Tribunal meeting number 193 / Case 1

Case reference:	**79449**
Level 2 provider:	**DSLB Ltd (UK)**
Type of service:	**“Babe Wap TV extra” video / picture subscription service**
Level 1 provider:	**Veoo Ltd (UK); IMImobile Europe Limited (UK)**
Network operator:	**All Mobile Network operators**

THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.5 OF THE CODE

BACKGROUND

The case concerned a video/picture subscription service operating on shortcodes 89250 and 69100 (the “**Service**”).

The Level 2 provider for the Service was DSLB Ltd (“**the Level 2 provider**”). The Level 2 provider has been registered with PhonepayPlus since 27 April 2011.

The Level 1 provider for Service shortcode 89250 was Veoo Ltd (“**Veoo**”). The Level 1 provider for Service shortcode 69100 was IMImobile Europe Limited (“**IMImobile**”).

The Service

The Executive understood the Service to be a glamour video / picture download subscription. The tariff was understood to have initially started at £3.00 per week on shortcode 69100. The tariff was understood to have changed to £2.50 per week following a user migration to shortcode 89250. A description of the Service costs was not supplied by the Level 2 provider. The Level 2 provider confirmed that consumers entered the Service via a mobile originating (“MO”) message opt-in only.

Background to operation of the Service

Based on information from the the Level 2 provider’s ‘Responsible Person’ and text in the message logs, the Executive understood that a further provider **(“the Alternate Provider”)**, had been involved in the provision of the Service. Prior to the formal investigation, the Executive sent numerous formal directions for information in order to make a complete assessment of the Service. However, the responses to the Executive’s directions for information were generally incomplete. Initially, the Executive had been unable to establish which of the providers the complaints related to, due to failures by the Level 2 provider to respond to the Executive’s general complaint requests for information (“**RFI**”). As a result, the Executive requested information relating to a list of MSISDNs and sought clarification on the relationship between both organisations. The Responsible Person for the Level 2 provider confirmed that the initial Service traffic was shared between both organisations until all traffic migrated over to the Alternate Provider. The Executive noted that this was later contradicted by Veoo, who confirmed that the Service had in fact novated from the Alternate Provider to the Level 2 provider on 12

May 2015. The Executive noted that all revenue for the aforementioned complaint period was paid out to the Level 2 provider.

The Executive noted that generally the Responsible Person responded to the directions for information for both the Level 2 provider and the Alternate Provider. The Executive further noted that although it had received responses to formal directions, the failure by the Level 2 provider to respond to the general complaint RFIs continued. The Level 2 provider later attributed this to the ill health of the Responsible Person.

Having regard to the above, the Executive relied on the responses provided on behalf of both organisations.

Summary of complaints

The Executive received 109 complaints concerning the Service between 14 April 2015 and 1 June 2016.

Complainants variously alleged that the Service charges were unsolicited and that they received further charges after sending the STOP command. A sample of complainant accounts is provided below:

"I keep receiving texts from this company at £2.50 a time these are unsolicited unwanted texts as I never signed up for them. I have asked them for a refund or evidence of signing up to them but gave heard nothing. They need to remove my number from their database." [sic]

"Unsolicited charges being taken from my bill as premium text received. I haven't received any of these supposed texts. This number was named in a BBC doc on phone scamming."

"The Above number have charged me £15.50 for a service I didn't want or subscribe to! They have sent me loads of messages but I didn't know I was getting charged intil I saw my bill. Please can you investigate this thank you" [sic]

"Don't know what the service is but seems to be charged several times month. Have never signed up for any subscription services etc"

"I have not knowingly subscribed to this service, and on 2 occasions have text stop to the number in question and after receiving my last bill have seen I have been billed for close to £25 on the month of September and £10 for the month of October, I can provide copies of the bill if needed just not the computer I am using now." [sic]

