

Tribunal meeting number 178 / Case 1

Case reference: 72414
Level 2 provider: Modena Solutions Limited (UK)
Type of service: Sexy-Hunnies glamour video subscription service
Level 1 providers: IMImobile Europe Limited (UK); Veoo Limited (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

The case concerns a glamour video subscription service, charged at £3 per week, operating on dedicated shortcode 65002, and shared shortcodes 82999, 88150 and 88177 (the "**Service**").

The Level 2 provider for the Service was Modena Solutions Limited (the "**Level 2 provider**"). The Level 1 provider for Service shortcode 65002 was IMImobile Europe Limited ("**IMImobile**"). The Level 1 provider for Service shortcodes 82999, 88150 and 88177 is Veoo Ltd ("**Veoo**").

Between 5 March 2015 and 11 November 2015, the Executive received 77 complaints concerning the Service. Complainants variously alleged that the Service charges were unsolicited.

The investigation

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

The Executive sent a breach letter to the Level 2 provider on 11 November 2015. Within the breach letter the Executive raised the following breaches of the PhonepayPlus Code of Practice (the "**Code**"):

- Paragraph 4.2.4 – Provision of false information to PhonepayPlus
- Rule 2.3.3 – Consent to charge
- Rule 2.3.11 – Method of exit
- Paragraph 3.4.12 – Failure to register a number

The Level 2 provider responded on 30 November 2015. On 14 January 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 a Mobile Network operator's verifier;
- Correspondence between the Executive and a Third Party Verifier;
- Complainant message logs from the Level 2 provider, Level 1 provider and Mobile Network operator's verifier;
- Complainant questionnaires and responses;
- PhonepayPlus Guidance on 'Method of exit from a service';
- The breach letter of 11 November 2015 and the Level 2 provider's response of 30 November 2015 including annexes;
- Further correspondence between the Level 1 providers and the Executive dated 6 January and 7 January 2016; and
- Two further written submissions supplied by the Level 2 provider dated 13 January 2016.

The Service

The Service was stated to be a glamour video subscription service charged at £3 per week. The Executive understood that consumers could enter the Service either via a mobile originating ("MO") opt-in or a wireless application protocol ("WAP") opt-in.

The Level 2 provider confirmed that the WAP element of the Service commenced operation in April 2014 and was currently operational on three of the Service shortcodes.

IMImobile confirmed that the Service commenced operation on shortcode 65002 on 27 September 2013. The Executive understood that this date only applied to the MO element of the service. All elements of the Service were suspended by IMImobile in September 2014.

Veoo confirmed that all elements of the Service commenced operation on shortcode 88150 on 20 May 2013 and on shortcode 82999 on 16 January 2015. Veoo did not provide a Service commencement date for shortcode 88177; however, the Executive noted that 88177 was a new shortcode, having only been registered with PhonepayPlus on 24 August 2015.

Complainant message logs supplied by the Level 2 provider showed that users of the Service opted in to the Service on shortcode 65002. All Service users were then migrated to either Service shortcode 88150, or Service shortcode 82999. Further, the Executive noted that the user migration from shortcode 65002 to shortcode 88150 or 82999 was staggered over a period of time.

The Level 2 provider supplied the following summary of the promotion and operation of the Service:

"... Towards the end of April 2014 we decided to launch and market a MSISDN BOX service. We initially thought that the best way to attract subscribers would be to have them enter through a double Opt In method, where simply inputting [sic] a MSISDN does not activate a subscription but



leads the user to then click on a WAP link that is sent to them, clearly highlighting all terms in the link that is sent to the MSISDN.

When we launched and marketed our MSISDN BOX we used banners to promote this and then direct people to our site.

[Screen Shot One]



Browser the [sic] clicks on the promoted banners and get redirected to our landing page.

[Screen Shot Two]

This is a subscription service costing £3.00 per week.
This unlimited download service is provided by ModenaSolutions. Help number 01424572016
Text STOP to 65002 to opt out.
Remember - you must be at least over 16 years old to use this service.
Any questions? Email or call us directly:
E: admin@modenasolutions.com

To subscribe to this service, please enter your mobile number

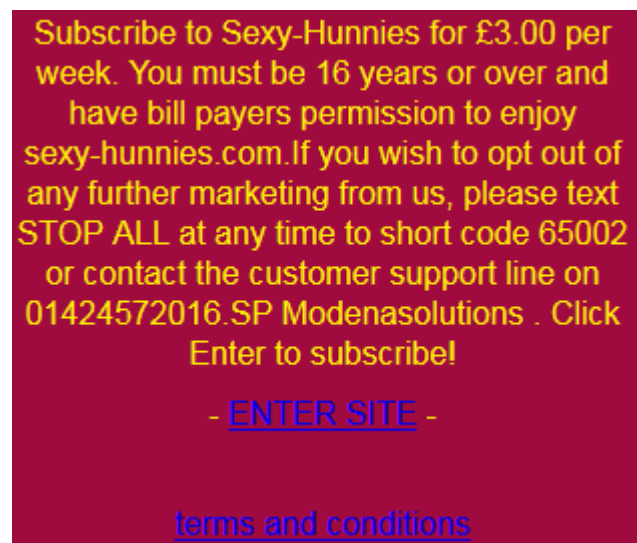
Please enter your mobile number in international format E.G. 449876543210.

Please tick the box below to confirm that you accept the terms of this service and you are over 16.

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If the user is still interested in starting a subscription they are then asked to input their MSISDN into the box provided, in doing so they will then receive a direct WAP link.

[Screen Shot Three]



On entering into the service they are then sent a FREE join message TWO billed messages and a FREE monthly reminder message. The browser can leave the subscription service at any time they choose and can simple [sic] send in a STOP to our shortcode that will see them receive nothing further other than a FREE message stating they have left the service."

The Executive noted that all complaints received related to WAP opt-in. As the Executive's investigation focused on this method of entry to the Service, the Level 2 provider was not requested to provide an explanation as to how consumers would opt-in to the Service via the MO route.

Complaints

The Executive had received 77 complaints concerning the Service since 5 March 2015. Complainants variously allege that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

"It appears to be a link to an adult service which I have not followed! I have not requested ay of these services. They are entirely unsolicited and I have received two charges of £3.00 each message from Vodafone and I consider this scandalous that someone/anyone can just send me a text and I get charged £3.00 per text!! I do not charge or get charged when I send or receive texts from family or friends so how can this charge arise?" [sic]"



"I'm receiving, and being charged £2.50 per message, texts from this number. It is not something I have signed up to receive, and I do not know how to stop these offensive and unwanted messages. So far I have been charged £10.83 for receiving these unrequested texts."

