

Tribunal meeting number 179 / Case 2

Case reference: 74815
Level 2 provider: Cloudspace Limited (UK)
Type of service: Fun-sexygirls.com / Myhot-glambabes.com/UrHottestBabes/
HornyHotBabes glamour video subscription service
Level 1 provider: IMImobile Europe Limited (UK); Wireless Information Network Limited (UK); Veoo Ltd (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

The case concerned a glamour video subscription service, charged at £3 per week, operating on shared shortcodes 89225, 85222, 89333, 66144 and 88150 (the “**Service**”). The Service was operated by the Level 2 provider, Cloudspace Limited (the “**Level 2 provider**”) from January 2014 when it was novated to the Level 2 provider from Circle Marketing Ltd. “Myhot-glambabes.com” was promoted from June 2015.

The Level 2 provider has been registered with PhonepayPlus since 11 November 2013. The Level 1 provider for Service shortcodes 85222 and 89333 was IMImobile Europe Limited (“**IMImobile**”) (and subsequently Wireless Information Network Ltd (“**WIN**”). The Level 1 provider for Service shortcodes 89225, 88150 and 66144 was Veoo Ltd (“**Veoo**”).

Between 21 November 2014 and 17 November 2015, the Executive received 60 complaints concerning the Service. Complainants variously alleged that the Service charges were unsolicited.

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 7 January 2016. Within the breach letter the Executive raised the following breaches of the PhonepayPlus Code of Practice (the “**Code**”):

- Paragraph 4.2.4 – Provision of false information to PhonepayPlus
- Rule 2.3.3 – Consent to charge

The Level 2 provider responded on 25 January 2016. On 4 February 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);
- Correspondence between the Executive and the Level 1 providers;
- Correspondence between the Executive and a Mobile Network operator's verifier;
- Complainant message logs from the Level 2 provider, Level 1 provider and Mobile Network operator's verifier;
- Complainant questionnaires and responses;
- The breach letter of 7 January 2016 and the Level 2 provider's two separate responses of 25 January 2016.

The Service

The Service was stated to be a glamour video subscription service charged at £3 per week. The Executive understood that consumers could enter the Service via a wireless application protocol ("WAP") opt-in. The Executive noted that one message log for MSISDN *****138 provided by the Level 2 provider demonstrated that the "Fun Sexy Girls" Service could be opted into via a mobile originating ("MO") opt-in. The Level 2 provider confirmed that "Fun Sexy Girls" was still live but was no longer being promoted.

The table below sets out the shortcodes on which the Service(s) operated and the Level 1 providers for each shortcode:

| Service name | Shortcode | Level 1 provider | Cost per week |
|------------------------|-----------|--------------------------|---------------|
| UrHottestBabes | 85222 | IMImobile Europe Limited | £3 |
| | 89333 | IMImobile Europe Limited | |
| | 88150 | Veoo Limited | |
| HornyHotBabes | 89333 | IMImobile Europe Limited | £3 |
| | 88150 | Veoo Limited | |
| | 89225 | Veoo Limited | |
| Myhot-glambabes | 66144 | Veoo Limited | £3 |
| | 89225 | Veoo Limited | |

The Executive compiled the below flowchart to demonstrate its understanding of how the Service operated after 21 November 2014:



Once a consumer has clicked on the banner they are directed to either:

MO landing page

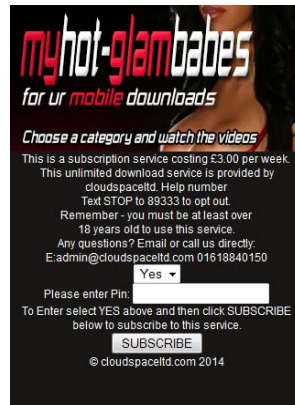
WAP opt in landing page



The consumer sends the keyword to the shortcode and is subscribed to the service.



After entering their mobile number the consumer will be sent a PIN to their handset. They will be directed to this second WAP landing page.



The consumer enters their PIN and is then subscribed to the Service.

Complaints

The Executive had received 60 complaints concerning the Service since 21 November 2014. Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

"I am receiving text message that I have not subscribed to or asked for. I am being charged massive amounts and because I don't get a Vodafone paper bill and the online system is useless it has been going on for longer than it should. I've only just realised these messages are costing me money. It's being going on for months..."

