



Tribunal meeting number 179 / Case 3

Case reference: 72412
Level 2 provider: SMS Avalanche Limited (UK)
Type of service: allfoxyladies glamour video subscription service
Level 1 provider: Zamano Solutions Limited (Ireland); Veoo Limited (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

The case concerned a glamour video subscription service, charged at £3 per week, operating on dedicated shortcode 78686, and shared shortcodes 82999 and 88150 (the “**Service**”).

The Level 2 provider for the Service was SMS Avalanche Limited (the “**Level 2 provider**”). The Level 2 provider was incorporated in the UK on 3 April 2014 and was first registered with PhonepayPlus on 1 May 2014. The Level 1 provider for Service shortcode 78686 was Zamano Solutions Limited (“**Zamano**”). The Level 1 provider for Service shortcodes 82999 and 88150 was Veoo Ltd (“**Veoo**”).

Between 26 March 2015 and 15 December 2015, the Executive received 84 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 6 January 2016. Within the breach letter the Executive raised the following breach of the PhonepayPlus Code of Practice (the “**Code**”):

- Rule 2.3.4 – Undue delay

The Level 2 provider responded on 22 January 2016. On 4 February 2016, the Tribunal, having heard informal representations made on behalf of the Level 2 provider, reached a decision on the breach 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;
- Complainant message logs from the Level 2 provider;
- PhonepayPlus Guidance on 'The avoidance of undue delay';
- The breach letter of 6 January 2016 and the Level 2 provider's response of 22 January 2016; and
- Complainant questionnaires and responses.

The Service

The Service was stated to be a glamour video subscription service charged at £3 per week. The Level 2 provider confirmed that the Service commenced operation in July 2014 and was currently operational. Zamano confirmed that the Service commenced operation on shortcode 78686 in 10 June 2014. Veoo confirmed that the Service commenced operation on shortcode 82999 on 18 January 2015 and on shortcode 88150 on 27 December 2014.

The Executive noted from message logs supplied by the Level 2 provider that users of the Service opted in to the Service on shortcode 78686 and that some Service users were migrated to either Service shortcode 82999, or Service shortcode 88150. Further, the Executive noted that the partial user migration from shortcode 78686 to shortcode 82999 or 88150 was over a staggered period of time.

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





- User enters msisdn and gets a free message back with click2enter page



- User click on 'enter' to confirm they accept Full Terms and Conditions. Once this is completed, user get subscribed and receives a Welcome MSG:
- FreeMsg: U have joined Allfoxyladies subscription service costing £3 per week until you send stop to 78686. Help? 01303661018. Service provided by SMS AVALANCHE.

Complaints

The Executive had received 84 complaints concerning the Service since 26 March 2015. Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

"I have no idea who or what this service is, I haven't subscribed to anything premium rate, but have recently got a text message saying my content was ready to download and a charge for £2.50 on my phone bill..."

"I've been charged for a service I've never heard of or subscribed to and neither have I received any text messages until I checked my bill"

"I have no idea who this company or service is neither have I subscribed deliberately or inadvertently..."



"I did not sign up to this service or ask to receive these text or agree to the privilege of paying to receive such unwanted texts. Thus I have been charged £9 without my permission on my mobile phone bill because i just received these SPAM texts without warning. Is that reasonable? I have also been inconvenienced in time and effort trying to get my money refunded and complaining to the text sender (via my network), Three (network), your website (Phonepayplus), and ICO website."

"I have recieved many texts from this number and have deleted them. I then find out that I've been charged £3.00 each time! I didn't subscibe to anything and have sent "STOP" several times. To no avail. [sic]"

"I've been trying to get these texts stopped, I've followed the advice given by Vodafone but I'm still receiving them and being charge £2.50 at time usually twice a month it's been going on for sometime now and I can't get any help in getting them stopped.

Vodafone are completely useless in their assistance other than now suggesting I contact yourselves.

Any assistance is gratefully received [sic]"

Complainant text message logs

During the preliminary investigation, the Level 2 provider was issued with requests for text message logs for all the complainants. The Executive noted from 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 the complainants' message logs showed numerous failed messages from the date of the complainants' purported opt-in followed by successfully delivered chargeable messages.

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

Previous complaint resolution procedures

On 30 October 2014 as part of a Track 1 procedure, the Level 2 provider accepted a Track 1 action plan in respect of a breach of rule 2.3.3 and 2.4.2 of the Code, as the Level 2 provider accepted that it did not hold robust verification to establish consumers' consent to be charged, or consent to market. On 6 November 2014, the Level 2 provider confirmed that they had implemented the actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge. The Level 2 provider confirmed that full robust verification via GoVerifyIt went live on 23 October 2014.



The allegation of a breach of the Code with respect to this Track 2 investigation relied on evidence gathered from complainants who first contacted the Executive after the Track 1 procedure was finalised.