"From what I can gather, this service offers pornographic material. This was not signed up to & i received this out of the blue. [sic]"

"I wish to make this complaint as I have not signed up to this service so I am being charged £3 per week for this messages that have not been wanted." [sic]"

"I have rung EE, they have told me I am getting charged for a Text message service 82999, I have never signed up for any service."

"Don't know what the service is but seems to be charged several times month. Haven't ever signed up for any subscription services etc" [sic]"

Complainant text message logs

During the preliminary investigation, the Level 2 provider supplied text message logs for 68 out of the 77 complaints received. The Executive noted from the text message logs supplied by the Level 2 provider that:

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

The Executive noted that in these logs, failed messages occurred from the date of the complainants' purported opt-in. The failed messages were later followed by successfully delivered chargeable messages.

The Executive noted that where the purported opt-in occurred on shortcode 65002, all but three logs indicated a 100% message failure rate on this shortcode. For these logs, chargeable messages were only successful after user migration to shortcode 88150 or 82999.

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

Complainant responses to the Executive's questionnaire

In light of the high number of failed messages identified by the Executive in the complainants' text message logs and the possible explanations offered by the parties in the value chain for the failed messages, on 14 September 2015 the Executive contacted 74 complainants (the total number of complaints received by PhonepayPlus about the Service as at that date) with the following series of questions:

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



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

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

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

In addition the complainants were sent a copy of Screen Shot One and Screen Shot Two (as shown above) and asked whether they recalled viewing and/or interacting with it or a similar service promotion. As at 11 November 2015, the Executive had received responses to the questionnaire from 15 complainants. A breakdown of the responses received from complainants is set out below :

Question	Response	Comments
Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go?	9 respondents confirmed they were on contract No respondents confirmed they were on pay-as-you-go	2 of the respondents did not respond to this question
If the mobile phone that was charged is pay-as-you-go, please advise whether you regularly / always had more than £3 credit on your mobile phone?	N/a	
Please advise whether the mobile phone that received the chargeable messages was regularly switched off and/or had no mobile signal for long periods of time (i.e. for more than several days)?	8 respondents advised their mobile phone was not regularly switched off and/or had no mobile phone signal	1 respondent advised that their phone was switched off at night 2 of the respondents did not respond to this question
Please advise whether you transferred your mobile number between mobile telephone companies in the six months before you received the chargeable text messages? If yes, please confirm if you	8 respondents advised they had not transferred between mobile companies 1 respondent advised they	2 respondents did not respond to this question



experienced long periods with no signal and/or difficulty in sending and receiving text messages	had transferred between mobile companies	
Please advise if you recall viewing and interacting with the attached, or a similar, promotion?	10 respondents advised that they did not view / interact with the Service promotion	1 respondent did not respond to this question

Previous complaint resolution procedure

On 9 January 2015, the Level 2 provider accepted a Track 1 action plan in respect of a breach of rule 2.3.3 of the Code, as the Level 2 provider accepted that it did not hold robust verification to establish consumers' consent to be charged between May 2014 and January 2015. On 22 January 2015, the Level 2 provider confirmed that it had implemented the required actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge.

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

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 4.2.4 – Provision of false information to PhonepayPlus

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

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.4 for the following reasons:
 1. Message logs supplied by the Level 2 provider were false; and
 2. The Level 2 provider provided misleading information relating to the date on which robust third party verification for the Service commenced.

Reason 1– Message logs supplied by the Level 2 provider were false;

- i. Failed chargeable Service messages listed in the Level 2 provider message logs were not sent (or attempted to be sent) to complainants

The Executive relied on correspondence exchanged with the Level 2 provider, the Level 1 providers, complainant accounts (which are referenced in the 'Background' section above), complainant questionnaire responses and text message logs.



The Executive noted that the complaints received by PhonepayPlus following the Track 1 procedure spanned the period between March 2015 to October 2015. Further, it noted from complainant text message logs supplied by the Level 2 provider that the apparent opt-in date for those complainants was consistently shown in all message logs as occurring between August 2014 and November 2014 regardless of when the complaint was received. Yet in the complainant message logs, the date of the first successfully charged Service message was significantly later than the purported date of Service opt-in.

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

Level 2 provider message log for mobile number *****126

The Executive noted that the provided log showed that the initial opt-in to the Service occurred on 26 September 2014. The subscription confirmation message stated:

"FreeMsg:U have joined Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena Solutions Need Help? Call 01424572016"

The Executive noted from the message logs supplied by the Level 2 provider that the status of the Service messages were variously described as 'FAILED', 'BILLED', 'SENT' or 'ACCEPTED'. The Level 2 provider however clarified that messages listed as 'SENT' and 'ACCEPTED' were pending, as a positive message delivery receipt had not been received from its aggregator, meaning that the messages had not been received by consumers.

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages on shortcode 65002 were listed as either 'FAILED' or 'ACCEPTED'. The first Service message listed as 'BILLED' was on shortcode 82999 (after the Service had migrated to Veoo) and was delivered on 12 April 2015, more than six months after the purported opt-in date.

Level 2 provider message log for mobile number *****753

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

"FreeMsg:U have joined Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena Solutions Need Help? Call 01424572016"

The Executive noted that following the above entry in the message log, the status of all chargeable Service messages on shortcode 65002 was listed as either 'FAILED' or 'ACCEPTED'. The first message listed as 'BILLED' was on shortcode 82999 (after the



Service had migrated to Veoo) and was delivered on 25 January 2015, almost four months after the purported opt-in date.

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

The Executive contacted the Level 1 providers for a sample of 24 complainant message logs. Although the logs provided by the Level 2 provider revealed a purported opt-in on Service shortcode 65002 followed by a series of failed messages, IMI mobile did not provide matching message logs for the complainants, and stated there had been no interaction on shortcode 65002 (save for one consumer's message log).

The logs supplied by Veoo confirmed that the first chargeable Service message on the Level 2 provider logs generally occurred after the Service had migrated to Veoo.

In order to obtain further clarification on the message failure issue, the Executive contacted Mobile Enterprise Ltd (the "Verifier") which has access to mobile data held by the Mobile Network operator Vodafone Limited ("Vodafone"). The Verifier was sent a sample of 17 Vodafone complainant mobile numbers and was requested to supply message logs showing the interaction between the Service and the complainants' mobile numbers.

The Executive noted from the 17 message logs supplied by the Verifier that generally the first message log entry occurred on the same date that successfully charged Service messages were shown within the Level 2 provider messages logs, and that no failed messages were shown in the period after the purported opt-in. For example the Verifier log for *****126 listed the first Service message on 12 April 2015, and the Verifier log for *****753 listed the first Service charge on 25 January 2015.

