

Tribunal meeting number 190 / Case 2

Case reference: 62595
Level 2 provider: Treasure Media Limited (UK)
Type of service: "Glamour Teasers" glamour video subscription service
Level 1 provider: Veoo Ltd (UK); Zamano Solutions Limited (Ireland)
Network operator: All Mobile Network operators

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

BACKGROUND

The case concerned a glamour video subscription service operating under the brand name 'Glamour Teasers' on dedicated shortcode 78123, and shared shortcodes 80333, 82999, 88150 and 88881 (the "Service").

The Level 2 provider for the Service was Treasure Media Limited ("the Level 2 provider"). The Level 2 provider had been registered with PhonepayPlus since 4 August 2014.

The Level 1 provider for Service shortcode 78311 was Zamano Solutions Limited ("Zamano"). The Level 1 provider for shortcodes 80333, 82999, 88150 and 88881 was Veoo Ltd ("Veoo").

The Service

The Service was stated to be a glamour video subscription service charged at £3 per week. The Executive understood that consumers entered the Service via a wireless application protocol ("WAP") opt-in. The Level 2 provider stated that the Service promotion commenced on 1 August 2014. The Service was operational as at 24 June 2016.

The Executive had noted from complainant message logs supplied by the Level 2 provider that users of the Service opted in to the Service on Zamano shortcode 78123, and some users were then in turn migrated to Veoo shortcodes 80333, 82999, 88150 and / or 88881. The Executive noted that the partial user migration from shortcode 78123 to shortcodes 80333, 82999, 88150 and / or 88881 was staggered over a period of time.

The Level 2 provider supplied information on the consumer journey into the Service, extracts of which are shown in **Appendix A**.

Summary of complaints

The Executive received 199 complaints concerning the Service between 3 February 2015 and 14 June 2016.

Complainants variously alleged that the Service charges were unsolicited. A sample of complainant accounts is provided below:

"Complaint Description: Consumer has been charged £5. Consumer received messages but deleted them as she thought that they were spam. Consumer did not realise she had been charged until she checked her bill. Consumer called the provider and asked how they got her number and they said they don't know"

*"Service Description: I have no idea what the service is as I have never signed up for it, nor opened the links that are contained the links. I am however being charged £2.50 a pop.
Summary of Complaint: I have never signed up for this company nor have I for any other subscription text service. I am furious that I am being charged for a "service" that I have not used nor signed up for."*

*"Service Description: Deleted Text - did not read - unknown/unwanted communication
Summary of Complaint: After checking my mobile phone account I realised that I had been charged several times for an amount of £2.50 on dates which I realised related to numerous texts which I had received and Immediately Deleted. I rarely read unsolicited texts and never realised that there could be charges /costs for receiving and deleting them. Upon receipt of the last Text I returned a STOP Text to find out later I was again charged for doing so. (No warning of a Charge)
Dates of Texts: 31/01/2015, 07/02/2015, 14/02/2015, 21/02/2015, 28/02/2015 and the stop reply (83p) 28/02/2015 TOTAL COST: £13.33 I am awaiting refund from this Company. This practice is outrageous and wonder how many people it is Entrapping, Especially people who don't have much time to check their phone bills. If this practise is not illegal, it should be, if it is not fraudulent, it's immoral and it is miss-selling at its very worst.. I would like to know if this could happen on a PAYG phone, as you would not even know you were being charged." [sic]*

"I have no idea, I never signed up for it, I received a text on 22 Feb and blocked the number without opening, now they have sent text and I found I am paying £2.50 a week! I received a text on 22 Feb, I blocked the number without opening. I have found out now I have been charged £2.50 every Sunday since! I did not request this service, never opened a text, had no idea it was even happening!"

"I started received these text with links in, I just deleted them without replying. They had the words glamour teasers in them so I did not want to click on the link in case it was Adult material. Just found from EE I've been charged £10 in total. I did not sign up to receive these." [sic]

The investigation

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



In accordance with paragraph 4.6.2 of the Code of Practice (14th Edition), the Executive sought a direction from a Tribunal on 14 July 2016 that interim measures be imposed in respect of the Level 2 provider. The decision of that Tribunal is set out at **Appendix C**.

The Executive sent a Warning Notice to the Level 2 provider on 24 June 2016, with a deadline for response of 15 July 2016. Within the Warning Notice the Executive raised the following breaches of the PhonepayPlus Code of Practice (the "**Code**"):

- Rule 2.3.3 – Consent to charge (12th and 13th Edition)

The Level 2 provider responded on 5 August 2016. On 15 August 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 provider;
- Correspondence between the Executive and the Third Party Verifier;
- Complainant message logs from the Level 2 provider;
- An extract from the PhonepayPlus registration database;
- PhonepayPlus General Guidance Note on "Privacy and Consent to Charge" (12th Edition of the Code);
- PhonepayPlus General Guidance Note on "Consent to Charge" (13th Edition of the Code);
- Correspondence between the Executive and the Level 2 provider's legal representative; and
- The Warning Notice of 24 June 2016 and the Level 2 provider's response of 5 August 2016

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.3 – Consent to charge (12th and 13th Edition)

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code as evidence provided by the Level 2 provider to establish that complainants who had entered the Services through the WAP opt-in route had consented to be charged was not verified by an independent third party, or in a way that meant that it could not be tampered with. Accordingly, the Executive asserted that the Level 2 provider had not provided sufficient evidence to establish consumers' consent to be charged.