PRELIMINARY ISSUE

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

The Chair of the Tribunal carefully considered the written application, together with the Executive's written response. Having done so, the Chair refused the application on 1 February. In reaching that decision, the Chair took into account the personal reasons for the preferred representative's inability to attend the hearing, and balanced this against the fact that no explanation was given as to why no alternative representative was instructed given his unavailability. In any event, given the nature of the hearing (to allow the Level 2 provider to make informal representations), the Chair's view was that any issues of clarification that the panel members may have may best be addressed directly by representatives from the Level 2 provider in question who should be encouraged to attend the Tribunal. The Chair also took account of the fact that the preferred representative still had ample opportunity to assist his client prior to the hearing. The Chair was mindful that cases should be dealt with expeditiously. Balancing all these factors, the Chair refused the application. The Chair noted that should the Level 2 provider have any further representations, it may make them at the hearing when they could be considered by the panel.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.4 – Undue delay

“Premium rate services must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged.”

1. The Executive asserted that the Level 2 provider had breached breached rule 2.3.4 of the Code, as logs showed that consumers had opted-in to the Service but had consistently not received messages which were required to access the Service content, and had not received Service content for a significant period of time. Accordingly, the provision of the Service was unduly delayed.

The Executive relied on the content of PhonepayPlus Guidance on ‘The avoidance of undue delay’ (the “**Guidance**”). The Guidance states:

“What constitutes undue delay

Paragraph 1.1



Once a consumer has chosen to engage with any type of premium rate service, the service should either offer prompt engagement with the service itself, or the service goods purchased should be promptly delivered (pay-for-product services), where this is possible.

Products not being delivered in a timely fashion (pay-for-product, including SMS)

Paragraph 1.17

Services that sell goods or products through the use of premium rate services as their payment mechanism must ensure that those products are delivered promptly where it is possible to do so, once a consumer has chosen to engage with the service. An example of where this may not be possible might be a situation where tickets have been purchased for an event and those tickets were not due to be printed until several months afterwards. We would expect consumers to be clearly informed.

Paragraph 1.18

Where digital services are concerned, we would expect ‘products’ to be delivered promptly, unless there is a staggered delivery system being used. Providers should note that, in the event of an investigation, we may ask for evidence of delivery dates and times, as well as any other relevant information.”

The Executive submitted that the Guidance (and the Code) regarding undue delay was not limited to fixed line services.

The Level 2 provider was directed to provide message logs for all complainants. After conducting an analysis of the message logs, the Executive noted that the logs showed that all complainants had opted-in to the Service via the WAP route. The opt-in date was consistently shown as occurring between August 2014 and September 2014. Yet in a number of complainant message logs, the date of the first successfully charged Service message was, in the majority of the message logs, significantly later than the purported date of Service opt-in. The chargeable Service messages included the means of access to the Service content.

A summary of two example message logs are below:

Level 2 provider message log for mobile number *****136

The Executive noted that the Level 2 provider’s message log for the above MSISDN showed that the initial opt-in to the Service occurred on 16 August 2014. The subscription confirmation message stated:

“FreeMsg:Welcome to amazing allfoxyladies video subscription service £3 per week. Helpline:01303661018.Text STOP to 78686 to STOP. SP:SMSAvalanche LTD”

This was then followed by a Service message which stated:

"http://allfoxyladies.com/?c=e69b0d013 TEXT STOP TO 78686 TO STOP ALL MESSAGES, FOR HELP CALL 01303661018 or admin@smsavalanche.com"

As outlined in the "Background" section above, the Level 2 provider confirmed that a consumer should then be sent one premium message on a weekly basis, which also contained the link to the desired content. The Level 2 provider had stated that by clicking the link the consumer would be provided with access to the Service content. The Executive understood that a consumer would only be able to access the Service once it had received the link in the chargeable Service message.

The Executive noted from the message logs supplied by the Level 2 provider that the status of the chargeable Service messages were variously described as 'FAILED', 'BILLED' 'ACCEPTED' or 'SENT'. The Level 2 provider clarified that messages listed as 'SENT' should in fact be listed as 'FAILED' within the message logs.

The first Service message described as 'BILLED' which was successfully delivered to MSISDN *****136 was on 25 April 2015, 36 weeks after the purported opt-in date.

Level 2 provider message log for mobile number *****084

The Executive noted that the Level 2 provider's message log for the above MSISDN showed that the initial opt-in to the Service occurred on 23 August 2014. The subscription confirmation message stated:

"FreeMsg:Welcome to amazing allfoxyladies video subscription service £3 per week. Helpline:01303661018.Text STOP to 78686 to STOP. SP:SMSAvalanche LTD"

This was then followed by a Service message which stated:

"http://allfoxyladies.com/?c=dbd6d9460 TEXT STOP TO 78686 TO STOP ALL MESSAGES, FOR HELP CALL 01303661018 or admin@smsavalanche.com"

The Executive noted that the status of the above messages and every other message that followed until 15 August 2015 were described in the Level 2 provider logs as 'FAILED'.

