

Case Ref: 150301

BETWEEN:

PHONE-PAID SERVICES AUTHORITY LIMITED ('PSA')

Executive

V

TCS COMBINED SOLUTIONS LTD

Respondent

ORAL HEARING DECISION

Oral Hearing Tribunal: Professor Ian Walden (Chair)
Mr Peter Wrench
Mr Martin Wrigley

Ms Jessica Boyd for the Executive
Ms Fenella Morris QC for the Respondent

Upon an application for an oral hearing by TCS Combined Solutions Ltd ('the Respondent'):

1. The Tribunal found the following breaches of the PSA Code of Practice 2016 (14th Edition) ('the Code') proved:
 - (1) The Respondent charged customers without their consent and failed to provide evidence which establishes that consent, contrary to paragraph 2.3.3.
 - (2) The Respondent failed in the course of promoting their Premium Rate Service ('PRS') to ensure that the cost/pricing information was prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service, before any purchase is made, contrary to paragraph 2.2.7.
 - (3) The Respondent failed to issue subscription reminder messages to customers, specifically spend reminders as required by the PSA Guidance on Subscription Services (issued under paragraph 3.12.1) contrary to paragraph 3.12.5.
 - (4) The Respondent knowingly or recklessly omitted to disclose information to the PSA, contrary to paragraph 4.2.2

- (5) The Respondent knowingly or recklessly provided false or misleading information to the PSA, contrary to paragraph 4.2.2
 - (6) The Respondent failed to disclose to the PSA, when requested, information that was reasonably likely to have a regulatory benefit in an investigation, when a direction had been made pursuant to paragraph 4.2.1, contrary to paragraph 4.2.3.
 - (7) The Respondent failed to renew registration annually or at intervals determined by the PSA contrary to paragraph 3.4.8.
 - (8) The Respondent failed to register the Service numbers on the PSA Registration Scheme within two working days of the Service becoming accessible to consumers on those numbers, contrary to paragraph 3.4.14(a).
2. The sanctions determined by the Oral Hearing Tribunal ('the Tribunal') are:
 - (i) A Formal Reprimand
 - (ii) A prohibition on the Respondent from providing, or having any involvement in, any premium rate service for a period of 3 years, starting from the date of the publication of the Tribunal decision, or until payment of the fine and the administrative charges, whichever is the later.
 - (iii) A requirement that the Respondent 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.
 - (iv) A fine of £885,000
 3. The Tribunal recommends a naming investigation in relation to Darren Hodes.

Background

4. The Respondent has been registered with the PSA since 6 October 2017.
5. The Respondent is the Level 2 provider of DiscountMeDirect ('the Service'), a premium rate subscription service that offers alerts to consumers regarding discount offers and competitions. The Level 1 providers are Veoo Limited (now in administration) (on shortcode 80250), Mobivate Limited (on shortcode 87121), and mGage Europe Limited (on shortcode 78484).
6. The Service commenced operation on 2 March 2018 on shortcode 80250, on 31 March 2018 on shortcode 87121, and thereafter on shortcode 78484. Exactly when the Service commenced operation on 78484 was a subject of dispute between the parties and is explored below.

7. Darren Hodes is the sole director and shareholder of the Respondent. Mr Hodes gave evidence that there were no other employees.
8. In order to consent to be charged for the Service, consumers are required to enter their mobile number into the Service website. The consumer is then issued a PIN by SMS which must be entered into the Service website, prior to the issuing of Service charges.
9. The Respondent has used two third party verification companies to capture and verify PIN opt-ins to the Service:
 - a. Tropocom, which it used from March 2018;
 - b. Square 1 Communications (“Pintegrity”), which it used from May 2018.
10. The Service operates at two price points – a maximum of two £2.50 messages per week on shortcode 80250 or a maximum of three £1.50 messages per week on shortcodes 87121 and 78484.
11. The Respondent has from time-to-time migrated customers from one shortcode to another. The Respondent has stated that this has included, in particular, the migration of 19,625 customers from Veoo to Mobivate; 7,066 customers from Mobivate to Veoo; and 9,864 customers from Veoo to mGage.
12. The Respondent paused promotions for the Service on 4 February 2019 due to interim measures being imposed, but the Respondent continued to bill existing subscribers.
13. At present the Service is only operating on shortcode 87121.