The Executive noted that the Service charges shown in the Level 2 provider's message logs occurred both in the period that the PhonepayPlus Code of Practice (12th Edition) was in force, and in the time period after the PhonepayPlus Code of Practice (13th Edition) came into force. The Executive submitted that given that rule 2.3.3 was effectively identical in the two versions of the Code, the Executive had raised an alleged breach of rule 2.3.3 covering the 12th Edition and 13th Edition of the Code, to address Service charges which were incurred when each edition was in force.

The Executive relied on correspondence exchanged with the Level 2 provider, correspondence exchanged with ETX (UK) Ltd (the "**Third Party Verifier**"), complainant accounts (which are referenced in the 'Background' section above), the PhonepayPlus General Guidance Note 'Privacy and consent to charge' (in support of the 12th Edition of the Code) (the "**Code 12 Guidance**"), the PhonepayPlus General Guidance Note 'Consent to Charge' (in support of the 13th Edition of the Code) (the "**Code 13 Guidance**") and text message logs.

The Code 12 Guidance states:

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

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

For charges generated by entering a mobile number on a website

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

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

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

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

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



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

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

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

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

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

- An opt-in is PIN-protected (e.g. the consumer must enter their number to receive a unique PIN to their phone, which is then re-entered into a website);
- A record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);
- Records are taken and maintained by a third-party company which does not derive income from any PRS. We may consider representations that allow a third-party company which receives no direct share of PRS revenue from the transaction, but does make revenue from other PRS, to take and maintain records. It will have to be proven to PhonepayPlus' satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;
- PhonepayPlus is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed), and real-time access to this opt-in data upon request. This may take the form of giving PhonepayPlus password-protected access to a system of opt-in records;
- Any other evidence which demonstrates that the opt-in cannot be interfered with."

On 23 April 2015 the Executive directed the Level 2 provider to provide evidence of when and how a sample of eight complainant mobile telephone numbers were opted in to receive the Service. On 30 April 2015 in response to the Executive's direction, the Level 2 provider stated:

*****222: 15/09/2014, 19:14:42
*****107: 20/09/2014, 14:49:24
*****662: 30/08/2014, 13:55:09
*****472: 21/09/2014, 12:58:51
*****333: 04/10/2014, 13:40:29
*****801: 29/09/2014, 19:28:52
*****920: 05/10/2014, 14:23:50
*****304: 04/10/2014, 14:14:35

Opt in records are held securely encrypted within VPN private protocol. They are locked by encryption key which means opt in records can be viewed but not accessed. Service is additionally hosted by outside third-party which does not derive income from PRS.”

On 19 May 2015 the Level 2 provider confirmed that the third party it had referenced in its email dated 30 April 2015 was the Third Party Verifier and supplied a copy of the contract between the Level 2 provider and the Third Party Verifier.

On 29 May 2015 the Executive contacted the Third Party Verifier with a sample of 10 complainant mobile telephone numbers (including the eight complainant mobile telephone numbers listed above) and requested that the Third Party Verifier confirm whether it had records of Service opt-in for the complainant mobile telephone numbers. On 5 June 2015 the Third Party Verifier stated

“...[the Level 2 provider] are a customer – but we have no opt-ins for these particular MSISDNs”

On 2 March 2016 the Executive contacted the Level 2 provider and directed it to provide an explanation why the Third Party Verifier did not hold evidence of Service opt-ins. On 15 March 2016 the Level 2 provider stated:

“The mobile numbers listed have subscribed to Treasure Media’s Service before the implementation of GoVerifyIt’s full system [the verification system operated by the Third Party Verifier]. Instead, GoVerifyIt would take daily mark-ups of all Landing pages which would verify what users have seen at the time of subscription.”

On 11 April 2016 the Executive contacted the Third Party Verifier with a further sample of 10 complainant mobile telephone numbers and requested that the Third Party Verifier confirm whether it had records of Service opt-in for the complainant mobile telephone numbers. On 14 April 2016 the Third Party Verifier stated *“Treasure Media are a client but I have no opt-ins for your list of MSISDNs”*.

On 16 May 2016 the Executive contacted the Level 2 provider and directed it to provide robustly verifiable evidence of Service opt-in that it had previously stated that it “held securely encrypted within [its] VPN private protocol” for a sample of 20 complainant mobile telephone numbers. On 25 May 2016, the Level 2 provider supplied “[Service] opt-ins pulled from [its] vpn protocol database for 20 mobile subscribers”. An example of the evidence supplied by the Level 2 provider is included at **Appendix B**.