The first chargeable Service message listed as 'BILLED' which was successfully delivered to MSISDN *****084 was on 22 August 2015, 52 weeks after the purported opt-in date.

Given the nature of the Service and its promotion, the Executive submitted that consumers would expect to receive their first content within less than an hour of subscribing, and at regular intervals thereafter.

Out of the 84 complaints logged, the Executive received 83 logs from the Level 2 provider in response to requests for information. An analysis of the complainant message logs revealed that of the 83 complainant logs, 82 complainants had not initially been successfully sent Service messages following their opt-in to the Service, prior to the later issuing of charged Service messages. The Executive noted that the individual complainant who did receive a successful message immediately after their opt-in received 34 weeks of failed messages before their next successful message.

The Executive further noted that on assessment of the complainant logs, there were three instances where the logs showed no successful chargeable messages.

During the investigation, the Executive also directed the Level 1 providers to provide message logs for a sample of complainants. The Executive noted that generally the Level 1 provider's complainant message logs were the same as the message logs provided by the Level 2 provider, and showed that numerous complainants opted-in to the Service but did not receive links to the content requested until a much later date.

The Executive directed the Level 2 provider to provide an explanation for the high failure rate of chargeable Service messages. On 21 September 2015, the following response was received from the Level 2 provider:

“SMS Avalanche signed an agreement with Level 1 provider on 20/06/2014, in which is stated:

‘Client (SMS Avalanche) desires to be provided with SMS connectivity in connection with its applications and zamano is willing to provide Client such SMS connectivity, the parties desire to establish herein the terms and conditions applicable for such SMS based service’.

SMS Avalanche traffic must be passed through the zamano Affiliate Gateway. This is the path we are following from the beginning of SMS Avalanche Ltd. We have implemented many restrictions on our side, before we will hand traffic to Zamano. Further in the Agreement we read:

‘Zamano cannot guarantee that the SMS Service will never be faulty but will do its reasonable commercial efforts to correct reported faults and make the SMS Service available as soon as zamano reasonably can.’

‘The Client is informed and understands that the zamano SMS Platform is connected to the Operator networks through their SMS-C or other interconnecting networks, which are not under the direct and/or indirect control of zamano. The Client acknowledges that zamano shall not be liable for any outage of the service due to a service interruption of an Operator or an interconnecting network.’

And also:



'Zamano is not responsible in any way for any mobile telecommunications system or networks, which it does not operate and in particular for the SMS-C of the Mobile Operators. Therefore zamano is not liable whether in contract, tort (including liability for negligence) or otherwise for the acts or omissions of other providers of telecommunication services (...) or for faults in or failures of their apparatus or network, and in general for any other technical reason attributable to Mobile operator's network'.

'If for one individual message submission there is no response from the aggregatee's server within 2 seconds, then the transaction will be considered failed.'

We can add to this comment many other reasons why messages are failing, but some of them are beyond our supervision. [sic]"

On review of the Level 2 provider's explanation, the Executive considered the response to the failure issue was unclear. On 5 October 2015 the Executive informed the Level 2 provider that it was not clear what reasons were being asserted for the failure rate and sought further clarification from the Level 2 provider. The Level 2 provider responded on 12 October as follows:

"We are surprised that this question came back to us again, as we clearly provided - what we thought – necessary explanation.

In our previous reply to PPP we have quoted some Terms from the Agreement between SMS Avalanche Ltd and Zamano. It was our fundamental reason, as why those messages were failing. We are trying our best to implement Due Diligence and Risk Assessment and Control, and we are still working with aggregators, as how and why our system is recognising messages as failed.

Also, in conversation we had with one of our aggregators, we have received information that the problem might be down to our network spam filter.

We are very concerned that our messages might not be delivered to our End Users, because of this. It could mean that many of our End Users will not receive our promotional materials due to this problem. Some of End Users could set up Spam Filter, that could delete unwanted messages (accident claims, insurance claims), but it could actually affect in not receiving our promotional material.

We clearly do not have control of what statuses are coming to us from our aggregator side. We think that this is something aggregator should investigate more rigorously."

The Executive further directed the Level 2 provider to confirm when and how it first became aware of the failed message issue and what steps it took to remedy the problem upon discovering it. On 12 October 2015, the following response was received from the Level 2 provider:



“SMS Avalanche first became aware of this in September 2014. We have informed Zamano, that after testing our service, results were not meeting our expectations. In that time delivery status was incorrect. We have received confirmation, after small investigation, that: ‘configuration change was made to your account by accident’. Also, ‘We are experiencing a technical issue at the moment; this is being worked on with the upmost importance’. We were continuously monitoring our service. SMS Avalanche sought an explanation with aggregators, and solution; in result which we have decided to migrate some traffic to 82999, 88150.”