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

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

"I believe there to be a number of reasons why the messages might fail which I have looked to highlight to you. Firstly there subscriber may well not have enough credit on the phone for the message to be processed. Secondly the phone may have been turned off for a period of time and the message may not be able to land. Thirdly I believe that while attempting to market



several different services and while trying to implement pinchecked into our systems we have experienced large issues with incorrect network codes and billing information being processed by our platform. It has not been until further investigation into the number of subscribers that we had and the billing success we were seeing where we decided to do network checks that we noticed that we were trying to send out billing messages / free subscription messages / monthly reminder messages to incorrect networks codes associated with each subscriber that we started seeing successful messages to our subscribers. Fourthly when we send out messages there can be a number of network downtime leading the messages to fail, further to this there can be a large amount of messages sent to our aggregator and then after being in a queue for so long they automatically fail...." [sic]

The Executive sought further clarification from the Level 2 provider on this matter. On 8 September 2015 the Executive received the following response:

- i. "Please provide the date that the issue with incorrect network codes and billing information being processed by the Level 2 provider's platform was identified and what action was taken to remedy it."

"There was no particular date as such that we identified the issue on a whole, from the screenshot that we sent over in our previous response we became very aware that there were a number of messages failing. We became concerned as to the reason for this but could not identify the cause nor pin-point it to anything specific. We believed, and still do, that there are a number of causes for messages failing as mentioned in our previous response. With the money that we were spending on advertising and the number of subscribers in previous months we expected our revenues to be higher. In March 2015 we decided on a course of action which involved pulling subscribers that had entered into our services and appeared to have very high failure rates, with these numbers we performed a routine network verification to first make sure the phone was still active; if not active we were going to unsubscribe them as they were only appearing as failures. It was at this point that we noticed a discrepancy with the networks attached to each subscriber. We decided to migrate the subscribers to a new aggregator in batches in order to confirm whether or not that was the cause of the problem, which did prove to be the case."

The Level 2 provider stated that as a result of the high failure rate of messages it decided to migrate users to a new Level 1 provider, however the Executive noted that complainants appear to have been migrated to Veoo from as early as November 2014

- ii. "Please provide evidence of the Level 2 provider's internal investigation into the issue. Please include all internal and external correspondence in relation to this investigation."

"Oh [sic] a whole this had been completed internally, we were seeing good results from our marketing allowing for all the factors of failed messages it was not until we started noticing high failure costs on invoices that we start looking further into this. We started completing the process above in March of this year and believed the fault to be with our server rather than our Level 1 provider."

The Executive sought further clarification from the Level 2 provider on its internal investigation into the incorrect network code issue. On 8 October 2015 the Executive



received the following response to its request that the Level 2 provider provide evidence of the Level 2 provider's internal investigation into the issue, including all internal and external correspondence in relation to the investigation.

"As previously stated we performed network searches on the subscribers that had a very high failure rate it was at this stage of an internal investigation that we noticed the network issue. Evidence of our own investigation can be seen via our Veoo portal I have provided a screenshot of the network verifications..."

The Executive submitted that the Level 2 provider had not provided sufficient evidence to prove that an issue had occurred on its system.

The Executive also made enquiries to IMI mobile and Veoo regarding the high failure rate of chargeable Service messages.

IMI mobile response:

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

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

However, with the Level 2 provider on shortcode 65002, it is likely that due to IMI mobile having taken action to suspend the Level 2 provider in advance of our decision to terminate the Gateway Agreement (contract), that the client was still attempting to send messages through our platform and that the enforcement of the suspension blocked them from being successfully billed."

The Executive considered the possible explanation provided by IMI mobile regarding the Service suspension but noted that message logs provided by the Level 2 provider indicated that the message failures shown in logs were occurring prior to the Service suspension. Accordingly, the Executive had ruled out this explanation as a possible reason for the high failure rate of messages.

Following receipt of the Level 2 provider's explanation, the Executive requested IMI mobile's comments on a possible 'network coding issue' and (prior to the breach letter being sent) it received two responses (the second a more detailed response after IMI mobile had consulted its technical team).

[Level 2 provider statement] – "I believe that while attempting to market several different services and while trying to implement pinchecked into our systems [sic] we have experienced large issues with incorrect network codes and billing information being processed by our platform."

First response:

a. To me this could be down to migrated numbers. So Modena have not had any update or know what network the end user is on other than the original one that had. So when the PSMS is sent to O2 as that was the original MNO for the end user, who has then ported to Vodafone. So O2 correctly says not on our network usually with the “unknown subscriber” error.

b. We would be pushing back the [delivery receipt] to Modena and they should check the response. If they knew what the code meant they might do a IMSI lookup on the number to confirm or get the end user to send a message in to their short code or ask IMI to send the message out to the know MNO instead of using their own. We would not always know the right MNO either if no MO had been sent into to IMI’s platform since porting.”
[sic]

Second response:

Our Technical Support Group team have looked in detail at the Modena traffic that went across the IMImobile platform. We can see that there was an issue with incorrect network codes being processed by Modena, at times reaching as high as 20% of their attempted traffic. [IMImobile provided a graph of SMS messages for the Service, based on days with over 1000 PSMS MT sent for the Level 2 provider, which showed a slow trend of increased volume being sent to wrong operators from 5 July 2014].

“Specifically, the Executive would be grateful if IMImobile would confirm whether it was aware of large issues with incorrect network codes or billing information being processed by the Level 2 provider’s platform”

Please see response to part 1 above.

“If there were such issues, please supply any evidence and/or correspondence that IMImobile has regarding these issues.”

Modena would have received the Delivery Receipts for the messages that were failing due to them having the wrong MNO. The Delivery Receipts from us would have come with a “Status 11 Unknown Subscriber”.

In response to IMImobile’s explanation above, the Executive sought clarification on whether IMImobile would have a record of an attempt to send messages to the consumer on an incorrect network code:

“The Executive notes IMImobile’s response in relation to incorrect network codes being processed by Modena. It is noted that in the months of July, August and September 2014, there was an increase in the number of messages failing due to incorrect networks. It is the Executive’s understanding that IMImobile would have a record of these failed messages



and that this would be reflected on any message logs provided. Please confirm if this is correct.”

This is correct.

The Executive asserted that incorrect network coding cannot be a reason for the failure of messages. The Executive noted that if messages had failed as a result of an incorrect network code, IMImobile’s logs would have had a record of the failed messages, but they do not.

The Executive sought further clarification from IMImobile on the possibility of the message failure issue being due to ‘network downtime’, as was suggested by the Level 2 provider. IMImobile stated:

- i. Please confirm whether IMImobile were aware of there being an issue regarding network downtime or messages being held in queue.