Investigation

14. From 3 April 2018 to 7 January 2020, the PSA received 100 complaints from members of the public, alleging that they had received chargeable messages from the Service without having opted-in to it.
15. The Executive wrote to the Respondent on 20 August 2018 indicating that it was making preliminary enquiries into the Service and its operation and/or promotion, and requesting, on an informal basis, various sorts of information about the Service. The Respondent replied on 4 September 2018.
16. On 15 November 2018, the Executive informed the Respondent that the investigation had been allocated to enforcement track 2.
17. The Executive subsequently made formal information requests in relation to the Service on 14 February 2019, 21 March 2019, 16 July 2019, 23 August 2019, and 30 September 2019. The Respondent responded to each of these requests.

18. The Executive sent formal requests under paragraph 4.2.1 of the Code to Veoo on 15 November 2018, to Mobivate on 21 November 2018, and to mGage on 21 May 2019.
19. On 17 January 2019 and 6 February 2019 respectively, Pintegrity and Tropocom provided the Executive with online access to their respective portals, enabling the Executive to check the Respondent's opt-in records.
20. On 28 February 2020, the Executive sent a Warning Notice to the Respondent, and on 23 March 2020, the Respondent submitted a Notice of Requirement for an Oral Hearing.

Interim Measures

21. On 12 December 2018 the Executive issued an interim order application.
22. On 14 December 2018, the Code Adjudication Tribunal ("CAT") imposed interim measures to withhold up to £160,000 in funds. Mobivate and Veoo were both directed to withhold service revenue.
23. On 18 January 2019, on the Respondent's application, the CAT rejected a review of the interim withhold measure and increased the withhold amount to £510,000. Mobivate was directed to withhold £239,700 and Veoo was directed to withhold £270,300.
24. On 27 June 2019, the CAT rejected a second review of the interim withhold measure. Veoo was directed to withhold £260,000, Mobivate was directed to withhold £200,000 and mGage was directed to withhold £50,000.
25. The sums which the three providers are currently directed to withhold are £100,000 for Veoo; £309,000 for Mobivate; and £101,000 for mGage.

Alleged breaches of the Code

26. The breaches alleged by the Executive were that the Respondent:
 - (1) Charged customers without their consent and/or failed to provide evidence which establishes that consent, contrary to paragraph 2.3.3.
 - (2) Failed in the course of promoting their Premium Rate Service ('PRS') to ensure that the cost/pricing information was prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service, before any purchase is made, contrary to paragraph 2.2.7.

- (3) Failed to issue subscription reminder messages to customers, specifically spend reminders as required by the PSA Guidance on Subscription Services (issued under paragraph 3.12.1) contrary to paragraph 3.12.5.
- (4) Knowingly or recklessly omitted to disclose information to the PSA, contrary to paragraph 4.2.2
- (5) Knowingly or recklessly provided false or misleading information to the PSA, contrary to paragraph 4.2.2
- (6) Failed to disclose to the PSA, when requested, information that was reasonably likely to have a regulatory benefit in an investigation, when a direction had been made pursuant to paragraph 4.2.1, contrary to paragraph 4.2.3.
- (7) Failed to renew registration annually or at intervals determined by the PSA contrary to paragraph 3.4.8.
- (8) Failed to register the Service numbers on the PSA Registration Scheme within two working days of the Service becoming accessible to consumers on those numbers, contrary to paragraph 3.4.14(a).

27. The Tribunal reminded itself that the Executive bore the burden of proving the breaches to the civil standard. All alleged breaches save 7 and 8 were disputed.

Evidence

28. The oral hearing took place between Wednesday 9 December and Thursday 10 December 2020. It was held remotely, using the Zoom platform. The Executive were represented by Ms Jessica Boyd, and the Respondent by Ms Fenella Morris QC. The Tribunal would like to register its thanks to both counsel for the detailed statements of case and succinct submissions, which greatly assisted the Tribunal.
29. The Tribunal heard live evidence from Gareth Stevens, an Investigations Executive who led the investigation into the breaches alleged by the Executive. It considered an agreed statement from Benedict Doonan, the Director of Square 1 Communications. For the Respondent it heard live evidence from Darren Hodes.
30. The Tribunal considered all of the live evidence and the considerable documentary evidence contained in the Hearing bundle. It was assisted by detailed Statements of Case and supplementary skeletons and oral submissions by respective counsel.
31. It would be impossible to reflect all of the evidence and submissions the Tribunal had before it in this decision. All of the documentary evidence is a matter of record and the oral proceedings were recorded in full. Only the key evidence and points which the Tribunal considered most relevant to the alleged breaches is summarised below.