The Executive also made enquiries to Zamano and Veoo regarding the high failure rate of chargeable Service messages. The responses from Zamano and Veoo are below:

Zamano’s response

“Once a text message has left Zamano’s message gateway its delivery to the customer’s mobile phone is out of our control. Primary causes of failed message delivery include:

- i. The customer’s phone has gone out of range or has ran out of power*
- ii. The customer is out of mobile credit*

Additionally if routing information stored against a certain mobile number is incorrect for some reason (e.g. following a port between operators) the message may not be routed to the correct mobile operator.”

Veoo response

Veoo explained that messages failed for reasons such as:

- *Veoo’s platform did not receive a final delivery status of the messages within the set validity period of therefore these messages have been marked as an “error”.*
- *Message failed due to insufficient credit*
- *Message failed due operator returning “subscriber is blocked”*
- *Network timeout response - where the message has not received a final delivery status response before the validity of the message expires.*

The Executive asserted that it was clear that the Level 2 provider was aware of messages failing from as early as September 2014, yet it did not take sufficient action to remedy the problem (promptly or at all), and failed messages continued to be issued.

Complainant questionnaire

In response to the Level 2 provider supplying possible reasons why messages may not be received by consumers, the Executive issued a questionnaire to complainants about the Service. A summary of the 14 responses received is set out below:

Question	Response	Comments
What is the Make and Model of your Mobile handset?	Apple – iPhone 6 (2) Apple iPhone 5 (5) HTC One (1) Nokia Lumia 800 (1) Samsung S6 (1) Samsung Galaxy S4 (1)	3 of the respondents did not respond to this question.
Is the mobile phone that received the chargeable text messages on contract or pay-as-you-go?	11 respondents advised they were on contract.	3 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	3 of the respondents did not respond to this question.
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)?	7 respondents advised their mobile phone was not regularly switched off and/or had no mobile phone signal.	3 respondent advised that their phone was regularly switched off. 4 of the respondents did not respond to this question.
Please advise when you first started receiving chargeable messages from the shortcodes mentioned above.	August (1) December 2015 (3) April 2015 (1) October/November 2015 (1) November 2015 (1) 2 nd quarter of 2015 (1)	3 respondents did not respond to this question. 3 respondents advised that they were unsure.

<p>Please advise whether you have experienced technical problems which have prevented text messages being received on your Mobile handset for long periods? If so, did these problems occur during the period of August 2014 to December 2015.</p>	<p>8 respondents advised that they had not experienced technical problems.</p> <p>1 respondent advised they had experiences some delays.</p>	<p>4 respondents did not respond to this question.</p> <p>1 respondent was unsure.</p>
<p>Please advise whether you are aware of more than one Service sending chargeable text messages to your mobile from the shortcodes mentioned above.</p>	<p>6 respondents advised that they were charged by only one service.</p> <p>1 respondent advised that "In turn only, as soon as I realised that Glamorous Fashion was charging me and texted STOP, a week later I got a text from supposedly a different source for "All Foxy Ladies" saying I had subscribed when I hadn't. As soon as I stopped one, the other started."</p>	<p>5 respondents did not respond to this question.</p> <p>1 respondent responded with n/a.</p> <p>1 respondent was unsure.</p>
<p>Please advise whether you recall sending STOP to any other Services operating on shortcodes 78686, 82999 and/or 88150, prior to becoming aware that you were being charged for the SMS Avalanche service.</p>	<p>2 respondents advised that they did not receive any messages.</p> <p>6 respondents advised that a STOP message was sent to the 'allfoxyladies' service.</p> <p>1 respondent advised that they did not text STOP to any other service.</p>	<p>4 respondents did not respond to this question.</p> <p>1 respondent stated that they were unable to advise.</p>
<p>Please advise whether you are aware</p>	<p>11 respondents</p>	<p>3 respondents did not</p>



of the application, Stop Mobile Spam.	advised that they were not aware of the Stop Mobile Spam application.	respond to this question.
Please advise whether you have used any Spam blocker applications or filters on your mobile handset between the period of August 2014 to December 2015, and if so, when you altered the settings on such applications.	7 respondents advised that they have not used spam blocker applications. 1 respondent advised that they use an Adult content blocker.	5 respondents did not respond to this question. 1 respondent advised that they has not received text messages.
Please advise whether you transferred your mobile number between mobile telephone companies in the six months before you received the chargeable text messages? If yes, please confirm if you experienced long periods with no signal and/or difficulty in sending and receiving text messages.	9 respondents advised they had not transferred between mobile companies.	5 respondents did not respond to this question.
Please advise if you recall viewing and interacting with the attached, or a similar, promotion? (web promotion supplied by the Level 2 provider was attached).	10 respondents advised that they had not seen or interacted with the Service promotion.	4 respondents did not respond to this question.

In response to questioning from the Tribunal, the Executive accepted that there was some confusion in some complainant responses, but noted that none of the complainants had heard of the “Stop Mobile Spam” application the Level 2 provider had referred to.