"I havent applied for any service ever!! Im a 50year old married woman and am very upset about this!! I have replied with the word stop on many occasions but this still continues. This has been going on for over a year now and the anmount that ive been charged has increased every month. I have bank statments and online mobile bills to prove this. And at an estimate i believe the amount ive been charged is around £250" [sic]

Previous complaint resolution procedures

The Level 2 provider had two prior informal dealings with PhonepayPlus:

- Case Reference: 32073

  On 22 July 2014, the Level 2 provider received a Track 1 action plan in respect of a breach of rule 2.4.2 of the Code, as the Level 2 provider accepted that it did not obtain consumers' consent to be marketed to. On 4 August 2014, the Level 2 provider accepted the Track 1 action plan.

- Case Reference: 55408

  On 28 November 2014, the Level 2 provider received and accepted a Track 1 action plan in respect of breaches of rule 2.3.3 (consent to charge) and rule 3.1.7 (inadequate technical quality). In this case, consumers had been charged after sending an incorrect STOP command to opt out of receiving marketing messages.

The investigation

In accordance with the transitional arrangements set out at paragraph 1.8 of the PhonepayPlus Code of Practice (14th Edition), the Executive conducted this matter as a Track 2 procedure in accordance with paragraph 4.5 of the Code of Practice (14th Edition).

The Executive sent a Warning Notice to the Level 2 provider on 8 July 2016, with a deadline for response of 22 July 2016. Within the Warning Notice the Executive raised the following breaches of the PhonepayPlus Code of Practice (the "**Code**"):

- Rule 2.3.3 – Consent to charge (12th and 13th Edition)
- Rule 2.3.11 – Method of exit (12th and 13th Edition)
- Paragraph 4.2.5 – Failure to provide requested information (13th Edition)

The Level 2 provider responded on 26 July 2016. On 2 September 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;
- Complainant message logs from the Level 2 provider;
- PhonepayPlus Guidance on 'Method of exit from a service'; and

- The Warning Notice of 8 July 2016 and the Level 2 provider's response of 26 July 2016

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
Rule 2.3.3 – Consent to charge (12th and 13th Edition)
"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 failed to provide evidence that established that consent for the following reasons:

1. No evidence of consent to charge was provided for the majority of complainants; and

2. The text message logs provided by the Level 2 provider demonstrated that the complainants were charged more than the service cost.

The Executive relied on the message logs from the Level 2 provider, the Level 1 providers, the Verifier, and complainant accounts (referenced in the 'Background' section above).

Reason 1 – No evidence of consent to charge was held for complainants

The Executive noted from the Level 2 provider's response to a direction for information,received by the Executive on 28 October 2015, that the users entered the Service via MO opt-in route only.

The Executive noted from the message logs supplied by the Level 2 provider, that in the majority of cases opt-in information had not been provided, despite the fact that the Executive had requested this information on numerous occasions.

On 15 October 2015 the Executive sent a direction for information that included a requirement to provide evidence of when and how a list of 62 MSISDNs had opted in to receive the Service. On 23 October 2015, the Executive received text message logs for 55 MSISDNs, seven of which were duplicates. However, the Executive noted that only eight of these message logs included the opt-in date and method.

On 26 October 2015 a further request for information was sent requesting the outstanding information. On 28 October a response was supplied by the Level 2 provider, but again the opt-in date and method for the outstanding text message logs was not provided.

On 3 December 2015, the Executive sent a further request for this information. On 21 December 2015 the Level 2 provider confirmed by telephone call and email that the outstanding information would be provided by post. This information was, however, never received by the Executive.

On 12 January 2016, the Level 2 provider confirmed that the information had been reposted but this information was not received by the Executive.

On 26 January 2016, the Executive received a response from a customer service operator at the Alternate Provider. The response included the previously submitted spreadsheet of text message logs for 55 MSISDNs, the majority of which did not include the requested opt-in information.