Alleged breach 1

Decision: UPHELD

32. Paragraph 2.3.3 of the Code states:

2.3.3

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

33. The Executive suggested that the Respondent had breached 2.3.3 both by charging consumers without their consent, and by failing to provide evidence which establishes that consent.

34. The Executive suggested that these breaches were established in three ways.

35. First, the Executive initially suggested that the 100 complaints received between 3 April 2018 and 7 January 2020, and the responses to a follow up questionnaire sent to those complainants, were evidence that those consumers had been charged without their consent. However, in her opening statement for the Executive at the outset of the hearing Ms Boyd abandoned this ground, because Tropocom and Pintegrity provided specific PIN opt-in verification information for each of those 100 complainants, showing that the user did consent to be charged. The Tribunal's view was that concession was sensibly made and did not find this ground to be established.

36. Second, the Executive relied on very significant discrepancies between the Respondent's monthly new subscriber figures and verified PIN figures. These were as follows:

Month	Verified PINs	New Subscribers
March 2018	7507	5110
April 2018	7651	6219
May 2018	12121	8831
June 2018	9694	13276
July 2018	10733	12215
August 2018	15729	13261
September 2018	6627	6678
October 2018	8513	10467

November 2018	5083	9325
December 2018	9334	13755
January 2019	1175	6308
February 2019	147	421

37. As can be seen from the above table the Respondent's subscriber figures and verified PIN figures did not reconcile in any of the months where they could be compared. In most months, the new subscribers outweighed the verified PINs, often by thousands. In a few months the verified PINs outweighed the new subscribers.
38. The Respondent's case, supported by Mr Hodes in evidence, was that these discrepancies were largely explained by the migration of subscribers from one shortcode to another. Because migrated users were treated by the system as 'new subscribers', but had in fact consented with a verified PIN, there was in fact one verified PIN for every subscriber.
39. Mr Hodes relied on the fact that the Executive were not able to point to any individual MSISDNs where consent could not be evidenced from the third-party verification services used by the Respondent. The Executive in turn, relied on the fact that they had never been provided with a full list of the Respondents' MSISDNs, albeit they had only asked for these on 6 November 2020. The Executive was therefore unable to check that there was a PIN opt in record for every MSISDN. The Executive suggested that the Tribunal could safely draw an inference that the Respondent did not want the Executive to be able to check the PIN verifications against each MSIDN.
40. The Tribunal's view was that it could not safely draw any particular inference from the Respondent's failure to provide a full list of MSIDNs when it was only asked for these on 6 November 2020, just over one month before the oral hearing. The Executive could have asked for that list much earlier in the investigation.
41. However, Mr Hodes explanations of the significant discrepancies were wholly unsatisfactory. He did not provide any analysis of how the numbers reconciled once migrated users were discounted, or any supporting evidence that they were in fact counted as new users on the system. The explanation did not stand up to the Respondents own numbers. For example in February 2019 the Respondent migrated 9,864 users from Veoo to mGage. However, its figures only showed 421 new subscribers that month, suggesting that the new subscribers figure was not artificially inflated by migrated users. Mr Hodes was unable to explain that discrepancy in his written witness evidence or in cross-examination.
42. The Tribunal agreed that the discrepancies were such that the Respondent was not able to provide evidence which establishes the consent of charged consumers, and it had therefore breached paragraph 2.3.3. Further, the discrepancies were so significant, with

far more new subscribers than verified PINs, that on the balance of probabilities the Tribunal found that consumers had been charged without their consent, which was a further breach of paragraph 2.3.3.

43. Third and in addition, the Executive relied on specific instances where the Respondent's evidence demonstrated that whether or not a consumer had opted into the service, they had been charged more than they had consented to.
44. The Respondent's own text logs demonstrated that individual users had been sent more than the 3 x £1.50 per week or 2 x £2.50 per week they had consented to. In addition, 7,566 consumers were migrated from Mobivate, where they had consented to 3 x £1.50 messages per week, to Veoo, meaning they could be charged 2 x £2.50 messages per week, making £5.00 per week rather than £4.50.
45. Mr Hodes' evidence was that users were not normally sent the full quota of messages per week, and so any overcharging as a result of the migration would have been minimal. Any users who had complained were offered refunds. However he had not done any analysis of the 7,566 users who were migrated or done anything proactive to identify how many had been overcharged.
46. Mr Hodes suggested that there may be individual explanations for users being charged more than the number of text messages per week, such as an incorrect billing cycle start date on the system. He accepted that there were overcharges in at least 21 out of the 98 message logs which could be analysed, and that was a high percentage.
47. The Tribunal was satisfied on the evidence that a significant proportion of users of both migrated users and non-migrated users had been overcharged, and had therefore not consented to all of the charges made by the service.
48. The Tribunal therefore found this breach proved both in respect of failure to provide evidence of consent, and in respect of it being established that consumers were charged without their consent. This was on the basis of the discrepancies in the Respondent's verified PIN and new subscriber figures, and also the overcharging in message logs and as a result of the migration from Mobivate to Veoo.

