Tribunal meeting number 216

Case reference: 117560

Level 2 provider: Cellso Limited, London, United Kingdom

Type of service: Video subscription service

Level 1 provider: Zamano Limited, Dublin, Ireland
Veoo Limited, London, UK

Network operator: All Mobile network operators

This case was brought against the Level 2 provider under Paragraph 2.3.3 of the Code of Practice

Background

The case concerned a video subscription service (the "**Service**") operating on dedicated shortcode 66169 and shared shortcodes 66033, 88150, 88881 and 80333.

The Level 2 provider for the Service was Cellso Limited (the "**Level 2 provider**"). The Level 2 provider had been registered with the Phone-paid Services Authority ("**PSA**") since 22 March 2013.

The Level 1 provider for Service shortcode 66033 was Zamano Solutions Limited ("**Zamano**"). Zamano had been registered with the PSA since 3 June 2011. The Level 1 provider for Service shortcodes 66169, 88881, 88150 and 80333 was Veoo Ltd ("**Veoo**"). Veoo had been registered with the PSA since 17 August 2011.

The Service was stated to be a video subscription service charged at £3 per week. The Level 2 provider had informed the Executive that the Service commenced operation on 11 October 2013. Zamano had confirmed that the Service commenced operation on shortcode 66033 in October 2013. Veoo had confirmed that the Service commenced operation on shortcode 66169 in June 2016; shortcode 88150 in May 2013; shortcode 80333 in November 2015 and shortcode 88881 in December 2015.

It had been noted by the Executive from message logs supplied by the Level 2 provider that users opted into the Service on shortcode 66033 and that some Service users were subsequently migrated to Service shortcode 66169, 88881, 88150 or 80333.

Consumers subscribed to the Service via WAP opt-in. The Level 2 provider had supplied the following summary and consumer journey for the promotion and operation of the Service:

"When a customer subscribed to our service they had to go through various steps prior to even receiving a message from us. First of all, a customer had to click on one of our banner adverts prior to viewing our landing page. Once done the customer then viewed all of the terms and conditions and decided if the service is for them or not. If the customer decided they wished to proceed with the subscription they then had to enter their mobile number into the MSISDN box provided. The next step was the customer receiving a free WAP push messages to their handset which the customer had to open and verify the subscription by clicking enter on the WAP page. Both the landing page and WAP page where verified using offline GVI at the time. Once the subscription service was activated the customer was given immediate access to the content of this service via the WAP page, the customer was then also sent a join message and 15 seconds later a billing message which also gave the customer access to the content."

The above journey had been provided by the Level 2 provider during a previous Track 2 investigation into the Service (case ref: 71959). The Executive sought to rely on information supplied by the Level 2 provider and the Level 1 providers during this previous investigation as far as they were considered relevant to the current case.

The Level 2 provider had confirmed that it ceased to operate the Service as of February 2017.

The Executive had received 151 complaints concerning the Service since 17 March 2016. The Executive had only included complainant accounts following the Tribunal adjudication against the provider on 3 March 2016.

Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts are provided below:

"I never subscribed to this service, I never gave them permission to charge me for this service, I never used this service."

"I have received a txt every week from Fri 17 June, totalling £21 I want my money back! This is a scam I didn't knowingly sign up for!!"

"I have been charged £3 on a weekly basis by a company called Cellso-babes that I have not subscribed to. It is described as adult entertainment according to research i carried out on the company. In total i have been billed £15. I contacted the customer service number provided and spoke to a woman who told me i would have my number taken off their billing list and a refund would be sent to my address in the form of a cheque."

"I have no idea what the message is but they have text me every Saturday since April this year at a cost of £3 .the number is 66033. I want all payments refunded as this I've been advised by Vodafone is a scam . The number has now been barred."

As part of the standard request for information process, the Level 2 provider supplied text message logs for the complaints received. The Executive noted from the text message logs

supplied by the Level 2 provider that there was a high failure rate of chargeable Service messages following the purported consumers' opt-in. In these logs, failed messages occurred from the date of the complainants' purported opt-in. The failed messages were later followed by successfully delivered chargeable messages.