Given that the majority of text message logs supplied by the Level 2 provider were unclear, 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 15 Vodafone complainant mobile numbers and was requested to supply message logs showing the interaction between the Service shortcodes (69100 and 89250) and the complainants' mobile numbers. Of the 15 text message logs supplied by the Verifier (covering the period January 2011 to April 2016), only ten could be compared with the text message logs supplied by the Level 2 provider (as the Level 2 provider had not supplied text message logs for five of these MSISDNs). The Executive noted from the ten message logs supplied by the Verifier that there was no evidence of any MO opt-ins.

In addition, the Executive contacted IMImobile and Veoo to determine whether consumers had opted in to receive the Service. A total of 15 message logs were supplied by IMImobile and 17 message logs were supplied by Veoo. The Executive noted that the message logs supplied by IMImobile did not include any MO opt-ins. The Executive noted that although Veoo's message logs made reference to MO opt-ins, this appeared to be based on information submitted to Veoo by the Level 2 provider as part of the Service migration process (and the Executive noted further, that in at least six of the message logs supplied by Veoo, the opt-in date was shown as 1 January 1970).

Considering the opt-in method and shortcode (69100), the Executive's view was that there should be a record of MO opt-ins on the message logs provided by IMImobile and the Verifier. The Executive noted however, that this was not the case as there was no evidence of any MO opt-ins on the message logs provided by IMImobile and the Verifier. The Executive therefore submitted that the opt-in information submitted to Veoo by the Level 2 provider was incorrect.

Reason 2 – Complainants were charged more than the service cost.

The Executive stated that its understanding was that when the Service first commenced operation (on shortcode 69100), the price point was £3.00 per week, but this changed to £2.50 per week after the service migrated to shortcode 89250. In the case of shortcode 69100, the £3.00 charge was made up of two £1.50 Service messages per week. In the case of shortcode 89250, the charge was made up of one chargeable Service message of £2.50 per week.

The Executive noted that within some message logs supplied by the Level 2 provider, there was more than one chargeable entry on shortcode 89250 within the same week, and in some cases on the same day.

Level 2 provider message log for mobile number ********621

The Executive noted that the message log for mobile number ********621 stated that the complainant was first charged on 12 April 2015. The Executive noted that after receiving a free message confirming the migration from shortcode 69100 to shortcode 89250, the complainant received a chargeable message of £2.50 on 29 April 2015 and a further chargeable message of £2.50 on 30 April 2015. Then after a three week period of inactivity, two further chargeable messages were received on 26 and 29 May 2015 respectively. This was followed by two chargeable messages on 30 May 2015 and one final charge on 31 May 2015 (five charges in one week).

The Executive asserted that given the indication on the free migration confirmation message that this was a £2.50 per week service, and the clear evidence that the complainant was charged more than this on three occasions, the above complainant would not have consented to being charged more for the same subscription service.

Level 2 provider message log for mobile number ********228

The Executive noted that the message log for mobile number ********228 stated that the complainant was first charged on 12 April 2015.

The Executive noted that after receiving a free message confirming the migration from shortcode 69100 to shortcode 89250, the complainant received a chargeable message of £2.50 on 29 April 2015 and a further chargeable message of £2.50 on 30 April 2015. After a three week period of inactivity the complainant received a chargeable message on 23 April 2015. The following week, the complainant received three chargeable messages, two on 30 May 2015 and one on 31 May 2015. A similar period of inactivity occurred the following month followed by two charges on 23 June 2015, three charges on 27 June 2015 and a further three charges on 30 June 2015 (eight charges in one week).

The Executive asserted that given the indication on the free migration confirmation message that this is a £2.50 per week service, and the clear evidence that the complainant was charged more than this on numerous occasions, the above complainant would not have consented to being charged more for the same subscription service.

The Executive noted this to be a regular occurrence on the Level 2 provider's text message logs.

In light of the above, the Executive asserted that firstly, the message logs did not show a valid opt-in to the Service, and so the Level 2 provider did not have consent to initiate Service charges and had failed to provide evidence that establishes that consent for some complainants, and

secondly, the Level 2 provider had charged some complainants more than the advertised Service price.

