

**MATTERS DECIDED BY THE TRIBUNAL**

Tribunal meeting number, case number and date	Case ref	Network operator	Level 1 provider	Level 2 provider	Service title and type	Case type	Procedure
181 Case 1 17/03/16	71962	All Mobile Network Operators	IMImobile Europe Limited (UK) Fonix Mobile Limited (UK) Veoo Ltd (London, UK)	Coretech Promo Limited (UK)	Dreamy Babes / Dreamygirlz glamour video subscription service	Level 2 provider	Track 2

Between 18 April 2015 and 22 January 2016, the Executive received 99 complaints concerning a glamour video subscription service, charged at £3 per week, operating on dedicated shortcodes 65022 and 65025 and shared shortcode 81300 (the "Service").

The Level 2 provider for the Service was Coretech Promo Limited (the "Level 2 provider"). The Level 1 provider for Service shortcode 65022 was IMImobile Europe Limited ("IMImobile"). The Level 1 provider for Service shortcode 81300 was Veoo Ltd ("Veoo"). The Level 1 provider for Service shortcode 65025 was Fonix Mobile Limited ("Fonix").

Complainants variously alleged that the Service charges were unsolicited. In addition, after analysing complainant message logs, the Executive noted that there was a high failure rate of chargeable messages following the purported consumer opt-ins, and the delivery status of Service messages was unclear.

The Executive raised the following potential 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 Tribunal upheld the two breaches of the Code raised. The Level 2 provider's revenue in relation to the Service was in Band 2 (£500,000 - £999,999). The Tribunal considered the case to be very serious and imposed a formal reprimand, a fine of £250,000, 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%



## Tribunal meeting number 181 / Case 1

**Case reference:** 71962  
**Level 2 provider:** Coretech Promo Limited (UK)  
**Type of service:** Dreamy Babes / Dreamygirlz glamour video subscription service  
**Level 1 provider:** IMImobile Europe Limited (UK); Fonix Mobile Limited (UK); Veoo 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 shortcodes 65022 and 65025, and shared shortcode 81300 (the “**Service**”).

The Level 2 provider for the Service was Coretech Promo Limited (the “**Level 2 provider**”). The Level 1 provider for Service shortcode 65022 was IMImobile Europe Limited (“**IMImobile**”). The Level 1 provider for Service shortcode 81300 was Veoo Ltd (“**Veoo**”). The Level 1 provider for Service shortcode 65025 was Fonix Mobile Limited (“**Fonix**”).

Between 18 April 2015 and 22 January 2016, the Executive received 99 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 confirmed that the Service commenced operation on 3 April 2014 and was currently operational. IMImobile confirmed that the Service commenced operation on shortcode 65022 in October 2013, although the Executive understood that this start date applied to the mobile originating (“**MO**”) opt-in route into the Service.

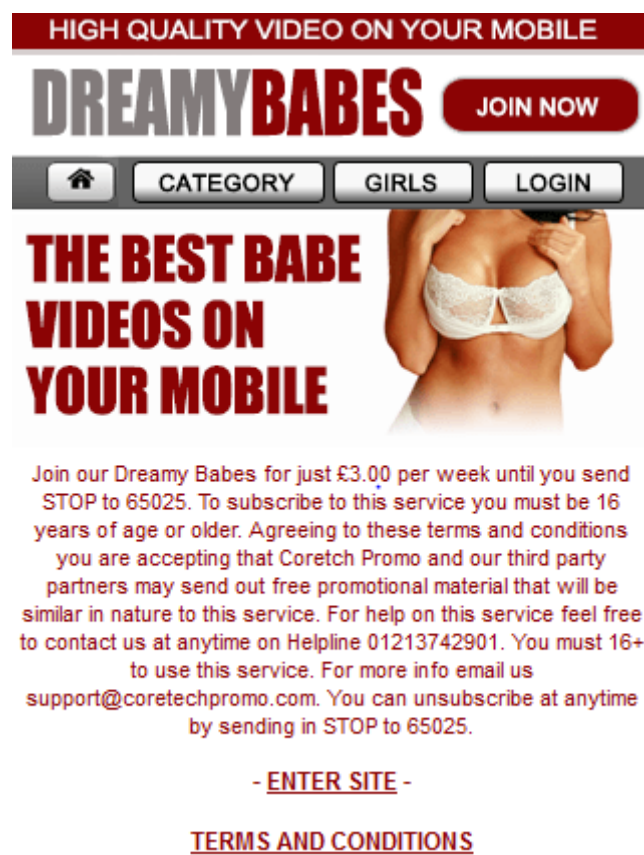
Fonix confirmed that the Service commenced operation on shortcode 65025 on 31 August 2014 and Veoo confirmed that the Service commenced operation on shortcode 81300 on 14 May 2015.

The Executive noted from complainant message logs supplied by the Level 2 provider that users of the Service opted in on either shortcode 65022 or shortcode 65025. A small number of users were migrated from shortcode 65025 to shortcode 81300, on or around 15 May 2015.

The Executive understood that consumers can enter the Service either via an MO opt-in or a wireless application protocol (“**WAP**”) opt-in. The Executive noted that all complaints received to date related to WAP opt-in. The Level 2 provider supplied the following summary for the promotion and operation of the Service:

- Customer clicks on our online banner
- They are taken to our "MSISDN ENTRY BOX"
- Customer will input their MSISDN into the box, they also have to tick that they are over 16 years of age as this is only a glamour service. They then click on "ENTER" to submit their MSISDN.
- The customer will receive a direct message from our platform that has a WAP link the allows them to click onto this and activate a subscription.
- They will receive £3.00 weekly billing messages until they decide to stop the service which can be by sending in Stop to the shortcode or indeed contacting us via our customer support email or our support landline.

The Level 2 provider supplied the following promotion for the Service:



HIGH QUALITY VIDEO ON YOUR MOBILE

**DREAMYBABES** JOIN NOW

HOME CATEGORY GIRLS LOGIN

**THE BEST BABE VIDEOS ON YOUR MOBILE**

Join our Dreamy Babes for just £3.00 per week until you send STOP to 65025. To subscribe to this service you must be 16 years of age or older. Agreeing to these terms and conditions you are accepting that Coretech Promo and our third party partners may send out free promotional material that will be similar in nature to this service. For help on this service feel free to contact us at anytime on Helpline 01213742901. You must 16+ to use this service. For more info email us support@coretechpromo.com. You can unsubscribe at anytime by sending in STOP to 65025.