The Level 2 provider had been subject to a prior informal dealing with the PSA. On 7 January 2015, the Level 2 provider was sent a Track 1 action plan in respect of a breach of rule 2.3.3 of the Code, as the Level 2 provider accepted that it did not hold robust evidence of consumers' consent to be charged prior to January 2015. On 14 January 2015, the Level 2 provider had confirmed that it had implemented the required actions and had engaged the services of a third party verifier to provide robust evidence of consent to charge.

On 3 March 2016 a Tribunal had adjudicated on an allegation of breach of paragraph 2.3.4 the Code of Practice in respect of the Service, namely there being undue delay in the provision of the service. Whilst not upholding the particular breach alleged by the Executive in that case, the Tribunal had expressed "*grave concern at the conduct of the Level 2 provider in commencing (and continuing) the charging of consumers.*"

That Tribunal had expressed its view that consent to charge should be proximate to the chargeable message, and that after a substantial delay from the date on which consumers opted in, the Level 2 provider should have taken adequate additional steps to ensure that any consent to charge previously obtained was still current, before commencing charging. That Tribunal's view was that, even where this was not intentional, this conduct had resulted in consumers of premium rate services being treated unfairly and inequitably.

As at 3 March 2016, the earlier Tribunal was concerned that this issue had yet to be finally resolved and stated that the Executive may reasonably decide to take further action on this issue.

The breach allegations raised in the current case related to the evidence of complainants who first contacted the Executive after this earlier Tribunal had taken place.

Interim measures

On 7 June 2017 the Code Adjudication Panel ("**CAP**") imposed a withhold on Service revenues of up to £267,000.

The Investigation

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

The Executive had sent a Warning Notice to the Level 2 provider in which the following breach of the PSA Code of Practice (the "Code") was raised:

- Code 13 and 14 rule 2.3.3 – Consent to charge

On 6 October 2017, the Tribunal reached a decision on this breach. 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, correspondence sent subsequent to the service of the Warning Notice and the Level 2 provider's response, supporting information, and the previous complaint resolution procedure)
- correspondence between the Executive and the Level 1 providers
- correspondence between the Executive and the third-party verifier
- the Track 1 Action Plan, dated 7 January 2015
- the Tribunal minutes of the Track 2 procedure on 3 March 2016
- message logs
- PSA Guidance on "Consent to Charge" (Code 14)
- revenue statistics for the Service.

Submissions and Conclusions

Preliminary Issue

On 31 October 2017 the Level 2 provider wrote to the Executive requesting an adjournment of the Tribunal hearing to an unspecified date at the end of November 2017. The request was made by the Director of the company on the basis that she had been required to deal with a "family matter" which had occupied the majority of her time in the past few weeks and would not be able to attend the hearing. She also stated that it was necessary for her to attend in person as she had information that could resolve the matter.

The application was opposed by the Executive on the basis that an adjournment at such a late stage would have costs and resource implications for the Executive; there was a public interest in the case being dealt with expeditiously; the reason put forward for the adjournment by the Executive was vague and unsupported by any evidence, despite requests for further details; and that the Level 2 provider would not be unduly prejudiced by the adjournment not being granted as it had already submitted a detailed response to the Warning Notice which would be considered by the Tribunal and had the opportunity to supply further written representations prior to the hearing.

On 3 November 2017, the Chair considered the application and the Executive's response and refused the application to adjourn. The Chair's reasons were that the grounds stated by the Level 2 provider were vague and that, in any event, the Tribunal was not an opportunity for the Level 2 provider to offer new evidence or information as this was a paper based process. Further, there was an opportunity for the Level 2 provider to make further written representations if it so wished, which was sufficient to ensure that there would not be any undue prejudice in proceeding with the hearing.