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 submitted that it took the breach allegations seriously and was not trying to hide or dismiss them. It stated that it was not interested in running away from the issues and wanted to see them resolved to everyone's satisfaction.

The Level 2 provider submitted that it had a long trading history, both with its suppliers and with PhonepayPlus. The Level 2 provider had requested a meeting to go through the breaches as soon as was acceptable, and to provide alternative evidence of what had actually occurred. The Level 2 provider submitted that it would explain the history between it and PhonepayPlus including numerous past meetings, and submitted that past and current staff of PhonepayPlus could confirm that it had always actively engaged in a healthy and consumer focused attitude to PhonepayPlus' mandate.

In informal representations, the Level 2 provider stated that it took on board some of what had come out in the investigation, some of which it agreed with and some of which it did not. The Level 2 provider submitted that it was only because it had not responded promptly to enquiries that the Executive had looked at the "consent to charge" and "stop" issues.

The Level 2 provider disputed that it did not have evidence of consent to charge. The Level 2 provider stated that consumers would have opted in to the Service via MO but on a previously-used shortcode. The Level 2 provider stated that it had not been attracting new customers to the Service for a year or so. The Service traffic had originally been on IMIMobile, and before that with the Level 1 provider Tanla. The Level 2 provider explained that subscribers confirmed that they wished to enter the Service by sending an MO. It worked with data partners who provided it with opt-ins. Before it was allowed to upload subscribers to Veoo, random checks for opt-ins had been carried out on its subscriber database.

The Level 2 provider stated that when it had proposed to transfer its Service to a new Level 1 provider's shortcode, it had met with PhonepayPlus staff to seek advice on how to do this. The Level 2 provider stated that PhonepayPlus and the Tribunal's advice had been to randomly check the numbers for evidence of opt-in, and to send consumers a text message informing them of the transfer, and reminding them of how to opt-out, and so complainants would have received this reminder message. The Level 2 provider stated it was also advised to send no chargeable message for a couple of weeks after the transfer, with an opt-out reminder 5 days later.

The Level 2 provider stated that it had answered the specific questions asked by the Executive, for example if the Executive asked it for all messages for a user for a certain shortcode, this is

what it had provided. However, this might not include the evidence of consent to charge if this was on an older shortcode for the Service. The Level 2 provider submitted that if it had been asked to give the Executive any messages at all for the MSISDN it would have been more helpful. The Level 2 provider queried why the Executive had asked the question this way when it was fully aware that opt-ins were on previously-used shortcodes. The Level 2 provider submitted that this was not a case of it not having consent to charge evidence or not wanting to provide this. The Level 2 provider stated it had not been clear that this investigation was about consent to charge; until recently it had understood the investigation to relate to delay in providing information. The Level 2 provider stated that in fact it had thought it was appearing to make representations on interim measures.

The Level 2 provider submitted that the complaints represented only 0.06% of the service revenue for the relevant period, and the complainants had all been refunded. The Level 2 provider submitted that Ofcom, a comparable regulator, considered a 2-3% complaint level acceptable. In response to questioning from the Tribunal as to whether it had provided any evidence of refunds given, the Level 2 provider stated it could do so but it had not been asked to; this evidence would be a very large file. The Level 2 provider also submitted that it had voluntarily suspended the Service when put on notice of these proceedings, on 1 July 2016.

In relation to subscribers who were charged multiple times in one billing period, the Level 2 provider submitted that, if billing was missed one week, it could roll over to the next week, but it never charged more than what was due per month. The Level 2 provider submitted that there may have been database glitch errors on the moves from Tanla to Veoo, and that it planned to now migrate to PayForIt to avoid this problem in the future.

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

The Tribunal noted that, in respect of complainants cited by the Executive, the Level 2 provider had not supplied evidence of their consent to be charged.