We have not found a single message which expired on our platform, so no downtimes have been recorded and therefore we did not fail to submit the messages to the operators (some expired at MNO but that is natural if user isn’t active).

- ii. If there were such issues, please supply any evidence and/or correspondence that IMImobile has regarding these issues.

N/A

- iii. The Executive’s understanding is that IMImobile would have a record of these failed messages on its logs if network downtime and/or lengthy queueing were an issue. Please confirm if this is correct.

“That is correct.”

The Executive submitted that network downtime cannot be a reason for the message failures, as IMImobile would have had a record of the failures in its logs, but they do not.

Although Veoo did also provide a response to the Executive’s queries, because most of the failed messages occurred on the IMImobile shortcode, it was not able to provide a comprehensive response on the issue.

In response to questioning by the Tribunal, the Executive stated that it was not aware of what an approximate normal message failure rate for a service would be. However based on the Level 1 provider’s responses, it believed that failures would show in the Level 1 provider’s logs.

Consequently for the reasons stated above, the Executive submitted that the possible explanations for the failed messages provided by the Level 2 provider cannot be correct.



Further, the Executive relied on the complainant accounts, and the complainant responses to the Executive's questionnaire (referenced in the 'Background' section above). The Executive considered it highly unlikely that the complainant accounts, and those complainants who responded to the complainant questionnaire stating that they never interacted with the Service website, were unfounded.

The Executive noted from the previous Track 1 procedure that the Level 2 provider asserted that it did not have robust verification prior to 19 January 2015. The Track 1 procedure was created in part to address the issue of consent to charge that had occurred during the third and fourth quarters of 2014. The Executive noted however that it continued to receive complaints about consent to charge well into the third quarter of 2015. The Executive's view was that by inserting failed messages into logs and creating artificial opt-in dates in the period prior to closure of the Track 1 procedure, the Level 2 provider had attempted to persuade the Executive that a consent to charge breach arose only in a limited period, and that the scope of such a breach was confined to a lack of independent third party verification, as opposed to a wider allegation of unsolicited charges.

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

- ii. Service messages on the Level 2 provider message logs for complainants do not correspond with the logs provided by the Level 1 providers.

The Executive noted from the logs supplied by the Level 2 provider and Veoo that there were some discrepancies with the shortcodes that were used. For example, the Level 2 provider message log for *****375 indicated that a subscription reminder message dated 6 May 2015 was sent from shortcode 82999. This however appeared to be incorrect as the message log provided by Veoo indicated that the reminder message was sent from 88150. The Executive noted at least six further examples of this in a sample of 15 logs.

The Executive sought clarification from Veoo on this discrepancy and received the following response:

The responsibility for setting the originator on bulk messages such as the confirmation of opt-in, confirmation of opt-out and reminder messages lies with the L2 provider. This discrepancy would lie with the L2 Provider sending messages with the wrong shortcode as the header of the message. During our compliance testing, there have been instances where we have noticed this and notified the L2 provider. Please refer to attachment 'Email from Veoo to Modena re wrong shortcode'

The Executive noted that where the Level 2 provider has amended the message header, it had failed to include the correct shortcode (88150) on its call logs.



Furthermore, the Executive noted from the logs supplied by the Level 2 provider and the Level 1 providers that there were discrepancies with the service exit messages. For example, the Level 2 provider log for *****753 indicated that the service exit message dated 26 March 2015 was sent from shortcode 82999 which was not reflected on the message log provided by Veoo. In fact, according to IMImobile this text message was sent from shortcode 65002.

Reason 2 – the Level 2 provider provided misleading information relating to the date on which robust third party verification for the Service commenced

The Executive referred to the previous Track 1 procedure against the Level 2 provider. The Executive noted that during the preliminary investigation that resulted in the initial Track 1 procedure, the Level 2 provider was asked to provide robust evidence of consent to charge for complainants. The Level 2 provider did not provide this.

The Executive noted that on 22 January 2015, the Level 2 provider had confirmed that it had implemented the Track 1 action plan and had engaged the services of PIMS-SCA Limited (“**PIMS-SCA**”) to verify Service opt-ins via its consumer consent verification service (“**PinChecked**”). The following response was received:

“CONSENT TO CHARGE – WAP based Service(s)

Firstly regarding the first point, we have been looking at ways to ensure we can show a verifiable trail of how a user subscribes to our service. Initially, on the advice that we sought within the market we were aiming to get subscribers to enter using a double Opt-In method , where simply inputting a MSISDN does not activate a subscription but the user then has to further click and agree with terms and conditions that are sent via a WAP link to the MSISDN. After further research and of my own understanding of the PhonepayPlus COP I realised that we needed a further level of security and I sought this in the form of the company Pinchecked who I had seen where themselves verified by PhonepayPlus. We have integrated this into our system and the URL for this service is <http://www.sexy-hunnies.com/?id=PV3cf166>.”

The Executive sought further clarification from the Level 2 provider on the exact date that it had implemented Pinchecked. The Executive asked the Level 2 provider to confirm the date it began using the full version of the Pinchecked service to verify consent to charge, and on 16 September 2015 received the following response:

“We implemented Pinchecked on all our services on 19th January 2015.”

The Executive wrote to PIMS-SCA on 24 August 2015 to obtain information on the Level 2 provider’s account. PIMS-SCA confirmed that the PinChecked service had been available for the Level 2 provider to use from 18 June 2014 and that the first PINs were sent on 23 June 2014. The Executive obtained further evidence of this through PinChecked’s online system which provided the date PINs were requested as well as the verification success rate of each request.



The Executive asserted that in light of the responses received from the Level 2 provider, the Executive was misled into believing that the Level 2 provider did not have robust verification in place for the period that the Track 1 procedure related to, and was misled into believing that Pinchecked was not available to it until 19 January 2015. However, it was clear from the information supplied by PIMS-SCA that Pinchecked was in fact available to use prior to this date.

The Executive viewed the Level 2 provider's lack of evidence of robust verification of the Service opt-in for the complainants as more serious than simply not having third party robust verification in place, because the Level 2 provider was aware of the requirement and did indeed appear to have previously used it (as confirmed by PIMS-SCA). However, the Executive noted that the Level 2 provider did not use the third party verification available to it to robustly verify the Service opt-in of all consumers.

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

2. The Level 2 provider denied the alleged breach. The Level 2 provider felt that the inclusion of a target tribunal date along with accusatory language such as "purported opt-in" revealed that rather than providing a factual and impartial investigation regarding the Service, this alleged breach had been founded upon a poor understanding of the technical aspects of the industry, utilised evidence that would be wholly inadmissible in a court of law and had been carried out with a view to finding the Level 2 provider in breach at whatever cost using obfuscation and procuring responses from Level 1 and 2 providers, MNOs and consumers to suit the Executive's position.