Alleged breach 2

Decision: UPHELD

49. Paragraph 2.2.7 of the Code states:

2.2.7

In the course of any promotion of a PRS, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.

50. The Executive's case was that the various examples of marketing provided by the Respondent were not prominent or proximate to the means of access to the service. The Executive suggested the marketing did not comply with the PSA's Guidance on Promoting Premium Rate Services. The Respondent argued that the examples were sufficiently prominent and proximate, and did comply with the guidance.

51. Below are some representative examples which were provided to the Tribunal:

Exclusive offers only to OUR members

YOUR CHANCE TO **WIN** **£500** worth of **easyjet** vouchers

Never miss out - MOBILE UPDATES AVAILABLE **Massive Savings** GUARANTEED

PLEASE ENTER YOUR MOBILE NUMBER

JOIN

By clicking SUBMIT you agree to our terms and that you may receive up to 2 text alerts per week depending on availability of latest offers. charged £2.50 per text message. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 80250.

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Our offers **DIRECT** to YOU

Win a £250 Fashion Gift Card

Exclusive offers only to OUR members

YOUR CHANCE TO **WIN** **£500** worth of **easyjet** vouchers

Never miss out - MOBILE UPDATES AVAILABLE **Massive Savings** GUARANTEED

WE HAVE SENT A UNIQUE PIN TO YOUR MOBILE - PLEASE ENTER HERE TO ACCESS YOUR EXCLUSIVE OFFERS

JOIN

By clicking SUBMIT you agree to our terms and that you may receive up to 2 text alerts per week depending on availability of latest offers. charged £2.50 per text message. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 80250.

[TERMS AND CONDITIONS](#)

discountMEdirect

Exclusive weekly offers ONLY to our members

Win the new iPhone X



Massive Savings GUARANTEED

Mobile Updates Available

PLEASE ENTER YOUR MOBILE NUMBER

SUBMIT

By clicking SUBMIT you agree to our terms and that you will be charged £1.50 per text message. You may receive up to 3 text alerts per week depending on availability of latest offers. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 87121. This service is not available to Vodafone customers.

[TERMS AND CONDITIONS](#)

Our offers DIRECT to YOU

discountMEdirect

Exclusive weekly offers ONLY to our members



Massive Savings GUARANTEED

Mobile Updates Available

PLEASE ENTER YOUR MOBILE NUMBER

SUBMIT

By clicking SUBMIT you agree to our terms and that you may receive up to 2 text alerts per week depending on availability of latest offers. charged £2.50 per text message. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 80250.

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discountMEdirect

Exclusive weekly offers ONLY to our members

Win the new iPhone X



Massive Savings GUARANTEED

Mobile Updates Available

PLEASE ENTER THE PIN WE SENT

SUBMIT

By clicking SUBMIT you agree to our terms and that you will be charged £1.50 per text message. You may receive up to 3 text alerts per week depending on availability of latest offers. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 87121. This service is not available to Vodafone customers.

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Our offers DIRECT to YOU

discountMEdirect

Exclusive weekly offers ONLY to our members



Massive Savings GUARANTEED

Mobile Updates Available

WE HAVE SENT A UNIQUE PIN TO YOUR MOBILE - PLEASE ENTER HERE TO ACCESS YOUR EXCLUSIVE OFFERS

SUBMIT

By clicking SUBMIT you agree to our terms and that you may receive up to 2 text alerts per week depending on availability of latest offers. charged £2.50 per text message. Charges will be added to your mobile phone bill. You will be receiving all the hottest and latest offers from our partners until you send stop to 80250.