The Executive stated that, upon review of the information supplied by the Level 2 provider, it was unclear how the information supplied demonstrated evidence of consent to charge complainants. The Executive stated that, in an attempt to verify whether the above information demonstrated that the Level 2 provider held robust evidence of consent to charge, it directed the Level 2 provider to supply the following information:

- i. A clear explanatory note of the information contained in submitted opt-in information and how this information demonstrated robust evidence of consumer opt-in to the Service;
- ii. A copy of the user agreement referenced in the opt-in information supplied by the Level 2 provider; and
- iii. A request that the Level 2 provider supply to the Executive real time access to its Service messaging system (which may have taken the form of giving PhonepayPlus password protected access to its Service message logging system).

On 3 June 2016 the Level 2 provider provided the following response to the Executive's enquiries:

- i. *"Please find attached Powerpoint presentation".*
- ii. *"We explained this matter on the Powerpoint presentation, it is a standard requirement for our Admin to maintain system security and keep the confidential information safe."*
- iii. *"With respect to the system safeguards implemented it is impossible to access VPSecure storage by external user, however all provided details have been pulled from the system and provided to Executive to fully assist with this case. As per previous correspondence with the Executive regarding our security procedures, we feel that providing access via a simple password would breach our stringent security procedures and introduce possible vulnerability to the system. As we have discussed in detail, we implement multiple types of security, and with respect to the request from the Executive, this would undermine all attempts to keep this information secure, robust and untampered. System is stored on an internal server and VPSecure is backed up by a secondary server therefore can only be accessed from inside the office. By putting this online we would risk the system being vulnerable and potentially tampered with by hackers."*

The Executive noted that the time period in which the Level 2 provider message logs showed complainants purportedly opting into the Service (August 2014 – October 2014) occurred prior to the Level 2 provider's implementation of GoVerifyIt's full system. Further the Executive also noted that the Third Party Verifier was unable to provide verification that a sample of 20 complainants had opted into the Service and consented to the Service charges.

Further, despite the Level 2 provider's assertions that it kept "[Service opt-in] information secure, robust and untampered", the Executive asserted that it was apparent that data relating to the WAP opt-in for individual complainants had not been held by a third party, nor was there any evidence that it was held in a way which meant it categorically could not have been tampered with since creation.

The Executive noted that the Code 12 Guidance and Code 13 Guidance made it clear that all charges must be robustly verifiable. However, the Executive submitted that the Level 2 provider in the relevant period did not utilise the Third Party Verifier's robust verification process. The Executive submitted that, although Guidance was not binding on providers, where a provider failed to follow Guidance there was an expectation that it would take

equivalent alternative steps to ensure that it fulfilled PhonepayPlus' expectations (and complied with the Code).

In response to questioning by the Tribunal, the Executive stated that, as long as the full version of the Third Party Verifier's robust verification process was properly implemented, this allowed providers to meet the Code requirements regarding evidencing consent to charge. The Executive understood that the Third Party Verifier also offered a "light option" in which it took screenshots of a service's landing page. The Executive submitted that this assisted with showing compliance with PhonepayPlus rules on pricing, but does not prove that any particular consumer has opted in to a service. The Executive stated that it had not had confirmation from the Level 2 provider as to when it had implemented the full version. The Executive stated that if the full version had now been implemented, its understanding was that this would still not provide sufficient evidence of consent for consumers who were opted in to the Service prior to that date but charged after the implementation date. The Executive clarified that it had not verified whether refunds had in fact been given to consumers by the Level 2 provider.

The Executive submitted that the Level 2 provider did not have sufficiently robust systems in place to provide evidence of consent to charge, and so asserted that it had breached rule 2.3.3 of the Code.

2. The Level 2 provider admitted the breach in part. The Level 2 provider denied that it charged consumers for premium rate services without their consent. However it accepted (notwithstanding its evidence below) that the evidence upon which it had relied to establish this consent was likely to be insufficient, and as such that a finding of breach of 2.3.3 was made out. In response to questioning from the Tribunal, the Level 2 provider confirmed that its admission was that in the relevant period it did get verification of consumer consent, but this was not the robust verification recommended by the Guidance.

The Level 2 provider stated that steps had been taken to remedy this (it now uses GVI which should eradicate any issues as to evidencing consent to charge).