The Level 2 provider noted that the adult skew of some of the services it provided was, by their very nature, likely to cause complaints. The Level 2 provider stated that if a consumer's partner found text messages and browser history details on a consumer's phone or queried costs on their bill, the simple answer of "I never signed up to this" would most likely be given. The Level 2 provider asserted that for that reason alone, the veracity of consumer complaints must be questioned. Secondly, the Level 2 provider asserted that the questionnaire carried out by the Executive must also be called into question as it was skewed towards an agenda set by PhonepayPlus rather than an attempt to procure valid information on which to base the investigation. The Level 2 provider therefore rejected the questionnaire and complainants as acceptable evidence.

The Level 2 provider stated that it had previously explained why messages may fail and felt that the Executive's conclusion that logs were falsified as they did not match either the MNO or Level 1 provider's log was invalid. The Level 2 provider stated that messages may fail at any point along the delivery chain and the Level 2 provider would expect to find, as in this instance, messages with incorrect network codes not even hitting the Level 1 provider's server. The Level 2 provider always expected a failure rate averaging 50% and,



presumably as with any other Level 2 provider, it constantly tried to reduce this failure rate and tried to identify the root causes, although this was of course not always possible. The Level 2 provider stated that migration from Veoo to IMI was done in an attempt to reduce the failure rate that the Level 2 provider was experiencing. Furthermore, the Level 2 provider submitted that there were no supporting statements of evidence from the Level 1 providers or MNO's on the volumes or reasons for messages failing. The Level 2 provider submitted that the Executive had merely supposed the reason for failure was due to something spurious, when it wasn't and no evidence had been supplied to suggest otherwise. The Level 2 provider noted that the Code made no reference to technical failure rates nor does the Code or any Guidance propose acceptable levels of failure rates of messages. Without any such guidelines, the Level 2 provider asserted that it appeared to be down to the whim of the Executive as to what constituted an acceptable level of failure or not.

The Level 2 provider stated that it had been implementing Pinchecked across all its services since the summer of 2014 and this process was expedited during the Track 1 procedure to ensure that Pinchecked was used as a robust method of verification for all services. The Level 2 provider asserted that it had therefore fulfilled the directives issued in the Track 1 procedure and no breach had occurred.

In informal representations, the Level 2 provider strongly denied that it had falsified logs. The Level 2 provider submitted that it had experienced a high volume of failed messages. It submitted that technical failures were surprisingly common and more widespread than might be thought. As a result, it had investigated with the MNOs and Level 1 providers to find out potential reasons why that might be the case, and had submitted further evidence to the Tribunal as a result, including two strong scenarios of message failure in its latest correspondence. The Level 2 provider submitted that if messages failed at the Level 2 provider level, the Level 1 provider or Network operator would not be aware, and there was no way they could validate that this happened. The Level 2 provider submitted that it had supplied a number of potential reasons why messages might be failing to the Executive but they had not been explored. The Level 2 provider submitted that there was no evidence that they had falsified logs.

The Tribunal asked the Level 2 provider if it could provide evidence, such as a worked example, to support its contention that the examples of potential technical problems had in fact happened. The Level 2 provider stated that it was unable to do so at this stage.

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

In respect of Reason 1, the Tribunal considered the Executive had compiled a compelling body of cogent evidence to show that the Level 2 provider had falsified message logs which it had submitted to the Executive.

The Tribunal then considered whether the material submitted by the Level 2 provider undermined the case which had been advanced by the Executive. The Tribunal, exercising



its discretion, included in its considerations the late submissions made by the Level 2 provider on 13 January, as it considered it was fair and just to do so in the circumstances of this case.

The Tribunal noted the Level 2 provider's submission regarding acceptable message failure rate. The Tribunal did not determine that there was a message failure rate which was acceptable, but concurred that there may be an average message failure rate. However the Tribunal noted that in respect of the complainants, the Level 2 provider's logs appeared to show a 100% failure rate for a significant period of time. The Tribunal noted that those failed messages did not appear on the Level 1 provider or Verifier's logs.

The Tribunal gave consideration to the potential technical reasons for message failure which had been put forward by the Level 2 provider. The Tribunal noted that the Level 2 provider had not supplied evidence which, firstly, showed that any of these had actually occurred in respect of the complainants, and secondly, that such issues had caused the discrepancies between the Level 2 provider's logs and the Level 1 provider (and Verifier) logs in respect of the complainants. The Tribunal considered that the Level 2 provider had been given opportunities to provide such evidence to substantiate its submissions, but had not done so.

In the absence of this supporting evidence, the Tribunal was not assisted by the Level 2 provider advancing potential reasons for message failure. In the course of oral representations by the Level 2 provider's representative, the Tribunal specifically requested any evidence supporting the assertion that there were technical reasons which would help to explain the significant discrepancy in the logs, but nothing was forthcoming. Further, the Tribunal sought assistance with applying the theoretical modelling (as contained in the Level 2 provider's late submissions dated 13 January 2016) to the facts, but the theories did not assist with providing an explanation for the discrepancy in the logs that was conceded by the Level 2 provider's representative. Therefore, having had regard to the facts of the case, the Tribunal did not consider that the Executive's case was undermined by the material submitted by the Level 2 provider.

The Tribunal considered the Level 2 provider's submissions that the Executive's case (a) was supported by inadmissible evidence; (b) was based on a poor understanding of the technical aspects of the industry; and (c) had been carried out with a view to finding the Level 2 provider in breach at whatever cost using obfuscation. The Tribunal considered that the Level 2 provider had not provided sufficient support for any of these propositions.

In respect of Reason 2, the Tribunal noted that the Level 2 provider had not expressly stated that third party verification was not available to it during the relevant period. However the Tribunal considered that the Level 2 provider's responses on 22 January 2015, and on 16 September 2015, gave the impression to the reader that the PinChecked system had not been used by the provider for this Service prior to 19 January 2015. In fact the Level 2 provider had not only had access to the PinChecked system, it had used it to get a sample of MSISDNs prior to that date. There was no evidence that the Level 2 provider had



corrected this impression by providing a fuller explanation. To that extent, the Tribunal found that the Level 2 provider's response on 22 January 2015 was misleading. The Tribunal considered that, given the Level 2 provider knew it had previously accessed the PinChecked system, the Level 2 provider had provided such a response knowingly.

The Tribunal was satisfied, for all the reasons advanced by the Executive, that the Level 2 provider had knowingly falsified information, and provided false and misleading information to PhonepayPlus.