52. Mr Hodes said that these examples were records provided by Tropocom of individual user's stories. The Tribunal therefore took them to be an accurate representation of what users would have seen. Similar examples were provided as a presentation provided by the Respondent and said to be a presentation to Level 1 providers, screenshots from a video created by the Executive of the investigator clicking on adverts, and further screenshots provided with the Respondent's Statement of Case.
53. The Tribunal found that the pricing information was sufficiently proximate to the means of access to the service, however it was not on balance prominent within the meaning of paragraph 2.2.7. The Tribunal were concerned that a consumer accessing the service on their mobile phone, as was likely, would easily miss the pricing information, which was in small font contained in a paragraph of text. The Guidance requires that the font size does not require a close examination by a reader with average eyesight. Further, the word 'SUBMIT' does not make the obligation to pay clear, as with the wording recommended by the Guidance of 'Pay Now'.
54. The Tribunal noted that the Respondent did provide some examples of Facebook banners, on 25 February 2019, that were more compliant with the Code:



55. The Tribunal accepted the Respondent's submission that this may be a relatively borderline case, but did find this breach proved on the balance of probabilities, on the basis of the majority of the examples provided.

Alleged breach 3

Decision: UPHELD

56. The relevant paragraphs of the Code under this charge are as follows:

3.12.1

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

...

(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;...

3.12.2

The service categories to which paragraph 3.12.1 refer are:

...(h) Subscription services;

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 PSA 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.

5.3.37

‘Subscription services’ are services which incur a recurring premium rate charge.

57. It was common ground amongst the parties that subscription services were required to send spend reminders at specific intervals under PSA Guidance issued under paragraph 3.12.1(c). The Respondent argued that it was an alert service, rather than a subscription service, because charges were made upon a consumer receiving a text, which were not sent at regular intervals. Mr Hodes gave evidence that his system was set up to send spend reminders, but he disabled this function because he did not consider the service to be a subscription service.

58. Mr Hodes said that he had read the Sector Specific Guidance Note on Subscription Services in force at the time, the relevant parts of which read as follows:

1.1 Subscription services are services which incur a recurring premium rate charge usually on a per week or per month basis until the user requests to end the subscription or exit the service.

1.2 As charges are recurring it is essential that consumers are made aware of all information that is likely to affect their decision to subscribe before they are charged.

...

4.4 In certain, limited, cases, the Phone-paid Services Authority's Executive will not pursue enforcement action in relation to the requirement on a provider of a subscription service to provide spend reminders as set out above in paragraph 4.1. However, these are currently limited to services that send alerts as to football or cricket matches (and/or results). This is on the grounds that the events leading to the information being sent, such as goal or wicket updates, are likely to be unpredictable, and the information contained therein easily verified later, and so unlikely to be falsified by a provider in order to create extra charging. Providers who wish to seek an exemption for any other service type should contact the Phone-paid Services Authority before they begin to operate a service.

59. Mr Hodes suggested that paragraph 4.4 of the Guidance had led him to believe that alert services were not 'subscription services'. The Tribunal's view was that paragraph 4.4 suggests the opposite. If irregular alert services were not subscription services, there would be no need for an exemption from enforcement for football and cricket match alerts. That exemption clearly did not apply to the Respondent's service, and neither did the rationale because the events on which the Respondent's alerts were predicated were not easily verifiable later. The Respondent never contacted the PSA to seek an exemption as suggested by the Guidance.

60. It was argued on the Respondent's behalf that the Tribunal should give precedence to the definition in the Code. The Respondent suggested that the words 'subscription' and 'recurrent' as understood by the industry at the time, required a regular charge at regular intervals.
61. The Tribunal's found that even if restricting itself to the Code, as invited by the Respondent, the natural meaning of a subscription service incurring a recurrent charge simply covered services which issued further charges without a need for additional consent. It did not connote the regularity read in by the Respondent. The Tribunal agreed with the Executive that both the Guidance, and a purposive interpretation, gave further support to that natural meaning.
62. The Respondent's service was therefore clearly a subscription service and was required to send out spend reminders. It did not do so. The Tribunal found this breach proved.

Alleged breach 4

Decision: UPHELD

63. Paragraph 4.2.2 of the Code states:

4.2.2

A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to the PSA (either by inclusion or omission).