The Executive noted from the complainant accounts that the majority of complainants had stated that they did not opt-in in to the Service. In light of this, the Executive had initially investigated whether there was a breach of the Code requirement that Level 2 providers must have consent to charge consumers. However, in light of the third party log evidence held by the Executive, and the conclusions of previous PhonepayPlus Tribunals on similar evidence in other matters, the Executive did not for the purposes of this case seek to challenge the Level 2 provider’s statement that these complainants did in fact opt-in to the Service, and proceeded in reliance on this statement. This position was reaffirmed to the Tribunal upon questioning of the Executive. The Executive also confirmed upon questioning by the Tribunal that whilst it was not necessarily the case that all logs examined by the Executive were identical as between the Level 1 provider and Level 2 provider, the sample logs highlighted in the case report did mirror each other exactly.



The Executive understood that consumers that received failed messages following their opt-in would not have been charged. Notwithstanding this, the Executive submitted that the Code and Guidance was clear that once a consumer had chosen to engage with a premium rate service, the service offered should be provided promptly. The Executive submitted that the outcome that consumers are treated fairly and equitably was not achieved where there was a delay in Service provision. The Executive submitted that consumers who do not receive the desired content promptly are likely to seek equivalent content elsewhere, and would therefore no longer wish or expect to receive the Service. The Executive submitted that the consumer complaints demonstrated that consumers were not expecting to receive the Service at the time billing for it commenced.

The Executive submitted that the failure to send the billable message also deprived consumers of a reminder of how to opt-out of the Service at the outset, and at regular intervals thereafter, as required by the Code.

The Executive submitted that the undue delay had therefore caused consumer harm.

Consequently, on the basis of the information provided in the Level 1 and Level 2 providers' message logs which appeared to demonstrate that complainants opted in to the Service, but did not demonstrate that consumers received messages which were required to give them access to the Service, the Executive asserted that the provision of the Service was unduly delayed after the consumer had done what was reasonably necessary to connect with the Service. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.4 of the Code.

2. The Level 2 provider denied the alleged breach. The Level 2 provider referred to its previous responses to enquiries and the Level 1 provider responses.

The Level 2 provider referred to a BBC report dated 11 January 2016 regarding network problems on the EE and O2 networks, and the network providers' Help and Support websites (specifically for O2).

The BBC article referred to an incident when '*signal problems had ... affected calls from mobiles to landlines*', and the Level 2 provider stated that it recognised rising FAILED messages in situations like that. Taking this example and many others, it wanted to show that network providers have and will have problems with losing signal, which would cause unexpected issues, which the Level 2 provider submitted included delivering messages to its customers. The Level 2 provider referred to the Ofcom Mobile Coverage Checker. The Level 2 provider noted that if the signal was bad or did not exist, it would affect the delivery of message, and stated that it is not responsible for customer preferences when it comes to choosing network provider.

The Level 2 provider stated that where a first delivery attempt was unsuccessful and the phone number was not recognised/"ERROR", then no further delivery attempts were made, but if the delivery attempt was ineffective because the mobile phone was temporarily



unavailable (switched off or in a very poor reception area), then the network would continue retrying for some time. The Level 2 provider stated that the Message Validity Period could be set to between 1 and 72 hours and was different for different aggregators or even networks. The Level 2 provider stated that it had discovered that consumers can also select validity periods themselves. The Level 2 provider submitted that if a customer set up delivery validity for just few hours or even a day, then he would not receive requested promotional material (because of a bad area, signal, mobile phone turned off, Wifi ON), this could either be shown as an ERROR or unknown subscriber.

The Level 2 provider stated that it had discovered that there were problems with new Android phones such as Galaxy S6 or iPhones, especially where the customer is moving from iPhone to Android mobile phone, and cited various web articles. The Level 2 provider was aware that their technical support advised that *“you should talk to your carrier about this issue first as this might be network related. There may be an on-going network outage or problems affecting your area that you don’t know of. This is an important first step before troubleshooting your phone.”* It also stated that consumers were advised when they had problems with their new SIMs to clear their cache, clear data, and reboot their system.

The Level 2 provider stated that it was aware that consumers on Wifi may not receive text messages, and cited a consumer complaint to T-Mobile about *“[not] receiving texts on time for months. Why are they delayed?”*

The Level 2 provider stated that it had learned that some applications that customers installed on their handset could cause them not to receive messages, and that mobile support advised their customers (if resetting is solving that problem) to remove all installed apps.

The Level 2 provider submitted that where big brands faced message delivery problems on a global stage, surely it could not take responsibility for the failures/errors on its platform. The Level 2 provider however stated that it was not using network problems, or brand new mobile handsets to explain why messages on its logs were failing, but simply cited these as other possibilities to take on board. It clarified that the reasons set out below were affecting message delivery, and its business.