- [ENTER SITE](#) -

[TERMS AND CONDITIONS](#)

As the Executive's investigation focused on the WAP method of entry to the Service, the Level 2 provider was not requested to provide an explanation as to how a consumer would enter the Service via the MO route.



## Complaints

The Executive had received 99 complaints concerning the Service since 18 April 2015. Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

*"I received unsolicited text messages with a link to an adult website on, i did not access the link and there was no information on the message indicating that it was chargeable or how to stop receiving them." [sic]*

*"I have no idea why they have my number, and I want to ensure that I receive no further texts from them.*

*They appear to be of an adult content - Dreamy-babes.com and I have not at any point subscribed to such a service. I am looking for a full refund." [sic]*

*"I just randomly started getting these Pornographic nature text messages. I did not subscribe for anything nor did I enter my phone number anywhere." [sic]*

*"I did not sign upto this adult content, I do not know how my number was obtained. I was a full refund of the charges that have been made." [sic]*

*"i dont know what this is but they have been charging me £3.00 a text for months and i have only just noticed, fuming! [sic]*

*i have no idea how these people got my number but i have been charged a lot over the last 6 months and only just realised, very angry![sic]*

## Complainant text message logs

As part of the standard request for information process, the Level 2 provider supplied text message logs for 93 out of the 99 complaints received. The Executive noted from the text message logs supplied by the Level 2 provider that:

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

In these 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 65022 or 65025, all but nine logs indicated a 100% message failure rate immediately after the purported opt-in. For these logs, chargeable messages were only successful some months after the purported opt-in.

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

**Complainant responses to Executive questionnaire**

In light of the high number of failed messages identified by the Executive in the complainants' text message logs and the possible explanations offered by the parties in the value chain for the failed messages, on 11 December 2015 the Executive contacted 86 complainants (the total number of complaints received by PhonepayPlus about the Service as at that date) with the following series of questions:

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

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

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

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

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

As at 22 January 2016, the Executive had received responses to the questionnaire from 12 complainants. Below is a breakdown of the complainant responses:

Question	Response	Comments
Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go?	10 respondents confirmed they were on contract	2 respondents did not respond to this question
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?	Not applicable	
Please advise whether the	9 respondents advised their	3 respondents did not



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)?	mobile phone was not regularly switched off and/or had no mobile phone signal	respond to this question
Please advise whether you transferred your mobile number between mobile telephone companies in the six months before you received the chargeable text messages? If yes, please confirm if you experienced long periods with no signal and/or difficulty in sending and receiving text messages	8 respondents advised they had not transferred between mobile companies	4 respondents 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	3 respondents advised that the question was 'not applicable'

#### **Previous complaint resolution procedures**

The Level 2 provider has had a prior informal dealing with PhonepayPlus. On 7 January 2015, the Level 2 provider accepted a Track 1 action plan in respect of a breach of Rule 2.3.3 of the Code, as the Level 2 provider accepted that it did not hold robust verification to establish consumers' consent to be charged between May 2014 and January 2015. On 23 January 2015, the Level 2 provider confirmed that it had implemented the required actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge.

The breach allegations raised in this case relied 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 (13<sup>th</sup> 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 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 12 February 2016. On 17 March 2016, the Tribunal, having heard informal representations made on behalf of the Level 2 provider, reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses including supporting documentation);
- Correspondence between the Executive and the Level 1 providers;
- Correspondence between the Executive and the Verifier;
- Correspondence between the Executive and complainants;
- Correspondence between the Executive and a third party verifier;
- Complainant message logs from the Level 2 provider; and
- The breach letter of 22 January 2016 and the Level 2 provider's response of 12 February 2016.

## PRELIMINARY ISSUES

### Closure of Track 1 procedure

The Level 2 provider stated that it had not received notice of the formal closure of the previous Track 1 procedure. It stated that the Executive had proposed an action plan, and the Level 2 provider had written to the Executive to confirm that it had complied with that plan, but it had not received further correspondence to confirm that the Track 1 procedure was closed. Noting that matters raised in this adjudication might have been considered under this procedure, the Level 2 provider questioned whether it was appropriate for them to now be dealt with under the Track 2 procedure. The Level 2 provider submitted that the Track 1 procedure was still open.

The Tribunal referred to para. 4.3.2 of the Code. In a Track 1 procedure, if a provider accepted an action plan but did not demonstrate to PhonepayPlus that the action plan had been followed and the breach remedied on or before the deadline, PhonepayPlus would assume that the breach had not been remedied and the Track 2 procedure may be invoked. If the provider did accept the action plan and demonstrated that it had been followed, the Code did not require further correspondence, and the Tribunal did not find that the procedure required further communication from the Executive to be considered closed. Further, the Tribunal noted that in its response to the Executive's direction dated 13 November 2015, the Level 2 provider had stated "*We presented our Pinchecked contract and all relevant information in our previous Track 1 which was closed.*" The Tribunal therefore concluded that the Track 1 procedure had been closed and the Level 2 provider had understood this.



Further matters raised in informal representations

The Tribunal heard informal representations from the Level 2 provider who raised a number of matters which it had not raised in its response to the breach letter. It referred to evidence which it stated existed, but had not been provided with its response to the breach letter. The Tribunal considered whether to adjourn the hearing to another date in order to allow the Level 2 provider to supply further evidence, and to allow the Executive to consider and respond to that evidence if considered necessary.

The Tribunal noted that in raising new matters on the day of a hearing, the Level 2 provider was depriving the Executive of a fair opportunity to properly consider any new material unless the case was adjourned. However the Tribunal noted that adjourning a case placed a further burden on the Executive and would result in Tribunal time being wasted. Nevertheless, the Tribunal considered that a provider should be given an opportunity to submit material which may affect the Tribunal's decision, and that an adjournment may still be granted, if otherwise the procedure would be unfair.

The Tribunal noted that the breach letter had been sent to the Level 2 provider on 22 January 2016. The Tribunal noted that the matters raised by the Level 2 provider had been within its knowledge at that time, and the evidence to which it referred would have been in its possession.

Further, the Tribunal noted that the Level 2 provider had stated that it had been aware in March 2015 of a relevant actual technical problem which affected the delivery of its messages, but noted that despite this, the Level 2 provider had not previously supplied information on this actual technical problem to the Executive, including in its response of 24 November 2015 to the question "*please advise why chargeable Service messages appear to be routinely failing.*" The Level 2 provider accepted it had not mentioned its current explanation or evidence in this response, but stated it had been giving the bigger picture in this response; it had only been answering the question asked and didn't realise it would come to this.