"Consumer has been charged £20 for texts that she has not asked for, does not know what the service is, and has not subscribed to anything."

"Consumer was receiving messages but was just deleting them they didn't realise they were getting charged. Consumer has no idea what service is or how the phone got subscribed..."

"Consumer has no idea why she is receiving unsolicited messages on her phone. Consumer has been receiving adult messages. She is saying she has not signed up to nothing."

Complainant text message logs

During the preliminary investigation, the Level 2 provider supplied text message logs for 56 out of the 60 complaints received. The Executive noted that the text message logs supplied by the Level 2 provider generally showed 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 in these logs, failed messages occurred from the date of the complainants' purported opt-in. The failed messages were later followed by successfully delivered chargeable messages.

Where the purported opt-in occurred on shortcode 89333, all but one log indicated only message statuses of either FAILED, SENT or ACCEPTED on this shortcode in the initial period.

The Executive noted from the sample of logs obtained from the Level 2 provider messages that statuses are shown as FAILED, SENT or ACCEPTED, but no interaction is shown on the IMImobile logs (save for two logs in respect of which the apparent opt-in was before August 2014). For these logs, chargeable messages were only successful after user migration to shortcode 88150, 89225 or 66144.

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

Complainant responses to the Executive's questionnaire

In light of the high number of failed messages identified by the Executive in the complainants' text message logs and the possible explanations offered by the parties in the value chain for the failed messages, on 21 October 2015 the Executive contacted 55 complainants (the total number of complaints received by PhonepayPlus about the Service as at that date who supplied email addresses) 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 copies of the promotional material outlined above and asked whether they recalled viewing and/or interacting with it or a similar service promotion. As at 7 January 2016, the Executive had received responses to the questionnaire from 10 complainants. A breakdown of the responses received from complainants is set out below :

| Question | Response | Comments |
|---|---|----------------------|
| Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go? | 10 respondents confirmed they were on contract. | |
| If the mobile phone that was charged is pay-as-you-go, please advise whether you regularly / always had more than £3 credit on your mobile phone? | N/A | N/A |
| Please advise whether the mobile phone | 8 respondents advised their | The remainder of the |

| | | |
|--|---|---|
| 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)? | mobile phone was not regularly switched off and/or had no mobile phone signal. | respondents stated: 1 stated potentially in response to this question. 1 stated their phone was rarely off never more than 4 hours. |
| 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 | 9 respondents advised they had not transferred between mobile companies. | 1 respondent did not respond to this question. |
| Please advise if you recall viewing and interacting with the attached, or a similar, promotion? | 9 respondents advised that they did not view / interact with the Service promotion. | 1 respondent did not respond to this question. |

PRELIMINARY ISSUES

1. Withdrawal of the case

The Level 2 provider applied for the case to be withdrawn on the basis that:

- information which it had previously supplied had been redacted or edited in the breach letter, meaning that a biased and misleading case would be presented to the panel;
- the case had been brought under the incorrect Code of Practice, because the Executive is reliant on evidence of consumer complaint data, and consumer service interaction which occurred prior to the current edition of the Code of Practice; and
- some of the complaints referenced in the breach letter which were received in the earlier part of this period should have been considered as addressed by the previous Track 2 procedure against the Level 2 provider, and not included in this case as it amounted to “regulatory double jeopardy.”

The Chair of the Code Compliance Panel (“CCP”) considered the written submissions of the Level 2 provider, contained in a letter dated 25 January 2016, and the original breach letter with a schedule showing some redaction, which it was noted in the main (though not wholly) referred to a previous Track 2 case against the Level 2 provider. The Chair of the CCP noted that material

referring to previous case history or misconduct is usually redacted in order to avoid a complaint being made of prejudice from such material. If the Level 2 provider wished to rely on that previous Track 2 procedure as part of a defence of double jeopardy, it was of course at liberty to rely on such material which it submits is relevant to its defence.