Alleged Breach 1

Rule 2.3.3 (Code 13 and 14)

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code as consumers had been charged in the period after 14 January 2015, by which time the Level 2 provider knew that it did not have the required robust third party verification of consent to charge in respect of those consumers. It was the Executive's case that even where consumers had opted-in prior to this date, by the time the consumers were charged, the Level 2 provider was aware that it did not hold the required robust third party verification of consent to charge for those consumers. In light of the adjudication on 3 March 2016, the Executive argued that the relevant period for the purposes of an apparent breach of rule 2.3.3 was from 4 March 2016 onwards.

   The Executive relied on the correspondence exchanged with the Level 2 provider and Level 1 provider, complainant accounts, text message logs, correspondence with the third party verifier GoVerifyIt, PSA's General Guidance Note 'Consent to Charge' in support of the PSA Code of Practice, 14th Edition (the "**Code 14 Guidance**"), the previous Track 1 Action Plan and the minutes of the earlier adjudication against the Level 2 provider.

   Code 14 Guidance states:

   > *"1. Why is the capability to verify your right to charge important?*
   > *1.1 Premium rate services allow a charge to be generated to a consumer's phone bill, whether pre-paid or post-paid as part of a contract with an originating network, directly and remotely. A major concern then is that they can be charged without having requested or consented to any purchase.*
   > *1.2 It is important to understand the need for transparency when establishing any consent to charge a consumer via PRS payment. The key service information necessary to comply with rule 2.2.4 of the Phone-paid Services Authority's Code of Practice must be presented clearly and with suitable proximity and prominence. This is to ensure any action on the consumers part reflects a genuine intention to consent to the charges triggered by the action.*
   > *1.3 We treat matters such as these with the utmost seriousness and will always work closely with the appropriate authorities (such as the Serious Fraud Office and the local police) and continue to provide them with the evidence they require in order to prosecute those who commit offences.*

1.4 Without prejudicing the primacy of such criminal cases, where a Phone paid Services Authority Tribunal finds that a service has breached the Code in this respect they can also order refunds for all those consumers affected, whether they have made a complaint to the Phone-paid Services Authority or not, and the Phone-paid Services Authority will generally do its best to ensure that the perpetrators of unauthorized charges do not profit from them at the expense of the PRS market's reputation.

1.5 For this reason, it is essential that providers can provide robust evidence for each and every premium rate charge.

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. By 'properly verifiable', we mean a clear audit trail that categorically cannot have been initiated by anything else other than a consumer legitimately consenting, and cannot have been interfered with since the record was created."

In response to a direction for information dated 10 March 2017, the Level 2 provider had supplied a spreadsheet which it stated contained the evidence of consent to charge, namely the time and date of the opt-ins for the complainants who had contacted the Executive. The Executive noted that the date/time information found in the consent to charge spreadsheet were the same as the time stamps for the initial opt-in messages found in the message logs provided by the Level 2 provider.

The Executive had contacted a third party verification company, GoVerifyIt, whom the Level 2 provider had stated that it employed as part of its verification process. The Executive sent GoVerifyIt a sample of 50 complainant MSISDNs and asked it to provide the opt-in verification audit trail showing that Cellso held consent to charge for the MSISDNs. GoVerifyIt responded, stating that it did not hold any opt-in data for the MSISDNs in relation to the Level 2 provider's Service.

The Executive subsequently requested message logs for a sample of 29 MSISDNs from Veoo. In addition, the Executive asked Veoo for any evidence of consent to charge it held for the 29 MSISDNs. Veoo provided some data it held in relation to third party verification of the opt-ins. However, this data did not relate to the sample of 29 MSISDNs which had been provided. The data provided related to MSISDNs that were not the subject of the Executive's request for information. Furthermore, the opt-in verification data provided by Veoo covered a period of December 2014 onwards and therefore post-dated the primary opt-in period of the complainants (August 2014 to November 2014).