The Executive submitted that the Level 2 provider had had opportunity to provide its explanation for the discrepancy between the logs in the course of the investigation and had not raised these new matters then. The Executive submitted that the Level 2 provider had had ample opportunity to submit its evidence in the course of the investigation and in response to the breach letter. The Executive stated that it had included everything the Level 2 provider had supplied in its response to the breach letter in the case report which was before the Tribunal.

The Tribunal asked the Level 2 provider why these matters were not raised previously and the evidence was not provided in its response to the breach letter. The Level 2 provider stated that this should have been done, but it had now found further information and were raising the matters now. The Level 2 provider submitted that it was not fair for it not to be given the opportunity to provide its evidence to the Tribunal, and submitted that this may result in it requesting an oral hearing.

The Tribunal considered that the additional matters raised, and the additional evidence referred to, could all have been supplied to the Executive in its response to the breach letter. The Tribunal



considered that the Level 2 provider had been given plenty of opportunity to do so. The Tribunal stated that where information had been available, it should have been provided beforehand, as the Tribunal had been listed to determine the matters on the date of the hearing and could not give much weight to evidence which was not before it but might be provided at some point in the future. The Tribunal understood that Level 2 providers were advised in the breach letter to provide supporting evidence with their response to the breach letter, which they were required to submit by the stated deadline, and that this response was incorporated into the case report which was submitted to the Tribunal. The Tribunal further noted that the Level 2 provider had not previously requested an adjournment of the hearing for this further information to be made available. The Tribunal therefore considered that the Level 2 provider had been given a fair opportunity to raise these matters in its response, but it had not done so, and therefore adjudicating on the alleged breaches on the date appointed for the hearing was not unjust or unfair.

Having balanced these factors and heard the parties' representations on the proposed adjournment, the Tribunal determined that it would not adjourn the case. The Tribunal would give appropriate consideration to the informal representations when adjudicating on the alleged breaches.

#### Registration of shortcode 65022

The Tribunal noted that this shortcode was stated to be unregistered. The Executive stated that it believed that the number was no longer operational for the Service.

### **SUBMISSIONS AND CONCLUSIONS**

#### **ALLEGED BREACH 1**

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

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

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

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 the complaints received by PhonepayPlus following the Track 1 procedure spanned the period between April 2015 to December 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 all message logs as occurring between August 2014 and October 2014, regardless of when the complaint was received.



Yet in the complainant message logs, the date of the first successfully charged Service message was significantly later than the purported date of Service opt-in.

As set out in the 'Background' section above, the Executive noted that it was common for complainant text message logs to show several months of unsuccessful Service messages prior to the issuing of successfully charged Service messages. The Executive understood that consumers that only received failed messages following their opt-in would not have been charged.

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

*"The status 'FAILED' means that the message has failed during the transit period between our server and actually reaching the end user.*

*The status 'BILLED' means that the message has been successfully delivered to the end user and we have been given a positive delivery receipt from our Level 1 provider. The status 'ACCEPTED' means that the message has been sent by our server to the Level 1 provider who in turn submits them to the network who have accepted it, however there is no receipt for the message being delivered during the return path and thus marked as ACCEPTED."*

*"The status 'SENT' means that our server has submitted the message to our Level 1 provider to be delivered to the end user. The status confirms that we have indeed submitted the message to the Level 1 provider who in turn has submitted to the network to be delivered to the end user. However we have not been given a positive indication by return and our system marks this is SENT."*

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

The Executive provided a summary of two example message logs, as set out below:

Level 2 provider message log for mobile number \*\*\*\*\*506

The Executive noted that the provided log showed that the initial opt-in to the Service occurred on 25 September 2014. The subscription confirmation message stated:

*"FreeMsg:U have subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901"*



The Executive noted that following the above entry in the message log and prior to 2 May 2015, the status of all chargeable Service messages were listed as either 'FAILED' or 'ACCEPTED'. The first Service message listed as 'BILLED' was delivered on 2 May 2015, more than six months after the purported opt-in date.

Level 2 provider message log for mobile number \*\*\*\*\*684

The Executive noted that the provided log showed that initial opt-in to the Service occurred on 3 October 2014. The subscription confirmation message stated:

*"FreeMsg:U have subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901"*

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages were listed as either 'FAILED' or 'ACCEPTED'. The first message listed as 'BILLED' occurred after the Service had migrated from Fonix to Veoo, and was delivered on 16 May 2015, more than seven months after the purported opt-in date.

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

The Executive contacted the Level 1 providers for a sample of complainant message logs. The Executive noted that although the logs provided by the Level 2 provider showed a purported opt-in on Service shortcodes 65022 and 65025 followed by a series of failed messages, IMI mobile and Fonix did not provide message logs for the complainants which matched those provided by the Level 2 provider. The text message logs supplied by Veoo only confirmed successful chargeable Service messages where the Service had migrated to Veoo.

In order to obtain further clarification on the message failure issue, the Executive contacted Mobile Enterprise Ltd (the "**Verifier**") which has access to mobile data held by the Mobile Network operator Vodafone Limited ("**Vodafone**"). The Executive sent the Verifier a sample of 12 Vodafone complainant mobile numbers and requested that they supply message logs 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 immediately after the purported opt-in. For example, the Verifier log for \*\*\*\*\*506 listed the first Service message on 2 May 2015, and the Verifier log for \*\*\*\*\*684 listed the first Service charge on 16 May 2015.

The Executive noted that the Verifier had previously confirmed that all messages sent from the Service shortcode that charged or attempt to charge the consumer would appear in its text message logs. Similarly, Fonix had confirmed that all chargeable messages (attempted and successful) would appear in its text message logs. The Executive noted that although IMI mobile indicated that it would have a record of all chargeable messages (attempted and successful), it would not have a record of any messages that failed on the Level 2 provider's server before reaching the Level 1 provider.