The Chair of the CCP noted that the Tribunal had previously ruled on applicability of the 13th Code of Practice in cases where the relevant allegations took place during the period when the 12th Code of Practice was in force, and had stated in that case that "... *the relevant provisions were those of 12th Code as the relevant conduct took place in the period governed by that Code. However, as the case was being considered by the Tribunal in the period governed by the 13th Code, the procedural provisions of the 13th Code governing the consideration of the case by the Tribunal applied. The Tribunal considered that there was no material difference between the relevant provisions of the Codes and therefore it did not impact on the fairness of the hearing.*"

On 25 January 2016, the Chair of the CCP ruled that:

- a) The Level 2 provider may place any material from the previous Track 2 procedure which it submits is relevant as being part of its defence generally and specifically, double-jeopardy, before the Tribunal;
- b) The appropriate Code to be followed was the 13th edition;
- c) The Level 2 provider may place the further material contained in its letter of 25 January 2016 before the Tribunal (as set out in paragraph 5 onwards of that letter); and
- d) That the Executive provide any submissions as to (a) above, to the Level 2 provider and Tribunal by close of business on 28 January 2016.

The parties were given further leave to apply and the ruling was made available to the Chair of the hearing on 4 February 2016.

2. Adjournment of the hearing

Further, on 25 January 2016, the Level 2 provider applied for the case to be adjourned from 4 February 2016 to another Tribunal date after 18 February, because its preferred representative was unavailable due to an appointment on 4 February, and in the week of 18 February 2016.

The Chair of the Tribunal carefully considered the written application, together with the Executive's written response. Having done so, the Chair refused the application on 1 February. In reaching that decision, the Chair took into account the personal reasons for the preferred representative's inability to attend the hearing, and balanced this against the fact that no explanation was given as to why no alternative representative was instructed given his unavailability. In any event, given the nature of the hearing (to allow the Level 2 provider to make informal representations), the Chair's view was that any issues of clarification that the panel members may have may best be addressed directly by representatives from the Level 2 provider in question who should be encouraged to

attend the Tribunal. The Chair also took account of the fact that the preferred representative still had ample opportunity to assist his client prior to the hearing. The Chair was mindful that cases should be dealt with expeditiously. Balancing all these factors, the Chair refused the application. The Chair noted that should the Level 2 provider have any further representations, it may make them at the hearing when they could be considered by the panel.

Prior to consideration of the case, the Tribunal noted that the Level 2 provider had not attended (in person or by telephone) to make informal representations, nor had it arranged for alternative representation following the Chair's decision not to grant an adjournment. The Tribunal noted that the Chair had expressly encouraged the attendance of the Level 2 provider and the Executive's various attempts to encourage the provider's attendance. The Tribunal also noted the Level 2 provider's lack of response to these attempts. The Tribunal decided to proceed with consideration of the case, noting that the Level 2 provider had voluntarily decided not to attend despite the Tribunal Chair and Executive's encouragement to do so.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 4.2.4 – Provision of false information to PhonepayPlus

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

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.4 because message logs supplied by the Level 2 provider were false, in that failed chargeable Service messages listed 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, complainant accounts (which are referenced in the 'Background' section above), complainant questionnaire responses and text message logs.

The Executive noted that complaints had been received by PhonepayPlus since November 2014 through to 17 November 2015. 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 the majority of message logs as occurring between August 2014 and November 2014, even for complaints received later in this period. The Executive noted that 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.

The Executive noted that it was common for complainant text message logs to show several months of failed chargeable Service messages prior to the issuing of successfully

charged Service messages. The Executive understood that consumers that were only sent failed messages following their opt-in would not have been charged. A summary of three example message logs are provided below:

Level 2 provider message log for mobile number *****486

The Executive noted that the provided log showed that the initial opt-in to the Service occurred on 2 October 2014. The subscription confirmation message stated:

"FREEMSG: you joined Horny-hotbabes for £3 per week. Support 01618840150, STOP to 89333 to unsubscribe. SP Cloudspace. 18+"

The Executive noted from the message logs supplied by the Level 2 provider that the status of the Service messages were variously described as 'FAILED', 'BILLED', 'SENT' or 'ACCEPTED'. The Level 2 provider clarified that where messages were listed as 'ACCEPTED', this meant that a message had attempted to reach the handset but it had not received confirmation on its status. The Level 2 provider confirmed that 'SENT' meant that the Level 2 provider had sent the message and their platform has acknowledged that the message has left. Both "SENT" and 'ACCEPTED' messages differ from 'BILLED' messages; the Level 2 provider confirmed that this was where the message had reached the handset and the Level 2 provider receives a positive delivery receipt ("DR").

