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
198 1.12.16	72416	All Mobile Network Operators	Zamano Solutions Ltd (Ireland) Veoo Ltd (UK)	MarketbyBrand Ltd	Babes2Mobi Glamour video subscription service	Level 2 Provider	Track 2

Between 16 April 2015 and 1 December 2016, the Executive received 347 complaints concerning a glamour video subscription service "Babes2Mobi" ("the Service").

The Level 2 provider for the Service was MarketbyBrand Limited ("the Level 2 provider"). The Level 1 providers were Zamano Solutions Limited and Veoo Limited.

Complainants variously alleged that the service charges were unsolicited.

The Executive raised the following potential breaches of the PSA Code of Practice, 12th and 13th Editions ("the Code")

1. Rule 2.3.3 – Consent to charge
2. Rule 2.3.12(d) and rule 3.12.5 – Subscription spend reminders

The Tribunal upheld the breaches of the Code raised. The Level 2 provider's revenue in relation to the Service was in Band 1 (£1,000,000 plus). The Tribunal considered the case to be very serious and imposed a formal reprimand, and a total fine of £400,000 comprised of a fine of £250,000 in respect of the breach of rule 2.3.3 and a fine of £150,000 in respect of the breach of rule 2.3.12(d). The Tribunal also imposed a requirement that the Level 2 provider remedy the breaches by (a) ensuring that it has robust verification of each consumer's consent to be charged before making any other charge to the consumer, including for existing subscribers to the Service and (b) ensuring that all consumers are provided with subscription spend reminders. The Tribunal also imposed a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made.

Administrative charge recommendation: **100%**

Tribunal meeting number 198

Case reference:	72416
Level 2 provider:	MarketbyBrand Ltd
Type of service:	"Babes2Mobi" glamour video subscription service
Level 1 provider:	Zamano Solutions Ltd (Ireland)
	Veoo Ltd
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 glamour video subscription service ("the **Service"**), which operated across shortcodes 66033, 88150, 82999 and 87221.

The Level 2 provider of the Service was Marketbybrand Limited ("the **Level 2 provider**"). The Level 2 provider had been registered with Phone-paid Services Authority ("**PSA**") since 3 June 2011.

The Level 1 provider for Service shortcode 66033 was Zamano Solutions Limited ("**Zamano**"). Zamano had been registered with PSA since 3 June 2011. The Level 1 provider for Service shortcodes 88150, 82999 and 87221 was Veoo Limited ("**Veoo**"). Veoo had been registered with PSA since 17 August 2011.

The Service was a glamour video subscription service charged at £3 per week. The Executive understood that consumers entered the Service either via a wireless application protocol ("**WAP**") or by Mobile originating ("**MO**") opt-in.

According to the Level 2 provider, the Service promotional campaign commenced in November 2013. The Service was operational at the date of Tribunal.

The Executive noted from complainant message logs supplied by the Level 2 provider that users of the Service opted in to the Service on Zamano shortcode 66033. Some users were subsequently migrated to Veoo shortcodes 88150, 82999 and / or 87221. The Executive noted that the partial user migration from shortcode 66033 to shortcodes 88150, 82999 and / or 87221 was staggered over a period of time. Veoo had confirmed that shortcode 87221 was now the only dedicated Veoo shortcode running the Babes2Mobi Service.

The Level 2 provider supplied a summary and screen grabs of the intended operation of the Service (**Appendix 1**).

Summary of complaints

The Executive had received 347 complaints in respect of the Service since 16 April 2015.

Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts are provided below:

"I have never subscribed to this or the other number associated with this company. Since March 2015 they have been charging my account £12-15 per month. I reemphasie that I have never knowingly opted in to any of their services. I would like the number reported and also reembursed the £75 to date that this.company has charged me.... [sic]"

"I was sent text messages by this company, for which I never subscribed or requested. Looking for ways to stop these messages, I searched the phone number on the Internet and I was horrified to find I was being charged £3 for each unsolicited message I had been sent. I was unprepared to send the 'STOP' message as it may alert the company that this was an active number and my details may be passed on to other companies, and also because I would probably be charged."

"Thankfully, I found this out quite early and, to date, I think I have been charged £6. I am supposedly going to receive a refund, having contacted the company. However, THIS IS THEFT!!!!!!!!!"

"I want these criminals prosecuted. There is no way I would ever subscribe to anything like this, certainly no way would I pay to receive any message of any sort. How these people can be allowed to get away with this is beyond belief."

"Unsolicited text from this company charged at £2.50 per message received. Not happy that i have been charged by a third party without my knowledge or consent. EE refuse to refund as it is not them who have charged. [sic]"

"'Opt out' only offered, which I first treated as spam to confirm my 'phone number so I ignored. The company proceeded to charge my account without permission. I NEVER subscribed, though since identifying the theft, and taking advice from Talk Mobile I sent "STOP" to 66033 and Talk Mobile say they have blocked (why didn't they do that to start with or verify my permission?) [sic]"

Track 1 Procedure

On 6 June 2014 the Executive issued a set of required actions (the "**Action Plan**") to the Level 2 provider under the Track 1 procedure. Within the action plan the Executive alleged a breach of rule 2.3.3 of the Code for the failure of the Level 2 provider to hold robust evidence verifying consumer opt-ins to the Service.