Furthermore, the Executive directed the Level 2 provider to provide an explanation for the high failure rate of chargeable Service messages. On 24 November 2015 the following response was received from the Level 2 provider:

*"These messages can fail anytime during transit between our server sending the messages and reaching the end users handset.*

*Once we send the messages out via our server to the level 1 provider, who in turn submits them to the network, we are completely out of control in delivering the messages to the end user once it has left our server and reliant other factors in delivering them to the end user.*

*Message failures can happen for many reasons which can be that the message has timed out when submitted to the network, users handset being out of signal, or switched off, failure at the level 1 system, message timing out on route to the end user, incorrect network handling code and could have also failed as soon as our server submits them to our Level 1 providers for delivery." [sic]*

The Executive sought further clarification from the Level 2 provider on this matter and on 14 December 2015 the Executive received the following response:

*"As pointed out in our previous reply, messages can fail at any point along the route from our server, to the Level 1 Provider, mobile networks and customer handsets. One point that messages could fail is between us and the Level 1 provider and could be caused by a number of reasons including, but not limited to, our own server downtime, heavy traffic or technical glitches at either the Level 2 or Level 1 end."*

The Executive also sought confirmation from the Level 2 provider on whether it performed its own internal investigation to identify the issues that may be resulting in the high message failure rates. On 14 December 2015 the following response was received:

*"Message failures are a routine occurrence and as such we are always trying to identify and minimise any disruption or inconvenience to our customers, as such, this is a continual process for us rather than a single investigation for which we can provide evidence."*

The Executive submitted that the Level 2 provider had not provided any credible evidence to prove that issue(s) occurred on its system. Further, the Executive noted (i) the lengthy period of unexplained but consistent message failure shown in the Level 2 provider logs



and (ii) that a failure between the Level 1 provider and Level 2 provider's systems would not explain the discrepancy between the logs in respect of "SENT" or "ACCEPTED" messages.

The Executive also made enquiries to IMI mobile, Fonix and Veoo regarding the high failure rate of chargeable Service messages. Although Veoo provided a response, the majority of failed messages occurred on the IMI mobile and Fonix shortcodes, and therefore it was not able to provide a comprehensive response on the issue. The responses from IMI mobile and Fonix are located (in italics) below.

#### Fonix

*"Having looked at all billed messages for Coretech Promo for the past 2 months, we can see that just under 60% of the messages failed to deliver. These failures are down to several reasons including insufficient funds (19%), barred MSISDNs (7.6%) and 'unknown' (25%)."*

Following receipt of the Level 2 provider's explanation of why messages may be routinely failing, the Executive put the Level 2 provider's response regarding reasons why chargeable Service messages may be routinely failing to Fonix and sought clarification from Fonix on whether it would have a record of these attempts to bill the consumer. The following response was received:

*"... Fonix has a record of all chargeable messages as well as their status ('delivered' or 'not delivered'). If the status is 'not delivered' we can also see the reason for the failure. I have attached a report showing a list of reasons for failures on 28/11/15."*

#### IMI mobile

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

- *Failure at Network Level;*
- *Insufficient Credit;*
- *Subscriber blocked from Network or Level 1 provider level; and*
- *Message expired at Operator.*

*Coretech Promo Limited would have received the Delivery Receipts for the messages that were failing, which would have detailed the reasons."*

A graph showing delivery success/failure rates by month for the Level 2 provider's traffic that went across the IMI mobile platform was supplied. The Executive noted that although the graph suggested a message failure rate averaging around 50%, it did not account for messages that did not appear on IMI mobile's logs.

Following receipt of the Level 2 provider's explanation of why messages may be routinely failing, the Executive sought clarification from IMI mobile on its understanding that IMI mobile



would have a record of these failed chargeable messages on its logs if any of the stated issues were occurring. The following response was received:

*“Your understanding is correct and 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. Please note that we would not have any record of any messages that failed on the Level 2 provider’s server.”*

The Executive submitted that the Level 2 provider had not provided sufficient evidence that the text message failures were the result of an issue on its server. Further, the Executive noted (i) the lengthy period of unexplained but consistent message failure shown in the Level 2 provider logs and (ii) that a failure between the Level 1 provider and Level 2 provider’s systems would not explain the discrepancy between the logs in respect of “SENT” or “ACCEPTED” messages.

Further, the Executive noted that the text message logs supplied by the Level 2 provider in response to more recent requests for information included chargeable Service messages with the status ‘SENT’ instead of ‘FAILED’. These were also followed by the issuing of successfully charged Service messages some months later. A summary of an example message log is provided below:

Level 2 provider message log for mobile number \*\*\*\*\*848

The Executive noted that the provided log showed that initial opt-in to the Service occurred on 19 September 2014. The subscription confirmation message stated:

*“FreeMsg:U have subscribed to Dreamygirlz video service costing £3.00 per week until u send stop to 65022. Service provided by Coretech Need Help? 01213742901”*

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages were listed as ‘SENT’. The first message listed as ‘BILLED’ was delivered on 6 April 2015, almost seven months after the purported opt-in date. The Executive noted that, as was the case with text message logs displaying failed messages, the Level 1 provider log did not match the Level 2 provider’s log.

The Executive relied on further examples of message logs supplied by the Level 2 provider which contained messages displaying the status ‘SENT’.

The Executive submitted that, considering the explanation provided by the Level 2 provider, chargeable Service text messages displaying the status ‘SENT’ should appear as messages on the text message logs provided by the Level 1 providers. The Executive noted however that this was not the case as the text message logs provided by IMI Mobile and Fonix did not include these message attempts. The Executive therefore asserted that



the attempts to send chargeable messages to consumers were not made by the Level 2 provider.

Consequently for the reasons stated above, the Executive submitted that the possible explanations for the unsuccessful messages provided by the Level 2 provider could not be correct. Further, the Executive referred to the complainant accounts, and the complainant responses to the Executive's questionnaire, both of which are referenced in the 'Background' section above. The Executive considered it was highly unlikely that the complainant accounts, and those complainants who responded to the complainant questionnaire stating that they never interacted with the Service website, were unfounded.

The Executive noted from the previous Track 1 procedure that the Level 2 provider did not have robust verification prior to the action plan being accepted. The Track 1 procedure was created in part to address the issue of consent to charge that had occurred during the third and fourth quarters of 2014. The Executive noted however that it continued to receive complaints about consent to charge well into the third and fourth quarters of 2015. The Executive's view was that by inserting failed messages into logs and creating artificial opt-in dates in the period prior to closure of the Track 1 procedure, the Level 2 provider had attempted to persuade the Executive that a consent to charge breach arose only in a limited period, and that the scope of such a breach was confined to a lack of independent third party verification, as opposed to a more serious allegation of unsolicited charges.

