

## Tribunal meeting number 203

**Case reference:** 97476

**Level 2 provider:** Browser Games Limited (UK)

**Type of service:** Games subscription service

**Level 1 provider:** Veoo Ltd

**Network operator:** All Mobile Network operators

**This case was brought against the Level 2 provider under Paragraph 4.5 of the Code of Practice**

### Background

The case concerned a games subscription service operating under the brand name “Browser Games” on the shared shortcode 88450 (“**the Service**”).

The Level 2 provider for the Service was Browser Games Limited (the “**Level 2 provider**”). The Level 2 provider had been registered with the Phone-paid Services Authority since 3 November 2015. The Level 1 provider for the Service was Veoo Ltd (the “**Level 1 provider**”).

### The service

The Service was stated to be a games subscription service charged at £4.50 per month. The Executive understood that consumers entered the Service via a wireless application protocol (“**WAP**”) PIN opt-in. Message logs for the Service obtained from the Level 2 provider indicated that the Service commenced operation in November 2015.

The Level 2 provider stated that the Service promotion commenced in October 2015. Tap2bill advised that the Service commenced operation on its platform on 18 February 2016 and was suspended on 24 March 2016.

The Level 1 provider supplied promotional material for the Service. Attached at **Appendix A** is a screen shot of the material supplied to the Executive.

### Preliminary issue

The Executive noted that the Level 2 provider had failed to respond to formal directions for information. The Executive received a notification letter from Wilson Field Limited (“**the Joint Administrators**”) informing them that the Level 2 provider had gone into administration and two of their staff had been appointed as Joint Administrators of the Level 2 provider on 2 September 2016. The Executive noted that under the terms of the Insolvency Act 1986, an automatic moratorium is imposed in respect of proceedings against a company in administration. The Executive noted that on 18 October 2016, the Joint Administrators had consented to the lifting of the moratorium, subject to confirmation that the administrators will

not participate in the process, that the administrators will not be liable for any administrative costs of the process, and that any fine imposed would be classified as an unsecured claim in the administration.

### Summary of complaints

The Executive had received 38 complaints concerning the Service since 29 February 2016. Complainants variously alleged that the Service charges were unsolicited.

A sample of complainant accounts is provided below:

“As far as I am concerned, I have never signed up for this service. I immediately sent a STOP message and contacted my phone provider "Three". The [sic] passed me to "Browser Games" who passed my complaint to "Veoo". They did call back and said that I had signed up for the service 3 months prior. I was unable to take this conversation further as I was out at the time. I did call them again later to discuss the charges, but they have not returned the calls.”

“I received [sic] my bill from 3 network. It had £13.50 premium messages charge. When i looked into this i have been charged three times at a rate of £4.50 per message on 28.2.16 at 22:46, 29.2.16 at 01:19 and 26 march at 23:18 all from the number 88450. When i called [sic] 3 to question it they said I had a subscription to a company called browser games and were being charged for messages but i have never signed up to any subscriptions [sic] i do not use my phone for gaming. And i never even received [sic] the messages in question in the first place. Three tried to contact the company in question but it went to voicemail. I have also tried to call the company myself on 0130 2245 074 but all i got was an automated person and a voicemail. Three were unable to give me a refund but have blocked the number from charging me further.”

“I am unaware that i have agreed to being charged and do not know how this has happened. I am being billed £3.75 per month on my O2 bill date. I have mistakenly paid 3 payments so far, i urgently want to stop it and ensure i do not pay any further charges. I used your site to look up the number and it says browser games but as i say i have no recollection of sending any replies to this number.”