As part of the Track 1 action plan, the Executive required the Level 2 provider to confirm what provision they had taken, or intended to put in place, in order to obtain robustly verifiable evidence of consumers' consent to be charged.

The Level 2 provider accepted the Track 1 action plan on 13 June 2014 in respect of the breach of rule 2.3.3 of the Code, and in doing so the Level 2 provider accepted that it did not hold robust verification to establish consumer consent to be charged.

The allegation of a breach of the Code, subsequent to the previous Track 1 investigation, relied upon evidence gathered from complainants who first contacted the Executive after the Track 1 procedure was finalised in June 2014. The Executive noted however that it continued to receive complaints alleging lack of consent to charge after the Track 1 procedure was finalised, and well into the third quarter of 2016. The logs subsequently provided by the Level 2 provider suggested that such complainants opted-in to the Service prior to the Action Plan being agreed.

Interim Measures

On 30 August 2016 the Code Adjudication Panel ("**CAP**") considered an application by the Executive for the imposition of interim measures. A Withhold of £277,000 of Service revenue was imposed.

The Investigation

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

The Executive sent a Warning Notice to the Level 2 provider on 24 October 2016 with a deadline for response of 10 November 2016. Within the Warning Notice the Executive raised the following breaches of the PSA Code of Practice (the "**Code**"):

- Rule 2.3.3 (12th and 13th Edition) – Consumers must not be charged for PRS without their consent. Level 2 providers must be able to provide evidence which establishes that consent
- Rule 2.3.12 (a) (12th Edition) and rule 3.12.5 (13th Edition) – For all subscription services, once a month, or every time a user has spent £17.04 plus VAT if that occurs in less than a month, subscription spend reminders must be sent free to subscribers

The Level 2 provider responded on 11 October 2016. The Tribunal reached a decision on the breaches raised by the Executive on 1 December 2016. 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 provider;
- Correspondence between the Executive and GoVerifyIt;
- Screenshots of Babes2Mobi website;
- Sample complainant message logs and;

- General Guidance Note 'Privacy and consent to charge' in support of the Code of Practice, 12th Edition and General Guidance Note 'Consent to Charge' in support of the Code of Practice, 13th Edition
- Previous Track 1 procedure documentation;
- The Warning Notice dated 24 October 2016 and attachments;
- Level 2 provider response to Warning Notice dated 11 October 2016 and representations on sanctions;

Submissions and Conclusions

Preliminary Issues

On 30 November 2016, the Level 2 provider applied for the case to be adjourned from 1 December 2016 to another Tribunal date, because its Director was unavailable due to personal family reasons.

The Chair of the Tribunal carefully considered the written application, together with the Executive's written response. Having done so, the Chair refused the application on 30th November 2016. In reaching that decision, the Chair took into account the late stage in the proceedings at which the adjournment request was being made. The Chair's view was that the reasons advanced for the adjournment at such a late stage were not sufficiently substantial. In addition, the Chair noted that it was open to the Level 2 provider to appoint a consultant, representative or senior employee of the company to attend in the Director's stead. The Chair's view was that, when considered in the round, it was not in the interests of justice or proportionate to adjourn the matter when these other options were available. Accordingly, the application to adjourn the case was refused.

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 the Level 2 provider had not provided sufficient evidence to establish consumers' consent to be charged. The Executive noted that the evidence supplied by the Level 2 provider in order to establish the consent of complainants who had entered the Service through the WAP opt-in route was not verified by an independent third party and was not incapable of being tampered with.

The Executive noted that opt-in and billing dates shown in the Level 2 provider's message logs occurred both in the period that the PSA Code of Practice, 12th Edition was in force, and in the time period after the PSA Code of Practice, 13th Edition came into force. Given that rule 2.3.3 was effectively identical in the two versions of the Code that were in force when complainants incurred Service charges, the Executive had raised an alleged breach of rule 2.3.3 of both the 12th and 13th Editions of the Code.

The Executive relied upon correspondence exchanged with the Level 2 provider, the complainant accounts, the General Guidance Note 'Privacy and consent to charge' in support of the Code of Practice, 12th Edition (the "Code 12 Guidance") General Guidance Note 'Consent to Charge' in support of the Code of Practice, 13th Edition (the "Code 13 Guidance") and text message logs.

The Executive outlined the relevant sections of the Code 12 Guidance which stated:

"2. What is robust verification of consent to charge?

2.1 Robust verification of consent to charge means that the right of the provider to generate a charge to the consumer's communication bill is properly verifiable (see section 5 below). By 'properly verifiable', we mean a clear audit trail that categorically cannot have been interfered with since the record, either of consent to purchase or simply of consent to future marketing (see Part Two for guidance around consent to marketing), was created.

For charges generated by entering a mobile number on a website

For the avoidance of doubt, this section applies to the consent evidence required for services initiated from a web page and where premium SMS is the chosen billing mechanic. This section does not apply to 'web' Payforit.