The Level 2 provider noted the submissions of the Executive and responded as follows:

a) the Level 2 provider followed both of the first options set out by section 2.10 of the Guidance – the opt in was PIN-protected and record of such was taken, time stamped in appropriately secure VPN format. The Level 2 provider referred to the evidence it had supplied of secure opt-in time stamps/PINs, and its detailed specification relating to secure opt ins. The Level 2 provider stated that each compound of VPSECURE Storage had been analysed and explained. The Level 2 provider had trusted it was a correct way of compliance maintenance – albeit one which it had developed ourselves.

b) the Level 2 provider stated that it had understood that where a provider does not have a third party verifier for opt in recording and storage, it should endeavour to take alternative



steps to make sure its own system fulfils requirements and meet PhonepayPlus expectations. The Level 2 provider stated that it had developed extensive know-how and workforce to put in place a secure system and specification, details of which had been provided to the Executive. With hindsight, the Level 2 provider accepted that this appeared to have been flawed, and it was now adopting GVI.

c) with respect to the Code rules and the Guidance recommendations, the Level 2 provider stated that it had changed the way its service opt in flow worked and it was now fully compliant with PhonepayPlus rules, i.e. it utilised full online GoVerifyIT option. It had been cooperating with the Third Party Verifier for a while now. It stated that full online integration was not a straightforward process and took longer than expected. The Level 2 provider stated that its trials clearly showed delays in page loading leading to losing consumer interest in the service. The Level 2 provider stated that, after long term internal developers' work, it managed to adjust the technical platform to corroborate with GoVerifyIT and it confirmed that the issue identified by the Executive had now been rectified and third party verification was used for the Service.

In response to questioning from the Tribunal, the Level 2 provider confirmed that, having received the Warning Notice on 24th June, it took them perhaps two weeks to implement the full version of GVI, and it became effective on Monday 11 July 2016. In respect of pre-existing subscribers to the Service, the Level 2 provider stated that anyone who requested a refund was provided with a full refund. The Level 2 provider stated that to its knowledge there were no cases where a refund had been refused when requested, but it did not have any records of refunds to hand as at the date of the hearing. The Level 2 provider stated that for such subscribers, its system still detected the time-stamped records, and those consumers would still get information on how to opt out.

The Level 2 provider was asked why the consumer journey it had supplied did not include a screen on which a consumer entered their PIN. The Level 2 provider stated that, from the commencement of the Service, it had sent internal PINs to consumers – consumers had to click on the unique link they were sent in a text message to opt into the Service. The Level 2 provider confirmed that consumers were not required to enter a PIN number into a web page, they simply had to follow the link sent to them in a text message. The Level 2 provider confirmed that the time and date stamp it retained related to the time and date on which the consumer had clicked that link.

The Level 2 provider confirmed that it had had a contract with the Third Party verifier since 1 August 2014 but until 11 July 2016, they had only been provided with the “offline” service. The Level 2 provider submitted that this still assisted the consumer if they had any queries about the opt-in process, and also allowed the Level 2 provider to confirm that the terms and conditions the consumer would have seen were correct.

In oral representations, the Level 2 provider denied that the Code or consumer rights had been infringed in any way. The Level 2 provide submitted that it was inappropriate for the Executive



to describe the alleged breach of Rule 2.3.3 as “apparent” until a finding was made by the Tribunal.

The Level 2 provider stated that it held records of consumer consent and had referred the Executive to these on many occasions in response to its request for information. It submitted that its team had spent a great deal of time providing information to the Executive in layman’s terms, and had produced a Powerpoint presentation for them. Notwithstanding this, the Level 2 provider accepted that the evidence upon which it had relied to establish this consent was likely to be insufficient, and that was the only extent to which the Tribunal could make a finding that there had been a breach of Rule 2.3.3.

The Level 2 provider reiterated matters stated in its response to the alleged breach regarding compliance with the Code 12 Guidance, its own system for verification, and the steps it had now taken to implement GVI.

The Level 2 provider submitted that one of the example complaints highlighted in the “summary of complaints” had been negligent, in that the consumer had admitted neglecting to read and deleting service messages. The Level 2 provider stated that consumers who said they did not know how to opt out were not telling the truth, as this information was shown clearly on the message logs. Referring to the log for MSISDN *****598, the Level 2 provider submitted that these showed the price point for the Service, the support telephone number, and opt-out information.

The Level 2 provider stated it had been disappointed in how this matter had been dealt with by PhonepayPlus in its final stage. The Level 2 provider stated that its first request, on 11 July, for an adjournment of the hearing relating to interim measures had been declined by PhonepayPlus, and submitted that this had been a fair request but was rejected without merit. The Level 2 provider submitted that this had left its legal representative with one hour to respond to the notice regarding interim measures, though the Level 2 provider submitted that their comments on disproportionate sanctions and mitigating factors were fully adequate.

The Level 2 provider submitted that the incorrect legal framework had been applied to this case, as had been argued in the correspondence of its legal representative. The Level 2 provider stated that its confusion came from the fact that in the Warning Notice the Executive had cited two previous editions of the Code, and the new Code had been in force for only 1 day prior to its response deadline. The Level 2 provider stated that the Executive had written to it on 12 July to suggest that it would benefit from the changes in the new Code, but it had not been able to identify these advantages, and had had to attend on a conference call to make its oral representations. The Level 2 provider acknowledged that it had received a letter setting out the transitional arrangements, which was intended to provide a safeguard, but submitted that that letter lacked any legal force whatsoever and did not provide relevant information or transparent advice because it did not comment on the particulars of this case. The Level 2 provider submitted that it was paradoxical for the Executive to rely on paragraph 1.8.2 of the new Code as this came into force after the transitional letter had been sent.