The Tribunal did not consider that the Level 2 provider's submission that it had provided the information requested by the Executive (and not other information) was strictly accurate. The Tribunal noted for example that in the Executive's correspondence of 3 December 2015 it had stated "the logs provided do not include the opt-in date/time and method (WAP or MO). As I'm sure you're aware, PPP requires this information to ensure that consumers have consented to receive chargeable messages. Please provide this information for all the MSISDNs listed in the direction for information. Please also ensure that moving forward this information is also included when you respond to our standard RFIs". The Tribunal also noted that the Level 2 provider had not provided its evidence of consent in response to the allegations made in the Warning Notice.

The Tribunal considered that it was clear that the Executive had concerns about the Level 2 provider's evidence of consent to charge consumers. The Level 2 provider had had numerous opportunities, including both before and after the Warning Notice was sent, to provide responses to the Executive's queries. It had also had opportunities to respond to the Executive's case,

including its supporting evidence, and had been given a chance to set out what had actually happened, both prior to the hearing and in its oral representations on the day of the hearing, in accordance with the established procedure.

The Tribunal noted the Level 2 provider's submission about what the Executive had asked it to do upon its migration of the Service to a new shortcode, including a suggestion that there were random checks of the consent to charge evidence. The Tribunal understood such advice to relate to the process of migrating the Service from one shortcode to another. The Tribunal did not understand the Executive to have relieved the Level 2 provider of its obligation to hold evidence of consent to charge for every consumer it charged, and to produce that evidence when requested.

In relation to the second reason, the Tribunal, having considered the message logs and the Executive's evidence, found that complainants had been charged more than the advertised costs for the Service, including one consumer who had been charged five times in one week and one consumer who had been charged eight times in one week. The Tribunal considered that the Level 2 provider had not supplied any evidence to refute that this was what had occurred, and its explanation for the charging pattern shown in the logs was unsatisfactory.

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

Decision: UPHELD

ALLEGED BREACH 2

Rule 2.3.11 – Method of exit (12th and 13th Edition)

"Where the means of termination is not controlled by the consumer there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charge to the consumer after exit except where those charges have been legitimately incurred prior to exit."

1. The Executive asserted that the Level 2 provider breached rule 2.3.11 of the Code as some complainants received chargeable messages after sending 'STOP' to Service shortcode 89250.

   The Executive relied on the content of the PhonepayPlus Guidance on 'Method of exit from a service' (the "Guidance"), message logs from the Level 2 provider, Veoo, the Verifier, and complainant accounts (which are referenced in the 'Background' section above).

The Executive noted that chargeable entries were listed in message logs after the STOP command was sent to Service shortcode 89250 both before 1 July 2015 ("Code 12") and after 1 July 2015 ("Code 13"). The Executive therefore considered that both the Code 12 Guidance and the Code 13 Guidance were applicable. The relevant section of the Guidance (which was the same for both Codes) that the Executive relied on stated:

"…2. Use of the 'STOP' command

2.1 The most common and easily implemented system for consumers to exit a service is through the use of the 'STOP' command. This command should be recognised through both the capitals variation of 'STOP' and the lowercase variation of 'stop', and any combination thereof.

2.2 With regard to how the 'STOP' command should work in practice, we consider it best practice that consumers should be able to text 'STOP' to the mobile shortcode the service was initially requested from, or from which it is receiving (chargeable) messages, in order to stop the service. For example, if a consumer enters a service on 89XXX, they should be able to text 'STOP' to that same shortcode to opt out."

The Executive noted that some complainants stated that they recalled receiving chargeable text messages after sending a STOP command. The Executive was concerned that comments made by complainants indicated that some consumers were not able to exit the service as required by rule 2.3.11 of the Code.

The Executive noted that within some text message logs supplied by the Level 2 provider, there were chargeable entries after the STOP command. This was also demonstrated on the text message logs provided by the Level 1 providers and the Verifier. Below is a summary of a sample of Level 2 provider message logs:

Level 2 provider message log for mobile number ********001

The Executive noted that the message log for mobile number ********001 states that on 19 August 2015 two STOP requests were sent to shortcode 89250, followed by two free text messages confirming that the Service had been terminated. However, the Executive noted that the complainant received a further seven chargeable messages. The Executive noted that this was confirmed on the Veoo message log.