For the reasons set out above, the Executive submitted that the Level 2 provider did not hold robust and verifiable evidence of consent to charge at the time of the consumers purported to opt-in to the Service.

The complaints received by the PSA following the Track 2

procedure span the period between March 2016 to March 2017. The Executive noted from complainant text message logs supplied by the Level 2 provider that the apparent opt-in date for those complainants was consistently shown in all message logs as occurring between August 2014 and November 2014 regardless of when the complaint was received. Yet in the complainant message logs the date of the first successfully charged Service message was significantly later than the purported date of Service opt-in. The Level 2 provider had provided a breakdown of the opt-ins for the Service from January 2014 to March 2017. The spreadsheet showed that the majority of the opt-ins took place between the months of August and October 2014.

The Executive reminded the Tribunal that the Track 1 procedure highlighted the fact that the Level 2 provider did not hold robust verification to establish consumers' consent to be charged prior to January 2015. Therefore the Level 2 provider would have been aware that the majority of its subscriber base opted-in at a time when it did not have third party verification for consent to charge in place. A review of the message logs received from the Level 2 provider indicated that, in the majority of the logs, the first billable message was received by the complainants over 12 months after the opt-in date. The Executive noted that the longest delay between the opt-in and the first billable message was 23 months.

In view of the comments of the Tribunal of 3 March 2016, the Executive had asked the Level 2 to provide details of the steps the Level 2 provider had have taken to ensure that any consent to charge previously obtained was still current, before commencing charging. The Level 2 provider stated:

"While the Tribunal expressed these views there was no direction put in place or evidence in the code that we had breached any rules. We would point out that consent to charge was not in doubt in the original case levied against Cellso. It was made clear to the panel at the time of the original hearing that content and access to content was provided to every subscriber prior to billing. At this stage I would like to point to Case Reference 85964 and highlight the fact that they were providing a service that had a substantial period of time before billing commenced, 6 months / 9 months or even 12 months. In this case there was no comment of this being questioned. This is fundamentally the case for the service that we were operating, where content was given and consent to charge was recognised by the previous tribunal however there was a delay in the billing commencing to a small amount of subscribers. As had previously also been highlighted to the tribunal it would not have been financially a viable option for us to simply cease attempting to send weekly billable messages to the subscribers that had entered into our service over a period of heavy market spend. We have provided each consumers consent to charge time and date in an excel that are identical to the method of Opt In that had been accepted in our previous case."

The Level 2 provider had stated that there was no direction in place requiring it to do anything proactively to ensure that it had consent to charge prior to billing consumers that were subscribed to the Service. It was the Executive's case that even in the absence of a direction from the Tribunal, that the Level 2 provider could not charge consumers where it had knowledge that they did not have the required robust

evidence of consent to charge; this would have been in breach of paragraph 2.3.3 of the Code, which states that:

"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."

The Executive had asserted that this was an on-going obligation regardless of whether a Tribunal has applied a sanction or not. In addition to the Code provision, the Guidance regarding consent to charge states that:

"…it is essential that providers can provide robust evidence for each and every premium rate charge."

Following on from this, the Level 2 provider had stated that it had made changes to its terms and conditions to state that it had experienced some technical issues and that customers may not be charged immediately for the Service. The Level 2 provider had stated that the terms and conditions also set out that customers would not be re-billed for the "lost period".

The Executive had been unable to validate the changes made by the Level 2 provider as the Service website was unavailable for monitoring. The Executive noted that the majority of complainants had stated that the charges were unsolicited and that they did not engage with the Service. As such, the Executive argued that placing amended terms and conditions on the Service contents pages would not have informed consumers of any forthcoming charges. Furthermore, even if consumers had seen the terms and conditions, there was no mechanism by which they could actively consent to the charges.

It was the Executive's case that the Level 2 provider had charged consumers in the period after 4 March 2016 whilst knowing that it did not have the required robust third party verification of consent to charge in respect of those consumers. Even if consumers had opted-in prior to this date, at the time the charges were made, the Level 2 provider had been aware that it did not hold the required robust third party verification of consent to charge for those consumers.