The Level 2 provider stated that it had been informed by its lawyers about an agenda against the company and submitted that there had been unfair treatment and an apparent breach of human rights.

The Level 2 provider submitted that it had made several attempts to settle the case but these were all rejected. The Level 2 provider stated that these rejections had been disappointing, as it had cooperated with the Executive, provided all information required, and taken the initiative in building its own internal system to verify consent. The Level 2 provider submitted that, after a year of cooperating with the investigation, this matter could have been resolved informally.

The Level 2 provider submitted that it had attempted to run its business within the regulatory framework.

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

The Tribunal first considered the issue of whether or not the matter was proceeding under the correct edition of the Code of Practice.

The Tribunal noted that in this case the Level 2 provider had not responded to the Executive's case until 5 August 2016.

The Tribunal noted that transitional arrangements had been published in advance of the coming into force of the 14th Code of Practice, and the Level 2 provider had specifically been given advance notice that such arrangements may be relevant to them. The Tribunal noted that the Level 2 provider had been notified of the apparent breach on 24 June 2016, first spoke to its lawyers on 4 July 2016, and had had the opportunity to respond (which it did on 5 August 2016), and make oral representations.

The Tribunal considered the transitional arrangements established by paragraph 1.8.2(a) of the 14th Code of Practice. The Tribunal considered it was clear that such arrangements would apply to matters for which investigations were not concluded by 12th July 2016, even where the investigations had started before that date. Having considered the timeline of correspondence, the Tribunal found that the matter was brought to it under the correct edition of the Code of Practice.

The Tribunal considered the Level 2 provider's submission that it had been treated unfairly in the process adopted by the Executive. The Tribunal was not satisfied that this was the case, noting that the Level 2 provider had been given time and opportunity to instruct lawyers, respond to the Executive's case, and make oral representations. The Tribunal had considered the Level 2 provider's response to the Warning Notice, even though it was served over three weeks late. The Tribunal noted that the Level 2 provider had in fact had longer to prepare its case than it would have had under the 13th Code of Practice procedure.



The Tribunal noted that the Level 2 provider had admitted the breach in part, but not in full. On being questioned, the Level 2 provider had stated that it had a verification process in place throughout but was only recently aware that this did not satisfy the requirements that it be 'robust' in line with the 12th Code Guidance. It denied that the Code or consumer rights had been infringed in any way.

The Tribunal considered the 12th Code Guidance and the 13th Code Guidance. The Tribunal noted that the 12th Code Guidance set out factors which could contribute to robustness which included *"an opt-in is PIN-protected (e.g. the consumer must enter their number to receive a unique PIN to their phone, which is then re-entered into a website);"* *"a record is taken of the opt-in, and data is time-stamped in an appropriately secure web format (e.g. https or VPN);"* and *"Records are taken and maintained by a third-party company which does not derive income from any PRS... it will have to be proven to PhonepayPlus' satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;"* and *"any other evidence which demonstrates that the opt-in cannot be interfered with."* The Guidance also stated that *"...it is essential that providers can provide robust evidence for each and every premium rate charge. robust verification of consent to charge means that the right of the provider to generate a charge to the consumer's communication bill is properly verifiable... By 'properly verifiable', we mean a clear audit trail that categorically cannot have been interfered with since the record...was created."* The Guidance also stated *"providers who are considering using a method of verifying consent to charge, which employs a method that does not involve independent Network operator records of consent, are advised to contact PhonepayPlus before they begin to operate it."* The Tribunal also considered the 13th Code Guidance, which came into force on 1 July 2015.

The Tribunal did not consider that the Level 2 provider had ensured that records of consent were held by a third party company which did not derive income from any PRS, and that such records could not be created without consumer involvement or tampered with in any way once created. The Tribunal did not consider, by reference to the evidence and explanation provided by the Level 2 provider, that the Level 2 provider had in fact "PIN-protected" the opt-in as the evidence showed that a consumer clicked on a unique URL in order to consent to the charges, and did not receive a unique PIN which they then re-enter into a website. The Tribunal considered that a system in which consumers clicked on a unique URL to consent to be charged for the Service was not by itself sufficient to robustly verify consent to charge for all those charged by the Service. It was not clear how this system, even where the Level 2 provider kept time-stamped records, created a clear audit trail that categorically could not have been interfered with since records were created. The Tribunal noted that the number of complaints about lack of consent to charge supported the view that there was a lack of sufficient evidence of consent to charge in respect of those complainants.

The Tribunal noted that the Level 2 provider had stated that it had understood that where a provider does not have a third party verifier for opt-in recording, it should take alternative steps to make sure its own systems fulfils requirements, and it was only with hindsight when it had been told otherwise that it realised its system was flawed. The Tribunal commented that



providers were required to pro-actively take steps to comply with the Code. The Tribunal noted that the Level 2 provider could have taken compliance advice if it was unsure of what it had to do to comply with the Code, and providers who were not using independent network operator records were encouraged to do this by the Guidance (as set out above).