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

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

2. The Level 2 provider denied the alleged breach. The Level 2 provider stated that it was a small company who had been progressing in the PSMS market over the past few years. As a small company, it needed to respond quickly to market trends and mobile changes to keep up with the industry and relied on the specific work of its customer care / technical team whilst working at such a fast pace. The Level 2 provider stated that, in order to streamline these processes, it made the decision to outsource a number of administrative tasks to external parties. During this period of growth, it also became heavily reliant on its technical team making changes / implementing technical integrations on its platform quickly. The Level 2 provider stated that it had approached and worked with a number of companies over the past few years including IMImobile, Fonix, Veoo, Pinchecked and a bulk SMS provider. The Level 2 provider stated that on the whole these relationships had been very successful but it had identified technical issues that had resulted in messages being sent from its server but not reaching the handset.





The Level 2 provider stated that when every subscription was first started each subscriber was sent a free content link and so could have access to downloads/content straight away, which meant that if a chargeable message did not land on the handset the customer still had access to content although it would not receive the subscription fee.

The Level 2 provider stated that when it starts a new promotional campaign, there were a number of different factors that it took into account including creating appropriate banner advertisements for its target audience and selecting a provider to handle the messages, and it had been through this process that it had experienced the technical issues. The Level 2 provider stated that for every provider it worked with, it sent different technical settings and parameters to allow its server to talk to their server. Examples of this included having exact URLs and settings for every message, and the Level 2 provider supplied examples of settings for the Service for IMI, Fonix, and Veoo.

The Level 2 provider stated that when it markets a new campaign, in order for it to be able to track the marketing spend against the number of new subscribers and the amount of revenue that it makes from each promotion, it has to set up brand new technical routes for each promotion. The Level 2 provider stated that it was here that it was very reliant on its technical team creating the correct routes and ensuring that all the technical variables were in place. The Level 2 provider stated that if these settings were not correct, it may still report subscribers entering its service promotions and would attempt to automatically send them weekly billing messages and monthly service subscription reminders. The Level 2 provider stated that when its server attempted to automatically send these messages, they would be marked as SENT whilst it awaited the appropriate delivery receipt from its provider. It believed that at some point in this process, a number of promotional campaigns were set up incorrectly with incorrect variables and will not have reached the Level 1 provider who therefore had no record of them being sent.

The Level 2 provider stated that when it had been asked to provide activity logs, it simply pulled from its database everything associated with the number, including all messages whether successfully sent or not. The Level 2 provider noted that there were a number of log records which showed correctly billed messages just after the opt-in and so submitted that this error was not common. The Level 2 provider submitted that if the Tribunal looked at the number of opt-ins that it had provided in its previous replies detailing subscribers per month entering the Service, it would be seen that it had not only provided / marketed services that people were interested in, but that subscribers were happy with.

In informal representations, the Level 2 provider stated by way of background that it had commenced promoting subscription services in various forms in 2013. On 7 January 2015, it had been informed by the Executive that it was being offered a Track 1 procedure. It had worked alongside the Executive and submitted the changes to its service. It had implemented independent third party verification of its WAP entry route to the Service. It had on 10 October 2014 informed the Executive that it did have a contract for this with GoVerifyIt, but it accepted that it had not implemented it across all its services. After

complying with the Track 1 procedure it had confirmed that this was the only way a consumer could now enter the Service.

In relation to the allegation that it had provided false message logs, the Level 2 provider stated that it had supplied a number of technical reasons why messages might not have landed on consumers' phones, including reasons they may not have landed on the Level 1 provider's platform, but the Executive had not accepted these. The Level 2 provider stated that it had asked its technical staff to set up the message delivery for promotions using a copy and paste method. The Level 2 provider stated that if they miss out an entry or digit in this process, the message will attempt to send but fail to reach the aggregator. The Level 2 provider stated that it also has to be formatted to fit into templates and if copied incorrectly messages will fail to deliver. The Level 2 provider stated that it had first come across these technical errors in March 2015. The Level 2 provider stated that this could be confirmed by technicians and it could show technical errors. The Level 2 provider accepted it had not supplied this evidence in its response. The Level 2 provider stated that it was not the only provider in the chain who experienced technical problems. The Level 2 provider stated that it was an ongoing process to make sure subscribers were receiving messages.

The Level 2 provider submitted that seeing failed messages in its logs was nothing new to the Executive and that it had seen other logs showing failed messages prior to the Track 1 procedure. The Level 2 provider submitted that the Executive was aware of the problem then and had not taken any action. The Level 2 provider referred to logs it had provided on 23 December 2014 (case number 57973) which showed a total of 18 failed messages, on 1 December 2014 (case number 56753) which showed over 75 failed messages and on 17 December 2014 (case number 55673) which showed 12 failed messages. The Level 2 provider accepted it had not previously raised this matter in its response to the breach letter nor supplied these logs in its response.

The Level 2 provider submitted that it could also show it was the case that some messages recorded as failed did in fact succeed. The Level 2 provider referred to a phone bill for MSISDN \*\*\*\*\*874 which showed billing where the log had shown a negative delivery status. The Level 2 provider stated there were other examples. The Level 2 provider stated that the evidence of the phone bill for phone bill for MSISDN \*\*\*\*\*874 had been provided in earlier correspondence with the Executive on 14 December 2015. The Level 2 provider accepted it had not raised this matter in its response to the breach letter nor supplied supporting evidence in its response.

The Level 2 provider also stated that the logs showed that six complainants did receive billing messages from the date of opt-in. The Level 2 provider referred to complaint reference numbers 70336, 73552, 81048, 88743, 77017 and 84195 as examples. The Level 2 provider accepted it had not raised this matter in its response to the breach letter nor supplied supporting evidence in its response.



In relation to each of the matters raised in informal representations on the day of the hearing which the Level 2 provider had not raised in its response to the breach letter, the Tribunal queried why these matters had not been raised in the response to the breach letter, and supporting evidence supplied at that stage. The Level 2 provider accepted that matters should have been raised then, but it had now found further information and was raising the matters now. The Level 2 provider accepted that it had not provided supporting evidence in its response to the breach letter and so the Tribunal was not able to assess this evidence at this hearing.

The Level 2 provider submitted that the evidence supplied by the Verifier only related to a small amount of its campaign, and that this Mobile Network operator would not be able to see messages which were not sent to the Level 1 provider. The Level 2 provider stated that it appeared the technical issues affected only a small amount of its campaigns. The Level 2 provider stated that it had 34,616 subscribers and the number of complainants was a small percentage of its customer base, the rest of whom were satisfied with the Service.

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

The Tribunal noted the Executive's submission that, because certain transactions prior to April 2015 were shown in the logs of the Level 2 provider but not shown in the logs of the Verifier or the Level 1 provider, the log entries in the logs of the Level 2 provider for complainants' MSISDNs were false. The Tribunal considered that the Executive's explanation was plausible, noting in particular the pattern of the discrepancies, the inclusion of both "accepted" and "sent" messages in the Level 2 provider logs which were not in the Level 1 provider or Verifier logs, and in the absence of a credible alternative innocent explanation.

