Tribunal Sitting, Case Number and Date	Case Ref	Network Operator	Level 1 Provider	Level 2 Provider	Service Title and Type	Case Type	Procedure
No. 114 Case 1 22/11/12	06776	Oxygen8 Limited UK and Cable & Wireless (UK) Limited	BCH Digital Limited UK	Churchcastle Limited	Wordsearch competition	Level 2 Provider	Review

On 27 September 2012, a Tribunal (the "**Original Tribunal**") upheld various breaches of the 12th Edition of the PhonepayPlus Code of Practice (the "**Code**") against the Level 2 provider, Churchcastle Limited. The adjudication related to word search puzzle competitions, which consumers had to complete in order to enter into premium rate prize draws for large cash prizes or to obtain items of jewellery. The Executive received 15 complaints regarding the service. All complaints related to elderly consumers, the majority of whom were over 80 years old, and were made by concerned relatives.

The Tribunal upheld four breaches of the Code and assessed the case as "very serious". The Tribunal imposed a formal reprimand, a direction to remedy the breaches, a fine of £800,000 and a requirement that the Level 2 provider must refund all complainants 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.

On 25 October 2012, the Level 2 provider submitted an application for a review on four grounds and an application for partial suspension of the fine sanction. The Executive submitted the application for review to the Chair of the Code Compliance Panel ("**CCP**") on 29 October 2012. On 30 October 2012, a legally qualified member of the CCP concluded that a review was prima facie merited on all four grounds and granted a partial suspension of the fine. The specific grounds advanced by the Level 2 provider were as follows:

- Ground 1: A breach of rule 2.3.10 (vulnerability) of the Code should not have been upheld.
- Ground 2: A breach of rule 2.3.2 (misleading) of the Code should not have been upheld.
- Ground 3: A breach of rule 4.2.4 (conceal information) of the Code should not have been upheld.
- Ground 4: The Level 2 provider disagreed with the Tribunal's assessment of seriousness and the level of the fine sanction imposed.

On 22 November 2012, a Tribunal (the **"Review Tribunal"**) considered the Level 2 provider's submissions and the additional comments and evidence provided by both the Executive and Level 2 provider in relation to one of the grounds submitted for review. The Review Tribunal concluded that the Original Tribunal's decisions on breaches were ones which it was entitled to come to on the evidence before it and were not decisions to which no reasonable Tribunal, properly directing itself, could have reached. The Review Tribunal also concluded that the Original Tribunal's decisions on seriousness were open to a reasonable Tribunal on the evidence and were not decisions to which no reasonable Tribunal, properly directing itself, could have reached. The Review Tribunal also concluded that, in setting the fine sanction at the level that it did, the Original Tribunal had directed itself correctly in law and reached decisions that were open to it on the evidence and its findings. Accordingly, the Review Tribunal upheld the decisions of the Original Tribunal in relation to breaches, seriousness and sanctions.

Administrative Charge Awarded	100%

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday 22 November 2012
TRIBUNAL SITTING No. 114
CASE REFERENCE: 06776

Level 2 provider: Churchcastle Limited

Level 1 provider: BCH Digital Limited UK

Network operators: Oxygen8 Limited UK and Cable & Wireless (UK) Limited

THIS CASE WAS BROUGHT BEFORE A REVIEW TRIBUNAL FOLLOWING THE GRANTING OF AN APPLICATION BY THE LEVEL 2 PROVIDER FOR A REVIEW UNDER PARAGRAPH 4.7 OF THE CODE

BACKGROUND

On 27 September 2012, a Tribunal (the "**Original Tribunal**") upheld various breaches of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**") against the Level 2 provider, Churchcastle Limited.

The adjudication related to word search puzzle competitions, which consumers had to complete in order to enter into premium rate prize draws for cash prizes or to obtain items of jewellery. After completing the initial word search competition, complainants were sent highly personalised direct mail marketing which informed them of the result of their first entry (i.e. that their entry would be entered into a prize draw) and/or promoted additional stages of the same competition and/or a new competition. The cost of entering the competitions varied between 10p per minute from a BT landline for initial promotions or early stages of the competition (0871 numbers) to £1.53 per minute from a BT landline for later participation (090 numbers). The length of calls varied from just under three minutes to six minutes and 55 seconds. In order to claim additional "matching" items of jewellery or enter additional competitions, consumers were required to stay on the call for an extended or additional period of time.

The Executive received 15 complaints regarding the service. All complaints related to elderly consumers, the majority of whom were over 80 years old, and were made by concerned relatives. The complainants raised a number of concerns regarding the size, visibility and readability of the pricing information, "bill shock", misleading promotions (including the poor quality of jewellery items) and the large volume of highly personalised direct mail marketing promotions. In addition, a number of complainants had stated that in their opinion the Service took advantage of elderly people who were vulnerable because of their age.

The Original Tribunal hearing was heard in accordance with paragraph 4.5 of the Code. The Tribunal upheld four breaches of the Code, rule 2.3.10 (vulnerable groups), rule 2.2.5 (pricing), rule 2.3.2 (misleading) and paragraph 4.2.4 (concealing information).

The initial seriousness rating attributed to the breach of rule 2.3.10, 2.2.5 and 2.3.2 was "very serious". The initial seriousness rating attributed to the breach of paragraph 4.2.4 was "serious". After taking into account two aggravating and one mitigating factor, the Original Tribunal considered the breaches overall to be "very serious" and imposed the following sanctions:

- A formal reprimand;

- A direction to remedy the breaches;
- A fine of £800,000; and
- A requirement that the Level 2 provider must refund all complainants 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.

The Executive subsequently informed the Level 2 provider that the fine of £800,000 had been apportioned as follows:

Rule 2.3.10 –	£250,000
Rule 2.2.5 –	£250,000
Rule 2.3.2 –	£200,000
Paragraph 4.2.4 –	£100,000

On 8 October 2012, the Executive informally notified the Level 2 provider of the outcome of the Tribunal hearing. Part payment of the fine (£400,000) and full payment of PhonepayPlus' administrative charge was received on, or about, 26 October 2012.

REQUEST FOR REVIEW

On 25 October 2012 the Level 2 provider submitted an application for a review on four grounds and an application for partial suspension of the fine sanction. The Executive submitted the application for review to the Chair of the Code Compliance Panel ("**CCP**") on 29 October 2012. On 30 October 2012, a legally qualified member of the CCP concluded that a review was merited in respect of both breaches and sanctions and on the basis of all the grounds advanced by the Level 2 provider.

The specific grounds advanced by the Level 2 provider were as follows:

- Ground 1: A breach of rule 2.3.10 (vulnerability) of the Code should not have been upheld.
- Ground 2: A breach of rule 2.3.2 (misleading) of the Code should not have been upheld.
- Ground 3: A breach of rule 4.2.4 (concealing information) of the Code should not have been upheld.
- Ground 4: The Level 2 provider disagreed with the Tribunal's assessment of seriousness and the level of the fine sanction imposed.

The relevant Code provisions

The application was made in writing under paragraph 4.7.2 of the Code paragraph 4.7.2 states:

> "The relevant party or PhonepayPlus may request a review by setting out in writing the grounds for a review. Except where new information, not reasonably available at the time of the original determination, has come to light, a request for a review must be made within ten working days of the publication of the relevant determination, or the sending to the relevant party of the prior permission decision or the administrative charge invoice. In any case, except in highly exceptional circumstances, a request for a review must be made within 30 days of the publication of the relevant determination, or receipt of the prior permission decision or the administrative charge invoice."