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

Further, the Tribunal was concerned that (a) the Level 2 provider had not put in place the system for robust independent verification of consent to charge until 11 July 2016, despite having had a contract in place with the Third Party Verifier since 2014; the Tribunal noted the Level 2 provider's comment that "full online integration took longer than expected... our trials clearly showed delays in page loading leading to losing [sic] consumer interest in the Service"; and (b) the Level 2 provider did not appear to be taking pro-active steps to ensure that it did not charge consumers including existing subscribers, unless it held robustly verifiable evidence of their consent (instead waiting for consumers to text "STOP" and claim a refund). The Tribunal was concerned that the period of time taken to remedy this issue from when the Level 2 provider was first on notice of it showed a disregard for the interests of consumers.

Decision: UPHELD

SANCTIONS

Representations on sanctions made by the parties

1. The Executive submitted that the following sanctions were appropriate:
 - a formal reprimand;
 - a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service;
 - a fine of £250,000; and
 - a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

based on an initial assessment of the breach as "very serious."

2. The Level 2 provider submitted that the following were mitigating factors:

- It always cooperated and was responsive to the Executive, responding to all “Requests for Information” letters
- It had no breach history and never experienced Customer Support issues
- It had a ‘no quibble refund policy’, as a gesture of goodwill

The Level 2 provider had also accepted the Executive’s recommendation that it remedied the breach, and submitted that it had now moved over to the full GVI service in order to obtain third party verification of consumers’ consent to be charged.

The Level 2 provider submitted that a finding that the breach was “serious”, and the following sanctions:

- a fine of £100,000;
- an obligation to refund all complainants; and
- an obligation to pay the Executive’s administrative charges

was a realistic and reasonable outcome – sufficient to send out a strong message and to act as a deterrent, yet reflective of the differences between the present case and other recent cases (which the Level 2 provider listed) in which there had been a higher seriousness rating, another breach allegation upheld (provision of false information to PhonepayPlus), and a higher fine. The Level 2 provider accepted responsibility for its failure to establish sufficient evidence of consent to charge, but nevertheless submitted that this case needed to be distinguished from the other cases which had been referred to by the Executive. The Level 2 provider, in oral representations, referred to the previous case of *Moblix Ltd* and submitted that this case demonstrated that the top of the range for the fine in this case should be £100,000. The Level 2 provider submitted that it had not found any comparable cases with higher fines.

The Level 2 provider submitted that excessively severe fines imposed on small businesses was a big negative factor on a path to innovation and a healthy market. It stated that it understood that regulatory policy must be in place alongside enforcement, but asserted that it should not be a blocking factor for business to flourish. The Level 2 provider submitted that a degree of harmony between these two factors was what the industry needed now, especially with respect to recent PhonepayPlus announcements that the new Code and its sanctions procedure was expected to be flexible, provider-friendly and cooperative.

Tribunal’s initial overall assessment

The Tribunal’s initial assessment of the breach of the Code was as follows:

Rule 2.3.3 – Consent to charge

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



- The Level 2 provider charged consumers without having reliable evidence of consent to charge;
- The nature of the breach was likely to severely damage consumer confidence in premium rate services; and
- The case had a clear and highly detrimental impact on consumers.

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

Final overall assessment

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

- Numerous previous adjudications and PhonepayPlus Guidance have made clear the importance of ensuring that a provider holds robustly verifiable consent to charge; despite this (and the Level 2 provider being on notice of complaints since February 2015), there was evidence that the Level 2 provider had not decided to implement robust independent verification until after receipt of the Warning Notice, and had further delayed implementing this until 11 July 2016 for commercial reasons, due to concerns about it resulting in them losing potential customers.

In determining the final overall assessment for the case, the Tribunal did not find any mitigating factors. Although the Tribunal noted in particular the Level 2 provider's statements that it had a "no quibble" refunds policy and that it had refunded all complainants who had contacted it, the Tribunal noted that the Level 2 provider had not supplied evidence to support these assertions, nor evidence of refunds given. The Tribunal also noted that some complainants had stated they had experienced delays / difficulties in contacting the Level 2 provider to seek a refund. The Tribunal noted the Level 2 provider's submission that it had complied to the extent it could with the investigation, but referring to paragraphs 40 and 43 of the PhonepayPlus Supporting Procedures, the Tribunal did not consider that the Level 2 provider had gone beyond what was expected of it.

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

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

Sanctions imposed

The Tribunal considered the submissions made by Executive and the Level 2 provider on sanction. The Tribunal, whilst it did not consider itself bound by decisions of previous Tribunals on sanctions in comparable cases, paid regard to such decisions, and in particular considered a range of comparable cases in which the Tribunal had fined a Level 2 provider in the same revenue band for



breach of Rule 2.3.3 (excluding cases in which a Tribunal had determined that the Executive had been provided with false information). The Tribunal noted that fines in those cases ranged between £100,000 and £250,000. The Tribunal considered the Executive's representations on sanctions. The Tribunal, having considered the evidence presented and the circumstances of the case, determined that this case did not warrant a fine of £250,000. The Tribunal considered the Level 2 provider's representations on sanctions. The Tribunal noted that there were some differences between the facts of the *Moblis* case and this case, including aggravating factors, and that in the *Moblis* case an additional compliance advice sanction had been considered appropriate.