2.5 Some services are initiated by a consumer entering a mobile number on a website, or a mobile website (i.e. a website browsed on the mobile handset). In recent years, consumers have not appreciated that doing so can result in a charge being generated to their mobile device, or that the entry of their number can be taken as being consent to future marketing by the provider concerned.

2.6 As a result, some consumers have entered a mobile number belonging to someone else (either by mistake or deliberately) and this has generated a charge to a second – unwitting – consumer. Even if there are no chargeable messages, just free marketing messages, the unwitting consumer often feels that their privacy has been invaded (see Part Two for further information around marketing).

2.7 For this reason, we recommend that consumers should always be encouraged to initiate services, or future marketing, with an MO. Failing that:

• All costs should be clearly stated and be proximate and prominent to the field where the consumer is to enter their number;

• After entering the number, a Mobile Terminating message ('MT') should be sent to the consumer. As an example this should state:

"FreeMsg: Your PIN is [e.g. 0911], please delete if received in error"

2.8 An MT message, in these circumstances, should not promote the service itself (e.g. use its name), or give the consumer the option to reply YES to initiate the service. In addition, this method would require robust systems for verifying any PIN once entered (see paragraph 2.12 below for further details).

2.9 It is more difficult to verify where a charge is generated by a consumer browsing the mobile web, or by using software downloaded to their device. In these circumstances, where the consumer may only have to click on an icon to accept a charge, the MNO has no record of an agreement to purchase, and so robust verification is not possible through an MNO record alone.

2.10 In both of the instances set out above, we would expect providers to be able to robustly verify consent to charge (or to marketing, see Part Two of this General Guidance Note). Factors which can contribute to robustness are:

• An opt-in is PIN-protected (e.g. the consumer must enter their number to receive a unique PIN to their phone, which is then re-entered into a website);

• A record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);

• Records are taken and maintained by a third-party company which does not derive income from any PRS. We may consider representations that allow a third-party company which receives no direct share of PRS revenue from the transaction, but does make revenue from other PRS, to take and maintain records. It will have to be proven to PhonepayPlus' satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;

• PhonepayPlus is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed), and real-time access to this opt-in data upon request. This may take the form of giving PhonepayPlus password-protected access to a system of opt-in records;

• Any other evidence which demonstrates that the opt-in cannot be interfered with.

2.11 Providers who are considering using a method of verifying consent to charge, which employs a method that does not involve independent Network operator records of consent, are advised to contact PhonepayPlus before they begin to operate it."

On the 26 May 2015, a direction for information was issued to the Level 2 provider, which directed that they provide evidence of when and how a sample of 5 MSISDNs opted into the Service. In response to this direction, the Level 2 provider provided "MO/Mobile Terminating ("**MT**") logs" and stated that the relevant details were enclosed in these logs. The Level 2 provider further confirmed that *"opt ins are in a form of WAP and MO. Additionally WAP procedure relies on external company who verifies the consent to charge and maintain secure records of opt ins."*

The Executive noted, upon reviewing the MO/MT logs, that they were standard Excel logs which simply showed a link within the initial MT message. The Executive asserted that the logs provided did not contain evidence of how and when the complainants opted in to the Service and therefore that they did not amount to robust evidence of opt-ins by the complainants.

On 9 September 2016, the Executive contacted GoVerifyIt (GVI), a verification service engaged by the Level 2 provider, to check whether it held verification of opt in data for a sample of 16 MSISDNs supplied by the Executive. GVI confirmed that it held no verification records for the list of MSISDN's supplied.

The Executive also sought clarification from GVI in respect of a separate statement that had been made by the Level 2 provider to the Executive during the Track 1 procedure, which was:

"…For the numbers in question, we are able to provide offline opt in date mark ups due to server issues that affected the (HTTP) connection with GVI system. The failure resulted from our server capacity and latency issues and subsequent downtimes that occurred…"

The Executive had received the following response from GVI in regarding the Level 2 provider's statement:

"… I have checked emails and we have no record of integrations problems or issues. They may well have had problems, but I don't have a record of it."

On 30 September 2016, the Executive wrote to the Level 2 provider raising its concerns that a breach of rule 2.3.3 of the Code had occurred, as GVI did not hold evidence of Service opt-ins, and the evidence supplied by the Level 2 provider did not robustly verify that complainants had consented to the Service charges.

On 7 October 2016 the Level 2 provider responded to the Executive as follows:

"To our best knowledge all subscribers joined our service via 3rd party channel being GVI version that was available to us. We are not sure why we and yourself encountered an issue there – please let us investigate this further allowing more time i.e. 5 working days to provide you with full detailed report."