Level 2 provider message log for mobile number ********051

The Executive noted that the message log for mobile number ********051 indicates that at 11:52 on 23 June 2016 a STOP message was sent to shortcode 89250, followed by a free text message confirming that the Service had been terminated. However, the Executive noted that the complainant received a further chargeable message at 12:40 on the same day. The Executive noted that this was confirmed on the Veoo message log.

Veoo message log for mobile number ********703

The Executive noted that the message log for ********703 indicates that a STOP command was sent on 28 November 2015 and 7 December 2015. On both occasions, a free text message confirming that the Service had been terminated was sent to the handset. However, the Executive noted that the complainant received a further chargeable message at 18:58 on 19 December 2016. The Executive noted that a further STOP command was sent at 18:59 on the same day followed by another free text message confirming that the Service had been terminated. However, the complainant received a further chargeable message at 00:50 on 20 December 2015. Although the Level 2 provider had not supplied a text message log for this mobile number, these transactions were demonstrated in the text message logs provided by the Verifier.

The Executive therefore asserted that, for the reason listed above, the Level 2 provider had failed to terminate the Service when required. Accordingly the Executive asserted that the Level 2 provider had breached rule 2.3.11 of the Code.

2. The Level 2 provider denied the alleged breach. The Level 2 provider, in informal representations, submitted that it had not had any issues on IMIMobile with the STOP command, and that it seemed to be a problem it had experienced on the Veoo platform. The Level 2 provider was unsure of why this appeared to have happened. The Level 2 provider submitted that it largely saw STOP being processed correctly at its end. The Level 2 provider submitted that if its system was passed correct details by the Veoo platform then consumers who wished to exit the Service would be unsubscribed. The Level 2 provider submitted that these complainants may have slipped through a loophole. The Level 2 provider submitted that Veoo had told it that this was caused by problems at its end which had now been remedied.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal considered that the logs showed consumers being charged, in some cases on multiple occasions, after they had sent the STOP command to the Service shortcode.

The Tribunal noted that the Level 2 provider was unsure why this had happened but referred to it being a problem with Veoo's platform that was now remedied. The Tribunal noted that the Level 2 provider had not supplied any evidence to support this submission, and moreover had not submitted evidence that the Level 1 provider was solely responsible for processing the STOP command.

Consequently, for the reasons advanced by the Executive, the Tribunal was satisfied that the Level 2 provider had charged complainants after they had sent the STOP command and accordingly, the Tribunal upheld a breach of rule 2.3.11 of the Code.

Decision: UPHELD

ALLEGED BREACH 3
Paragraph 4.2.5 – Failure to provide requested information (13th Edition)

"A party must not fail to disclose to PhonepayPlus when requested any information that is reasonably likely to have a regulatory benefit in an investigation."

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.5 of the Code on the basis that it did not disclose opt-in information for the majority of cases when it was requested, which information was likely to have had a regulatory benefit to the investigation.

   The Executive relied on the correspondence and text message logs supplied by the Level 2 provider. As referenced above in the breach of rule 2.3.3 of the Code, the Executive made numerous requests for opt-information for the complaints received. However, the Executive noted that the majority of text message logs supplied by the Level 2 provider did not include the opt-in method and date.

   The Executive required this evidence in order to assess whether the Level 2 provider had adequate consent to charge for the complainants, which was particularly important as the Executive had received various complaints regarding receipt of unsolicited Service messages.

   The Executive asserted that the information required by the Executive from the Level 2 provider was reasonably likely to have had a regulatory benefit to the investigation as without evidence of complainants' opt-in, it is not possible for the Executive to assess whether consumers have in fact given their consent to be charged.