Paragraph 4.7.4 of the Code states:

> "Having received a request for a review, the Chairman of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide whether a review is merited. If it is decided that the review is merited, a Tribunal will carry out a review of the relevant decision(s) as soon as is practicable."

On 22 November 2012 a Tribunal (the "**Review Tribunal**") considered the Level 2 provider's submissions and the additional material provided by both the Executive and Level 2 provider in relation to Ground 4.1.

REVIEW SUBMISSIONS AND CONCLUSION

THE LEVEL 2 PROVIDER'S CASE FOR REVIEW

The Level 2 provider submitted a lengthy review application and a subsequent letter containing additional submissions in response to the Executive's submissions in relation to Ground 4.1. The review application, additional submissions and the accompanying annexes were considered by the Tribunal in detail. A summary of the arguments is set out below.

GROUND 1
A breach of rule 2.3.10 (vulnerability) of the Code should not have been upheld.

The Level 2 provider submitted that the Original Tribunal should not have upheld a breach of rule 2.3.10 of the Code against it for the six reasons outlined below.

The Level 2 provider submitted that each of the reasons was admissible pursuant to paragraph 4.7.3 of the Code on the grounds that either, the reason raised a new issue of fact or law that was not reasonably available at the time of the adjudication, as the Tribunal's factual and legal errors emerged only in the decision itself and could not have been reasonably anticipated by the Level 2 provider, and/or the decision in relation to each reason was such that no reasonable Tribunal could have reached it.

1.1 The Level 2 provider asserted that rule 2.3.10 is concerned with the deliberate exploitation and targeting of any vulnerable group and noted that the Tribunal made a finding that, "the Level 2 provider had knowingly taken advantage of a vulnerable group". However, the Level 2 provider asserted that the Tribunal failed to identify any evidence in support of the finding that the provider had acted in a deliberate manner, or the Tribunal had failed to consider whether there was sufficiently cogent evidence to justify a finding of intentional exploitation, or failed to consider whether there were any alternative hypotheses (e.g. innocent or negligent mistake) which were more probable than the inherently unlikely theory that a legitimate business had set out to exploit a vulnerable group. The Level 2 provider asserted that this omission was in itself sufficient to render the finding of a breach of rule 2.3.10 unsound.

1.2 The Level 2 provider asserted that the solitary reason given by the Tribunal for its finding of deliberate wrongdoing was that the Level 2 provider had failed to implement compliance advice received from the Executive. Thus the Level 2 provider asserted that the Tribunal appeared to have allied its perceived failure to implement compliance advice with an intention to take advantage of the elderly. The Level 2 provider submitted that this reasoning was fundamentally flawed. It argued that the Executive had never suggested, in the context of the compliance procedures, that the elderly were particularly vulnerable to misunderstanding or being misled by the Service, nor that age was ever a factor. In all the circumstances, the Level 2 provider

stated that the perceived failure to follow the compliance action plan was not logically capable of sustaining the conclusion that it set out to exploit the vulnerable. In addition, the provider stated that the Tribunal had failed to consider whether there was a more plausible explanation for the perceived failure to follow the action plan (such as administrative error, or a genuine belief that the action plan did not relate to the particular service in question).

1.3 The Level 2 provider submitted that the Original Tribunal's conclusion that it had disregarded or failed to follow the action plan was wholly unjustified. Notwithstanding this, the Level 2 provider stated that a failure to implement compliance advice ought to have given rise to an allegation of a breach of paragraph 3.1.4 of the Code (failure to act on a direction). The provider argued that not only was a breach of paragraph 3.1.4 not advanced, but that the Tribunal appeared to have assumed the breach without considering the basis for its finding. The provider submitted that it was incumbent upon the Tribunal to consider whether the Level 2 provider had in fact failed to implement compliance advice as the Executive alleged but that it had failed to do so.

1.4 In addition, the Level 2 provider stated that in reaching its decision the Tribunal failed to take into account the evidence that the Level 2 provider's placement of advertising was in no way targeted at the elderly and that the Level 2 provider does not generally collect any information from its users in respect of age. The provider asserted that this was demonstrated by the fact that it was necessary for it to engage an independent analyst to calculate the age demographic of the customer database. The Level 2 provider further submitted that such evidence was plainly inconsistent with the suggestion that the Level 2 provider deliberately targeted the elderly, and ought to have been (but was not) taken into account by the Tribunal in assessing the probability of a breach of rule 2.3.10.

1.5 Further, the Level 2 provider stated that there were a number of critical defects in the Tribunal's reasoning:

i) The Level 2 provider submitted that rule 2.3.10 required the Tribunal, before making any finding of a breach of the rule, to identify both the relevant group or set of personal circumstances and why customers within that group, or in those personal circumstances, were 'vulnerable'. The Level 2 provider submitted that the Tribunal appeared to have proceeded upon the assumption, unsupported by analysis, that "the elderly" (a) are an identifiable group for the purposes of rule 2.3.10 and (b) are necessarily 'vulnerable', presumably on the basis that they are less able to appreciate the detail of the terms and conditions of the Service. The Level 2 provider asserted that these imprecise generalisations are offensive to the members of the class of "elderly" people whom the Tribunal apparently believed it was seeking to protect. The Level 2 provider submitted that the lack of any proper analysis as to who is 'vulnerable', or why, had led the Tribunal to an unjustifiable conclusion that the "elderly" are an identifiable and vulnerable group in general.

ii) The Tribunal held that the service in question, "was particularly attractive/ alluring," to the elderly, and that the type of marketing and jewellery were "particularly appealing". The Level 2 provider asserted that these findings had no basis whatsoever in the evidence and were no more than assertions based on stereotype.

iii) The Tribunal held that the elderly, "had made up a significant number of users". The Level 2 provider asserted that there was no evidential basis for this finding and that the reality as to the age demographic of the users is that only 19% of users are over the age of 75.

1.6 The Level 2 provider asserted that had it targeted the elderly, as found by the Tribunal, then not only would this be reflected in a more marked way in the age demographics of the users, but also this would have been reflected in a greater number of complaints as a percentage of calls made. However, the facts suggest the opposite. The Level 2 provider stated that the data concerning complaints is in fact below the PhonepayPlus industry average. The Level 2 provider submitted that this is inconsistent both with the findings which were made by the Tribunal, and with the draconian sanctions which were imposed.

CONCLUSION ON GROUND 1

The Review Tribunal considered the submissions made by the Level 2 provider under Ground 1. The Tribunal noted that the Original Tribunal had expressly detailed the evidence it had relied on to find that, "the Service was particularly attractive to the elderly", namely, "the personal nature of the direct marketing promotions and the style of jewellery". Further, the Review Tribunal concluded that it was clear from the Original's Tribunal decision that the determination that the Level 2 provider had knowingly taken advantage of a vulnerable group was not confined solely to failings in relation to the implementation of compliance advice. The Review Tribunal also considered that there was sufficient evidence before the Original Tribunal for it to conclude that the Level 2 provider had failed to comply fully with compliance advice. The Review Tribunal noted in particular that the Original Tribunal had sight of a promotion that was submitted by the Level 2 provider to the Complaint Resolution Team (**Appendix A**) but that when the same promotion later appeared in the press in December 2011 the pricing information, which was previously prominent and proximate to the premium rate number, had been removed (**Appendix B**).

The Review Tribunal considered it irrelevant to a review that the Executive may have alleged other breaches of the Code.