At the Tribunal, the Executive was asked the reason for not pursuing a breach of rule 2.3.3 at the earlier Tribunal. The Executive explained that this was a policy decision, taken as that adjudication had taken place at a time proximate to the Track 1 Action Plan being agreed, part of which was a requirement on the provider to remedy concerns about consent to charge.

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

2. The Level 2 provider denied the breach. It stated that the Track 1 Action Plan had been fully complied with and that no new subscribers had entered into the Service without using third party verification. It also referred to the adjudication on 3 March 2016 in which the breach of paragraph 2.3.4 was not upheld. The Level 2 provider argued that the issues raised in this case had already been considered by the earlier Tribunal and that to investigate the same matters twice was a major failing on the part of the PSA.

   The Level 2 provider stated that it had since ceased all subscription charges for every subscriber.

3. The Tribunal considered the Code and all of the evidence before it, including the correspondence exchanged with the Level 2 provider and Level 1 provider, complainant accounts, text message logs, correspondence with the third party verifier GoVerifyIt, the previous Track 1 Action Plan and the minutes of the earlier adjudication against the Level 2 provider.

   The Tribunal noted that, as part of the Track 1 Action Plan, the Level 2 provider had accepted that it did not have robust and verifiable evidence of consent to charge consumers prior to January 2015. The Level 2 provider, had not, by its own admission, sought to ensure that it had robust evidence of consent to charge its existing consumer base at any time thereafter and in particular, following on from the earlier Track 2 procedure, heard on 3 March 2016.

   The Tribunal noted the Level 2 provider's submissions that the current case related, in essence, to a breach that had already been adjudicated by the previous Tribunal. The Tribunal did not accept this argument in light of the fact that the earlier case related to an alleged breach of a different provision of the Code. Furthermore, although the Tribunal accepted that the earlier Tribunal had not made a direction requiring the Level 2 provider to ensure that it had robust and verifiable evidence of consent to charge consumers who had been opted-in to the Service prior to 4 March 2016, the Level 2 provider was, at all times, still required to adhere to the Code. This obligation to comply with the Code existed regardless of whether there had been a specific direction by the earlier Tribunal.

   The Tribunal was satisfied that the Level 2 provider had continued to bill consumers, for whom it knew it did not have robust and verifiable evidence of consent to charge.

   For the reasons outlined above, the Tribunal was satisfied that the Level 2 provider did not hold robust evidence that consumers had given their consent to charge. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

   Decision: UPHELD

SANCTIONS

1. Initial assessment of sanctions

The Executive's initial assessment, before any potential uplift or downgrade in light of aggravating or mitigating features, was that the following sanctions were appropriate:

- a formal reprimand
- a requirement to remedy the breach
- that access to the Service be barred until the breach is remedied
- a requirement that the Level 2 provider refund all consumers who claim a refund; and
- a fine of £250,000.

based on a preliminary assessment of the breaches as "very serious".

With regard to the Executive's recommendation of a fine, the Level 2 provider stated that: "*There should be no fine for a service that the executive has reviewed a number of times and allowed to continue throughout this time.*"

With regard to the Executive's recommendation of requiring the Level 2 provider to remedy the breach, the Level 2 provider argued that it had "*already remedied the apparent breach*" as they had "*ceased the billing of all of our subscriptions within the UK*".

With regard to the Executive's recommendation of a formal reprimand the Level 2 provider stated that there should be no formal reprimand and that, if there were to be such a sanction, the Executive should also receive one as it had failed to recognise issues when it first investigated the Service.

The Level 2 provider, in relation to the recommendation that access to the Service is barred the Level 2 provider argued that "*the Service has been running for a number of years all of which the executive had the full information on request regarding the service. No service barring as this is not required.*"

The Level 2 provider asserted that it had provided evidence that it already actioned refunds for any subscriber and would continue to do so. As such, it argued that the sanction was "*irrelevant*".