On 10 October 2016, following a direction by the Executive to provide further information and clarification, the Level 2 provider provided a further response to the Executive's concerns as follows:

"I have now finally received an update from my tech support. In the light of and in addition to already highlighted issues we encountered with our system (elaborated within our long term correspondence) it was explained that landing page requests would have been very likely to time out during loading (i.e. straight after user would enter advertisement and decided to visit service site). After a fixed and set limit of loading time was exceeded and service page was loading for unreasonable period of time, such page request would have been handled by Market by Brand pin-protected render hosting service. Thanks to this safe back up method, we could have avoided page display time outs that would lead potential service subscribers to our competitors' services/ advertisements. This solution proved to be efficient and may we assure that consumer protection was a top priority for Market by Brand development in this area. The key aspect was to provide service without delay and I am certain that everyone on in their life could recall a situation when the internet page was loading too long and this issue caused just switching off the page, choosing different site from for example Google search engine. [sic]"

The Executive submitted that, despite the Level 2 provider's assertions, there was no evidence that data relating to the WAP opt-ins for complainants had been held by a third party at any stage, either before or after 22 June 2014, and the opt-in data supplied had not been held in a way which meant that it categorically could not have been tampered with since creation.

The Executive submitted that the full version of the GVI service, if used, provided sufficiently robust evidence of consent to charge and the purported system downtimes

did not absolve the Level 2 provider of the requirement to not charge of consumers if it did not hold adequate evidence of their consent. The Executive further submitted that there was no evidence that the Level 2 provider had contacted GVI or had acted promptly to resolve any difficulties or to implement an adequate system. The Executive noted that, in any event, the Level 2 provider's logs indicated that each of the complainants had opted in to the service prior to the Track 1 procedure.

The Executive asserted that the evidence of consent supplied by the Level 2 provider was not sufficiently robust to comply with the Code's requirements and that, given the nature of the complaints received, the complainants in respect of the service did not in fact opt-in.

The Executive submitted that the Level 2 provider had charged consumers in the period after the Track 1 procedure had concluded on 13 June 2014, despite knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers. Furthermore, there was no evidence that the Level 2 provider had taken any adequate steps after the Track 1 procedure was finalised to obtain robust evidence of consent to charge in relation to the complainants before making such charges. The Executive submitted that, when the Level 2 provider charged consumers after June 2014, it must have been aware that it did not hold the required robust third party verification of consent to charge consumers who had opted-in, if indeed they had opted in, before June 2014.

In response to questioning by the Tribunal, the Executive clarified that the previous Track 1 procedure had been email-based, and that all relevant Track 1 information had been included in the Tribunal paperwork. The Executive confirmed that its understanding had been that the Level 2 provider had implemented the full version of GVI when the previous Track 1 procedure was finalised in April 2014. The Executive had subsequently been informed that GVI was not fully implemented by the Level 2 provider until around March 2015. The Executive directed the Tribunal to the relevant correspondence between the Level 2 provider and the Executive dated 13 September 2016. The Executive confirmed the identity of the director of the Level 2 provider and confirmed that he was the sole director, but the Executive could not provide the Tribunal with any further background information about the company or its officers.

For the reasons set out above, the Executive asserted that the Level 2 provider had acted in breach of rule 2.3.3 of the Code.

2. The Level 2 provider accepted the breach in part and only to the extent that it was not in a position to supply the Executive with evidence that established consent to charge for the fraction of subscribers that were the subject of the Executive's investigation. The Level 2 provider explained that it held evidence of user consent in every instance, however this was based on internal records and not an outside partner, such as ETX or its alternative. The Level 2 provider expressed its disappointment that the Executive did not agree to acknowledge the validity of in-house company opt in records which were pin inclusive. The Level 2 provider understood that the Executive was obliged to strictly

follow the rules of Code of Practice without any variation and it therefore accepted that the breach occurred in the limited sense set out above.

The Level 2 provider denied that it did not establish consent to charge of mobile users upon joining the subscription as all the service subscribers in question had completed the appropriate opt in process and agreed to the Terms and Conditions of the service, which all clearly stated that the fee that was to be deducted from airtime via premium SMS billing.

The Level 2 provider explained that server issues experienced across specific periods of time, accompanied by an imperfect system which was unable to connect to the ETX framework in full, resulted in opt in flows being redirected to an internal verification system, disabling ETX flow on these particular instances. It had applied a solution, and changed server to one located in the UK territory and this fact had been explained to the Executive. The Level 2 provider highlighted that these were past unfortunate events, which had been concluded with a fortunate server change.

The Level 2 provider submitted that any subscriber who changed their mind and wished to leave the service, was treated with understanding and its full attention, including the operation of a flexible refund policy that allowed good will gesture refunds on any occasion where a valid claim for a refund was made. It submitted that proof of issued refunds had already been provided to the Executive and that, as refunds were ongoing, a fresh itemised list was available to the Executive upon request.

The Level 2 provider wished to underline that it had been operating as a Level 2 provider under the Code rules for many successful years and that there had been no breach history connected with the company, which had been confirmed by the due diligence of the Level 1 provider who gave the Level 2 provider a low risk label.

It was submitted by the Level 2 provider that the explanation it had provided regarding the ETX system was consistent with the statement expressed by ETX officers to the Executive, whereby they confirmed that the offline version of the verification of opt in flow was the type offered and available to providers at the time of the events which were the subject of this case.

The Level 2 provider stated that, in order to show its will for cooperation with the Executive and to remedy the suggested breach which might have occurred unintentionally, it could offer the Executive the solution of sending a special service message to subscribers, following which it would continue to charge only those subscribers who responded with transparent, repeated consent to remain members of the subscription in question. The Level 2 provider stated that this solution would eliminate further complaints and limit potential consumer harm to zero.