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages on shortcode 89333 was listed as 'SENT'. The first Service message listed as 'BILLED' was on shortcode 66144 (after the Service had migrated to Veoo) and was delivered on 22 August 2015, ten months after the purported opt-in date.

The Executive contacted IMImobile to clarify whether IMImobile would have a record of messages with 'SENT' and 'ACCEPTED' statuses, and that this would be reflected on any message logs provided by IMImobile. Their response was:

"We would have delivery statuses for any messages received by our platform. For this client that did not include free to user messages."

The Executive contacted IMImobile to clarify whether IMImobile would have a record of messages with the status 'FAILED' on the Level 2 provider's logs, and whether this would be reflected on any message logs provided by IMImobile. Their response was:

"It depends where the messages failed. If they failed at the L2 provider level, before reaching our platform we would have no record. If they left our platform but failed to be delivered to the handsets then we would have a record."

Level 2 provider message log for mobile number *****072.

The Executive noted that the provided log shows that initial opt-in to the Service occurred on 16 October 2014. The subscription confirmation message stated:

“FREEMSG: You joined horny-hotbabes videos for £3.00 per week. Support 01618840150, STOP to 88150 to unsubscribe. SP Cloudspace. 18+”

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages on shortcode 89333 was listed as either ‘FAILED’ or ‘ACCEPTED’. The first message listed as ‘BILLED’ was on shortcode 88150 (after the Service had migrated to Veoo) and was delivered on 19 December 2014, almost two months after the purported opt-in date.

Level 2 provider message log for mobile number *****213.

The Executive noted that the provided log shows that initial opt-in to the Service occurred on 24 September 2014. The subscription confirmation message stated:

“FREEMSG: You joined horny-hotbabes videos for £3.00 per week. Support 01618840150, STOP to 88150 to unsubscribe. SP Cloudspace. 18+”

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages on shortcode 89333 was listed as ‘SENT’. The first message listed as ‘BILLED’ was on shortcode 89225 (after the Service had migrated to Veoo) and was delivered on 23 May 2015, almost seven months after the purported opt-in date.

The Executive contacted the Level 1 providers for a sample of 23 complainant message logs in respect of the WAP opt-in route. The Executive noted that although the logs provided by the Level 2 provider revealed a purported opt-in on Service shortcode 89333 followed by a series of failed messages, out of the 23 logs, IMI mobile did not provide matching message logs for the complainants, and the logs showed that there had been no interaction on shortcode 89333 (save for two consumers’ message logs, in which the opt-in took place prior to August 2014).

The Executive noted that the logs supplied by Veoo confirmed that the first chargeable Service message on the Level 2 provider logs generally occurred after 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 12 Vodafone complainant mobile numbers and was requested to supply message logs from 1 October 2013 showing the interaction between the Service and the complainants’ mobile numbers. The Executive noted from the 12 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 after the purported opt-in. For example the Verifier log for *****486 listed the first Service message on 22 August 2015, and the Verifier log for *****072 listed the first Service charge on 19 December 2014.

The Executive noted that the Verifier had previously confirmed that all messages sent from the Service shortcode that charge or attempt to charge the consumer would appear in its text message logs. Similarly, IMImobile had confirmed that all chargeable messages (attempted and successful) would appear in its text message logs. In light of this, the Executive asserted that the failed attempts to send the chargeable Service messages (as shown on the Level 2 provider’s message logs) did not occur.

Furthermore, the Executive directed the Level 2 provider to provide an explanation for the high failure rate of chargeable Service messages. On 4 September 2015 the following response was received from the Level 2 provider.