64. The Executive's case was that the Respondent had provided false or misleading information to the PSA by omitting to disclose the use of shortcodes 87121 and 78484.
65. On 20 August 2018, the Executive asked the Respondent to supply all shortcodes used in the service and the promotion of the service. The Respondent's answers only referred to shortcode 80250, and did not disclose the use of 87121, which was discovered by the Executive later in the investigation.
66. The key response of the Respondent in this respect was in the right box of the table below:

6. Please list all other numbers, shortcodes, trigger or keywords used in this service and in the promotion of this service.	Service is operated on a number of different shared codes these are
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67. Although a number of different explanations for the failure to mention 87121 were put forward at different stages of the case, Mr Hodes' oral evidence was that he had meant to return to this question and complete the answer. He had not had the newer shortcode to hand, so had meant to find them and record them accurately in this answer. He forgot to do so. The Executive's case was this was a deliberate omission because Mr Hodes did not want the Executive to know about 87121.
68. The Tribunal accepted Mr Hodes' explanation. It did not think it likely that someone attempting to conceal the existence of an additional shortcode would have referred to different shared codes in a clearly incomplete answer. It therefore did not consider this omission to be knowing or reckless, and found the breach not to be proved on this basis.
69. The Executive suggested there was a further breach however, when the service began to use the shortcode 78484. The Executive suggested that this shortcode was also deliberately hidden from the Executive, predominantly to circumvent the CAT revenue withhold orders which were by then in place.
70. It was common ground that 78484 was not mentioned to the Executive until July 2019. By then there had been two withhold decisions and Mobivate and Veoo had been directed to withhold up to £510,000.
71. The Respondent's case was originally that 78484 was not in use until February 2019. However, Mr Hodes eventually accepted in cross-examination that it did seem to have been operating at least as early as November 2018. Mgage had confirmed that to the Executive.
72. The Executive relied upon a German bank account that the Respondent had set up. There were invoices which directed payments from Mgage into the German account between October 2018 and February 2019. The Executive's case was that this was an additional measure to circumvent the withhold orders. Mr Hodes' evidence was that the German account had been set up for an expansion into the Netherlands which never got off the ground, that Mgage had never been asked to pay money into it, and it had nothing to do with 78484.
73. The Tribunal was not able to come to a conclusion on the purpose of the German bank account. On the one hand, it did not understand why the Respondent would choose an account in Germany to start a business in the Netherlands. Mr Hodes' evidence that the invoices were created by Mgage, and he did not tell Mgage to pay money into the account also did not make sense. On the other hand, the account was a Euro account so

would not have been suitable for circumventing the withhold orders as suggested by the Executive. The Tribunal did not therefore consider the German bank account or the Mgage invoices as support for the Executive's case.

74. In the context that 78484 was operating, at least to some extent, by November 2018, the Tribunal considered the correspondence between the Executive and the Respondent.
75. In December 2018, the Respondent's representatives confirmed to the CAT, for the purposes of the first withhold decision, that there were no other revenue streams beyond those disclosed in the information provided. No existence of, or revenue from, 78484 was disclosed.
76. Whatever the level of activity from November 2018, in February 2019 Mr Hodes accepted that he migrated more than 9000 users to Mgage, and therefore 78484. Yet on 25 February 2019 the Respondent told the Executive:
- “the service operates on two different shortcodes (80250 and 87121 – see further below...”
- “We decided to approach two different aggregators for the service's shortcodes (Veoo + Mobivate).” [There was no mention of Mgage].
77. Mr Hodes accepted that read in this context the answers appeared misleading. He suggested the questions were focused on marketing, and marketing was not taking place on 78484 so he had not thought it relevant.
78. In the same response the Respondent was explaining its previous failure to mention 87121. The Tribunal considered it was absolutely clear by this stage that the Executive were concerned about transparency, and that all shortcodes needed to be supplied. The Respondent continued to suggest to the Executive that it was only operating on two shortcodes.
79. On 15 April 2019 the Respondent repeated the answer that “the use of two separate shortcodes provides us with more flexibility. Shortcode 87121 as hosted by Mobivate and set at price point 1 (£1.50 per message). Shortcode 80250 as hosted by Veoo and set at price point 2 (£2.50 per message).” That answer was provided in the context of a question about migrations. Mr Hodes knew that 78484 was operating and that he had migrated over 9000 users to it.
80. In the same response the Respondent again apologised for any confusion over the failure to disclose revenue for 87121, and said it had understood the question only to relate to 80250. It provided invoices and revenue statistics for 87121. There was no mention at all of 78484.

81. The effect of the failure to disclose was that 78484 operated for at least 6 months with no withhold in place. The Tribunal was satisfied from the exchanges that Mr Hodes knew that the Executive was asking about all the shortcodes and sources of revenue, and deliberately did not disclose the existence of 78484 and the users who had been migrated on to it. As will be considered under Breach 8, the Respondent also did not register 78484 with the Executive, as it was required to. The Tribunal found this breach proved on the basis of the deliberate concealment of 78484, in order to partially circumvent the withhold orders.