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

- a formal reprimand;
- a fine of £135,000;
- a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service; 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:

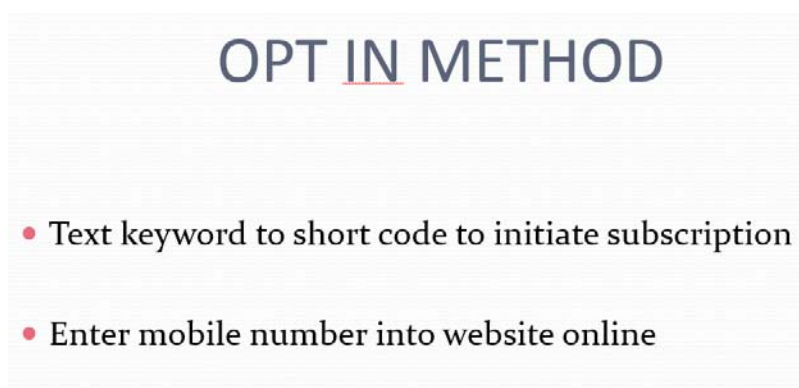
100%

Appendix A – extract from example of consumer journey for the Service

Screen Shot One



Screen Shot Two



Screen Shot Three



CALL 2 ACTION PROMO MATERIAL

WWW.GLAMOURTEASERS.COM



GLAMOUR TEASERS

WATCH HOT GIRL VIDS ON YOUR MOBILE

VIEWED: 2354 RATED: 91% VIEWED: 2354 RATED: 91%



TO WATCH VIDEOS
TEXT SEXY TO 78123

SUBSCRIPTION SERVICE COSTS
£3 PER WEEK OR UNTIL YOU SEND STOP TO 78123

CLICK PIC TO PLAY CLICK PIC TO PLAY

T&Cs:
Sexy Treasure Chest offers you a subscription service charged at £3 per week until you text stop to 78123. All images and videos are compatible with colour wap-enabled handsets. Network charges may apply. You have to be over 18 and have bill payer's permission to use this service. By accepting Terms of Use you agree we may send you promotions of similar nature in future. You can opt out from future marketing by texting 'opt out' to 78123. Helpline 02035984322. You can also contact our Customer Care on info@treasuremedia.co.uk. Service provided by Treasure Media Ltd. Explore Treasure Chest to get your unique erotic experience.

WATCH HOT GIRL VIDS ON YOUR MOBILE

VIEWED: 60292 RATED: 94% VIEWED: 46625 RATED: 76%




CLICK PIC TO PLAY CLICK PIC TO PLAY



UNLIMITED VIDEOS
ENTER MOBILE NUMBER BELOW

submit

OVER 18 ONLY
THIS SUBSCRIPTION CHARGES £3 PER WEEK
TEXT STOP TO 78123 TO UNSUBSCRIBE
CUSTOMER SUPPORT: 02035984322

TERMS AND CONDITIONS
OVER 18 ONLY - Treasure Media videos service offers you a subscription service charged at £3 per week until you text stop to 78123. All images and videos are compatible with colour wap-enabled handsets. Network charges may apply. You have to be over 18 and have bill payer's permission to use this service. By accepting Terms of Use you agree we may send you promotions of similar nature in future. You can opt out from future marketing by texting 'opt out' to 78123. Helpline 02035984322. You can also contact our Customer Care on info@treasuremedia.co.uk. Service provided by Treasure Media Ltd.

WWW.GLAMOURTEASERS.COM

Screen Shot Four

SERVICE MESSAGES

- Welcome message:

FreeMsg: You joined GlamTeasers subscription service for £3 per week until you txt stop to 78123 CS 02035984322 SP Treasure Media

- Monthly reminder message:

FreeMsg: You are subscribed to GlamTeasers subscription service for £3 per week until you txt stop to 78123 CS 02035984322 SP Treasure Media

FreeMsg: You are subscribed to GlamTeasers subscription service for £3 per week until you txt stop to 82999 CS 02035984322 SP Treasure Media

Screen Shot Five

OPT OUT METHOD

- Text STOP to short code 78123 or 82999
- Contact Customer Support helpline 02035984322
- Website contact form on www.treasuremedia.co.uk

Appendix B - example of the opt-in evidence supplied by the Level 2 provider



Appendix C - decision of a previous Tribunal on 14 July 2016 to impose interim measures**Application for interim measures pursuant to Code of Practice paragraph 4.6**

Case ref: 62595
Service: "Glamour Teasers" glamour video subscription service
Level 2 provider: Treasure Media Limited
Level 1 provider: Veoo Limited
Cost: £3 per week
Shortcode: 78123, 80333, 82999, 88150, 88881