The Tribunal's initial assessment of the breaches of the Code was that the breach was very serious. In coming to this assessment, the Tribunal found the following:

- there had been significant financial harm to consumers
- there had been an impact on the average consumer's ability to make a free and informed transactional decision about whether to sign up to the Service
- there had been distress and inconvenience caused to consumers

- there was a potential for loss of confidence by consumers in premium rate services in general
- the breach had occurred over a significant period of time and consumers had been inappropriately charged a substantial amount of money
- the breach was intentional
- the Level 2 provider continued to bill its customer base despite the clear comments in the Track 1 Action plan and by the earlier Tribunal
- there had been a clear and highly detrimental impact on consumers
- consumers had incurred a very high or wholly unnecessary cost
- the breach demonstrated a fundamental disregard for the requirements of the Code
- the breach was repeated.

Based on its initial assessment of the severity of the breach, the Tribunal considered that the following sanctions were appropriate and proportionate:

- a formal reprimand
- access to the Service to be barred
- a prohibition on the Level 2 provider from involvement in PRS
- a general refund
- a fine of £250,000.

2. Proportionality Assessment

Assessment of aggravating and mitigating factors

It had been the Executive's submission that there were no mitigating factors in this case.

The Level 2 provider argued that there it was a mitigating factor that the Executive had investigated the Service previously and had not alleged a breach of Rule 2.3.3. It also asserted that after the Track 1 procedure, no subscriber had entered into the Service without robust verification. Further, the Level 2 provider has now suspended all UK services. The Level 2 provider had also suggested that it refunded consumers and engaged with the Executive throughout the proceedings.

In terms of mitigating factors, the Tribunal noted that the Level 2 provider had engaged with the Executive throughout the proceedings. However, the Tribunal did not place significant weight on this engagement as providers are expected, under the Code, to cooperate with investigations. The Tribunal did not find any other mitigating features.

The Tribunal found the following aggravating factors:

- the Level 2 provider continued to bill consumers despite the previous Track 1 procedure in which it accepted that it did not hold robust evidence of consent to charge consumers

- the Level 2 provider disregarded the comments of the Tribunal following the previous Track 2 procedure.

Financial benefit/Need for deterrence

The Executive asserted that the Level 2 provider generated an estimated £1,501,518.40 from the breach in this case and argued that there was a need to remove this financial benefit in order for the sanctions to achieve the sanctioning objective of credible deterrence. The Executive therefore recommended the maximum fine, albeit recognising that this would not amount to the financial benefit which it asserted had flowed from the non-compliant conduct.

The Level 2 provider argued that the case should not be deemed "very serious" and submitted that the fine recommended would have a detrimental effect as the Level 2 provider had ceased its operation in the UK.

The Tribunal accepted the evidence that the Service generated an estimated £1,501,518.40 from the apparent breaches. It decided that there was a need to remove as much of the financial benefit as possible and considered that the sanctions imposed should have both a specific and general deterrent effect.

Sanctions adjustment

The Executive had argued that the sanctions should be uplifted in light of the serious aggravation in the case, namely that the Level 2 provider commenced and continued to bill customers for whom it knew it did not hold robust and verifiable evidence of consent to charge.

The Level 2 provider suggested that the breach was not very serious as it was something that the Executive had investigated previously and not pursued at the earlier Tribunal.

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.

3. Final sanctions

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

- a formal reprimand
- access to the Service to be barred
- a prohibition on the Level 2 provider from involvement in PRS
- a general refund
- a fine of £250,000.

In imposing the above sanctions, the Tribunal sought to adequately reflect the serious aggravating features in the case. The Tribunal considered that the sanctions imposed were the minimum necessary in order to have a deterrent effect.

The Tribunal stated that it would likely have imposed a substantially higher fine in this case had it not been for the limitation imposed by the statutory maximum fine amount, which in this case was £250,000.

Administrative charge recommendation: **100%**