Alleged breach 5

Decision: UPHELD

82. Breach 5 related to the same provision as considered under breach 4.

83. The Respondent provided text message logs to the Respondent which indicated that spend reminders had been sent to consumers. In fact, as the Respondent accepted by the time of the hearing, no such spend reminders were sent, because Mr Hodes did not consider the service to be a subscription service.

84. Mr Hodes suggested that he was caught between a rock and a hard place in respect of the message logs. He knew that they were misleading, because they contained the send reminders which appeared to have been marked as sent. He knew that they were in fact disabled and had not been sent to consumers, but were merely recorded as sent due to a quirk of his system. He was therefore left with two options: to send the message logs as they appeared, with the risk that the Executive might be misled; or to edit them, which could be seen as misleading in itself. He decided on balance that it was best to send the logs unedited.

85. Mr Hodes was forced to accept in cross-examination that there was an obvious third way on the scenario he presented. He could have sent the unedited message logs with an accompanying explanation that would help the Executive understand what they showed. He accepted that he probably should have done that.

86. The Tribunal did not find Mr Hodes explanation of his actions credible. It was satisfied that the Respondent deliberately misled the Executive by providing the message logs without an explanation.

87. The Executive also initially suggested that the Respondent had deliberately misled it regarding free 'change of shortcode' messages. Mr Hodes said that he had genuinely believed those messages were being sent but had subsequently discovered that they were not due to a technical fault. The allegation that the Respondent deliberately or recklessly misled the Executive in this respect was not pursued with much enthusiasm and the Tribunal did not find the breach to be proved on this basis. For the reasons

explained, it found the breach to be proved on the basis of a deliberate provision of misleading text logs with respect to spend reminders.

Alleged breach 6

Decision: UPHELD

88. Paragraph 4.2.3 of the Code states:

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.

89. On 15 November 2018 the Respondent was directed, pursuant to paragraph 4.2.1, to provide:

- (i) Audited accounts (for the avoidance of doubt the audited accounts should include balance sheets and profit and loss accounts)
- (ii) Bank statements.
- (iii) Details of any overdraft facility
- (iv) Evidence of sources and amounts of recent/projected income
- (v) Any other information that you consider may assist the Executive

90. The purpose of the direction was expressly stated to be for the Executive to determine whether an application for a withhold of service revenue was necessary and appropriate.

91. The Respondent was warned that the Executive was considering raising a breach of paragraph 4.2.3 on 6 and 11 December 2018.

92. After a number of extensions, redacted bank statements were supplied on 7 December 2018. Some transactions, but most importantly the account balance, were redacted in full.

93. In documentation submitted to the CAT on 11 January 2019, the Respondent eventually confirmed that it did not have audited accounts, an overdraft facility, or other revenue streams or businesses in other jurisdictions. It also submitted an additional bank statement with fewer redactions, but this only ran to 30 November 2019.

94. The Respondent eventually supplied an unredacted bank statement on 17 January 2019. The Executive's case was that this was the first time the direction of 15 November 2018 was complied with, long after the extended deadline has expired.
95. The Respondent's case was that the unredacted bank statements were not reasonably likely to have a regulatory benefit, and that the Executive could have deduced the Respondent's financial position for the purposes of withhold measures by other means, for example by looking at user statistics. The Tribunal did not agree. The Respondent's current bank balance was essential to understand its financial position for the purposes of assessing withhold measures.
96. Mr Hodes said that he considered bank statements to be very personal documents, and had relied on legal advice in providing the bank statements provided. The Tribunal were not provided with any evidence of what the legal advice was. It found that the current balance of the bank statements was information that was reasonably likely to have a regulatory benefit, and that the Respondent failed to disclose that information to the Executive by the extended deadline. It therefore found this breach to be proved.

Alleged breach 7

Decision: UPHELD

97. Paragraph 3.4.8 of the Code states:

3.4.8

Registration must be renewed annually or at intervals determined by PSA..

98. The Respondent registered organisation details on the PSA registration system on 5 October 2017. However, after the Respondent's registration lapsed on 5 October 2018, it failed to renew its registration until 19 June 2019 – more than nine months later.
99. The Respondent admitted a breach of paragraph 3.4.8. A reminder message was sent to the Respondent on 5 October 2018, but was not received due to the Respondent having changed email address. It had notified the Executive of the change of email address. However, the Respondent accepted it was its responsibility to renew annually regardless of reminder messages. The Tribunal found this breach to be proved, but took into account the fact that the reminder was sent to the wrong email address when considering the appropriate sanction.