*“From the 49 complaints that were sent by PhonepayPlus we have identified several issues. We have noticed that all consumers opted in prior to our initial breach, after which we completed a rigorous compliance review. There was no mention of cancelling subscriptions for anyone that had entered into the service prior to our breach. We also note that we have not received any RFIs for the numbers *****182 / *****742 / *****085 / *****472 can you confirm that these are indeed complaints and why we have not received any RFI? For the rest of the RFIs that we received as complaints we have contacted 40 of the 49 customers and have issued them with full refunds as well as confirming that we have cancelled their subscriptions. As for the 9 numbers that we could not reach we are more than willing to offer full refunds... as these numbers entered the service within this time period. In all the logs that have been requested and sent back to the executive there are a number of failed messages and I believe that this is a regular occurrence with weekly subscriptions and could be due to phones not having credit / being out of range over the period of time that the message is trying to send / the aggregator returning the messages as failed after a certain period of time/ issues with our sever failing messages during down or peak times/ the messages not reaching the networks to pass on the message to the phone. We note that we have a real mixture of failed and delivered messages and are in fact losing out on revenue every time a message is returned to us as failed.”*

The Executive also made enquiries to IMI mobile and Veoo regarding the high failure rate of chargeable Service messages. Although Veoo provided a response, as most of the failed messages occurred on the IMI mobile shortcode it was not able to provide a comprehensive response on the issue. IMI mobile's response is summarised below.

"There are a number of reasons that the messages may be routinely failing such as:

- o *Failure at Network Level;*
- o *Lack of credit PAYG*
- o *Subscriber blocked from Network or Level 1 provider level.*
- o *Message expired at Operator."*

Following receipt of the Level 2 provider's explanation, the Executive put its comments to IMI mobile. The Executive asked IMI mobile to confirm whether IMI mobile would have a record of messages having failed for any of the reasons given by the Level 2 provider and if so, asked them to provide evidence to show this. IMI mobile's response is summarised below.

"We can confirm that we do have a record of failed messages and the reasons for them. These failure reasons are passed automatically to the Level 2 provider, through the 'Delivery Responses' that they receive.

Specifically, we can see:

- *Messages that have failed at Operator;*
- *Insufficient Credit;*
- *Messages that have expired at Operator;*
- *Messages that have failed because the Subscriber is barred from receiving PRS; and*
- *Messages that have failed because they have been sent to the incorrect mobile network for that MSISDN ('Unknown Subscriber').*

Our Technical Support Group team have looked in detail at the Cloudspace traffic that went across the IMI mobile platform. [a graph was supplied showing message statuses for PSMS sent for the Level 2 provider on days with over 1000 PSMS MT sent].

To assist further in understanding why messages fail, the following are reasons that are out of the control of the Level 1 / 2 providers:

- *Delivered to Phone – approx. 25%*
- *Failed at Operator – approx. 12.5%*
- *Insufficient Credit – approx. 27%*
- *Message expired at Operator – approx. 15%*
- *Subscriber Barred – approx. 3%*
- *Other – approx. 4%*

Total 86%

‘Unknown Subscriber’ is where the consumers Mobile Network Operator is incorrect when the client uploads to the Level 1 platform(s) and is something that could be acted on by the Level 2 provider, in response to receiving the Delivery Reports. This is approx. 14%.”

The Executive noted that the explanation provided by the Level 1 provider does not account for messages that have failed due to messages not reaching their server. The Executive understood that these messages would not be seen by the Level 1 provider. However, in a large proportion of message logs provided by the Level 2 provider messages were routinely recorded as SENT or ACCEPTED. In these instances, the Executive submitted that messages clearly would have left the Level 2 provider’s platform and therefore the Level 1 provider should have a record of these messages failing. As noted, out of the 23 logs provided by IMImobile, no record of interaction was shown on shortcode 89333 save for two logs.

The Executive noted that the Level 2 provider had not provided any evidence to prove that an issue such as those it suggested may have occurred actually did occur on its system. In light of the Level 1 provider’s confirmation regarding the visibility of “SENT” and “ACCEPTED” messages, and in light of the length of time such an issue, if real, went unremedied, the Executive submitted that the Level 2 provider’s suggestions of potential reasons for the consistent failures (and discrepancies between the logs) in respect of the complainants were not credible.