Decision: UPHELD

ALLEGED BREACH 2

Rule 2.3.3

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code as consumers had been charged without their consent and the Level 2 provider had been unable to provide evidence which established that consent.

Referring to the alleged breach of paragraph 4.2.4 of the Code, the Executive asserted that complainant message logs supplied by the Level 2 provider, which purported to demonstrate that consumers opted-in to the Service in a period when the Level 2 provider did not have operational robust verification of consent to charge, were false.

The Executive noted that the Verifier had provided 17 message logs to the Executive, all of which did not contain failed chargeable Service messages from shortcode 65002. Correspondence with the Verifier suggested that attempts to deliver chargeable Service messages which failed would appear in its message logs. Given the absence of failed chargeable Service messages in the Verifier's message logs, the Executive asserted that the entries in the Level 2 provider's complainant message logs must therefore be false.

Referring to the alleged breach of paragraph 4.2.4 of the Code, the Executive had requested that IMImobile provide message logs for 24 complainants. The Executive noted that IMImobile had provided message logs that did not correspond with those which were supplied by the Level 2 provider. In fact, apart from one, none of the message logs provided by IMImobile showed chargeable messages being sent or attempted to be sent to the consumer. IMImobile had indicated that this may be the result of the Service being suspended, however the Executive noted that of the 68 logs provided by the Level 2 provider, 34 showed failed messages occurring prior to service suspension.

Referring to the alleged breach of paragraph 4.2.4 of the Code, the Level 2 provider had provided four reasons why the Service messages may be routinely failing. However, taking into account the responses received from IMImobile and the responses to the complainant questionnaire, the Executive asserted that no reasonable explanation had been provided as



to why almost all Service messages from shortcode 65002 were failing on the Level 2 provider logs.

In addition, the Executive asserted that the Level 2 provider had not provided sufficient evidence to prove that an issue had occurred on its system. The Level 2 provider had been asked to provide evidence of an 'internal investigation' into the message failure issue but had not done so. The Executive therefore concluded that there had not been a message failure issue and that Service messages listed in the Level 2 provider message logs were not sent (or attempted to be sent) to complainants. Accordingly, the Executive submitted that as the complainant message logs provided by the Level 2 provider purportedly showing consumers' opt-ins to the Service were false, there was no valid evidence of opt-in to the Service and accordingly the complainants could not have consented to Service charges.

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

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

2. The Level 2 provider denied the alleged breach. The Level 2 provider referred to evidence previously provided to PhonepayPlus, being a screenshot from the Veoo portal which showed a high message failure rate from 25 August 2015 to 1 September 2015. The Level 2 provider stated that the screenshot clearly showed the number of subscription messages sent totalled 18413 and the failures 12365 (67.15% failure rate). The Level 2 provider stated that it had therefore provided PhonepayPlus with clear and irrefutable evidence that failures did occur. The Level 2 provider also provided a more recent screenshot of the service on Veoo's portal, which showed subscription messages sent totalled 17419 and failures totalled 12348 (70.8% failure rate) from 9 November 2015 to 16 November 2015.

The Level 2 provider submitted that this evidence could not simply be ignored because it did not fit the purported breach that PhonepayPlus were seeking to prove. The Level 2 provider also referred to evidence provided by IMI mobile that high failure rates had been experienced with its traffic. The Level 2 provider submitted that there were many reasons why a message could fail – most of them of a technical nature and outside of its control. The Level 2 provider stated that it did not control the mobile network and asserted that it could not be held accountable for the failure rates being so high. The Level 2 provider reiterated that there was no Code or Guidance provisions on acceptable failure rates for messaging and therefore asserted that it could not be found wanting in this regard.



The Level 2 provider stated that in March 2015 it had taken further action to investigate failure rates by collating subscribers with a history of failures and performing a routine network verification, and it had notified PhonepayPlus of this in its reply dated 16 September 2015. The Level 2 provider stated that after this procedure it had, as expected, noted a spike in complaints in March/April/May/June traffic due to consumers having received the service uncharged for several months. The Level 2 provider stated that after this had settled, it had received only nine complaints over a four month period, all of which were resolved.

In informal representations, the Level 2 provider noted that there had been a previous Track 1 procedure in relation to consent to charge issues. The Level 2 provider stated that the initial consumer interactions in this case had happened a long time ago, prior to that Track 1 procedure, and therefore submitted that the Executive was seeking to punish the Level 2 provider twice for the same actions.

The Tribunal asked the Level 2 provider to confirm what was the proportion of WAP opt-in customers compared to MO opt-in customers. The Level 2 provider was unable to provide this information at that time. The Executive stated that it had previously received information from the Level 2 provider which indicated, for the period of July 2014 to July 2015, there were 210 MO opt-ins and over 10,000 WAP opt-ins.

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

The Tribunal considered the Level 2 provider's submission that this matter had already been dealt with via the previous Track 1 procedure. The Tribunal noted that the complainants in this case had contacted the Executive in relation to charges which they had started receiving after the conclusion of the Track 1 procedure. Accordingly the breach of charging without consumer consent had occurred after the Track 1 procedure had been concluded. The Tribunal noted that in any event it was not precluded from taking action in respect of matters which arose prior to a Track 1 procedure where it was appropriate to do so.

The Tribunal referred to its previous findings regarding breach of para. 4.2.4. The Tribunal found that there was no reliable evidence that complainants referred to in this case had opted-in to the Service (prior to the conclusion of the Track 1 procedure, or at all).

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

Decision: UPHELD

ALLEGED BREACH 3
Rule 2.3.11



“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 had breached rule 2.3.11 of the Code as some complainants received chargeable messages after sending a STOP command.

The Executive relied on the content of the PhonepayPlus Guidance on ‘Method of exit from a service’, correspondence from the Level 2 provider and Veoo, and complainant accounts. The Guidance states:

“...2. Use of the ‘STOP’ command

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.

2.3 We accept that this may not always be possible – either for technical reasons, or because of the cost to a provider of doing so. However, where we discover that separate shortcodes for requesting a service and opting out from it are being used, then consideration will be given to a provider’s motive for doing so as part of any investigation. Any actions which are likely to confuse consumers may be considered unacceptable by a PhonepayPlus Tribunal.”

The Executive noted that some complainants stated that they recalled receiving chargeable text messages after sending a STOP command. The Executive’s view was 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.

A sample of complainant accounts is provided below:

“Consumer said that he sent a stop message to the 82999 number but has not received the confirmation text messages to say it has been stopped”

“SENT STOP? Yes but she continued to receive messages”

“Consumer previously has texted stop to the number messages have started again”

“I did not sign up for it, it said to send a text to 82999 saying STOP, this didn’t work and have now been charged £24.30”

“consumer advised that he sent stop after the first message was received but the messages did not stop”

“I texted stop and received new message week later: <http://sexy-hunnies.com?id=e19c87a5e> Need Help? Call 01424572016” [sic]

The Executive noted that within two text message logs supplied by the Level 2 provider and Veoo, there were chargeable entries after the STOP command. Below is a summary of the two Veoo message logs:

Veoo message log for mobile number *****230.