In relation to Ground 1.4, the Review Tribunal noted that the Original Tribunal had concluded that the provider had, "knowingly taken advantage of a vulnerable group," and had not found that the Level 2 provider had, "targeted the elderly" as stated by the Level 2 provider. For the reasons outlined by the Original Tribunal, the Review Tribunal concluded that, on the basis of the evidence before it, the Original Tribunal had acted within the proper exercise of its discretion in finding that the provider had, "knowingly taken advantage of a vulnerable group".

With regard to Ground 1.5, the Review Tribunal found that the Original Tribunal was entitled to use its own knowledge and experience to conclude that:

i. a greater proportion of the elderly are vulnerable by reason of their personal circumstances than those whose faculties are not diminished by age.
ii. the service in question, "was particularly attractive/ alluring" to the elderly; and,
iii. the type of marketing and jewellery were, "particularly appealing" to the elderly.

The Review Tribunal found that the conclusion that the elderly made up a "significant" number of users was a reasonable extrapolation based on the

complainants' accounts and testimonial letters. The Review Tribunal stated that this was further supported by the Level 2 provider's evidence that, "19% of the Applicant's users are over the age of 75".

With regard to Ground 1.6, the Review Tribunal noted that the Level 2 provider did not raise this argument before the Original Tribunal and, in any event, there was sufficient evidence before the Original Tribunal indicating that the elderly had been taken advantage of. The Review Tribunal noted that in its experience, a certain level of complaints does not necessarily mean that more consumers have not been affected.

In conclusion, the Review Tribunal held that the Original Tribunal had properly exercised its discretion as there was sufficient evidence before the Original Tribunal to support a finding of a breach of rule 2.3.10 of the Code. It further concluded that the Original Tribunal's decision to uphold the breach was not a decision to which no reasonable Tribunal, properly directing itself, could have reached on the evidence.

GROUND 2

A breach of rule 2.3.2 (misleading) of the Code should not have been upheld.

The Level 2 provider submitted that the Original Tribunal should not have upheld a breach of rule 2.3.2 of the Code against it for the four reasons summarised below.

The Level 2 provider submitted that each of the reasons was admissible pursuant to paragraph 4.7.3 of the Code on the grounds that either the reason raised a new issue of fact or law that was not reasonably available at the time of the adjudication, as the Tribunal's factual and legal errors emerged only in the decision itself and could not have been reasonably anticipated by the Level 2 provider, and/or the decision in relation to each reason was such that no reasonable Tribunal could have reached it.

2.1 The Level 2 provider submitted that no attempt was made by the Executive to prove, nor by the Tribunal to ascertain, precisely how many customers (if any) were at risk of being misled. The Level 2 provider asserted that this was a matter of particular importance given that only 15 complaints had been received, of which only 2 complaints related to the jewellery (which it stated formed the substance of the allegations of the breach of rule 2.3.2). The Level 2 provider stated that this was contrary to its evidence that customers carefully read the terms and conditions as evidenced by over 30,000 entries bring received by postal entry (a free method of entry described in small print in the terms and conditions).

2.2 In relation to the use of references to 'limited availability' or an 'urgent deadline', the Level 2 provider stated that the Tribunal failed to consider that such caveats were necessary and responsible (rather than misleading). If the Level 2 provider had failed to warn customers that only a limited number of jewellery items were available or that deadlines were impending and could not be missed (both of which were the case), that would itself have constituted a breach of rule 2.3.2 and may have exposed the Level 2 provider to potential civil liability in the event of high demand. The Level 2 provider asserted that it was wholly unreasonable for the Tribunal, even if it considered that references to "urgency" etc. created a sense of excitement to its commercial benefit, to fail to take into account the fact that these were sensible precautionary steps.

2.3 The Level 2 provider noted that the Tribunal determined that the quality of the jewellery had been misrepresented, and that consumers had been misled. The Level 2 provider asserted that this decision imported a value assessment of the jewellery which was based on no evidence from those who entered the competition (or at best upon the very limited evidence of complainants, who it asserted were an unreliable sample), and which was only based upon the subjective opinion and taste of the three members of the Tribunal. It was asserted that during the period of the investigation, over seven thousand consumers paid to participate in its service for a second time and in return received items of jewellery, for a second time. The Level 2 provider stated that this invited two unavoidable conclusions:

i) The apparent snobbery of the Tribunal was misconceived. As a matter of basic economics, consumers did attach significant value to the jewellery prizes; in this respect the resale value of the jewellery, which appears to have been the subject of the Tribunal's speculative assessment, is immaterial.

ii) The number of repeat customers is equally as valid and important a barometer of value of the jewellery to customers as the number of complaints, albeit on the positive rather than negative scale.

2.4 The Level 2 provider submitted that the Tribunal's comments failed to include any reasons or analysis as to the ways the descriptions offered were 'unrealistic', or the quality of the jewellery 'misrepresented'. Further, it asserted that for the Tribunal to have decided that there had been a breach on such grounds, without including any specifics as to ways in which the descriptions given had not been realistic, is for the Tribunal to base its assessment on no relevant evidence, but rather purely on the misconceived 'value judgment' referred to in Ground 2.3 above.

CONCLUSION ON GROUND 2

The Review Tribunal considered the submissions made by the Level 2 provider.

The Review Tribunal considered the Level 2 provider's argument that the Executive had not made any attempt to ascertain precisely how many consumers had been actually misled was irrelevant. It noted that the adjudicatory process does not rely solely on complainant evidence and that there is a breach of rule 2.3.2 if a promotion is *likely* to mislead.

In relation to Ground 2.2, the Review Tribunal held that whilst different conclusions were open to the Original Tribunal on the evidence, its finding was one that was open to a reasonable Tribunal, properly directing itself in law and fact.

With regard to Ground 2.3, the Review Tribunal noted that the Level 2 provider had not provided data in relation to repeat competitors to the Original Tribunal, although there was no reason to suspect that this evidence was not available at that time if it had been sought. The Review Tribunal concluded that the decision of the Original Tribunal was one which was open to it on the evidence, namely the pictures of the jewellery and the actual items of jewellery provided. The Review Tribunal concluded that the Original Tribunal had sufficient evidence and was entitled to make the findings it did in relation to the jewellery.

In addition, and with regard to Ground 2.4, the Review Tribunal found that the Original Tribunal was entitled to form a view of the quality of the jewellery as it had viewed examples of the jewellery, compared it to the descriptions contained in promotional material and set out its reasons with clarity.

The Review Tribunal concluded that in all the circumstances the Original Tribunal was entitled to uphold a breach of rule 2.3.2. The Original Tribunal's decision to uphold the breach was not a decision to which no reasonable Tribunal, properly directing itself, could have reached on the evidence. The Review Tribunal found that the Level 2 provider had not raised any new issue of fact or law that was not reasonably available at the time of the Original Tribunal.

GROUND 3
A breach of paragraph 4.2.4 (conceal information) of the Code should not have been upheld.

The Level 2 provider submitted that the Original Tribunal should not have upheld a breach of paragraph 4.2.4 of the Code against it for the three reasons summarised below.

The Level 2 provider submitted that each of the reasons was admissible pursuant to paragraph 4.7.3 of the Code on the grounds that either, the reason raised a new issue of fact or law, that was not reasonably available at the time of the adjudication as the Tribunal's factual and legal errors emerge only in the decision itself and could not have been reasonably anticipated by the Level 2 provider, and/or the decision in relation to each reason was such that no reasonable Tribunal could have reached it.