### The Investigation

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

The Executive sent a Warning Notice to the Level 2 provider on 27 January 2017 with a deadline for response of 10 February 2017. Within the Warning Notice the Executive raised the following breaches of the PSA Code of Practice (the "**Code**"):

- Rule 2.3.3 – Consent to charge
- Paragraph 4.2.3 - Failure to disclose requested information
- Paragraph 3.12.5 – Subscription spend reminders
- Paragraph 3.4.14(a) – Failure to register a number

On 15 March 2017, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full:

- The complainants' accounts;
- Correspondence between the Executive and the Level 2 provider (including directions for information);
- Correspondence between the Executive and Level 1 provider;
- Correspondence between the Executive and a third-party verifier;
- Complainant message logs from the Level 2 provider and Level 1 provider;
- PSA Guidance on "Consent to Charge" (Code 13) and on "Privacy and Consent to Charge" (Code 12);
- The Notice of Specified Service Charges and Duration of Calls published in accordance with paragraph 3.12.6 of the 13th Code of Practice;
- Revenue statistics for the Service;
- The Warning Notice dated 27 January 2017, including attachments; and
- Correspondence from the Joint Administrators for the Level 2 provider dated 18 October 2016.

## Submissions and Conclusions

### Alleged Breach 1

**Rule 2.3.3** – "Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code as the Level 2 provider had not provided any evidence to establish that complainants who had entered the Service had consented to being charged. The Executive requested evidence of consent to charge following receipt of a number of complaints from consumers alleging that they had incurred Service charges without their consent.

The Executive relied on correspondence exchanged with the Level 1 providers and ETX (UK) Ltd, complainant accounts, the Phone-paid Services Authority General Guidance Note 'Privacy and consent to charge' in support of the Code (13th Edition) (the "**Code 13 Guidance**") and text message logs.

Code 13 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 the Phone-paid Services Authority's satisfaction that these records cannot be created without consumer involvement, or tampered with in any way, once created;
- The Phone-paid Services Authority 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 the Phone-paid Services Authority password-protected access to a system of opt-in records;
- Any other evidence which demonstrates that the opt-in cannot be interfered with.

**2.11** Providers who are considering using a method of verifying consent to charge, which employs a method that does not involve independent Network operator records of consent, are advised to contact the Phone-paid Services Authority before they begin to operate it.

**2.12** Any MT message sent in these circumstances should not act as a promotion for the service itself (e.g. use its name). They should be designed and drafted as a functional tool to enable the completion of the verification process. Where it does act as a promotion and instructions given could be used by a recipient who had not moved through the prior steps in the verification process, it may breach other Code rules. Advice on this can be sought from the Phone-paid Services Authority directly.

**2.13** In some circumstances providers, instead of providing a PIN for entry into a website, invite the consumer to reply with an MO containing a keyword in order to agree to a charge. In these circumstances, and without the entry of a PIN to prove consumer interaction with the website, there is a greater chance that consumers could be subscribed without their explicit consent. For this reason where a consumer is asked to reply with an MO rather than by entering a unique PIN into a website, we would expect any MT message which arises from the consumer having entered their number into a website to contain all key service information, including name of the provider, price and whether it is a subscription or not."

In the absence of any response from the Level 2 provider to formal directions for information, the Executive made enquiries with the Level 1 provider in order to establish whether they held any information which would clarify the issue of consent to charge.

The Executive noted that the Level 1 provider had stated that the shortcode traffic was migrated from 87066 belonging to the Level 1 provider Tap2Bill Limited (“**Tap2Bill**”) (formerly known as IMI Mobile Europe Limited). However, when the Executive subsequently contacted Tap2Bill, it advised the Executive that:

“I can confirm that Browser Games have never operated via IMI mobile or Tap2Bill as a client. Additionally, we have never had any service titled ‘Browser Games’ on any of our shortcodes.”

The Executive also made enquiries of ETX (UK) Ltd (“**ETX**”) (a third-party verifier of Service charges) to establish whether they could verify that the complainants had consented to being charged. ETX (UK) Ltd confirmed that the Level 2 provider had been a client since 4 February 2016 but were unable to verify that any of the complainants had consented to the Service charges. All of the complainants’ opt-ins predated 4 February 2016. The Executive noted that the message logs provided by the Level 2 provider showed a WEB PIN opt-in in November 2015. The message logs from the Level 1 provider showed a Go Verify It (“**GVI**”) opt-in (the opt-in verification service operated by ETX) in November 2015.