The Level 2 provider stated that some customers have installed a “Stop Mobile Spam” application on their handset, to avoid getting text messages relating to PPI, injuries and other spam calls and text messages. The Level 2 provider stated that this would affect receiving promotions from the Service. When a customer requested the Service his lack of knowledge as to how the Service operated meant that he would not receive those messages, or he would receive only some of them. The Level 2 provider stated that when such customers speak with its Support Department, the Level 2 provider could see that the Service was never used, and it always offered a full refund.



The Level 2 provider stated that, where the customer was receiving messages through the Level 1 provider Veoo, SMS Avalanche was operating on shared short codes (e.g. 88150), and so if a customer might have texted “stop” on a different service using the same shared short code, the Service would be affected and messages might not get delivered to users because a block has been put by the Level 1 provider or even network provider on the specific customer using any service on the specific shared short code.

The Level 2 provider stated that when a customer contacted its Customer Support, asking to opt out, for whatever reason, and it knows that the Service was not used (or partly used), it refunds the charges in full, even if on the Veoo portal delivery status messages show an error or unknown subscriber. The Level 2 provider supplied redacted examples of such error messages.

In cases where it did not receive a positive delivery status, it was unsure if the message was delivered to the handset, and the Level 2 provider stated that in such cases it honoured its customers. The Level 2 provider supplied redacted examples of recent consumer resolutions. It stated that it reimbursed for such messages, even though sometimes it knew it was raising its costs. It submitted that its Support Department showed they respected customers and was always helpful, light-hearted and pleasant when talking with them. It stated that it taught Support to try to put themselves into the customer’s shoes, giving them full attention and understanding their needs.

The Level 2 provider stated that it was proud of its percentage of satisfied customers and the low percentage of unfavourable customers. The Level 2 provider stated that all companies needed to face such customers, and this was challenging in a time when everybody can freely share their thoughts, experience and emotions on social networks.

The Level 2 provider stated that it was a comparably ‘fresh’, young company. It wanted to provide the best service and also the best Customer Support to promote its name. It stated that over a year, it had received positive feedback from the way its Service was advertising on the market, from customers that had used its Service for a long time and also from new customers.

The Level 2 provider stated that it did not gain any advantage from FAILED or SENT messages. It stated that the customer would like to receive the service he requested, and it would like to provide a perfect, faultless service for him, and as a service provider it relied on network connectivity in the same way its customers do. The Level 2 provider stated that once a fault was recognised by a network provider or intermediary which affects a service, its loss is at least the same as the customers. The Level 2 Provider stated that it even contributed a percentage of profits in refunding customers for a Service they did not use, and submitted that nobody could then say that it was taking advantage of its customers. The Level 2 provider stated that when it engages a commercial approach it suffers monetary loss from network coverage that is so prone to defect.



The Level 2 provider stated that it had a policy for unsubscribing unbillable numbers, which was implemented following valued comments and compliance consultations. It now terminated subscriptions for any user after 120 day of inactivity, i.e. where messages sent to them are returned with FAILED delivery status. The Level 2 provider stated that it utilised automatic monitoring methods to make sure the policy was in action and that inactive subscriptions were terminated.

The Level 2 provider stated that it closely cooperated with Level 1 providers to ensure that the failed delivery rates were being monitored on an ongoing basis. The Level 2 provider stated that in doing so, it was trying to eliminate such occurrences in future.

The Level 2 provider stated that, while it tests the Service on a regular basis, it gets positive responses either from its aggregators, or through all networks, but later it receives all different delivery status messages. The Level 2 provider believed that no faults were committed while testing its Service, and its aggregators' tests are done, and submitted it cannot be responsible for a small percentage of Failed/ Error messages.

The Level 2 provider made submissions on the Code and the Guidance on undue delay. The Level 2 provider noted that there had been five previous cases dealing with breach of Rule 2.3.4, and noted firstly that none of them were under the jurisprudence of the current 13th Code. Secondly it noted that none of them referred to premium SMS messages (they all related to users being charged excessively due to prolonged phone calls). The Level 2 provider submitted that the Executive had made allegations without understanding properly how complex message delivery is. The Level 2 provider stated that it wished to provide an in-depth analysis to dismiss the Executive's allegation and to conclude that the Executive had not established the case on the sufficient balance of probabilities.

The Level 2 provider highlighted the following sections of the Guidance:

"Any products purchased through a premium rate service must be delivered in a timely fashion (...)"

The Level 2 provider asserted that consumer consent granted upon opting into the Service resulted in prompt service delivery to a user because an instant access would always be given upon subscription process completion, and therefore the condition set in the Guidance had been met in full.

The Level 2 provider stated that the service flow should have been explained more clearly to the Executive and if this had been done, no alleged breach would have been even raised. The Level 2 provider stated that the final step of the subscription process leads the user to a page with full content access, so that once a user completed the final step of the double opt in process on their mobile phone, they were simply taken to a website listing content categories, allowing them to browse through available mobile videos, ready to be displayed/played either through a browser or by means of mobile software installed on the handset. As a result, subscribers would have received access to the product.