Adjudication

- The Tribunal has paid full regard to the material supplied by the Executive.
- The Tribunal has paid full regard to the representations made by the Level 2 provider's solicitors on behalf of the relevant party. In respect of these representations, the Tribunal notes that:
 - a) The 14th edition of the Code of Practice ("Code 14") was in force as of 12th July 2016; consideration of the application for interim measures by a Tribunal of the Code Adjudication Panel pursuant to Code 14 paragraph 4.6.5 was taking place now, after the Code came into force.
 - b) It had been anticipated that the lifespan of some cases would continue into the period addressed by Code 14 and that there would be some overlap. Transitional arrangements for cases, as provided for in Code 14, were published in advance of Code 14 coming into force.
 - c) The Level 2 provider has asserted that the 13th edition of the Code of Practice applied and therefore there was no requirement to respond to the Interim Warning Notice. The Executive submitted that Code 14 was applicable.
 - d) In considering which Code applied, the Tribunal notes that the Level 2 provider had not supplied any evidence of any real prejudice caused by the Executive taking the approach of proceeding under Code 14. The Tribunal considered that proceeding under Code 14 was in any event fairer, noting that the 13th edition of the Code of Practice did not require there to be any consideration of representations from a provider, or adjudication by a Tribunal, prior to imposition of a withhold. Code 14 has changed that position and so now, the Executive is enjoined to give notice of an application for interim measures, such as withholding monies and in doing so, it must set out its case as fully as possible. The Level 2 provider then has an opportunity to respond to those submissions.
 - e) Further, the Level 2 provider had submitted that the time for response to the Interim Warning Notice should be extended, although a detailed response had now been provided in a letter dated 13th July 2016, and the Tribunal considers that it has sufficient material from both parties to proceed. Paragraph 86 of the Supporting Procedures suggest that ordinarily a respondent



would be provided with at least one working day in which to respond. Here the Level 2 provider has had since 24th June 2016 to consider the Interim Warning Notice and respond. The Tribunal considers that even if an adjournment had been formally requested, it would not have granted it, having considered the timeline which shows the Level 2 provider had a reasonable amount of time to respond to the Interim Warning Notice, and the next date for payment out of revenue to the Level 2 provider, being 15th July 2016. The Tribunal bears in mind that this is an interim hearing and not a final adjudication on breach of the Code of Practice.

- f) The Tribunal noted that the Level 2 provider does not appear to have considered the effect of section 80 of the Consumer Rights Act 2015 when making submissions that PhonepayPlus' sanctioning powers were limited to £250,000 per case (rather than being £250,000 per breach). Decisions on sanctions are case specific and there are often many factors which affect the level of a fine, for instance. Precedents provide some guidance but the Tribunal at the interim application has to make an assessment and its approach to the evidence is a holistic one.
 - g) Representations have been made on behalf of the Level 2 provider, but no supporting evidence has been supplied, including in particular the evidence suggested by paragraph 87 of the Supporting Procedures.
- The Tribunal has paid regard to the Supporting Procedures, including the factors set out at paragraph 80 and paragraph 91.

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

- 1) The Tribunal is satisfied that PhonepayPlus has made reasonable endeavours to notify the relevant party of its initial findings and the proposed interim measures.
- 2) At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there appears to be sufficient evidence that could support a breach of Code of Practice rule 2.3.3.
- 3) The Tribunal considers that the Level 2 provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. The Tribunal notes in particular:
 - a) the Executive's comments in its Debt Collection Withhold Assessment regarding there being no filed accounts for the Level 2 provider despite it trading for over two years, and as such there was no reliable information available on its assets and liabilities; and
 - b) the reports of consumer harm, and the potential seriousness of the breach, which could result in a higher level of fine.
- 4) The Tribunal notes the factors identified by the Executive which tended to suggest a risk that any enforcement required in due course would be ineffective if an insufficient withhold was imposed. The Tribunal takes into account the Level 2 provider's submissions regarding potential mitigating

factors, and the affect a fine of £250,000 would have on its business. The Tribunal also takes into account as guidance the previous adjudications referred to, though comes to its own conclusions as to what would be a sufficient sum to withhold, based on the facts of this particular case.

- 5) The Tribunal, having considered the Executive's and the Level 2 provider's submissions on the appropriate level of withhold to be imposed, and taking a holistic approach to the available evidence, considers that the measures set out below are appropriate and proportionate to take in the circumstances of this case.
- 6) Accordingly in respect of the Service, the Tribunal hereby directs that:
 - a) PhonepayPlus is authorised to direct a withhold of up to £268,000.
 - b) The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum authorised in this decision.
 - c) The Executive is given discretion to vary the total directed to be withheld downwards in the event that it is provided with alternative security which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course are paid.
 - d) Such interim measures are to be revoked upon the case being re-allocated to Track 1 or otherwise discontinued without sanction.

Mohammed Khamisa QC
14 July 2016