   For the reasons set out above, the Executive asserted that the Level 2 provider acted in breach of paragraph 4.2.5 of the Code as it failed to disclose when requested information that was reasonably likely to have a regulatory benefit in an investigation.

2. In informal representations, the Level 2 provider admitted the breach of paragraph 4.2.5 of the Code. The Level 2 provider submitted that last March its director had been diagnosed with a serious illness which had affected his ability to provide responses in a timely manner to the Executive's investigations. The Level 2 provider submitted that it had been in the industry for 20 years, had met many times with PhonepayPlus, and it was only since the director's health took a turn for the worse that this issue had arisen. The Level 2 provider submitted that prior to this it had proactively sought meetings with PhonepayPlus, in order to make sure that it was compliant.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted the Level 2 provider's admission of this breach on the date of the hearing, and the Executive's evidence of requests for information, which had been made but not complied with in a number of cases, promptly or at all. The Tribunal, having considered the case chronology, noted that this had resulted in the investigation taking longer than it otherwise would have taken.

   For the reasons advanced by the Executive, the Tribunal was satisfied that the Level 2 provider had failed to disclose to PhonepayPlus, when requested, information that was reasonably likely to have had a regulatory benefit in an investigation. Accordingly, the Tribunal upheld a breach

of paragraph 4.2.5 of the Code. In respect of the the element of harm caused by this breach that was replicated in its findings in respect of rule 2.3.3, the Tribunal confirmed that there would be no further sanction.

Decision: UPHELD

SANCTIONS

Representations on sanctions made by the parties

1. The Executive, based on its view that each of the three breaches was "very serious." submitted that the following sanctions were appropriate:

- a formal reprimand;
- a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service;
- a requirement that the Level 2 provider remedy the breach by ensuring that no consumers are charged after sending "STOP" to the Service shortcode;
- 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.

2. In response, the Level 2 provider submitted that all the complainants cited constituted only 0.06% of its service revenue for the period in question, and all of those had been refunded. The Level 2 provider submitted that sanctions totaling £270,000 would be 46 times the amount charged in respect of the complainants, and was therefore unfair. The Level 2 provider submitted that a fine of this amount would put it out of business and it wanted to find a trading solution where it could continue to work with PhonepayPlus. The Level 2 provider did not make any specific representations about the severity rating of the alleged breaches.

Initial overall assessment

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

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 but was unable to provide robustly verifiable evidence of consent to charge;

- The case had a clear and highly detrimental impact on consumers; and
- The nature of the breach was likely to severely damage consumer confidence in premium rate services

Rule 2.3.11 – Method of exit

The initial assessment of rule 2.3.11 of the Code was **very serious.** In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The service had been operated in such a way that consumers had not all been given a suitable method of exiting the service;
- The case had a clear and highly detrimental impact on consumers;
- The nature of the breach was likely to severely damage consumer confidence in premium rate services; and
- Consumers had incurred an unnecessary cost.

Paragraph 4.2.5 – Failure to provide requested information

The initial assessment of paragraph 4.2.5 of the Code was **serious.** In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The service had been operated in such a way that demonstrated a degree of recklessness over non-compliance with the Code; and
- The Level 2 had recklessly provided a limited, or no, response to directions to provide information.

The Tribunal's initial assessment was that, overall, the breaches were very serious.

Final overall assessment

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

- There had been previous enforcement action against the Level 2 provider in the form of a Track 1 procedure, in which issues of non-compliance with Rule 2.3.3 were raised; the Tribunal considered that the Level 2 provider was on notice of the need to be able to provide evidence of consent to charge in order to comply with the Code.

The Tribunal noted that the Executive had submitted that the Level 2 provider had been generally uncooperative and evasive during the investigation, but considered that this aspect of the case was adequately addressed by the finding of a breach of Code paragraph 4.2.5.