...“(...) where it is possible to do so”

The Level 2 provider stated that it had undertaken repeated attempts to explain the reasons for delivery failures and their common ground was undoubtedly the disruption across the delivery stream where messages did not reach networks due to reasons specified already in its response. The Level 2 provider submitted that where it was not possible to deliver a message to end user, it was not a fault on its account and it was impossible to deliver messages to consumers' mobile phone. The Level 2 provider stated that its actions were undertaken in good faith because service messages were sent with the final purpose being to reach the end user SMS inbox, however when it took into account the technical environment being so prone to downtimes, outages, flaws, and software interferences, delivery streaming was deemed to never be 100% efficient like every mechanism in the real world. The Level 2 provider submitted that the theory may always be to aspire to be perfect and fool-proof, but in practice it never is and never is for a mechanical, electrical or electronical device. The Level 2 provider submitted that its system would potentially deliver service products to consumers, i.e. subscribers, where it was possible to do so, because messages have been sent, and it did follow the Guidance in every aspect.

Page 5 of the Guidance, 1.17: *“Services that sell goods or products through the use of premium rate services as their payment mechanism must ensure that those products are delivered promptly where it is possible to do so (...)”*

The Level 2 provider submitted that this paragraph referred to SMS services and sets out a rule that products should be delivered promptly where it was possible to do so. The Level 2 provider stated that in this case it was not possible to do so because a small percentage of users were not able to have the messages delivered to their handsets due to delays unforeseen by it. The Level 2 provider submitted that the range of reasons for such delays resulting in message expiry prior to reaching network ends was provided to the Executive but not properly taken into any account during the preliminary investigation proceedings.

The Level 2 provider submitted that 98% of the Guidance referred to “IVR” or other telephone services. The Level 2 provider submitted that there was not any consumer harm, as consumers were not charged for failed messages. It never charged their subscribers more than stated in service Terms and Conditions. The Level 2 provider had attempted to collect due weekly charges as had been mutually agreed between the service provider and consumer; however this was not possible for a limited amount of users due to connectivity faults resulting in messages not being delivered to mobile phones. The Level 2 provider submitted that such faults were so common that it would be hard to find a mobile user in UK that never experienced connectivity issues.

The Level 2 provider submitted that the case had not been proven on the balance of probabilities. The Level 2 provider stated that it was truly disappointed that the breach of the Code had been alleged, when it had done its best to offer a quality service.



The Level 2 provider submitted that, having gained no commercial, monetary advantage or benefit from the circumstances under examination, it considered the alleged breach was without ground in the Code. The Level 2 provider submitted that, it had conducted itself in an appropriate consumer-orientated way at all times without prejudice to messages being not delivered to user handsets due to technical occurrences. The Level 2 provider stated that the purpose of the Service was to provide mobile content for the accepted price where it was possible to do so. The Level 2 provider submitted that investigation of incidents where it was not possible to do so due to reasons unforeseen by the Level 2 provider became impractical and fruitless because the Level 2 provider performed its duty in full by sending out service messages and making the strongest (yet effective) efforts to bring the percentage of consumer disappointment to a minimum.

In informal representations, the Level 2 provider noted that this case was a further allegation of a breach of the Code, after the previous Track 1 procedure had been concluded on 30 October 2014. The Level 2 provider stated that it had complied with that remedy plan. The Level 2 provider stated that it had implemented third party verification with Go Verify It on 6 November 2014. The Level 2 provider noted that the Executive accepted that generally, the Level 1 provider and Level 2 provider logs showed the same information.

The Level 2 provider referred to matters it had previously set out, including its previous responses giving possible reasons for message failures, the 120-day opt-out policy it had implemented, its constant work to improve its service and customer service, that all customers who had contacted it and all affected users were offered a full refund, and its analysis of previous undue delay cases dealt with by PhonepayPlus.

Regarding the 120-day opt-out policy, the Tribunal noted that 2 customers had opted-in in August 2014 but the first charge was applied after 120 days (36 weeks and 56 weeks later respectively). The Level 2 provider stated that the rule had only been introduced between a few months and six months ago, as a result of co-operation with Level 1 provider.

The Level 2 provider submitted that failed messages were beyond its control, and that once messages had left the systems of its Level 1 providers, receipt by end users was out of their control. It referred to its previous submission that it had experienced a high message failure rate, and that Zamano could not guarantee a faultless service. The Level 2 provider stated that it had investigated unforeseen technical circumstances, and it submitted that it had done everything possible to recognise problems. The Level 2 provider referred to the upgrade to systems performed by Level 1 provider between January 2015 and 13 January 2016. The Level 2 provider stated that it was still working with the Level 1 provider on failed/sent messages.

The Level 2 provider stated that it had no interest in sending failed messages but was reliant on the network working correctly. An SMS system would deliver service where possible but in the real world technical environment this was not 100% delivery. The Level 2

provider submitted that it had followed Guidance in sending messages where possible to do so, but that 98% of this Guidance related to IVR services, not SMS.