The Executive noted that the message log for mobile number *****230 stated that at 20:54 on 2 May 2015 a STOP message was sent to shortcode 88150 by the complainant. However, the Executive noted that the complainant received a further charge at 22:22 on the same day. The Executive noted that this chargeable message was confirmed in the message log provided by the Verifier.

The Executive noted a discrepancy with the Level 2 provider message log as it stated that the only chargeable message sent on 2 May 2015 was at 17:01.

Veoo message log for mobile number *****481

The Executive noted that the message log for mobile number *****481 stated that on 20 March 2015 a STOP message was sent to shortcode 88150. This STOP command appeared to have been sent in response to the following text message being received from shortcode 88150:

“FreeMsg: UR subscription for 3 per week is changing shortcode from 65002 to 82999. Service provided by Modena. Help? 01424572016 Text stop to stop.”

The Executive noted however that the complainant received chargeable messages from 82999 after the STOP message was sent. The charges from shortcode 82999 occurred on 21 and 28 March 2015, and 4 April 2015.

The Executive noted that this was confirmed on the Verifier message log, however the Level 2 provider message log did not include the STOP command message.

The Executive noted that the consumer had been informed in the above text message received from shortcode 88150 that to exit the Service they should text stop. Therefore, the Executive asserted that for a consumer to exit the Service, it was reasonable for the consumer to respond to that shortcode. The Executive asserted that if a consumer was required to text STOP to another shortcode, the consumer should have been clearly informed about the method of exit.

The Executive therefore asserted that 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 referred to *****230 as an example. The Level 2 provider stated that a STOP request was received from this MSISDN on 2nd May 2015 at 20:54:01, and the MSISDN was automatically opted-out of its service. The Level 2 provider stated that a confirmation message was sent on 2nd May 2015 at 20:54:02:

" FreeMsg: You have left the sexy-hunnies.com service - feel free to come back any time!"

The Level 2 provider stated that after this, the MSISDN was put on a block list ensuring that in addition to subscription messages, no further free messages or promotional messages would be sent.

The Level 2 provider stated that the user had evidently received its free message detailing opt-out information (sending STOP to 82999).

The Level 2 provider stated that a subscription reminder message for this MSISDN was sent on 2 May 2015 at 17:01:40 and was successfully sent, and that this was the last subscription message it sent. This message had a SENT status attributed it and would continue to do so until such time that the Level 2 provider received a delivery report from the Level 1 provider. Despite this message having been sent before the STOP command was received, the Level 2 provider asserted that the subscription message or indeed delivery report was clearly delayed and this was out of its control at this point. The Level 2 provider asserted that the reason for the delay in the subscription message being successfully charged could have been down to the handset being out of range or indeed out of credit. The Level 2 provider asserted that it had made no attempt to charge this consumer subsequent to them opting-out of the service.

The Level 2 provider stated that migrations had been successfully completed with no other issues and this MSISDN seemed to be the only one affected in this way. The Level 2 provider therefore asserted that their STOP and opt-out procedures were not only correct but were also fully functioning.

3. The Tribunal considered the Code and all the evidence before it. In respect of MSISDN *****230, the Tribunal considered that the Level 2 provider had offered a potentially reasonable technical explanation for what had occurred. However the Tribunal considered that as a matter of fact, the consumer had been charged because the method of exit had not taken effect immediately upon the consumer using it, and there had been a further charge to the consumer after exit. In respect of MSISDN *****481, the Tribunal noted that the Level 2 provider had not supplied any explanation for why this consumer had been charged three times after sending the "STOP" command.

Consequently, the Tribunal concluded that some consumers had not been provided with a method of exit which took effect immediately upon the consumer using it, and had been charged after exit. Accordingly, the Tribunal upheld a breach of rule 2.3.11 of the Code.

Decision: UPHELD

ALLEGED BREACH 4

Paragraph 3.4.12

"Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service."

1. The Executive asserted that the Level 2 provider acted in breach of paragraph 3.4.12 of the Code as it failed to provide PhonepayPlus with relevant details to identify the Service operating on shortcode 65002 to consumers.

Consequently, the Level 2 provider had failed to provide PhonepayPlus with the identity of Level 1 providers concerned with the provision of the Service. Such information was commonly provided to PhonepayPlus as part of the registration process, but the Level 2 provider failed to register this number with PhonepayPlus.

The Code requires that Level 2 providers supply relevant details to identify services to consumers. The Executive stated that the PhonepayPlus Registration Scheme is in place to facilitate providers to supply relevant details to identify their services to consumers. The Executive stated that once a provider has supplied details of its services, including which premium rate numbers it operates on, the details then appear on the 'Number Checker' section of the PhonepayPlus website. The Executive stated that the Number Checker allowed consumers to enter a phone number they may not recognise on their phone bill, and find out information regarding that number.

The Executive noted from the information supplied by IMImobile that the Service commenced operation on 27 February 2013. The Executive noted that the Level 2 provider used the shortcode 65002 until September 2014 when the Service was suspended by IMImobile. The Executive noted however that the shortcode 65002 was not registered with PhonepayPlus during the time it was in use by the Level 2 provider.

The Executive noted that the information on the PhonepayPlus Number Checker indicated that the shortcode was not registered with PhonepayPlus. The Executive asserted that where services are not registered, consumers do not have the ability to access information relating to the Service, which impairs PhonepayPlus' regulatory function.

In response to questioning by the Tribunal, the Executive stated that the Level 2 provider's failure to register was not noticed prior to the Track 1 procedure, and was only identified as part of the present investigation. The Executive stated that if the failure had been identified prior to the Track 1 procedure it would have been included in that action plan.

The Executive submitted that the failure to provide the requisite information to PhonepayPlus by registering the Service number was a breach of paragraph 3.4.12(a) of the Code.



2. The Level 2 provider denied the alleged breach. The Level 2 provider stated that PhonepayPlus had been in contact with it for a number of years regarding the shortcode 65002 and it therefore believed that this number had been correctly stored and registered with PhonepayPlus. The Level 2 provider noted that it had received requests for information regarding this service on this shortcode on 17 March 2014, 13 May 2014 and 2 June 2014. The Level 2 provider stated that all marketing and calls to action clearly details its contact details for support.