The Tribunal considered the potential reasons for the discrepancies put forward by the Level 2 provider, and in particular that if its settings were not correct its server would attempt to automatically send messages (which it stated would be marked as SENT whilst it awaited the appropriate delivery receipt from its provider), but that it believed that at some point a number of promotional campaigns were set up incorrectly with incorrect variables and so messages will not have reached the Level 1 provider, who therefore had no record of them being sent. The Tribunal accepted that, in principle, in some cases specific technical reasons might result in discrepancies between the logs of different providers in the value chain. However the Tribunal noted that the Level 2 provider did not supply evidence to support its explanation that the particular alleged discrepancies in respect of each of these complainants' logs occurred because of a technical reason.

The Tribunal considered the further issues raised by the Level 2 provider in informal representations in support of its explanation. In particular, the Tribunal considered the Level 2 provider's assertions that (i) they had some examples when they had received a negative delivery receipt from a Network operator but the consumer's bill showed they had received the billable message; (ii) for three complainants prior to the Track 1 procedure, the Level 2

provider had in relation to that investigation previously provided the Executive with logs which showed series of failed messages; and (iii) the logs showed that six complainants did receive billing messages from the date of opt-in.

The Tribunal noted that the further assertions made in informal representations were not supported by documentary evidence, and the Level 2 provider had had ample opportunity to provide such information and evidence both in response to the breach letter and in the course of investigations.

The Tribunal noted that the six complainants cited by the Level 2 provider had been accounted for by the Executive's stated case. The Executive had stated that there were 99 complaints, and all but nine logs provided by the Level 2 provider indicated total message failure immediately after the purported opt-in. The Tribunal noted that the examples given by the Level 2 provider did not correspond with the examples highlighted in the Executive's case, and so did not directly contradict the Executive's case in respect of the example MSISDNs or any other unrelated complainant MSISDNs. It was therefore unclear as to how the Level 2 provider's further assertions, even if supported by documentary evidence, would have materially undermined the Executive's case.

The Tribunal noted that the specific technical issue which the Level 2 provider stated was responsible for the discrepancies had not been made known to the Executive and evidenced at an earlier stage (despite, according to the Level 2 provider's informal representations, being known to it as early as March 2015), and that the assertion was not supported by documentary evidence. The Tribunal noted that the Level 2 provider had not provided this evidence in response to a specific question on why messages were shown as routinely failing in November 2015. The Tribunal considered that this cast doubt on the credibility of the Level 2 provider's assertion.

Having considered the evidence, the Tribunal found on the balance of probabilities that logs supplied by the Level 2 provider were false and misleading. Consequently, the Tribunal was satisfied, for the reason advanced by the Executive, that the Level 2 provider had supplied false and misleading information to the Executive. Accordingly, the Tribunal upheld a breach of paragraph 4.2.4 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH 2**

**Rule 2.3.3 – Consent to Charge**

"Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code for the following reasons:



1. Complainant message logs supplied by the Level 2 provider purporting to show consumers' opt-in to the Service were false; and
2. Level 2 provider and Level 1 provider logs and evidence supplied by Mobile Network operators demonstrated that complainants were charged more than the advertised price.

**Reason 1 – complainant message logs supplied by the Level 2 provider purporting to show consumers' opt-in to the Service were false**

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 has been unable to provide evidence which establishes that consent.

As noted in the alleged breach of paragraph 4.2.4, complainant message logs supplied by the Level 2 provider, which purported to demonstrate that consumers opted-in to the Service in a period 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, the majority of which did not contain failed / unsuccessful chargeable Service messages from shortcode 65022 or 65025. Correspondence with the Verifier suggested that attempts to deliver chargeable Service messages which failed would appear in its message logs. Given the absence of failed / unsuccessful chargeable Service messages in the Verifier's message logs, the Executive asserted that the entries in the Level 2 provider's complainant message logs must therefore be false.

As noted in the alleged breach of paragraph 4.2.4, the Executive had requested that IMI mobile provide message logs for a sample of complainants. Of the 12 message logs provided by IMI mobile which showed chargeable messages, the Executive noted that 11 did not correspond with those which were supplied by the Level 2 provider, and that none of the 11 message logs provided by IMI mobile showed chargeable messages being sent or attempted to be sent to the consumer immediately after the purported opt-in date. In all these cases, the first charges occurred some months after the purported opt-in date.

The Executive had also requested that Fonix provide message logs for a sample of complainants. Of the 13 message logs provided by Fonix, the Executive noted that 12 did not correspond with those which were supplied by the Level 2 provider. Of the 12 message logs that did not correspond, the Executive noted that none showed chargeable messages being sent or attempted to be sent to the consumer immediately after the purported opt-in date. The Executive noted that the first charges occurred some months after the purported opt-in date.

As noted in the alleged breach of paragraph 4.2.4, the Level 2 provider had supplied four reasons why the Service messages may be routinely failing. However, taking into account



the responses received from IMI mobile and Fonix and the responses to the complainant questionnaire, the Executive asserted that no credible explanation had been provided as to why almost all initial Service messages from shortcodes 65022 and 65025 were shown as not billed on the Level 2 provider logs, but not shown at all on the Level 1 provider logs.

In addition the Executive noted that the Level 2 provider had not provided sufficient evidence to prove that issue(s) had occurred on its system. The Level 2 provider was asked to provide evidence of an 'internal investigation' into the consistent message failure issue but had not done so. The Executive therefore submitted 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 could not have consented to Service charges.

As noted in the alleged breach of paragraph 4.2.4, the Executive's view was that by inserting failed messages into logs and creating artificial opt-in dates in the period prior to closure of the Track 1 procedure, the Level 2 provider had attempted to persuade the Executive that the consent to charge breach arose only in a limited period, and that the scope of the breach was confined to a lack of independent third party verification rather than a more serious allegation of unsolicited charges.

Further, in any event the Level 2 provider had charged consumers in the period after 23 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 must have been 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.