3.1 The Level 2 provider noted that paragraph 4.2.4 is concerned with deliberate or reckless concealment or falsification in the course of an investigation and not a failure to co-operate with the regulator. The provider submitted that the Tribunal actually found the Level 2 provider "guilty" of regulatory non-co-operation and that a failure to provide requested material would constitute a breach of paragraph 4.2.5. The provider submitted that there was no basis for upholding a breach of paragraph 4.2.4 and the Tribunal failed to give reasons for its decision. Further, there was no evidence before the Tribunal capable of supporting any finding of concealment or falsification, or the provision of false or misleading information.

3.2 The Level 2 provider stated that the factual findings of the Tribunal as to its non co-operation were unsustainable. The Level 2 provider states that it was alleged to have failed to comply with the Code on two occasions, but neither complaint was justified as in the first instance of alleged non compliance the provider provided the requested information and upon receipt of the breach letter, the Level 2 provider was reasonably, and genuinely, mistaken as to which further information the Executive was seeking.

3.3 The Level 2 provider asserted that the Tribunal appeared ultimately to have relied upon its alleged failure to provide material in response to the Executive's breach letter. The Level 2 provider submitted that the Tribunal's decision to uphold the allegation of a breach on these grounds was manifestly irrational. A charge is incapable of justification by facts occurring *after* the charge is made; and, since there was no conduct by the Level 2 provider so as to justify the charge at the time it was made, it ought to have been dismissed by the Tribunal, as it was not justified on an *ex post* basis.

CONCLUSION ON GROUND 3

The Review Tribunal considered the submissions made by the Level 2 provider and found that in respect of Grounds 3.1 and 3.2 there was evidence of at least one occasion when the Level 2 provider concealed information (i.e. requested invoices, or the fact that there were no invoices) and which was sufficient for the Original Tribunal to have based its finding that the provider knowingly concealed information. Therefore a finding of a breach of paragraph

4.2.4 was within the Original Tribunal's discretion on the evidence before it, being one that was open to a reasonable Tribunal, properly directing itself in law and fact.

The Review Tribunal noted the Level 2 provider's argument at Ground 3.3 in relation to the Original Tribunal's comment that the direction to provide an invoice was a continuing failure at the time of the Original Tribunal. However, the Review Tribunal found that the Original Tribunal had made it sufficiently clear that this was merely "noted" by the Tribunal and was not an additional breach. Further, without this note there was sufficient evidence to uphold a breach of paragraph 4.2.4 of the Code.

The Review Tribunal observed that if no invoices existed, the Level 2 provider could have raised this at the time of the Original Tribunal but had failed to do so and was therefore now seeking to raise a new issue of fact that was reasonably available to it at the time of the Original Tribunal.

GROUND 4
"The Level 2 provider seeks a review of the overall seriousness rating of 'Very Serious' and a review of the level of Sanctions imposed."

The Level 2 provider submitted that each of the reasons was admissible pursuant to paragraph 4.7.3 of the Code on the grounds that either, the reason raised a new issue of fact or law, that was not reasonably available at the time of the adjudication as the Tribunal's factual and legal errors emerge only in the decision itself and could not have been reasonably anticipated by the Level 2 provider, and/or the decision in relation to each reason was such that no reasonable Tribunal could have reached it.

4.1 Sanction is *Ultra Vires*: PhonepayPlus has no power to impose a total fine greater than £250,000

The Level 2 provider asserted that section 123 of the Communications Act 2003 ("**the Act**") imposes a statutory cap of £250,000 on any fine for breaching the Code. More particularly, that cap is applied to any fine for 'a contravention of conditions' (plural) set under section 120, i.e. for a contravention of multiple conditions in the Code. It further asserted that it was clear that in accordance with section 123, the Tribunal had no power to impose more than a £250,000 total fine in respect of *all* the Applicant's alleged breaches of the Code. So much appears from the reference to 'conditions' in the plural in subsection (1).

The Level 2 provider submitted that this was emphasised by the Department of Trade and Industry (the "**DTI**") in the Explanatory Notes accompanying the Communications Bill and the 2003 Act. It asserted that a fine of £800,000 was therefore *ultra vires* and unlawful.

The Level 2 provider asserted that there used to be a general consensus, including on the part of ICSTIS (as PhonepayPlus used to be called) that ICSTIS' fining powers were subject to a *global* cap, rather than a cap per alleged breach and that it was on this basis that the cap was increased to £250,000 in 2005. The Level 2 provider referred to the a consultation published by the DTI on 29 June 2005 entitled, "Raising the Maximum Penalty for Misusing Premium Rate Services, and Disclosure of Information," in which the DTI considered that the existing £100,000 cap applied generally, not on a per breach basis. The Level 2 provider added that DTI's explanatory memorandum accompanying the draft Statutory Instrument increasing the cap again noted that this was the, "maximum penalty for contraventions," (plural) "of the Code of Practice".

In addition, and following the Executive's submissions (below) relating to this Ground 4.1, the Level 2 provider relied upon a document entitled "ICSTIS Brief on raising Maximum Fine Levels Under the Communications Act 2003" in which it noted that the Act had always been interpreted so that one contravention of the section 120 condition would occur when a particular set of breaches was raised in any one case against one service provider, and that this had been accepted by Ofcom as part of its Review of PRS Regulation in December 2004.

The Level 2 provider asserted that the above established first-hand knowledge on the part of the Executive that *before* the Act came into force (i.e. at the time when it was being drafted and in the process of consultation) section 123 of the Act was to impose a maximum penalty in respect of, "a particular set of breaches … in any one case against one service provider". The Level 2 provider submitted that such clear evidence as to the intention of those negotiating, drafting and considering the statute punctured the 'purposive approach' to interpretation of the relevant clause which the Executive invited, and begged the question how the Executive could advance the case that the Act could mean something other than the meaning which the Level 2 provider had advanced. In addition, the Level 2 provider stated that ICSTIS affirmed that it had never sought to impose the maximum fine across multiple different breaches, and highlighted the "legitimate expectation" of service providers, a legitimate expectation (against the background of the level of fines previously imposed) which subsists today.

The Level 2 provider noted that ICSTIS subsequently – for example in its October 2006 Sanction Guide – claimed to be able to impose a fine of up to £250,000 per breach. But the Level 2 provider asserted that it is clear that the Order increasing the statutory maximum of £250,000 was made on the understanding that the 2003 Act imposed a global cap. That understanding was, in the Level 2 provider's submission, correct. If, however, it was wrong it would follow that the 2005 Order was made on the basis of a mistake of law and was liable to be quashed, and that ICSTIS' power to impose fines had then never exceeded £100,000 per breach.

On the issue of the proper construction of section 123 of the Act., the Level 2 provider accepted that the parties were agreed that section 123 imposes a statutory cap. It considered that the issue for the Review Tribunal was whether on a true construction of that section the cap applies per case (so that an operator's total exposure in any one set of regulatory proceedings against it was £250,000: a "global" cap) or per breach (such that an operator's exposure is limited only by the number of individual breaches of the Code that the Executive is able to identify).

The Level 2 provider stated that the Executive's construction of the relevant provisions of the Act (as set out below) would defeat the essential purpose of section 123(2), namely to provide operators with a measure of regulatory certainty and to protect them from the excesses of an over-zealous regulator. In addition the Level 2 provider asserted that it was well-established that a statute imposing a penalty should be strictly construed and that Parliament should not be taken to have granted the regulator power to impose effectively unlimited fines in the absence of express provision to that effect.