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 robust verifiable evidence of their consent to be charged. The Tribunal noted that the Level 2 provider was asking the Tribunal to rely upon its

own internal documents in order to establish the consent of consumers to be charged. However the Tribunal did not consider these documents to be robust, independent or verifiable.

The Tribunal considered that the Level 2 provider's submission that it had been "*a victim of technical software and hardware faults that had prevented the full online ETX system from operating undisrupted*" lacked credibility.

The Tribunal noted that the Level 2 provider had previously assured the Executive, in relation to the previous Track 1 procedure, that they would be closely monitoring the service to ensure compliance in the future. The Tribunal noted for example that, in its correspondence of 8th April 2014, the Level 2 provider had stated that "*the full online version of GVI is implemented and is something we check more frequently to make sure all our services are fully compliant*" and that the Level 2 provider had indicated it had taken "*all possible measures to limit the consumer harm…and carried on constant monitoring of our system to make sure it ties up with our 3rd party verification scheme*". The Level 2 provider had also confirmed in the correspondence that it would be "*keeping a very close eye on our new server to keep any teething problems that may arise from the new upgraded hardware to an extreme minimum".*

The Tribunal considered that, given the nature of the previous Track 1 procedure, which dealt with identical concerns relating to the lack of evidence of consent to charge consumers, this type of activity was the very thing the Level 2 provider had previously assured the Executive that it would closely monitor for. For this reason, the Tribunal did not accept that the technical problems the Level 2 provider claimed to have experienced were undetectable as it had suggested.

The Tribunal considered that the Level 2 provider had been given ample opportunity to provide a full account of the technical issues it had experienced, together with supporting evidence, but had failed to do so. The Tribunal noted for example that in response to the Executive's correspondence of 3 August 2016 and 30 September 2016, the Level 2 provider had not provided an explanation of its technical difficulties which was cogent or convincing. For example, whilst the provider had provided some information about the processes that had gone wrong, it had not adequately explained the reasons why this had happened.

In any event, the Tribunal considered that the evidence about the Level 2 provider's technical difficulties did not assist in determining whether or not a breach of rule 2.3.3 had occurred, as technical difficulties did not absolve the Level 2 provider of the need to hold robust, verifiable evidence of consent to charge consumers.

The Tribunal noted that the third party verifier, GVI, had not been able to verify consent to charge in respect of the sample of MSISDNs the Executive had supplied. Whilst the Level 2 provider had stated in its correspondence of 8th April 2014 that it had implemented the full online version of GVI, in its later correspondence to the Executive of 13th September 2016, the Level 2 provider had contradicted this by stating that it had not "moved to full GVI" until "around March 2015". The Tribunal also noted that when the Level 2 provider had been asked to produce contracts with GVI, it had failed to do so.

The Tribunal was satisfied that the Executive's submissions were compelling and accurate, by contrast they did not find the Level 2 provider's submissions to be substantial, credible or supported by evidence.

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 the complainants had been charged without their consent. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: Upheld

Alleged Breach 2

Rule 2.3.12(d) – Subscription Spend Reminders (12th Edition)

"For all subscription services, once a month, or every time a user has spent £17.04 plus VAT if that occurs in less than a month, the following information must be sent free to subscribers:

(i) the name of the service;

(ii) confirmation that the service is subscription-based;

(iii) what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent;

(iv) the charges for the service and how they will or can arise;

(iv) how to leave the service; and

(vi) Level 2 provider contact details."

Rule 3.12.5 – Subscription Spend Reminders (13th Edition)

"Any reference to compliance with the rules or obligations under this Code shall include compliance with all specified amounts, call durations and actions set by PhonepayPlus under paragraph 3.12.1. (below). A breach of any specified amount, duration or action set under that paragraph shall be a breach of the Code."

"PhonepayPlus may, in relation to the service categories set out in paragraph 3.12.2 below, specify:

(a) the service charges which may be spent per call or calls taken together in any 24 hour period or monthly billing cycle,

(b) the duration permitted for a call or calls to a service in any specified time period,

(c) the actions which must be taken at specified intervals, or after specified service charges or call duration have been reached, including but not limited to:

(i) The provision of a spend or call duration reminders;

(ii) The immediate termination of the service after provision of a spend or call duration reminder unless the consumer positively confirms a wish to continue to use the service;

(iii) The immediate termination of the service."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.12(d) of the Code (12th Edition) and rule 3.12.5 of the Code (13th Edition), as subscription reminder messages were not issued to some complainants.

   The Executive relied upon correspondence from the Level 2 provider, the text message logs and complainant accounts.

   The Executive made reference to the Notice of Specified Service Charges and Duration of Calls published in accordance with paragraph 3.12.6 of the Code (13th Edition) .

   The Executive noted that some complainants had not realised that they were incurring Service charges until they had viewed their telephone bills and that this lack of awareness of the Service charges on the part of complainants likely indicated that Service subscription reminders were not being issued as required.