The Level 1 provider advised the Executive that the service commenced operation on its platform on 27 February 2016 and was suspended on 28 October 2016 following concerns over consent to charge.

The Executive stated that due to the Level 2 provider’s failure to respond to any directions from the Executive, it had not been possible to seek clarification from the Level 2 provider. Notwithstanding this, the Executive asserted that Level 2 provider did not hold robust evidence of consent to charge for any consumer who it stated had subscribed prior to the migration to the Level 1 provider for the following reasons:

- The failure of the Level 2 provider to respond to directions or to provide robust evidence of consent to charge consumers;
- The inability of ETX (UK) Limited to provide verification of consent to charge in respect of the complainants to the Executive;
- The incorrect information provided by the Level 2 provider to the Level 1 provider, namely that all of the MSISDNs were subscribed to the Service whilst the Level 2 provider was purportedly contracted to Tap2bill, when it appears it had never contracted with Tap2Bill.

For the reasons set out above the Executive asserted that the Level 2 provider has been unable to provide sufficient evidence which established consent to charge complainants. Accordingly, the Executive submitted that the Level 2 provider has acted in breach of rule 2.3.3 of the Code.

During the Tribunal hearing, the Tribunal referred to a document (a list of MSISDNs and their interactions provided by the Level 1 provider during the course of the investigation) and queried with the Executive whether they were real numbers as they

appeared to be for a chat service not a games subscription service. The Executive explained that the MSISDNs appeared to be interacting with a different shortcode and had queried this with the Level 1 provider. The Level 1 provider subsequently explained that it had not migrated these MSISDNs to the Service and therefore they had not been used. In relation to another list of MSISDNs supplied by the Level 1 provider during the investigation which were a sample of MSISDNs the Level 1 provider had sent to ETX to ascertain whether the Level 2 provider had consent to charge, the Executive confirmed that it had checked each number and none of the MSISDNs were complainants' MSISDNs.

The Tribunal noted that the revenue information provided by the Level 1 provider at two different points during the investigation did not correspond and it asked the Executive whether it could provide any explanation. The Executive was not able to add any further explanation.

2. The Joint Administrators did not respond to the Warning Notice. They had stated in earlier correspondence that they did not wish to take part in the process.
3. The Tribunal considered the Code and all the evidence before it, including the consumer complaints, the message logs, the absence of a response to directions for information from the Level 2 provider and the correspondence from the Level 1 provider and Tap2Bill which indicated that the Level 2 provider did not appear to have a contract with Tap2Bill at the time that the complainants had purportedly opted-in to the Service.

The Tribunal was satisfied that the Level 2 provider had not provided robust evidence that consumers had given their consent to be charged. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

## **Decision: UPHELD**

### **Alleged Breach 2**

**Paragraph 4.2.3.** - "Where a direction is made pursuant to paragraph 4.2.1 a party must not fail to disclose to the PSA, when requested, any information that is reasonably likely to have a regulatory benefit in an investigation."

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.3 of the Code because the Level 2 provider had failed to respond to formal directions for information to allow the Executive to fully investigate the service, and complaints being received stating that the Service was unsolicited.

The Executive relied on correspondence sent to the Level 2 provider and correspondence exchanged with the Level 1 provider.

The Executive sent a 4.2.1 formal direction for information dated 19 August 2016 with a deadline for response of 26 August 2016. On 22 August 2016 the Executive called the Level 2 provider on the contact number it had for it and left a message for the director of the Level 2 provider to return the Executive's call. The Executive also called the

director's mobile number, the person receiving the call answered by the director's first name and the Executive advised that a response was due by 26 August 2016 to the direction sent to the Level 2 provider. The person who answered then advised the Executive that the director was not available and she was just using her phone but would pass on the message. On receiving no response, the Executive sent two further e-mails to the Level 2 provider on 30 and 31 August 2016 to ascertain if it would be responding. The Executive received successful delivery notification for both e-mails.