The Level 2 provider highlighted sections 120 to 124 of the Act, which set out the basis of the regulatory regime, and sections 94 to 96, which outline the regime to follow where Ofcom takes responsibility for regulation. The Level 2 provider noted that the financial cap is created by section 123(2). The Level 2 provider asserted that it is perfectly clear that a 'maximum penalty' as it is described in subsection (4) is intended to create a single, global cap, as indicated by the use of the definite article

('the') and that had the legislature intended to apply a cap on a per breach basis, it would have said so.

The Level 2 provider submitted that this conclusion is reinforced by section 123(1), which applies sections 94 to 96, "in relation to a contravention of conditions". It also submitted that section 121(5)(a) permits a code to include, "provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2)," and that therefore the Code may not provide for a person to have to pay a sum exceeding that maximum, because that would conflict with section 123(2).

The Level 2 provider noted the Executive's assertion that Ofcom could impose multiple penalties for multiple contraventions in the absence of a Code and stated that this simply fails to grapple with the point that section 123(2) creates (whether there is regulation under an Order or under the Code) a single, maximum penalty that may be imposed in any one regulatory proceeding.

The Level 2 provider noted that the Independent Appeals Body ("**IAB**") had on one occasion decided that the statutory cap was a cap per breach. The Level 2 provider submitted that it was not a party to those proceedings and was therefore not bound by that decision, and that the decision of the IAB did not carry legal authority, nor was the Review Tribunal bound by it in any way.

In conclusion, the Level 2 provider stated that it is clear that section 123 of the Act invites the simple interpretation that the maximum level of penalty is to be imposed per case, rather than per separate breach alleged by the Executive. It added that for the Review Tribunal apply fines in excess of the maximum fine limit across multiple breaches not only appears incorrect on the basis of the straight-forward interpretation of statute, but also begs the question as to whether the Statutory Instrument increasing the fining power to £250,000 is in fact void. The Level 2 maintained that the Executive was now seeking to depart from its previous assurances.

4.2 Alternative argument on *vires*: the Tribunal has unlawfully and unfairly imposed a fine greater than £250,000 in respect of a single breach

In the alternative, the Level 2 provider submitted that if (contrary to its primary case set out under Ground 4.1) a wide reading of section 123 is adopted in favour of the regulator, it was at the very least clear that no more than £250,000 may be imposed for any single breach of the Code, and Parliament had so decided as a matter of legislative policy. The Level 2 provider added that even on such a wide reading of section 123 (the "**Wide Reading**"), it was clear that the Tribunal had acted *ultra vires*.

In assessing the sanction which should be imposed for the alleged breaches of rules 2.2.5 and 2.3.2, the Tribunal in each case adopted as a relevant criterion its conclusion that:

> "The Service leveraged vulnerable consumers in order to generate an income."

The Level 2 provider stated that the Tribunal did so to justify the swingeing fines which it had imposed in respect of each of the alleged breaches. However, at this stage the Tribunal had already punished the Level 2 provider for allegedly exploiting vulnerable consumers, by imposing a fine of £250,000 in respect of rule 2.3.10. The effect of the Tribunal's importation of "leveraging the vulnerable" as an aggravating factor in the assessment of sanction for the breaches of rule 2.2.5 and 2.3.2 was therefore to circumvent the statutory maximum of £250,000 per breach (on the Wide

Reading of section 123), and frustrate the intentions of Parliament and the requirements of fairness. The Level 2 provider had already been sanctioned to the maximum extent as prescribed by the statute; the Tribunal ought not to have allowed the breach of rule 2.3.10 in any way to influence the determination of the initial assessment in respect of any other breaches, as it clearly did. There was no doubt that the level of fines in respect of breaches 2.2.5 and 2.3.2 (at £250,000 and £200,000 respectively) had to at least some extent (and it is submitted a significant extent) been inflated by the application of the criterion that the Service leveraged vulnerable consumers. The effect of this was to impose a sanction in respect of that single breach in excess of the £250,000 imposed by statute: this amounted to a double (even triple) penalisation in respect of the same offence, and was clearly *ultra vires.*

4.3 Overall Finding of 'Very Serious' Ignores the Guidelines in Respect of Serious Ratings

The Level 2 provider noted that the PhonepayPlus Investigations and Sanctions Procedure lists various examples in respect of each level of 'seriousness' that can be attributed to individual breaches and the overall case. The Level 2 provider submitted that the examples given in the category of "Very Serious", are of a level of seriousness much more extreme that the circumstances of the present case. The Level 2 provider asserted that the clear overall impression is that the category of "Very Serious" is reserved for the fraudulent and the borderline criminal. The Level 2 provider considered that its service could not be so classified; there was no question that the service did provide purported value. It added, that in arriving at an overall seriousness rating of "Very Serious", the Tribunal had entirely disregarded the guidelines set out in the Investigations and Sanctions Procedure guidance. Had the Tribunal properly considered these, it ought to have found that any breaches were of at most "Moderate" severity.

4.4 Final Overall Assessment and Level of Fine Disproportionate

The Level 2 provider submitted that the Final Overall Assessment, and the level of fine, were both grossly disproportionate, in four crucial respects:

(a) The scale of complaints. The Level 2 provider received 15 complaints in respect of the services, from a total of over 1 million calls. On any analysis this was an extremely low rate of complaints.
(b) The costs to consumers. The cost to consumers was relatively low, particularly considering that the Level 2 provider operated a 'no quibbles' refund policy.
(c) In light of mitigating factors. Consumers were refunded on a 'no quibbles' basis, and the Level 2 provider cooperated in all respects throughout the investigation (subject to the issue in respect of breach of rule 4.2.4).
(d) Other cases precedent. Specifically, the cases concerning PCB Telecom, Jack Barnard Telecom Services and Connect Limited (which all involved "scams") and the adjudication against Opera Telecom (which concerned a TV vote in scandal on a huge scale).

The Level 2 provider also noted that in 2006 ICSTIS published the Sanctions Guide, which asserted (contrary to the position it had previously taken) that it could impose multiple fines on a per breach basis, it explained its approach to imposing the new statutory maximum fine as follows:

> "Application of the £250,000 sanction on a per contravention basis
> Following a decision by the Independent Appeals Body in July 2005, and following legal advice taken by ICSTIS, we have decided that in certain circumstances ICSTIS can apply a sanction for each breach upheld up to the maximum of £250,000 per breach. This would occur in the most extreme of cases where at least one breach attracts a £250,000 fine. An example would include where a service provider had already been sanctioned with the £250,000 fine and had then repeated the same or similar service. This would indicate a serious and wilful attempt to defraud or seriously mislead consumers with the full knowledge that its services were in breach of the Code of Practice. Please note that the per contravention approach will not mean that each breach will attract a maximum fine of £250,000. Rather each breach and any punitive sanction will be judged on its merits."

The Level 2 provider asserted that even if all the criticisms of the Level 2 provider by the Executive had been accepted by the Tribunal, this plainly was not, "one of the most extreme of cases," and it was untenable to suggest that the Level 2 provider set out to defraud or seriously mislead consumers, nor indeed that it knew that its services were in breach of the Code.