   The Executive further noted that the Level 2 provider had confirmed in its correspondence with the Executive of 10th May 2016 that message failures had indeed occurred , which were due to the fact that the:

   "Server Migration window was set up for limited time for database security reasons and although the migration was regarded as successful, the changeover window was closed prior migration completion leaving the very last batch of subscribers still on old server database. This last small batch was moved afterwards, however the credentials were outside of whitelist scope therefore even though sending trigger was assigned to them (on new server located in UK) as an automatic effect, any attempt to send a weekly message to such subscriber group was default to failure."

   The Executive submitted that it was the Level 2 provider's responsibility to send free spend reminder messages to subscribers, as required by the Code.

   The Executive submitted that the evidence suggested that a significant portion of subscribers did not receive subscription reminder messages. The Executive further submitted that this failure had contributed to the level of consumer harm as, had consumers received spend reminder messages as required, they would have been empowered to opt out of the service and possibly complain to the Executive at an earlier stage.

   The Executive asserted that, for the reasons outlined above, the Level 2 provider had failed to issue subscription reminder messages to complainants when required and had therefore breached rule 2.3.12(d) of the Code (12th Edition) and rule 3.12.5 of the Code (13th Edition).

2. The Level 2 provider denied the breach.

The Level 2 provider submitted that it had been placed in a position where it was unable to identify instances where service reminder messages were not sent to subscribers. The Level 2 provider submitted that this matter had never been highlighted by the Executive during the investigation and the reason for this was that there had not been an issue in this aspect. The Level 2 provider stated that the Executive had not cross checked its information or its doubts about whether spend reminder messages had been sent with either the Level 2 or Level 1 providers.

The Level 2 provider submitted that all service reminder messages were distributed to subscribers where it was appropriate and technically possible. The Level 2 provider stated that, in order to show its will for cooperation with the Executive and to remedy the suggested breach which might have occurred unintentionally, it could offer the Executive the solution of sending a special service message to subscribers, following which it would continue to charge only those subscribers who responded with transparent, repeated consent to remain members of the subscription in question. The Level 2 provider stated that this solution would eliminate further complaints and limit potential consumer harm to zero.

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

The Tribunal noted that the Level 2 provider appeared to be neither accepting nor denying the breach. The Tribunal also noted the Level 2 provider's submission that it had been placed in a position where it was unable to identify instances where spend reminder messages were not sent.

The Tribunal considered the complainant accounts, noting that in one instance a consumer had been charged in excess of £120.00 for chargeable text messages before realising that they had been subscribed to the Service.

The Tribunal also noted that the Level 2 provider had admitted in its previous correspondence with the Executive that attempts to send weekly messages to some subscribers had been "defaulted to failure". The Tribunal further noted that the Level 2 provider had not rebutted the Executive's submission that a significant proportion of subscribers would not have received subscription spend reminders.

For these reasons, the Tribunal was satisfied that a significant proportion of subscribers to the Service did not receive subscription spend reminders when required by the Code, and that the Executive's submissions in respect of the alleged breach were accurate. Accordingly the Tribunal upheld a breach of rule 2.3.12(d) of the Code (12th Edition) and rule 3.12.5 of the Code (13th Edition).

Decision: Upheld

Sanctions

Representations on sanctions made by the Executive

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

- a formal reprimand;
- a fine of £350,000;
- a requirement that the Level 2 provider remedy the breach and
- general refunds (4.8.3 (i)) to all consumers who have used the Service based on an initial assessment of breach 1 as "very serious" and breach 2 as "serious".

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

Rule 2.3.12 (d) (12th Edition), Rule 3.12.5 (13th Edition) – Subscription Spend Reminders

The initial assessment of rule 2.3.12(d)/3.12.5 of the Code was **very serious.** In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

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

Final overall assessment

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

- The Level 2 provider had been subject to a previous Track 1 procedure in respect of the same issues, and had agreed to an action plan which appeared to have not been adequately implemented.

The Tribunal did not find any mitigating factors.

The Level 2 provider's evidenced revenue in relation to the Service in the period from July 2014 to July 2016 was in the range of Band 1 (£1,000,000 +).

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

Sanctions imposed

The Tribunal considered that the Level 2 provider had engaged in repeatedly and deliberately non-compliant conduct in that it had been subject to a previous Track 1 procedure in respect of the same issues, yet the Track 1 Action Plan did not appear to have been adequately implemented.

The Tribunal noted that the Executive had initially assessed the breach of rule 2.3.12(d) to be serious. However, the Tribunal considered this breach to be very serious in light of the circumstances of this case and, in particular, the Tribunal's findings that the Level 2 provider did not hold robust verifiable evidence of consumers' consent to be charged, and that the complainants in this case did not consent to be charged. Viewed in this context, the Tribunal considered that the breach of rule 2.3.12(d) resulted in greater harm and greater potential harm to consumers, because consumers who had not consented would have been less likely to identify that they were being charged in the absence of spend reminders.