In response to questioning by the Tribunal regarding two instances where complaints appeared to be duplicated, the Executive explained that where a complainant complained about more than one Service shortcode, the complaints would be recorded as separate complaints for each shortcode. The Executive accepted that this meant it was unclear whether the text of the complaints accurately recorded their Service spend. The Executive stated the figures for Service spend in the text of the complaints was reported by the complainants. The Executive accepted it was not clear whether these two instances were duplicates from the face of the evidence, and noted that one instance of duplication appeared to have occurred across two different dates. In this case, the Executive stated it was possible for complaints to be made via the internet in which case the complainant may have copied and pasted the wording of a previous complaint about another Service shortcode.

In response to questioning by the Tribunal regarding some instances where complaints cited a 9-digit number, which the Level 2 provider stated was a Payforit number and not a

Service shortcode, the Executive stated that these numbers represented codes given to consumers on their bills by a Mobile Network operator. When these codes were inserted into a Mobile Network operator's number checker, they indicated that the charge related to a Service shortcode. The Level 2 provider did not challenge that explanation.

**Reason 2 – text message logs provided by IMImobile and the Level 2 provider demonstrated that complainants were charged more than the advertised price**

The Executive asserted that complainants were charged more than the advertised price because in some instances two Service charges were issued within the same week.

The Executive noted that the Level 2 provider had confirmed that the price point for the Service was £3 per week, that the Service cost was also stated as £3 per week in promotional material, and that Service messages provided by the Level 2 provider stated the cost was £3 per week.

The Executive noted that within some message logs supplied by the Level 2 provider, there were multiple chargeable entries on the same dates. Below is a summary of a sample of Level 2 provider message logs:

**Level 2 provider message log for mobile number \*\*\*\*\*237**

The Executive noted that the message log for mobile number \*\*\*\*\*237 stated that the complainant opted-in on 12 September 2014, and was first charged on 13 April 2015. The Executive further noted that on 17 April 2015 a second 'BILLED' message was received, followed by a third 'BILLED' message received on 25 April 2015. Thereafter the billing occurred once a week, in line with the £3 per week Service cost.

The Executive asserted that, given the promotional material and Service messages' explicit promotion of a £3 per week service, and the clear evidence in the form of text message logs that the complainant was charged £3 on 13 April 2015 and 17 April 2015, the above complainant clearly would not have consented to being charged twice for the same subscription for the Service.

**Level 2 provider message log for mobile number \*\*\*\*\*919**

The Executive noted that the message log for mobile number \*\*\*\*\*919 stated that the complainant opted-in on 25 September 2014, and like the previous mobile number was first charged on 13 April 2015. The Executive also noted that on 17 April 2015 a second 'BILLED' message was received, followed by a third 'BILLED' message received on 25 April 2015. Thereafter the billing occurred once a week, in line with the £3 per week Service cost.

The Executive asserted that, given the promotional material and Service messages' explicit promotion of a £3 per week service, and the clear evidence in the form of text message

logs that the complainant was charged £3 on 13 April 2015 and 17 April 2015, the above complainant clearly would not have consented to being charged twice for the same subscription for the Service.

Level 2 provider message log for mobile number \*\*\*\*\*424

The Executive noted that the message log for mobile number \*\*\*\*\*424 stated that the complainant opted-in on 26 September 2014 and that the first charge of £3 occurred on 25 April 2015 at 20:03. The Executive also noted that a second 'BILLED' message was issued to the complainant some 37 minutes later, resulting in a total cost of £6 for that day.

The Executive further noted that in the weeks that followed, the complainant was issued two £3 messages per week until they were unsubscribed from the Service. The text message log stated that these 'BILLED' messages were issued on 1 May, 2 May, 8 May, 9 May, 15 May and 16 May 2015.

The Executive asserted that, given the promotional material and Service messages' explicit promotion of a £3 per week service, and the clear evidence in the form of text message logs that the complaint was charged £6 per week from 25 April 2015 to 16 May 2015, the above complainant clearly would not have consented to being charged twice for the same subscription for the Service.

Level 2 provider message log for mobile number \*\*\*\*\*928

The Executive noted that the message log for mobile number \*\*\*\*\*928 stated that the complainant opted-in on 5 September 2014 and that the first charge of £3 occurred on 25 April 2015 at 20:03. The Executive also noted that a second 'BILLED' message was issued to the complainant some 38 minutes later, resulting in a total cost of £6 on the same day.

The Executive further noted that in the weeks that followed, the complainant was issued two £3 messages per week until they were unsubscribed from the Service. The text message log stated that these 'BILLED' messages were issued on 1 May, 2 May, 8 May, 9 May, 15 May and 16 May 2015. The Executive noted that on 22 May 2015 an attempt to bill the consumer failed but the complainant received a 'BILLED' message on 23 May 2015. Thereafter double billing continued with 'BILLED' messages issued to the complainant until 11 July 2015.

The Executive asserted that, given the promotional material and Service messages' explicit promotion of a £3 per week service, and the clear evidence in the form of text message logs that the complaint was regularly charged £6 per week from 25 April 2015 to 11 July 2015, the above complainant clearly would not have consented to being charged twice for the same subscription for the Service.





In response to questioning by the Tribunal, the Executive stated that its primary case was that the previously failed messages which the Level 2 provider stated entitled them to retry billing messages did not in fact occur, but in any event, even if consumers had opted in, they would not have consented to be charged more than £3 per week.

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

2. The Level 2 provider denied the alleged breach. The Level 2 provider stated, in relation to reason 1, that it had already provided a number of various options as to why messages fail. The Level 2 provider asserted that, if it were able to pinpoint exactly why messages failed, it would be very popular within the industry as it believed every provider in the business experienced similar issues. The Level 2 provider asserted that there was almost a contradiction in this breach as the Executive stated that there were some customers who do receive the correct billing messages after subscribing. The Level 2 provider stated that every activity log was treated exactly in the same way when it was requested, and that it downloaded every message that had been sent from its server to the handset whether its status was failed, billed or sent, and these were then forwarded.

In relation to reason 2, the Level 2 provider stated that as there had been a large amount of failed messages after the subscription had commenced, it was well within its rights to attempt to retry to send these messages. The Level 2 provider stated, in relation to each of the cited MSISDNs, its reasons for retrying as follows:

\*\*\*\*\*237 – Failed Message 11/04/2015  
\*\*\*\*\*919 – Failed Message 10/04/2015  
\*\*\*\*\*424 – Failed Messages 18/04/2015 - 11/04/2015 – 04/04/2015 – 28/03/2015  
\*\*\*\*\*928 – Failed Messages 18/04/2015 – 11/04/2015 – 04/04/2015 – 28/03/2015 –  
2\*1.50 messages 21/03/2015 - 2\*1.50 messages 14/03/2015 - 2\*1.50 messages  
07/03/2015 - 2\*1.50 messages 28/02/2015 - 2\*1.50 messages 21/02/2015 - 2\*1.50  
messages 14/02/2015 - 2\*1.50 messages 07/02/2015 - 2\*1.50 messages 31/01/2015.