4.5 Misframing of the Executive's Case

The Level 2 provider stated that the Executive had "misframed" the case as it had alleged a breach of 2.3.10 effectively because the Level 2 provider had failed to follow guidance advice in respect of pricing. The Executive separately alleged a breach of 2.2.5, governing pricing. The Level 2 provider submitted that the Executive ought to have alleged a breach of paragraph of 3.1.4, a breach which would have encapsulated both of the offences framed under 2.3.10, and 2.2.5. The case would have been more straightforward, and would have involved a simple analysis of whether or not the Level 2 provider had implemented the advice given, or not. The provider asserted that the fact that the Executive did not follow this route has allowed the Level 2 provider to be unfairly punished twice for the same offence.

4.6 Level of Sanction Imposed in Respect of Breach of rule 2.2.5

In respect of the breach of rule 2.2.5, the Level 2 provider noted that the Tribunal had imposed the maximum fine of £250,000, which was greater than that imposed in the Jack Barnard Telecom Services case, where no pricing information was available at all prior to connection of the call. The breach in respect of rule 2.2.5 was clearly one of degree: the Level 2 provider submitted that the decision as to prominence was a borderline one. Information as to pricing was 1cm away from the number in question (relatively proximate), and the information was in upper case. Further, the Level 2 provider had received copy advice from the Committee of Advertising Practice, for its promotional material which was found to be compliant as recently as September 2012, and further, the wording in question had previously been approved by the Executive during December 2010. Furthermore, many of the complainants had acknowledged within the body of their complaint that they were aware of the pricing information.

The Level 2 provider submitted that the Tribunal had been swayed by its finding of a breach of rule 2.3.10, in determining sanction in respect of the breach of rule 2.2.5. It was simply incorrect that the breach of rule 2.2.5, a technical breach if that, warranted a fine of £250,000, the maximum available, and of its own the third highest fine ever imposed.

4.7 Level of Fine Imposed in Respect of Breach of Rule 2.3.2

The Level 2 provider submitted that it was plainly unreasonable that a fine of £200,000 had been imposed in respect of a breach of this single rule. For the reasons set out above, if a breach had been found, then it is submitted that it is of a technical nature, and cannot compare, for example, with fraudulent instances where there were no Terms and Conditions at all (as in the PCB Telecom or the Jack Barnard cases).

4.8 Level of Fine Imposed in Respect of Breach of Rule 4.2.4

The Level 2 provider stated that the Tribunal had decided to impose a fine of £100,000, in respect of its failure to provide an invoice in response to the investigation. The Level 2 provider asserted that this was notwithstanding that no invoice for the 800 items, as requested by the Executive, existed. The imposition of a fine of this magnitude, in respect of an allegation of breach which, in the provider's submission, was confined purely, to the manner of cooperation with the investigation and not with the services which were under investigation (and so where there was no question of further consumer harm), was, in consideration of those same factors set out in 4.4 above, plainly a decision which was beyond the realms of reasonableness.

4.9 Consideration of Revenue as an Aggravating Factor

The Level 2 provider asserted that in considering its revenue in relation to the service, the Tribunal had considered the Level 2 provider's overall revenues as a company, and did not consider that:

i) a significant percentage of revenues were not in respect of services subject to the investigation; and
ii) even of those revenues which did relate to the investigation, that a significant percentage of those revenues were in respect of promotions which had been approved by the Executive.

4.10 Incorrect Consideration of Aggravating Factors

The Level 2 provider submitted that the Tribunal took into account two aggravating factors in determining the final overall assessment for the case: that the Level 2 provider had failed to follow Guidance; and that it had failed to follow the action plan of 9 May 2011. The Level 2 provider submitted that not only were both of those aggravating factors variants of the same (insofar as the Track 1 action plan related to pricing information) and so should have been considered as a single aggravating factor, but further, that aggravating factor was the same single criterion which allowed the Tribunal to find the Level 2 provider in breach of rule 2.3.10 – an offence for which the Level 2 provider had already been fined to the maximum extent of £250,000. As such it was wrong for the Tribunal to have considered these two aggravating factors at all.

THE EXECUTIVE'S SUBMISSIONS ON GROUND 4.1

The Executive submitted that PhonepayPlus has the power to impose financial penalties on a per breach basis so that there may be more than £250,000 imposed as fines in respect of a single case within which multiple breaches of the Code found. The Executive further submitted that the Level 2 provider's case was simplistic, a misinterpretation of the position under the Act, and incorrect.

The Executive noted that the relevant provisions of the Act are not straightforward and that accordingly a purposive approach to interpretation is appropriate.

The Executive noted that the Code sets no maximum on the fine which can be imposed per case or per breach and that the maximum lay solely in the legislation. The scheme under the Act enables Ofcom to set conditions that bind the persons to whom they are applied (section 120(1)). Under section 120(3) only one condition can be made, which is to require premium rate service providers to comply either:-

(a) with "directions given in accordance with an approved Code and for the purpose of enforcing its provisions", and if there is no Code, then
(b) with the provisions laid down by Ofcom by Order under section 122 (which would be requirements governing the content, promotion and marketing of premium rate services and the enforcement of those requirements).

The Executive argued that it is apparent from section 120(3) that when there is reference to "conditions" (plural) in section 120(1) it is in plural form because it is a single condition applying to each of the many individual premium rate service providers. It further stated that provision for enforcement of the Code is contained in section 121(4), whilst section 121(5)(a) allowed the Code to provide for payment of a penalty and referred to the maximum penalty specified in section 123(2). The Executive submitted that that maximum (currently £250,000) applied to a contravention of "conditions" set under section 120 which, if section 120(3)(a) applied, meant a failure by each premium rate service provider to comply with directions given by PhonepayPlus.

The Executive further stated that in terms of the relevance of sections 94 to 96, which are said by section 123(1) to apply to contravention of conditions set under section 120, those provisions involved a wholly different model of regulation to that described in the Code which had been approved by Ofcom and they therefore could not apply in toto to a contravention of a section 123(3)(a) condition (such contravention being a failure to comply with a direction given in accordance with an approved Code by PhonepayPlus). The Executive submitted that sections 94 to 96 could and would, however, be applicable in toto if applied to a contravention of section 120(3)(b) conditions, which require compliance with an Ofcom Order (that is to say to comply with the regulatory provisions set by Ofcom in the absence of a recognised Code).

The Executive noted that under section 96(2) there are penalties for "contravention of conditions specified in notifications," and that under section 96(3) where there is more than one contravention in a notification Ofcom may impose a separate penalty for each contravention in the notification and that this established that Ofcom (were it regulating) could impose a separate fine for each failure by a premium rate service provider to comply with a provision of the Ofcom Order.

The Executive considered that, similarly, given that the Ofcom Order is the alternative to the approved Code, where PhonepayPlus is regulating, it can impose a separate fine for each failure to comply with a provision of the Code. The Executive further submitted that because section 121(5)(a) imports the maximum in section 123(2), it also logically imports what it applies to and that as that maximum is per breach of a requirement set out in Ofcom's Order where there is no approved Code, it follows that it is per failure to comply with a provision of the Code where there is an approved Code.

The Executive acknowledged that the construction of the words used in section 120(3)(a) was not straightforward but that they could only realistically mean either (a) specific instructions given by PhonepayPlus pursuant to a power in the Code but separate from the Code; or more generally (b) the directions that are contained in the Code itself, requiring

service providers to act or not to act in a particular way, in order to achieve the aims of the Code. On a purposive construction the latter possibility most closely achieves what must be taken to have been intended, which is that the condition should require service providers to comply with the Code (as they are required to comply, absent a Code, with "the provisions of [an Ofcom] Order" under section 120(3)(b)). On that basis, each breach of the Code is a contravention of the condition that is sanctionable. But if the words did not carry the latter meaning then they must carry the former meaning, which would mean that a failure to comply with directions by PhonepayPlus to pay a fine in respect of a breach is a contravention (in each case) of the condition, that is sanctionable by the payment of the same fines that PhonepayPlus directed to be paid in respect of the breach. The Executive asserted that neither possibility lent any support to the Level 2 provider's argument.