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

2. The Level 2 provider denied the alleged breach.

The Level 2 provider submitted that the information from the questionnaire should be ruled out. The Level 2 provider submitted that the questions were at most very vague and were almost leading questions. The Level 2 provider submitted that the questions were meaningless and did not suggest any wrongdoing. The Level 2 provider noted that only 10 people responded, and submitted that this was unsurprising given that a number of people opt-in to the Service and when the reality hits them, they deny ever using the Service due to its nature. The Level 2 provider noted that it had 12,153 subscribers so the Executive had only communicated with 0.08% of the people that have used the Service. The Level 2

provider submitted that this was a very unrepresentative sample to base evidence on, and stated that it could identify more than 10 who had been very happy with the Service.

The Level 2 provider submitted that it was being pursued for a second time for a breach in respect of which it had already been fined, which placed it at risk of double jeopardy. The Level 2 provider submitted that the Executive was 'cherry-picking' certain elements from a previously closed breach because they were not satisfied with the outcome.

The Level 2 provider noted that one MSISDN (*****138) showed an opt-in on 13 June 2014, prior to the previously adjudicated breach. The Level 2 provider noted that it had already refunded this customer, paid a fine, and carefully followed the compliance advice issued after its former breach. The Level 2 provider submitted that *****072 was a prime example of a matter which should have been dealt with pursuant to the previous Track 2 adjudication against it. The Level 2 provider stated that it had completed a compliance audit with PhonepayPlus after that case, and yet this number, which had clearly been billed prior to the date of that adjudication, was cited in the current case. For the rest of the complaints, the Level 2 provider noted that the opt-in dates were prior to the initial adjudication. The Level 2 provider submitted that it was being pursued a second time in relation to this matter. The Level 2 provider stated that it had a large number of WAP opt-ins over the months of October 2014 to December 2014, and that after complying with the compliance guidance in January 2015, these numbers greatly reduced.

Separately, the Level 2 provider submitted that the Executive had relied on evidence of consumer complaints and interactions which occurred prior to the current edition of the Code of Practice. The Level 2 provider submitted that where evidence of complaints or a Service related to a period prior to the current edition of the Code being in force, it should be presented and evidenced under the Edition of the Code that was in force at that time.

The Level 2 provider noted that the evidence cited at page 15 of the breach letter and at page 44 and 45 of the Annex to the breach letter were edited versions of the Level 2 provider's response to the enquiries. The Level 2 provider noted that the breach letter also cited a date of 23 October 2014 which had not been in its previous reply. The Level 2 provider stated that it was concerned that the evidence had been edited by the Executive to the suit the case. The Level 2 provider submitted that this redacting of the evidence submitted with the breach letter without its permission constituted a potentially very serious abuse of the regulatory process. The Level 2 provider submitted its prior full responses to the Executive's enquiries regarding promotion of the Service, and relating to requests for information for MSISDNs which had opted into its Service prior to its previous breaches for the Tribunal to consider.

The Level 2 provider disputed that there had been 60 complaints involving the Service. The Level 2 provider noted that complaints from November and December 2014 had been included. The Level 2 provider submitted that these fell to be dealt with under its previous breach and so should not be included in this case. The Level 2 provider believed that the Executive would have contacted these complaints pursuant to the refund sanction imposed in that previous case. The Level 2 provider also objected to the Executive contacting such complaints with its questionnaire. The Level 2 provider submitted these complaints had been added to attempt to make the case look stronger against it.

The Level 2 provider noted that in one response it had queried why it had received no requests for information in relation to four MSISDNs, and had queried if they were indeed complaints. The Level 2 provider submitted that the Executive's failure to respond on this question demonstrated a lack of respect for the process and submitted that the four complainants may not have had their complaints followed up correctly.

The Level 2 provider submitted that, in light of matters being dealt with pursuant to its previous breaches, this minimised the number of complaints which should be reduced to 50 at the very least. The Level 2 provider submitted that if *****138 was removed from the complainants, there were 59 complaints, which resulted in a less than a 0.5% complaint ratio, which the Level 2 provider submitted was considered an "acceptable" level by the Executive and was well within industry standard complaint levels.