In informal representations, the Level 2 provider reiterated that it felt the consumer had received the Service for free and as they had consented to be charged £3 per week for the Service they were entitled to retry billing in accordance with its re-billing policy. The Level 2 provider submitted this was a process any company would follow. The Level 2 provider accepted that this policy was not communicated to consumers when they opted in to the Service and it was not in their terms and conditions.

The Level 2 provider submitted that it could provide evidence of opt-ins before the Track 1 procedure and the Executive was aware of this. The Level 2 provider stated that it had refunded 73 complaints and attempted to contact the remaining 22. The Level 2 provider



submitted that if it was found they had breached the Code, this should be on the basis that such a breach was as a result of a mistake and not intentional.

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

In respect of Reason 1, the Tribunal referred to its previous findings regarding breach of para. 4.2.4. The Tribunal found that, in addition to a failure to hold robust and verifiable evidence of consent to charge which was taken and maintained by a third party, there was in fact no reliable evidence that complainants referred to in this case had opted-in to the Service prior to the conclusion of the Track 1 procedure, or at all.

Referring to its above findings and the fact that complainants cited in the case had started receiving charges after the conclusion of the Track 1 procedure, the Tribunal found that this allegation of breach of the Code was not referable to the period prior to the conclusion of the Track 1 procedure.

In respect of Reason 2, the Tribunal noted that it was not contested that some consumers had been charged more than £3 per week.

Referring to its previous findings regarding breach of para. 4.2.4, the Tribunal was not satisfied that the Level 2 provider had in fact previously attempted to send the billable messages to which it had referred. Further, the Tribunal found that even if the Level 2 provider had attempted but failed to send these messages, it would not be permissible to seek to recoup charges which had failed in previous weeks, given the terms of a consumer's opt-in to the Service. Consumers who consented to receive the Service only consented to be charged £3 per week. In accordance with the Code, consumers should be enabled to respond to a weekly charge (to which they had previously consented) by opting out of further weekly charges by sending "STOP". The Tribunal noted that the Level 2 provider had not sought consumers' consent to be "back-charged" in this way, nor had the Level 2 provider given any notice to consumers that it intended to do so.

Consequently, for all the reasons advanced by the Executive, the Tribunal concluded that the Level 2 provider had not provided evidence which established consumers' consent and that consumers had been charged without their consent. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

### **Initial overall assessment**

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

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

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

- The Level 2 provider supplied false and misleading information to PhonepayPlus.
- The nature of the breach was likely to severely damage consumer confidence in premium rate services, in that provision of false and misleading information to PhonepayPlus in the course of its enquiries tends to undermine the regulatory regime

#### 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 1 procedure, which had included requirements regarding 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 May 2015 to November 2015 was in the range of Band 2 (£500,000 - £999,999). 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 fine of £250,000; 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%**

APPENDIX A

Message Log			
Outgoing Non Premium			
Date	MESSAGE	STATUS	CHARGE
25/09/2014 19:39	<a href="http://dreamy-babes.com/?mrn=2eafc6ac7">http://dreamy-babes.com/?mrn=2eafc6ac7</a>	SENT	£0.00
25/09/2014 19:39	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/10/2014 18:46	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/11/2014 19:43	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/12/2014 19:42	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/01/2015 18:28	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/02/2015 18:28	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/03/2015 19:30	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/04/2015 18:15	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
25/05/2015 20:24	FreeMsg: U are subscribed to Dreamy-Babes video service costing £3.00 per week until u send stop to 65025. Service provided by Coretech Need Help? 01213742901	SENT	£0.00
Outgoing Premium			
Date	MESSAGE	STATUS	CHARGE
26/09/2014 19:47	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
26/09/2014 19:47	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
03/10/2014 18:04	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
03/10/2014 18:04	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
10/10/2014 19:07	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
10/10/2014 19:07	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
17/10/2014 18:54	New hot videos are on the way to you, click the link sent to ur phone to access!	ACCEPTED	£1.50
17/10/2014 18:54	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£1.50
24/10/2014 18:49	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
24/10/2014 18:49	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
31/10/2014 18:49	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
31/10/2014 18:49	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
07/11/2014 18:10	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
07/11/2014 18:10	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
14/11/2014 19:49	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
14/11/2014 19:49	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
21/11/2014 18:51	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
21/11/2014 18:51	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
28/11/2014 19:13	New hot videos are on the way to you, click the link sent to ur phone to access!	ACCEPTED	£1.50
28/11/2014 19:13	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£1.50
05/12/2014 19:11	New hot videos are on the way to you, click the link sent to ur phone to access!	ACCEPTED	£1.50
05/12/2014 19:11	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£1.50
12/12/2014 19:08	New hot videos are on the way to you, click the link sent to ur phone to access!	ACCEPTED	£1.50
12/12/2014 19:08	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£1.50
19/12/2014 19:45	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
19/12/2014 19:45	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
26/12/2014 19:47	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
26/12/2014 19:47	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
02/01/2015 18:36	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
02/01/2015 18:36	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
09/01/2015 19:34	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
09/01/2015 19:34	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
16/01/2015 19:49	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
16/01/2015 19:49	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
23/01/2015 19:00	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
23/01/2015 19:00	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
30/01/2015 19:11	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
30/01/2015 19:11	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
06/02/2015 19:58	New hot videos are on the way to you, click the link sent to ur phone to access!	FAILED	£1.50
06/02/2015 19:58	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£1.50
13/02/2015 19:18	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
20/02/2015 19:53	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£3.00
27/02/2015 19:06	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
06/03/2015 18:30	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
13/03/2015 19:32	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
20/03/2015 19:42	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£3.00
27/03/2015 18:06	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
03/04/2015 18:07	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	ACCEPTED	£3.00
10/04/2015 18:03	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	FAILED	£3.00
12/04/2015 19:37	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
17/04/2015 19:01	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
25/04/2015 18:01	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
01/05/2015 18:31	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
08/05/2015 18:42	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
15/05/2015 19:04	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
22/05/2015 18:36	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00
29/05/2015 19:02	<a href="http://dreamy-babes.com/?mrn=934a8a5cc">http://dreamy-babes.com/?mrn=934a8a5cc</a> Need Help? 01213742901	BILLED	£3.00