The Executive also drew the Tribunal's attention to the decision of the IAB in the adjudication against PRS Communications. It noted that in that case the IAB reached the same conclusion that the maximum fine applies per failure to comply with a provision of the Code on the basis of slightly different reasoning involving the application of sections 94 to 96.

The Executive further submitted that there could not have been a legitimate expectation that PhonepayPlus would not impose a fine per breach in this case. The Executive noted that at the time the fine amount was increased in 2005, Alun Michael, the then Minister for Industry and the Regions was in favour of ICSTIS imposing penalties per breach rather than per service in appropriate circumstances and therefore he could not have been labouring under the misconception that this was not possible. The Executive stated that following passage of the Statutory Instrument, PhonepayPlus subsequently amended its sanctions guidance to make clear that in appropriate circumstances it would fine per breach as it was entitled to do. In addition, PhonepayPlus duly imposed a fine in a single case beyond £250,000 in 2009.

CONCLUSION ON GROUND 4

The Review Tribunal considered the submissions of the Level 2 provider and the Executive in detail. The Tribunal noted that Parliamentary records and documents in 2005, which were not contemporaneous with the drafting and coming into force of the Act, were of limited assistance in the construction of that Act. The Review Tribunal concluded that PhonepayPlus Tribunals have the power to impose fines on a per breach basis in appropriate cases. In coming to this conclusion, the Review Tribunal adopted the reasoning of the IAB set out in its decision in the PRS Communications case (5 July 2005).

However, the Review Tribunal considered that if the IAB decision was wrong the correct interpretation of the relevant provisions of the Act required a purposive approach to construction. It found that the word "direction" in section 120(3)(a) of the Act must, correctly construed, apply to both the circumstances set out immediately after that word, namely directions (i) 'given in accordance with an approved code by the enforcement authority' and directions (ii) 'for the purpose of enforcing its provisions'. Accordingly, correctly construed, s120(3)(a) is to be read as follows;

> "(3) The only provision that may be made by conditions under this section is provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with—
>
> (a) directions given in accordance with an approved code by the enforcement authority and **[directions]** for the purpose of enforcing its provisions…"

Consequently, the Review Tribunal concluded that both the provisions of the Code and specific directions issued for the purpose of enforcement of the Code's provisions, are "directions" for the purposes of s120(3)(a) of the Act.

Having so decided, the Review Tribunal considered the application of section 121(5)(a) of the Act which allows for the imposition of a fine of up to the statutory maximum set out in section 123(2) (namely £250,000). The provision states that:

> "(5) The provision for the enforcement of a code that may be approved under this section includes—
>
> (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2);"

The Review Tribunal noted that section 121(5)(a) expressly states what the maximum fine is, but is silent as to whether it applies per breach of a Code provision or per case. After consideration of Ofcom's powers pursuant to sections 94 to 96 of the Act and, in particular, noting that the wording in section 96(3) of the Act provides that Ofcom can impose a separate fine for each failure to comply with a provision of the Ofcom Order (were it regulating), the Tribunal concluded that the reference to a maximum fine in section 121(5)(a) must be a reference to a maximum fine per breach of a Code provision (and/or a specific direction given in relation to enforcement of the Code) pursuant to s120(3)(a) of the Act.

Consequently, the Review Tribunal concluded that PhonepayPlus Tribunals have the power to fine on a per breach basis and therefore, the Original Tribunal had not acted *ultra vires* in imposing a fine sanction in excess of £250,000.

In relation to Ground 4.2, the Review Tribunal found that the Original Tribunal, in all the circumstances and on the evidence before it, was entitled to regard the characteristics of users as a relevant factor in determining the seriousness rating of three breaches. The Review Tribunal concluded that the Original Tribunal had therefore not acted *ultra* vires or perversely in its assessment of the seriousness rating having regard to the criteria it adopted.

The Review Tribunal considered the Level 2 provider's submissions in respect of Ground 4.3 (namely, that the Original Tribunal had ignored the guidance contained in the Investigations and Sanctions Procedure in respect of seriousness ratings). The Review Tribunal found that it was evident from the reasons give by the Original Tribunal that it did have regard to the guidance. The Review Tribunal determined that the Original Tribunal was entitled to make the assessment it did and that the fact the Level 2 provider disputes the assessment does not make it irrational or perverse. The Review Tribunal concluded that the assessment of the overall seriousness rating as "Very Serious" was a determination that was within the discretion of the Tribunal on the evidence and on its findings.

In relation to Ground 4.4, the Review Tribunal found that the sanctions imposed were proportionate to other cases given the service revenue and the seriousness rating. The Review Tribunal noted that both the scale of complaints and financial cost to individual complainants were not conclusive factors. In addition, it was apparent that the Original Tribunal had taken into consideration the level of refunds as it was explicitly listed as a factor in mitigation. In relation to the comparison with other cases, the Review Tribunal noted that the cases raised were not directly analogous given their different facts and a simple comparison was not of great assistance. However, the fine imposed on the Level 2 provider was under 12% of its revenue in relation to the Service and therefore not disproportionate when compared to other precedent cases.

As regards Ground 4.5, the Review Tribunal found that it was not a ground for review that the Executive could have brought other breaches of the Code and the absence of a charge relating to rule 3.1.4 did not amount to a "misframing" of the Executive's case against the Level 2 provider. Further, the Review Tribunal reiterated that the Original Tribunal's reasons given for the finding of the breach of rule 2.3.10 were not confined to failings in relation to the implementation of compliance advice.

In relation to the level of the fines imposed in respect of the breaches of rules 2.3.2, 2.2.5 and 4.2.4 (Grounds 4.6, 4.7 and 4.8), the Review Tribunal found from the breakdown of how the fine of £800,000 had been arrived at that the Original Tribunal had considered questions of proportionality and applied its judgement as to what fine would be appropriate in relation to each breach. The Review Tribunal found that, whilst different Tribunals may have decided upon the same or different sanctions on the same facts, the decision of the Original Tribunal was one that was open to it in the proper exercise of its discretion on the evidence before it

The Review Tribunal did not uphold the Level 2 provider's submission that revenue had been considered as an "aggravating factor" (Ground 4.9). The revenue figures considered by the Original Tribunal were those that had been provided by the Network operators. The Review Tribunal found that the Original Tribunal had given proper regard to the Level 2 provider's service revenue in making its assessment of the appropriate and proportionate sanctions to impose. The Review Tribunal noted its earlier finding that the Original Tribunal had given due consideration to the issue of compliance advice and its implementation.

With regard to Ground 4.10, the Level 2 provider had submitted that the Original Tribunal was wrong to consider its failure to follow guidance and compliance advice as separate aggravating factors. The Review Tribunal did not accept that the Original Tribunal acted outside its discretion in finding that these aggravation factors referred to separate conduct. The Review Tribunal was also unpersuaded that the Original Tribunal had placed undue weight on either factor. In all the circumstances, the Review Tribunal found that the determination of the Original Tribunal was one that was open to it in the exercise of its discretion. Further, the Review Tribunal noted its earlier finding that the Original Tribunal had not based in decision that there had been a breach of rule 2.3.10 solely on the Level 2 provider's failure to comply with the action plan and therefore the provider's argument concerning the allegedly "same single criterion which allowed the Tribunal to find the breach of rule 2.3.10," was misguided.