On 31 August 2016, the Executive again called the Level 2 provider on its contact numbers, and left a message for the director. On calling the director's mobile number and asking to speak to the director, the Executive was advised that the director was not available.

The Executive submitted that the Level 2 provider had failed, when directed, to provide the following information, which was of a regulatory benefit to the investigation, as it would have assisted in establishing whether the Service and its promotion were operating compliantly with the Code:

- A summary of the way the Service is intended to operate including full terms and conditions;
- A clear step-by-step user flow of the full consumer journey into the Service (including screenshots);
- Details of the Service name or, if a name is not assigned its closest description;
- Details of the promotion that prompts initiation into the Service;
- Confirmation of whether this Service operated on a shared or exclusive shortcode;
- A list of all other numbers, shortcodes, trigger or keywords used for the Service and in the promotion of the Service;
- Evidence of how specific MSISDNs were opted in to the Service;
- Text volume statistics;
- Text revenue statistics;
- Details of any action was taken to ensure that SMS messages were not unsolicited;
- Whether compliance advice was sought from the Phone-paid Services Authority;
- All methods by which consumers were able to opt-in to the Service and how they could opt-out;
- A copy of the contract between the Level 1 provider and the Level 2 provider;
- Confirmation of the date the Service started; and
- Confirmation of whether the technical platform facilitating the Service's operation is located within the UK or, if outside of the UK, its geographical location;

For the reasons set out above the Executive asserted that the Level 2 provider had not complied with the Code in relation to responding to formal directions for information. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of paragraph 4.2.3 of the Code.

In response to questioning by the Tribunal regarding the requests for information that had been made to the Level 2 provider. The Executive confirmed that the Level 2 provider had been asked to provide message logs for each complainant very shortly after each complaint had been received as part of the Phone-paid Services Authority's informal request for information process, and the Level 2 provider had provided logs at that stage. It was later in response to formal directions for information that the Level 2 provider failed to respond.

2. The Joint Administrators did not respond to the Warning Notice. They had stated in earlier correspondence that they did not wish to take part in the process.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal considered that the Level 2 provider had not provided a response to the Executive's formal direction requiring the provision of information, and considered that the information requested was reasonably likely to have been of regulatory benefit. Consequently, the Tribunal upheld a breach of paragraph 4.2.3 of the Code.

#### **Decision: UPHELD**

#### **Alleged Breach 3**

**Rule 3.12.5** – “Any reference to compliance with the rules or obligations under this Code shall include compliance with all specified amounts, call durations and actions set by the Phone-paid Services Authority under paragraph 3.12.1. A breach of any specified amount, duration or action set under that paragraph shall be a breach of the Code.”

1. The Executive asserted that the Level 2 provider had breached paragraph 3.12.5 of the Code as, message logs show spend reminders were not sent every month as required.

The Executive referred to rule 3.12.1 of the Code which states:

“The PSA may, in relation to the service categories set out in paragraph 3.12.2 below, specify:

- (a) the service charges which may be spent per call or calls taken together in any 24 hour period or monthly billing cycle,
- (b) the duration permitted for a call or calls to a service in any specified time period,
- (c) the actions which must be taken at specified intervals, or after specified service charges or call duration have been reached, including but not limited to:
  - (i) The provision of a spend or call duration reminders;

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

The Executive also referred to the Notice of Specified Service Charges and Duration of Calls (the “**Notice**”) published in accordance with paragraph 3.12.6 of the Code. The Notice specifies that:

“...for all subscription services, once a month, or every time a user has spent £20.45 (inclusive of VAT) if that occurs in less than a month, the following information must be sent free to subscribers:

- (i) The name of the service;
- (ii) Confirmation that the service is subscription-based;
- (iii) What the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent;
- (iv) The charges for the service and how they will or can arise;
- (v) How to leave the service; and
- (vi) Level 2 provider contact details.”