In informal representations, the Level 2 provider stated that its view was that this matter should have been dealt with under the Track 1 procedure, rather than in the current proceedings.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal determined that as a matter of fact the Level 2 provider had failed to provide requisite information to PhonepayPlus by registering the Service number and had therefore breached para. 3.4.12(a) of the Code. However, the Tribunal noted the Executive's position was that this matter should have been identified earlier and would have been dealt with as part of the previous Track 1 procedure if so. The Tribunal found in the circumstances that this breach was substantially mitigated as a result, and determined that any sanctions imposed on the Level 2 provider would not increase as a result of this breach.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Paragraph 4.2.4 - Provision of false information to PhonepayPlus

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

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

Rule 2.3.3 – Consent to charge

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

- The Level 2 provider charged consumers without having reliable evidence of consent to charge;

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 was operated in such a way that some consumers had not been given a suitable method of exiting the service.

Paragraph 3.4.12 – Failure to register a number

The initial assessment of paragraph 3.4.12 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider had negligently failed to comply with a PhonepayPlus requirement, being registration of the service.

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

Final overall assessment

In determining the final overall assessment for the case, the Tribunal found the following aggravating factor:

- The Level 2 provider had previously been subject to a Track 1 procedure, which had included requirements regarding consent to charge.

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

- There was evidence that some complainants had been refunded by the Level 2 provider.
- As recorded above, in relation to the breach of para. 3.4.12 of the Code, the Executive had admitted that this matter should have been identified earlier and would have been dealt with as part of the previous Track 1 procedure if so.

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

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

Sanctions imposed

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

- a formal reprimand;
- a fine of £200,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Administrative charge recommendation:

100%

Appendix A

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INCOMING				OUTCOME	DATE
SHORTCODE	MOBILE NUMBER	COST	DETAILED MESSAGE	RECEIVED	
82999	[REDACTED]	£0.00	stop		10/06/2015 13:20
FREE TO PHONE				OUTCOME	DATE
SHORTCODE	MOBILE NUMBER	COST	DETAILED MESSAGE	SENT	
65002	[REDACTED]	£0.00	http://sexy-hunnies.com/?id=e8a8ffe09 FreeMsg:U have joined Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena Solutions	SENT	26/09/2014 18:27
65002	[REDACTED]	£0.00	Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	26/09/2014 18:30
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/10/2014 18:20
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/11/2014 18:10
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/12/2014 18:57
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/01/2015 18:15
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/02/2015 18:28
65002	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy Hunnies Video service for £3.00 per week until you send stop to 65002. SP: by Modena	SENT	13/03/2015 20:05
82999	[REDACTED]	£0.00	01424572016 Text stop to stop. FreeMsg: UR subscription for £3 per week is changing shortcode from 65002 to 82999. Service provided by Modena. Help?	SENT	11/04/2015 19:15
82999	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016 FreeMsg:U are subscribed to Sexy-hunnies video service for £3.00 per week until you send stop to 82999. SP: by Modena	SENT	13/04/2015 20:30
82999	[REDACTED]	£0.00	Solutions Need Help? Call 01424572016	SENT	13/05/2015 18:37
82999	[REDACTED]	£0.00	You have left the sexy-hunnies.com service - feel free to come back any time!	SENT	10/06/2015 13:20
BILLED TO PHONE				OUTCOME	DATE
SHORTCODE	MOBILE NUMBER	COST	DETAILED MESSAGE		
65002	[REDACTED]	£1.50	Thank you for being part of the club, we hope you enjoy!	FAILED	27/09/2014 18:29
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	27/09/2014 18:29
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	04/10/2014 17:06
65002	[REDACTED]	£1.50	Thank you for being part of the club, we hope you enjoy!	FAILED	04/10/2014 17:06
65002	[REDACTED]	£1.50	Thank you for being part of the club, we hope you enjoy!	FAILED	11/10/2014 17:06
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	11/10/2014 17:06
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	ACCEPTED	18/10/2014 17:37
65002	[REDACTED]	£1.50	Thank you for being part of the club, we hope you enjoy!	ACCEPTED	18/10/2014 17:37
65002	[REDACTED]	£1.50	Thank you for being part of the club, we hope you enjoy!	ACCEPTED	25/10/2014 18:39
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	ACCEPTED	25/10/2014 18:39
65002	[REDACTED]	£1.50	http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	01/11/2014 18:47



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65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	01/11/2014 18:47
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	08/11/2014 18:10
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	08/11/2014 18:10
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	15/11/2014 18:49
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	15/11/2014 18:49
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	22/11/2014 17:22
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	22/11/2014 17:22
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	29/11/2014 18:29
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	29/11/2014 18:29
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	06/12/2014 17:17
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	06/12/2014 17:17
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	ACCEPTED	13/12/2014 18:35
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	ACCEPTED	13/12/2014 18:35
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	20/12/2014 19:02
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	20/12/2014 19:02
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	27/12/2014 19:15
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	27/12/2014 19:15
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	03/01/2015 19:05
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	03/01/2015 19:05
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	10/01/2015 18:19
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	10/01/2015 18:19
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	ACCEPTED	17/01/2015 19:00
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	ACCEPTED	17/01/2015 19:00
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	24/01/2015 18:08
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	24/01/2015 18:08
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	31/01/2015 19:39
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	31/01/2015 19:39
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	07/02/2015 19:03
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	07/02/2015 19:03
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	14/02/2015 18:20
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	14/02/2015 18:20
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	21/02/2015 17:39
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	21/02/2015 17:39
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	28/02/2015 18:46
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	28/02/2015 18:46
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	07/03/2015 19:57
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	07/03/2015 19:57
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	14/03/2015 18:43
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	14/03/2015 18:43
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	FAILED	21/03/2015 19:16
65002	£1.50 Thank you for being part of the club, we hope you enjoy!	FAILED	21/03/2015 19:16
65002	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016	ACCEPTED	28/03/2015 18:59



65002	[REDACTED]	£1.50 Thank you for being part of the club, we hope you enjoy!
65002	[REDACTED]	£1.50 Thank you for being part of the club, we hope you enjoy!
65002	[REDACTED]	£1.50 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016
82999	[REDACTED]	£3.00 http://sexy-hunnies.com/?id=65f886476 Need Help? Call 01424572016

ACCEPTED	28/03/2015 18:59
ACCEPTED	04/04/2015 18:59
ACCEPTED	04/04/2015 18:59
BILLED	12/04/2015 18:51
BILLED	18/04/2015 17:53
BILLED	25/04/2015 18:27
BILLED	02/05/2015 17:51
ACCEPTED	09/05/2015 17:44
BILLED	15/05/2015 18:59
BILLED	23/05/2015 19:15
BILLED	30/05/2015 19:12
BILLED	06/06/2015 19:14