The Tribunal did not find any mitigating factors. The Tribunal acknowledged that the Level 2 provider had submitted that it had provided refunds, but noted that it had not supplied evidence to support this

submission. The Tribunal acknowledged that the Level 2 provider had submitted that its director had been suffering from a long-term illness which had impacted on the Level 2 provider's ability to respond to the Executive's investigation. In this regard, the Tribunal noted the nature of the breaches of the Code, and additionally commented that, whilst it had sympathy for the director's personal circumstances, this should not prevent a Level 2 provider from fully cooperating with the Executive as this could be delegated to other employees of the Level 2 provider.

The Level 2 provider's evidenced revenue in relation to the Service in the period from April 2015 to March 2016 was in the range of Band 2 (£500,000 to £999,999).

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

Sanctions imposed

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

- a formal reprimand;
- a fine of £200,000;
- a requirement that the Level 2 provider remedy the breaches:
    - by ensuring that it holds robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service; and
    - by ensuring that no consumers are charged after sending STOP to Service shortcode(s); 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%

The decision of a previous Tribunal on 14 July 2016 to impose interim measures is attached at Appendix A

APPENDIX A

Application for interim measures pursuant to Code of Practice paragraph 4.6

Case ref:	79449
Service:	"Babe WAP TV Extra" glamour video / picture download service
Level 2 provider:	DSLB Limited
Level 1 provider:	Veoo Limited
Cost:	£2.50 per week
Shortcode:	69100, 89250

Adjudication

- The Tribunal has paid full regard to the material supplied by the Executive.
- The Tribunal notes that no representations have been received from the Level 2 provider.
- The Tribunal has paid regard to the Supporting Procedures, including the factors set out at para. 80 and para. 91.

Having considered the evidence before it, the Tribunal has made the following determinations in relation to the Service:

1) The Tribunal, having considered the Executive's evidence of efforts made to effect service of the Interim Warning Notice, is satisfied that PhonepayPlus has made reasonable endeavours to notify the relevant party of its initial findings and the proposed interim measures.

2) At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there appears to be sufficient evidence that could support the following breaches of the Code of Practice:

   - Rule 2.3.3. (12th and 13th edition)
   - Rule 2.3.11 (12th and 13th Edition)
   - Paragraph 4.2.5 – Failure to provide requested information (13th Edition)

3) The Executive had referred to the dissolution of 3 other companies of which the director of the Level 2 provider had also been a director; however the Tribunal does not consider that this, in itself, indicates a high risk of non-payment by the Level 2 provider. Nevertheless, the Tribunal considers that the Level 2 provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. The Tribunal notes in particular:

a) the Executive's comments in its Debt Collection Withhold Assessment regarding:
   i) the Level 2 provider's lack of a credit rating;
   ii) the latest balance and profit figures for the Level 2 provider, dating back to 30 November 2012, showed a small figure for net assets;
   iii) the potential seriousness of the breach, and service revenue, which could result in a higher level of fine;
b) the apparent confusion created regarding whether DSLB Limited or the Alternate Provider. was responsible for the Service; and
c) the Level 2 provider's ostensible failure to co-operate to date with the Executive.

4) The Tribunal notes the factors identified by the Executive which tended to suggest a risk that any enforcement required in due course would be ineffective if an insufficient withhold was imposed. The Tribunal takes into account as guidance the previous adjudications referred to, though comes to its own conclusions as to what would be a sufficient sum to withhold, based on the facts of this particular case.

5) The Tribunal, having considered the Executive's submissions on the appropriate level of withhold to be imposed, considers that the measures set out below are appropriate and proportionate to take in the circumstances of this case:

6) Accordingly in respect of the Service, the Tribunal hereby directs that:

a) PhonepayPlus is authorised to direct a withhold of up to £274,000.

b) The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum authorised in this decision.

c) The Executive is given discretion to vary the total directed to be withheld downwards in the event that it is provided with alternative security which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course are paid.

d) Such interim measures are to be revoked upon the case being re-allocated to Track 1 or otherwise discontinued without sanction.

Mohammed Khamisa QC
14 July 2016