The Executive relied on the message logs supplied by the Level 2 provider. The Executive highlighted two example message logs:

Level 2 provider message log for MSISDN 07\*\*\*\*\*051

The Executive noted that the Level 2 provider log showed a billing message delivered on 27/02/16 at 21:28, however, no monthly subscription / spend reminder message was sent in February 2016.

Level 2 provider message log for MSISDN 07\*\*\*\*\*894

The Executive noted that the Level 2 provider log showed a billing message delivered on 27/02/16 at 20:28, however, no monthly subscription / spend reminder message was sent in February 2016.

Some of the other message logs supplied by the Level 2 provider also did not show the spend reminder message in February 2016, but in the same billing month, prior to the chargeable message, showed a free message with a link to the games, where the message contained some, but not all of the information required in a spend reminder message. It did not contain the name of the Service nor any information on how to leave the Service.

The content of the message with a link to the games was:

“Here is the link to your unlimited mobile Games <http://ow.ly/VC9al>. Club cost £4.50 per Month after discount period. For tech support call 01302 245074 BGL”

The content of the spend reminder message was:

“Enjoy Browser Games Club costing £4.50 per month until u reply STOP to quit. BGL Help 01302245074”

For the reasons set out above the Executive asserted that the Level 2 provider had not complied with the Code in relation to spend reminder messages for subscription services. Accordingly, the Executive submitted that the Level 2 provider had acted in breach of paragraph 3.12.5 of the Code.

2. The Joint Administrators did not respond to the Warning Notice. They had stated in earlier correspondence that they did not wish to take part in the process.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted that in one of the two examples highlighted by the Executive, although the spend reminder message was not sent in the calendar month of February 2016, a spend reminder message was sent before the expiry of one month in duration on 25 March 2016. In the other example highlighted by the Executive, the spend reminder had again not been sent in the calendar month of February 2016 but the subscriber had successfully unsubscribed from the Service before the expiry of one month in duration. The Tribunal also noted similar issues with the referenced examples of MSISDNs where the Executive had stated consumers had been sent some but not all the information required by the Notice.

The Tribunal carefully considered the wording of paragraph 3.12.1 and the Notice but concluded that it was not satisfied that spend reminders should be sent every calendar month. Accordingly, on the basis of the evidence before it, the Tribunal was not satisfied that the breach of 3.12.5 was made out and it did not uphold the breach.

#### **Decision: NOT UPHELD**

#### **Alleged Breach 4**

**Paragraph 3.4.14(a)**– “Level 2 providers must, within two working days of the service becoming accessible to consumers, provide to the PSA relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.”

1. The Executive asserted that the Level 2 provider had breached paragraph 3.4.14(a) of the Code as it failed to provide the Phone-paid Services Authority with relevant details to identify the Service operating on shortcode 88450 to consumers for a period of time when the Service was operational. Furthermore, the Level 2 provider has failed to provide the Phone-paid Services Authority with the identity of the Level 1 provider concerned with the provision of the Service.

The Code requires that Level 2 providers supply relevant details to identify services to consumers. The Phone-paid Services Authority Registration Scheme is in place to facilitate providers to supply relevant details to identify their services to consumers.

Once a provider has supplied details of its services, including which premium rate numbers it operates on, the details then appear on the 'Number Checker' section of the Phone-paid Services Authority website, [www.psauthority.org.uk](http://www.psauthority.org.uk). The Number Checker allows consumers to enter a phone number they may not recognise on their phone bill, and find out information regarding that number.

The Executive noted from the information supplied by the Level 2 provider that the Service commenced operation in November 2015. The Level 1 provider advised that the Service commenced operation on its platform on 27 February 2016. However, the Executive noted that the shortcode 88450 was not registered with the Phone-paid Services Authority until 13 April 2016. The Executive further noted that although the Service was registered on 13 April 2016, the Level 2 provider had not provided the identity of the Level 1 provider concerned with the provision of the Service at all.