The Level 2 provider submitted that it had looked closely at *****486, *****072 and *****213, and it had been in contact with all three consumers and issued them with a full refund, which they were happy to accept. The Level 2 provider asserted that all three numbers had subscribed on the dates that were mentioned in the logs. However the Level 2 provider stated that, with the large issues it was facing at the time including arising from the original breach and the impact the fine had on its business, it was not in a position to be able to track and collate the information needed to ensure that it was getting the correct subscription costs from each subscriber and so there was a large number of subscribers receiving the service for free. The Level 2 provider stated that it was not until it was in a position to realise this and further investigate reasons behind this that it managed to remedy a number of issues, allowing it to start earning the revenue due to it.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal considered that in respect of the relevant factual part of the alleged breach raised, it needed only to satisfy itself, on a balance of probabilities, that the information provided by the Level 2 provider was not correct and/or was misleading, and if it so found it did not need to consider the question of motive. The Tribunal found that, on the evidence before it, the Level 1 provider and Verifier logs were accurate. The Tribunal found that there was clear evidence of inconsistencies between the logs of the Level 2 provider and the Level 1 provider logs.

The Tribunal also found that there was clear evidence of inconsistencies between the logs of the Level 2 provider and the Verifier.

The Tribunal also found that there was no plausible explanation from the Level 2 provider as to the discrepancies. The Tribunal found that the reasons advanced by the Level 2 provider as to why its messages did not land on the Level 1 provider's platform were not plausible, particularly as no evidence had been provided in support of those reasons. For the above reasons the Tribunal was satisfied that the Level 2 provider's logs which had been supplied to the Executive were not accurate, and were therefore false. Accordingly, the Tribunal upheld a breach of para. 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 had been charged without their consent and the Level 2 provider had been unable to provide evidence which established that consent.

In a direction for information dated 22 June 2015, the Executive requested the following information in relation to specific MSISDNs:

"provide evidence of how and when this mobile number was opted-in to receive the service under investigation"

The Level 2 provider stated for all of the WAP opt in MSISDN's provided that:

"The consumer opted into the service by opening the free promotional WAP message that was sent...The consumer has entered the WAP page read the Terms and Conditions and subscribed to the service...The consumer was then sent a free message...."

Referring to the alleged breach of paragraph 4.2.4 of the Code, the Executive asserted that complainant message logs supplied by the Level 2 provider, which purported 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.

The Executive noted that the Verifier had provided 12 message logs to the Executive, 8 of which did not contain failed chargeable Service messages from shortcode 89333. Two logs

showed interaction with 89333, but the Executive noted that the opt-ins shown on these logs were before the period from August 2014 to November 2014, in which the other Level 2 provider logs showed consumers' opt-ins. The Executive noted that a further Verifier log showed no interaction with 89333, and in the final log the consumer did not interact at all with the shortcode 89333.

The Executive noted that correspondence with the Verifier suggested that if attempts to deliver chargeable Service messages which failed were made, these would appear in its message logs, and this was supported by the fact that in several of the Verifier's logs, failed messages did appear for the shortcodes 88150 and 89225.

Given the absence of failed chargeable Service messages in the Verifier's message logs for shortcode 89333, the Executive asserted that the entries in the Level 2 provider's complainant message logs must therefore be false.

As noted in the alleged breach of paragraph 4.2.4, the Executive requested that IMImobile provide message logs for 24 complainants (23 of which were relevant to this case). The Executive noted that IMImobile provided message logs that did not correspond with those which were supplied by the Level 2 provider, and that 21 of the message logs provided by IMImobile did not show chargeable messages being sent or attempted to be sent to the consumer (as stated above, one log showed that the consumer did not interact at all with the shortcode 89333).

The Level 2 provider had supplied several reasons why the Service messages may be routinely failing. The Executive asserted that, taking into account the responses received from IMImobile and the responses to the complainant questionnaire, no credible explanation had been provided as to why almost all Service messages from shortcode 89333 were shown as failing on the Level 2 provider logs. The Executive noted that the Level 2 provider had not provided sufficient evidence to prove that an issue had occurred on its system. 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 was no valid evidence of opt-in to the Service and accordingly the complainants did not consent to Service charges.

The Executive submitted that the Level 2 provider had created artificial opt-in dates and inserted subsequent failed messages into the logs in order to persuade the Executive that any failure to obtain robust consent to charge was limited to a period prior to 11 December

2014. The Executive asserted that through its conduct, the Level 2 provider had attempted to persuade the Executive that a consent to charge breach arose only in this limited period, and so the scope of the breach was confined to the Level 2 provider not having independent third party verification in place prior to 11 December 2014, rather than a more serious allegation of ongoing unsolicited charging.