Having regard to all the circumstances of the case, including the high service revenue generated, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a total fine of £400,000 (£250,000 in respect of breach 1 and £150,000 in respect of breach 2) ;
- 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 the PSA that such refunds have been made; and
- a requirement that the Level 2 provider remedy the breaches by (a) ensuring that it has robust verification of each consumer's consent to be charged before making any other charge to the consumer, including for existing subscribers to the Service and (b) ensuring that all consumers are provided with subscription spend reminders.

Administrative charge recommendation: 100%

The summary of the intended operation of the Service supplied by the Level 2 provider is attached at Appendix A.

The decision of a previous Tribunal on 30 August 2016 to impose interim measures is attached at Appendix B.

Appendix A

The Level 2 provider's summary of the intended operation of the Service

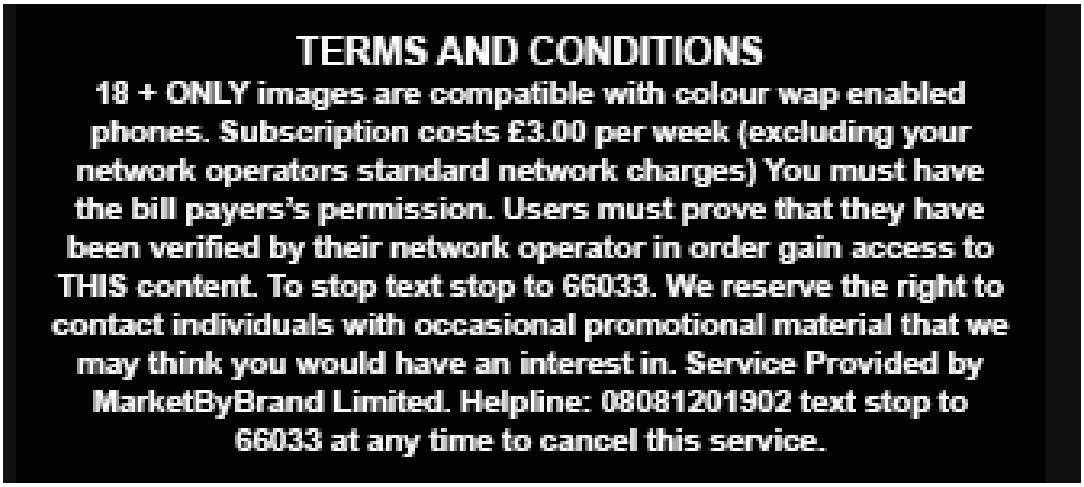
"*Service Babes2Mobi billing mechanic relies on reverse charge text messages sent to subscribers. Weekly charge of £3.00 is debited from handset credit through 1 text message priced at £3.00. Amount of these weekly premium messages depends on a price point attributed by UK Carriers and from 2015 there has been a limit for amount of premium messages sent to subscribers on one billing event. Messages sent by users to short codes are priced at standard UK carrier amounts, which varies between £0.10 - £0.15 and are network dependant. Subscribers may also be charged for using internet on their phones but this is a standard procedure and they are using either wi-fi that they have on Contract or data package which is charged at fixed amounts and subscribers are always informed about the price upon switching the Mobile Data usage on their phones. Of course there are also circumstances where wi-fi network is free of charge – at what we commonly name 'hot spots'.*

Full Terms and Conditions include costs and explanation on network charges. They do not limit to price information only though – but include: helpline in case subscribers wish to get in touch and require more information on service provisions, service brand name, charge frequency, privacy disclaimer and lastly very important guidance on unsubscribe from service should there be such decision made at any point of ongoing Babes2Mobi membership.

Promotions are handled by banners that have been designed for live promotions which enable potential subscribers accessing Babes2Mobi service while browsing internet on handsets."

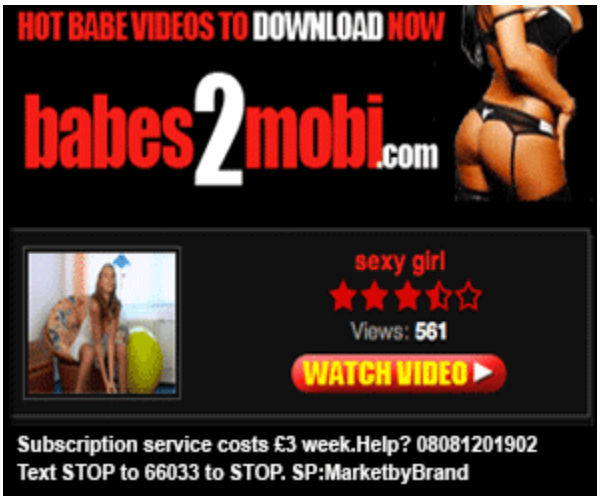
Short Terms that are visible in proximity to call2action:

Full Terms that are visible on screen without necessity to scroll down the page:



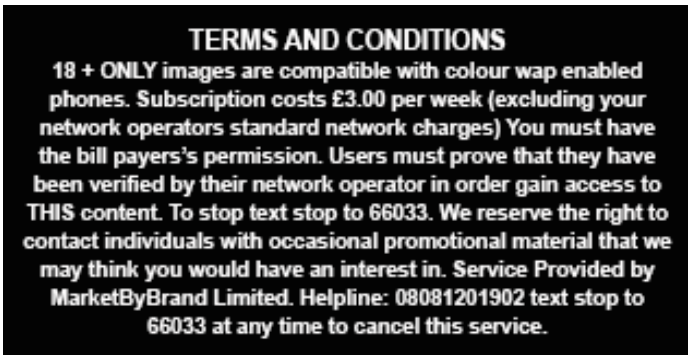
Promo material:

1st stage of Customer journey – standard branded banner ad



2nd stage of Customer journey – standard branded number enter display

Full Terms underneath number enter display



Standard MO keyword display

Standardsubscription confirmation free text

FreeMsg:You joined Marketbybrand subscription service at £3 week. Text STOP to 66033 to STOP. Help? 08081201902 SP MarketbyBrand

Standard subscription free text sent every calendar month

FreeMsg: U R subscribed to the MBB subscription service at £3 week, until U text STOP to 66033. Help? 08081201902 SP MarketbyBrand

Standard weekly charge of £3.00 premium text example

http://babes2mobi.com/enter/?pin= *(unique for subscribers)* for help call 08081201902

Standard stop confirmation free text in response to 'STOP' message received from subscriber

FreeMsg: You are now unsubscribed from this service, thank you.

Appendix B

Application for interim measures pursuant to Code of Practice paragraph 4.6

Case ref:	**72416**
Service:	**"Babes2Mobi" glamour video subscription service**
Level 2 provider:	**Marketbybrand Ltd**
Level 1 providers:	**Zamano Ltd, Veoo Ltd**
Cost:	**£3 per week**
Shortcodes:	**66033, 88150, 8299 and 87221**
Tribunal number:	**192**

Adjudication

1. The Tribunal has paid full regard to the material supplied by the Executive. In respect of the material submitted by the Executive, the Tribunal noted in particular:

   a) 297 complaints had been received about the Service after the last procedure against the Level 2 provider, the latest being on 18 July 2016;
   b) There was a history of previous Track 1 action against the Level 2 provider for charging consumers without having robust evidence of their consent;
   c) The nature of the apparent breach referred to by the Executive, including their submissions on the lack of robust third party verification of consent for charges; and
   d) The information in the Debt Collection Withhold Assessment.

2. The Tribunal has paid full regard to the representations provided by the Level 2 provider. The Tribunal noted in particular that:

   a) The Level 2 provider had not taken the opportunity to cover all of the points suggested in the "response" section of the interim warning notice;

   b) The Level 2 provider's representations focussed on its complaints handling processes rather than any steps taken to stop complaints arising;

c) The Level 2 provider had not supplied evidence of robust third party verification of consent to charge consumers and had indicated that it did not hold this evidence due to technical problems, but this did not excuse them of the need to provide it;

d) No evidence had been provided to show when the Level 2 provider had started using the full GoVerifyIt service

e) Following the previous Track 1 procedure, the Level 2 provider had not resolved the issue of an apparent lack of robust third party verification of consent to charge consumers (i.e. there was no evidence of what the Level 2 provider was doing to prevent charging of consumers who had been opted into the service prior to the implementation of the full GoVerifyIt service).

f) No evidence about the likely effect of a withhold on the Level 2 provider had been provided.

3. The Tribunal has paid regard to the Supporting Procedures, including the factors set out at paragraph 80 and paragraph 91.

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

4. At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there does appear to be sufficient evidence that could support a breach of Code of Practice rule 2.3.3.

5. The Tribunal does consider that the Level 2 provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. The Tribunal notes in particular:

a) The Level 2 provider is a company based in the UK with a 8 year trading history, however;

b) The Tribunal takes into account the Executive's comments in its Debt Collection Withhold Assessment regarding:

i) the Level 2 provider's most recently filed 2014 accounts which showed insufficient funds to pay such refunds, administrative charges and financial penalties that the Tribunal may impose in due course;

ii) the Level 2 provider's history of the delayed filing of accounts and the previous discontinued strike off actions by Companies House which suggested the company was not being well run;

iii) the lack of a credit rating, which of itself the Tribunal did not consider to be evidence of a lack of sufficient resources, but which did evidence a failure by the Level 2 provider to build up a positive credit score during its trading history;

iv) the Level 2 provider's compliance history, including the prior Track 1 procedure in June 2014;

v) the potential seriousness of the breaches, and service revenue, which could result in a higher level of fine;
vi) The Level 2 provider's failure to provide any evidence to show that it could pay any financial penalty that may be imposed.

6. The Tribunal is satisfied that PhonepayPlus has made reasonable endeavours to notify the Level 2 provider of its initial findings and the proposed interim measures.

7. Noting the previous cases referenced by the Executive, the Tribunal considers that the estimated fine is a reasonable assessment at this stage of a sanction which may be imposed by a Tribunal in due course, noting the volume of complaints, service revenue, and nature of the apparent breaches. The Tribunal considers that the measures set out below are appropriate and proportionate to take in the circumstances of this case.

8. Accordingly, the Tribunal hereby directs that:

a) PhonepayPlus is authorised to direct a withhold of up to £277,000.

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.

LINDA LEE
30 AUGUST 2016