The Executive asserted that where services are not registered, consumers do not have the ability to access information relating to the service, which impairs the Phone-paid Services Authority's regulatory function. The Executive submitted that the failure to provide the requisite information to the Phone-paid Services Authority by registering the Service number was a breach of paragraph 3.4.14(a) of the Code.

In response to questioning from the Tribunal, the Executive clarified that the shortcode 88450 was a shared shortcode and other Level 2 providers would have used that number for their services. As the shortcode belonged to the Level 1 provider it would have had to register the number, as would the other Level 2 providers using it.

2. The Joint Administrators did not respond to the Warning Notice. They had stated in earlier correspondence that they did not wish to take part in the process.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal considered that the Level 2 provider had not registered the Service with the Phone-paid Services Authority as it was required to do by paragraph 3.4.14(a) of the Code, for a period of at least six weeks and consequently, for the reason advanced by the Executive, the Tribunal upheld a breach of paragraph 3.4.14(a) of the Code.

**Decision: UPHELD**

## SANCTIONS

### Representations on sanctions made by the Executive

The Executive submitted that the following sanctions were appropriate:

- a formal reprimand;
- a fine of £200,000;
- a requirement that access to the Service is barred until compliance advice regarding the Level 2 provider's procedures for ensuring that it only charges consumers for whom it holds robust and verifiable evidence of consent to charge, and implemented to the satisfaction of the Phone-paid Services Authority; 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 PSA that such refunds have been made.

based on a preliminary assessment of breaches 1, 2 and 3 as "very serious" and breach 4 as "significant".

The Joint Administrators on behalf of the Level 2 provider did not comment on the sanctions, save to state that should any fine be imposed upon the Level 2 provider it would be ranked as an unsecured claim in the administration proceedings.

### Initial overall assessment

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

#### Rule 2.3.3 – Consent to Charge

The initial assessment of the breach 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 case had a clear and highly detrimental impact on consumers; and
- The nature of the breaches, and/or the scale of harm caused to consumers, was likely to severely damage consumer confidence in premium rate services.

#### Paragraph 4.2.5 – Failure to provide information

The initial assessment of the breach of paragraph 4.2.5 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider had deliberately and without good reasons provided no response to directions to provide information; and
- The nature of the breaches was likely to severely damage consumer confidence in premium rate services.

#### **Paragraph 3.4.1 – Failure to register the service**

The initial assessment of the breach of paragraph 3.4.1 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Level 2 provider failed to register the Service including the Service number and the identity of its Level 1 provider for a period of six weeks; and
- The nature of the breach is 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 breaches were **very serious**.

#### **Final overall assessment**

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

- There have been numerous previous adjudications making clear the importance of ensuring that consumers' consent to charge is obtained and that robustly verifiable evidence is held and supplied on request.

The Tribunal did not find any mitigating factors.

The Level 2 provider's evidenced revenue in relation to the Service in the period from February 2016 to September 2016 was in the range of Band 3 (£250,000 to £499,999).

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**

Having regard to all the circumstances of the case (including the fact of the Level 2 provider's administration), the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £200,000;
- a requirement that access to the Level 2 provider's Service is barred until compliance advice regarding the Level 2 provider's procedures for ensuring that it only charges consumers for whom it holds robust and verifiable evidence of consent to charge has

been obtained, and implemented to the satisfaction of the Phone-paid Services Authority; 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 the PSA that such refunds have been made.

The Tribunal noted that the Service appeared to have been sold on to another provider, although it was not clear whether the Service was still operational. Notwithstanding this, the Tribunal warned any provider that may be operating the Service in the future that it expected the issues identified in this adjudication to be rectified, and if non-compliance was brought to its attention in the future this is a matter that would be treated seriously.

**Administrative charge recommendation:**

**100%**

## Appendix A

A screenshot of a Service promotion provided by the Level 1 provider