In conclusion, the Review Tribunal found that the seriousness ratings and sanctions imposed by the Original Tribunal were not *ultra vires,* and further that, on the evidence before the Original Tribunal and on its findings of fact, they were decisions which were open to the Tribunal in the proper exercise of its discretion.

DECISION OF THE REVIEW TRIBUNAL

For the reasons outlined above, the Review Tribunal found that the Original Tribunal's decisions on the breaches, their seriousness and sanctions were ones to which it was entitled to reach on the evidence before it and were not decisions to which no reasonable Tribunal, properly directing itself in law, could have reached. Accordingly, the Review Tribunal upheld the decisions of the Original Tribunal in relation to breaches, seriousness and sanctions.

APPENDICES

Appendix A: Example promotion submitted to PhonepayPlus:

ADVERTISEMENT

Closes Tuesday 6th of December! Enter in less than 3 minutes!

Genuine 4-Carat Sapphire Eternal Diamond Pendant

... available to every reader who solves the puzzle – entry takes less than 3 minutes!

To promote Spencer and Mayfair Jewellery to readers of this publication we are delighted to have reserved one of our most prized items to date: a genuine 4-Carat Sapphire Eternal Diamond Pendant. This special piece of jewellery contains two precious gemstones – genuine Sapphire and a genuine Diamond – set in a silver-tone diamond shaped Pendant with gold-tone chain.

These special pendants, dispatched in a luxurious black satin pouch, are guaranteed to be received by all callers who register correct answers to the puzzle shown here, by Midnight Tuesday 6th of December. There is no more to it than that. And remember calls last less than 3 minutes!

It seemed fitting that we awarded our Genuine 4-Carat Sapphire Eternal Diamond Pendants to those with an ability to solve our Jewellery wordsearch. But strictly one entry per person please.

Should you solve the puzzle then call the number shown straight away. We will tell you whether you have the correct answers and are successful!

This genuine 4-Carat Sapphire Eternal Diamond Pendant may not be offered again in this publication, so call today to ensure you don't miss out on receiving yours. Good luck!


Certificate
Quality Assurance

X	A	G	D	M	T	N	A	D	N	E	P	Y	K	
E	P	L	A	T	I	N	U	M	A	R	A	I	T	
F	Y	R	E	L	L	E	W	E	J	G	T	R	Y	
B	I	V	P	U	V	T	A	R	A	C	D	J	K	
T	E	L	E	C	A	R	B	E	L	G	N	A	B	
X	S	E	N	O	T	S	M	E	G	H	O	M	E	
E	K	I	U	I	P	C	S	I	G	C	M	C	U	
A	Z	U	V	Z	A	P	O	T	D	O	A	M	B	
R	N	W	O	R	C	W	M	A	L	O	I	T	I	
R	J	D	L	O	G	G	K	W	A	R	D	H	X	
I	Y	R	U	B	Y	H	S	K	R	B	B	Z	K	
N	S	A	P	P	H	I	R	E	E	B	C	O	X	
G	P	E	A	R	L	O	H	J	M	T	Q	N	G	
S	J	R	P	F	U	R	G	W	E	O	E	G	L	
J	G	Y	S	A	R	V	I	J	N	T	M	P	E	

Contains 4 genuine one-carat Sapphires

Simply identify which TWO words below are MISSING from the grid. There is one missing word in each list.

List 1
GEMSTONES
PRECIOUS
CARAT
JEWELLERY
DIAMOND
PEARL
SAPPHIRE
EMERALD
RUBY
TOPAZ

List 2
GOLD
NECKLACE
PENDANT
BRACELET
EARRINGS
BROOCH
BANGLE
TIARA
CROWN
PLATINUM

Should you manage to solve the puzzle we would ask that you do not communicate the answers to any third party. Thank you.

REGISTER CORRECT ANSWERS BEFORE MIDNIGHT TUESDAY 6TH OF DECEMBER AND IN LESS THAN 3 MINUTES WE WILL AWARD YOU WITH A GENUINE 4-CARAT SAPPHIRE ETERNAL DIAMOND PENDANT

CALL NOW 0906 [redacted]

Calls cost £1.53 per min and last 3 mins. Network extras apply

*Calls last under 3 minutes and cost a maximum of £4.60. Calls from other networks may vary. Calls from a mobile or public payphone cost considerably more. This is a skill competition open to UK residents aged over 18. Correct entries will be acknowledged on the phone line. You may also receive other exciting offers by post from us and other selected reputable companies. If you do not wish to receive these offers please write to inform us at Dept. 0, 6 Castleham Road, St. Leonards on Sea, TN38 9NR or call free phone 08081263080. For Customer service queries please call 01424797534. Image of Pendant shown is not to actual size. Pendant diameter: 30mm or very close thereto. Each pendant has been set with four 1-Carat Sapphires and one tiny diamond. Chain length 18 inches. At the end of the call you will be asked if you wish to be transferred to another phone line to receive matching earrings. If you do choose to do so the second call will last 2 minutes and 53 seconds at a cost of £1.53 per minute. Phone line closes Midnight Tuesday 6th of December. We aim to deliver within 14 days but please allow 28. © Churchcastle Ltd. T/A Spencer & Mayfair 2011. Registered in England no 4301808.

Appendix B: Example of an actual promotion that appeared in the print media:

Closes Monday 5th of December! Enter in less than 3 minutes!

Genuine 4-Carat Sapphire Eternal Diamond Pendant

... available to every reader who solves the puzzle – entry takes less than 3 minutes!

Contains 4 genuine one-carat Sapphires

Simply identify which TWO words below are MISSING from the grid. There is one missing word in each list.

List 1

X A G D M T N A D N E P Y K
E P L A T I N U M A R A I T
F Y R E L L E W E J G T R Y
B I V P U V T A R A C D J K

T E L E C A R B E L G N A B
X S E N O T S M E G H O M E
E K I U I P C S I G C M C U
A Z U V Z A P O T D O A M B
R N W O R C W M A L O I T I
R J D L O G G K W A R D H X
I Y R U B Y H S K R P B Z K
N S A P P H I R E E B C O X
G P E A R L O H J M T Q N G
S J R P F U R G W E O E G L
J G Y S A R V I J N T M P E

GEMSTONES
PRECIOUS
CARAT
JEWELLERY
DIAMOND
PEARL
SAPPHIRE
EMERALD
RUBY
TOPAZ

List 2
GOLD
NECKLACE
PENDANT
BRACELET
EARRINGS
BROOCH
BANGLE
TIARA
CROWN
PLATINUM

Certificate
Quality Assurance

Should you manage to solve the puzzle we would ask that you do not communicate the answers to any third party. Thank you.

REGISTER CORRECT ANSWERS BEFORE MIDNIGHT MONDAY 5TH OF DECEMBER AND IN LESS THAN 3 MINUTES WE WILL AWARD YOU WITH A GENUINE 4-CARAT SAPPHIRE ETERNAL DIAMOND PENDANT

CALL NOW 0906 [redacted]

DEPT O. 6 CASTLEMAN RD
ST LEONARDS ON SEA TN38 9NR
TEL 01424 720383