set up) was not the only error which caused failed messages. The Level 2 provider stated that it had not completely finished sorting out the issues or customers who had subscribed in the period from July 2014 to December 2014, and it was still working its way through.

The Level 2 provider confirmed that where a consumer had opted-in in July 2014, billing would still commence a year later automatically when chargeable messages went through, even if they hadn’t receive messages in the meantime and hadn’t used the Service. The Level 2 provider stated that it had provided information on how to unsubscribe and stop the Service, and felt consumers had used the Service.

The Level 2 provider was referred to the complaints in which consumers stated they had not received any texts for the Service, and submitted that if a consumer had not received any texts they would not have been charged as the texts represented the charging mechanism.

The Level 2 provider confirmed it had not sought to rebill for past failed messages and had lost money as a result of this issue.

The Level 2 provider stated that it had now introduced a system that emailed the director with a list of MSISDNs for which there was no successful delivery receipt so that she could investigate. The Level 2 provider stated it had now introduced a system where if 120 days had passed without a billing message being successfully delivered, the consumer was automatically unsubscribed.



The Level 2 provider entirely denied that it had acted in breach of rule 2.3.4 of the Code, and submitted that if the Tribunal did uphold the breach it should acknowledge that the breach was not deliberate and that the Level 2 provider had learned from its mistakes and was working hard to take corrective action, including by working with a compliance advice provider.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted that the Level 2 provider had, in informal representations, stated that the answer it had previously supplied to the Executive's direction for information (namely, that consumers were provided with access to the Service solely by means of a link contained in a chargeable message) was incorrect. The Level 2 provider had instead stated that consumers could access the Service by following a WAP-push link which had been sent to their mobile handset in a non-chargeable message, prior to the subscription being confirmed, and that a consumer could access all the Service content in this way for the duration of their subscription. In the absence of any evidence to contradict this statement, the Tribunal accepted the Level 2 provider's latest statement of the position as correct.

The Tribunal noted that the Executive's case was predicated on the Level 2 provider's prior answer. The Level 2 provider had led the Executive to believe that consumers were unable to get access to the Service unless they had received chargeable messages.

The Tribunal understood that in the relevant period consumers had opted into the Service via WAP by clicking on a "subscribe" button, which they were provided only after they had clicked on the WAP-push link which had been sent to their mobile handset. The Tribunal accepted the Level 2 provider's statement that the WAP-push link allowed consumers to access the Service content, for the period in which they were subscribed to the Service.

Accordingly, the Tribunal did not uphold a breach of rule 2.3.4 of the Code.

However, the Tribunal expressed grave concern at the conduct of the Level 2 provider in commencing (and continuing) the charging of consumers. In these circumstances the Tribunal felt that consent to charge should be proximate to the chargeable message. After a substantial delay from the date on which consumers opted in, the Level 2 provider should have taken adequate additional steps to ensure that any consent to charge previously obtained was still current, before commencing charging. Even where this was not intentional, the Tribunal's view was that this conduct resulted in consumers of premium rate services being treated unfairly and inequitably. The Tribunal was concerned that this issue had yet to be finally resolved. The Tribunal considered that the Executive may reasonably decide to take further action on this issue.

Decision: NOT UPHELD

APPENDIX A

Time Stamp	Mobile Number	Shortcode	Cost	Message	Status
30/08/2014 16:42		66033	£0.00	http://celso-babes.com/enter/?cso=E8674D0A8	SENT
30/08/2014 16:45		66033	£0.00	FreeMsg:U have subscribed to Celso-Babes video downloads for £3.00 per week until u send stop to 66033 Service provided by Celso Need Help? 02033933695. 16+	SENT
30/08/2014 16:46		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
06/09/2014 15:32		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
13/09/2014 20:11		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	SENT
20/09/2014 15:54		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	SENT
24/09/2014 18:55		66033	£0.00	FreeMsg:U are subscribed to Celso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Celso Need Help? 02033933695.	SENT
27/09/2014 18:02		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
04/10/2014 17:24		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
11/10/2014 12:59		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
18/10/2014 14:21		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
24/10/2014 18:24		66033	£0.00	FreeMsg:U are subscribed to Celso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Celso Need Help? 02033933695.	SENT
25/10/2014 15:53		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
01/11/2014 14:12		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
08/11/2014 14:32		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
15/11/2014 12:24		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
22/11/2014 15:36		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
24/11/2014 18:31		66033	£0.00	FreeMsg:U are subscribed to Celso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Celso Need Help? 02033933695.	SENT
29/11/2014 13:20		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
06/12/2014 12:01		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
13/12/2014 15:00		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	SENT
20/12/2014 12:37		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	SENT
24/12/2014 19:57		66033	£0.00	FreeMsg:U are subscribed to Celso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Celso Need Help? 02033933695.	SENT
27/12/2014 19:24		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
03/01/2015 12:20		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
10/01/2015 17:39		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	SENT
17/01/2015 13:36		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	FAILED
24/01/2015 12:34		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	BILLED
24/01/2015 18:55		66033	£0.00	FreeMsg:U are subscribed to Celso-Babes video downloads for £3 per week until u send stop to 66033. Service provided by Celso Need Help? 02033933695.	SENT
31/01/2015 12:43		66033	£3.00	http://celso-babes.com/?cso=b95440486 TEXT STOP TO 66033 TO STOP ALL MESSAGES, FOR HELP 24HOURS CALL 02033933695	BILLED