Further, in any event the Level 2 provider had charged consumers in the period after 9 January 2015 whilst knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers. The Executive submitted that 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.

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

2. The Level 2 provider denied the alleged breach. The Level 2 provider referred to its above response and noted that logs sent to the Verifier related to a timeline before its previous Track 2 procedure. The Level 2 provider stated it was concerned that redactions had been made to the Verifier's evidence in both the breach letter and the evidence attached to that letter.

The Level 2 provider stated that all subscribers submitted to the Executive in a previous response were accurate. The Level 2 provider stated that it had had the following WAP subscribers -

October 2014 Opt Ins – 1779
November 2014 Opt Ins – 5850
December 2014 Opt Ins - 4429
January 2015 Opt Ins – 1
February 2015 Opt Ins – 0
March 2015 Opt Ins – 12
April 2015 Opt Ins – 30
May 2015 Opt Ins – 20
June 2015 Opt Ins – 9
July 2015 Opt Ins – 13
August 2015 Opt Ins – 10

The Level 2 provider stated that, after completing its compliance review, it had only added “promoted via Pinchecked” services and this was apparent in the numbers above. The Level 2

provider stated that it did however, need to work on making back the revenue that it was not able to charge on a weekly basis to the subscribers whose messages it could not deliver. In May 2015, when it had worked on a number of different theories into why its platform was not able to submit messages, it had initiated several changes to each service including updating incorrect billing codes / re-promoting to subscribers / staggering its billing mechanism / revamping its services. The Level 2 provider stated that it saw an increase to its revenues, along with an initial burst of complaints in May / June that had settled since then, and it was now showing a large drop in complaints.

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

The Tribunal considered the Level 2 provider's submission that this matter had already been dealt with via the previous Track 2 procedure and that the raising of the breach therefore amounted to "regulatory double jeopardy". The Tribunal noted that complainants in this case had contacted the Executive in relation to charges which they had started receiving after the conclusion of the Track 2 procedure. The Tribunal made clear that in considering the breaches it had restricted itself to breaches that occurred after publication of the earlier Tribunal's decision.

The Tribunal noted that the Level 2 provider had not provided any evidence to establish consumers' consent, and nothing in the Level 1 provider or Verifier's logs evidenced that consent. The Tribunal referred to its previous findings regarding breach of para. 4.2.4. Given its findings in relation to that breach, and in particular that the Level 2 provider's logs had been falsified, the Tribunal concluded on the evidence before it that consumers had been charged without their consent and that the Level 2 provider had failed to provide evidence establishing such consent. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

SANCTIONS

Paragraph 4.2.4 - Provision of false information to PhonepayPlus

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

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

Rule 2.3.3 – Consent to charge

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

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

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 found the following the following aggravating factor:

- The Level 2 provider had previously been subject to a Track 2 procedure relating to consent to charge.

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

- There was evidence that some complainants had been refunded by the Level 2 provider.

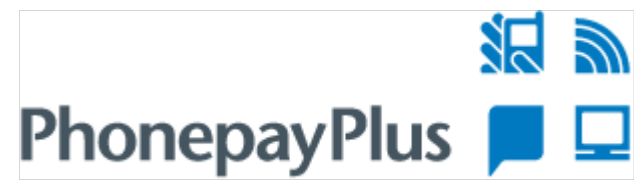
The Level 2 provider's evidenced revenue in relation to the Service in the period from November 2014 to November 2015 was in the range of Band 3 (£250,000 - £499,999). The Tribunal took this period as the relevant period for the purposes of determining appropriate sanctions.

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

Sanctions imposed

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

- a formal reprimand;
- a requirement to remedy the breach of being unable to provide evidence which establishes consumer consent to be charged. Within one month of the date of publication of this decision the Level 2 provider is to provide PhonepayPlus with current and satisfactory evidence of consumer consent to charge in relation to all of its services in line with the requirements of the Code and published Guidance. Such evidence is to include evidence of the systems in place to obtain evidence of consent, and the evidence of consent obtained for each consumer who has opted in to its services in the period from 25 February 2016 to 3 March 2016;
- a fine of £200,000; and



- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Administrative charge recommendation:

100%