The Level 2 provider submitted that it had co-operated in full providing information to the best of its knowledge with detailed explanations, but it assumed that Executive did not hold complete knowledge of the matter or understanding of the Service.

The Level 2 provider then addressed the questionnaire responses supplied by the Executive. The Level 2 provider analysed the responses supplied, and noted that:

- 1 mobile number had been provided twice. 1 mobile number had not subscribed to the Service. This left 12 respondents to the questionnaire.
- 1 respondent's mobile number was not found and therefore the Level 2 provider submitted that they did not subscribe to the Service (the Executive admitted that the mobile number cited in this example was incorrect).
- 1 mobile number showed an "adult block" meaning there was no way this customer could receive charges.
- 1 respondent did not answer questions.
- 1 respondent stated their phone was usually switched off.
- 1 respondent commented that their network was patchy and messages took two weeks to deliver.
- 1 respondent had switched network.
- 3 respondents (including one of the above respondents) stated they never sent STOP but the Level 2 provider had evidence that they did.
- 1 respondent did receive text messages and reminder messages.
- 1 respondent confirmed they did receive messages and sent STOP providing a different shortcode 89530, which was not a shortcode the Level 2 provider used.

Further, the Level 2 provider submitted that all answers provided could not be trusted as one complainant referred to a different service. The Level 2 provider submitted that some customers would not admit to using the Service. The Level 2 provider submitted that the Executive needed to understand that some problems were beyond its control.

The Level 2 provider noted that one example showed a customer receiving free messages, and stated the Executive incorrectly assumed free reminder messages weren't being sent. The Level 2 provider submitted that customers were aware of charges and could see full terms and conditions.

The Level 2 provider submitted that the Executive had assumed that it had been providing false information and had not been honest in its reply. The Level 2 provider submitted that the Executive had rushed its accusations, and simply wished to fine it.

In response to questioning by the Tribunal, the Level 2 provider stated that the systems in place to check messages were sent were the Level 1 provider's systems; they supplied the information and the Level 2 provider could not change anything. It stated that the Level 1



provider was doing major maintenance every month. The Level 2 provider stated that if a message was undelivered it was out of their control. The Level 2 provider did not provide any examples of steps it took when the Level 1 provider told them that messages were undelivered, or what it considered was within its control upon message failure. The Level 2 provider referred again to the 120 day opt-out policy, weekly tests, and working with the Level 1 provider to implement changes.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal considered that the obligation on a Level 2 provider to provide a service without undue delay after the consumer had done what is necessary to connect with a service was a strict liability obligation; the service must be provided to consumers without undue delay. Having considered the evidence and all of the Level 2 provider's submissions, the Tribunal found that the Level 2 provider had inadequate processes in place to ensure that (a) the Service was delivered on time and (b) the situation was remedied where the Level 2 provider had knowledge that its Service had not been delivered. The Tribunal found that there was evidence of significant delay to some consumers (including examples where the delay had been 36 weeks and 52 weeks), and that such delay was unreasonable. Accordingly, the Tribunal upheld a breach of rule 2.3.4 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.3.4 – Undue delay

The initial assessment of rule 2.3.4 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of the breach was likely to have caused, or have the potential to cause, a drop in consumer confidence in premium rate services.

The Tribunal's initial assessment was that, overall, the breach was **significant**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating factors. 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.
- The Level 2 provider had implemented a 120-day opt-out rule.



The Level 2 provider's evidenced revenue in relation to the Service in the period from December 2014 to December 2015 was in the range of Band 2 (£500,000 - £999,999). The Tribunal took this period as the relevant period for the purposes of determining appropriate sanctions.

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

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 £35,000;
- a requirement to remedy the breach by ensuring adequate processes are established and implemented to prevent undue delay of Service provision in future, with such processes to be established by no later than 18 March 2016; 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

Premium Messages						
Shortcode	Mobile Number	Network	Cost	Message	Status	When Sent
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	23/08/2014 19:55
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	30/08/2014 19:07
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	06/09/2014 15:30
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	13/09/2014 19:02
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	20/09/2014 19:40
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	27/09/2014 14:38
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	04/10/2014 18:28
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	11/10/2014 13:02
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	18/10/2014 14:50
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	25/10/2014 15:08
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	01/11/2014 18:34
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	08/11/2014 13:50
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	15/11/2014 17:12
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	22/11/2014 19:42
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	29/11/2014 17:20
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	06/12/2014 15:23
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	13/12/2014 17:16
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	20/12/2014 18:00
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	27/12/2014 14:11
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	03/01/2015 14:00
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	10/01/2015 15:26
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	17/01/2015 16:45
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	24/01/2015 18:07
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	SENT	31/01/2015 16:57
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	07/02/2015 13:11
78686		O2	£3.00	http://allfoxyldies.com/?c=eb19a8f3f Enjoy your allfoxyldies content. Helpline:01303661018 or admin@smsavalanche.com	FAILED	14/02/2015 14:08