Alleged breach 8

Decision: UPHELD

100.Paragraph 3.4.14 of the Code states:

3.4.14

Numbers

- (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.

101. This breach was also admitted by the Respondent, albeit the Respondent suggested this was a technical breach, and it had believed the shortcodes to have been registered.

102. 80250 commenced on 2 March 2018 but was not registered until 22 March 2018.

103. 87121 commenced on 31 March 2018 but was not registered until 12 September 2018.

104. 78474 commenced on 7 November 2018 but was not registered until 16 July 2019.

105. The Tribunal therefore found this breach proved. It did not accept the failure to register 78474 was a technical or inadvertent breach, for the reasons explained in relation to Breach 4.

Seriousness

106. The Tribunal assessed the sanctions to be imposed for the breaches found by reference to Sections 13 and 14 of the Supporting Procedures. It made an assessment of each breach's severity, an initial assessment of sanction, and then took into account aggravating and mitigating factors, proportionality, and revenue and financial benefit, to come to the sanctions imposed. It finally considered whether the overall sanction imposed was proportionate and fair.

Breach 1

107. The Executive suggested this breach was very serious and that the Respondent had charged consumers without consent either intentionally or recklessly. The Respondent argued that at worst it had been overambitious and disorganised.

108. The Tribunal found this breach to be serious, but not very serious. There was an attempt to gain consent to charge using third party verifiers, but migrations and the need to stay within the confines of a user's consent were approached casually. There was a clear detrimental impact on consumers. There was damage to consumer confidence. The breach would have generated higher revenues, albeit the extent to which it did so was not entirely clear. However, the Tribunal did not find that the service was designed to breach the Code in this respect, or that the service was incapable of providing any value to consumers.

Breach 2

109. The Executive suggested this breach was serious. The Respondent suggested any breach was marginal, pointing to the conflicting decisions by the CAT in the withhold decisions.

110. The Tribunal's found this breach to be significant. There was a material impact on consumers likely to cause a drop in consumer confidence. The lack of prominent pricing information was likely to have generated revenue. However, the breach could not be described as serious because the margin by which the marketing fell short of the required standards was relatively narrow.

Breach 3

111. The Tribunal agreed with the Executive that this breach was very serious. Of importance was the Respondent's decision to deliberately disable the spend reminders that were set up on its system. Mr Hodes did this after consulting the guidance and coming to a perverse interpretation of it by which he effectively considered himself to have found a loophole. The breach was intentional, the service being specifically designed to breach the requirement to send spend reminders.

112. Mr Hodes suggested that after spend reminders were introduced he saw no change in cancellations or complaints. However he produced no evidence of this, despite admitting that the information was available and claiming to have seen it. The Tribunal was satisfied that this breach had a high detrimental impact on consumers and was likely to severely damage consumer confidence in premium rate services.

Breach 4

113. The competing positions on seriousness between the Executive and the Respondent largely turned on whether this breach was intentional. The Tribunal found that it was, and that it demonstrated a fundamental disregard for the requirement of the Code not to mislead the regulator. The breach was therefore very serious. It represented a deliberate concealment of a shortcode from the regulator and the CATs considering withholds, and was the most serious breach before the Tribunal in this case.

Breach 5

114. The Tribunal did not accept Mr Hodes' explanation for sending the misleading logs regarding spend reminders. Mr Hodes specifically designed the system not to send spend reminders, and then provided logs to the Executive which suggested that spend reminders were sent. The Tribunal found this breach was committed deliberately, and again demonstrated a fundamental disregard for the requirements of the Code. The breach was very serious.

Breach 6

115. The Executive suggested that this breach was serious. The Respondent argued any failure to provide unredacted bank statements was negligent, and done taking into account legal advice.

116. The Tribunal found this breach to be serious. The Respondent deliberately did not provide the information and continued to refuse to do so over a significant period. It reflected the Respondent's wider attitude to the PSA, which was to provide only the information the Respondent felt was convenient to it.

Breach 7

117. The Executive argued this breach was significant. The Respondent suggested it was a minor technical breach. The Tribunal accepted this breach was negligent rather than deliberate or reckless. However it was of significant duration, and was not an isolated incident, being part of a wider lack of compliance. The Tribunal found this breach to be significant.

Breach 8

118. The Executive and Respondent's arguments on this breach mirrored those on Breach 7. The Tribunal found this breach to be serious, because the failure to register 78484 was part of the Respondent's deliberate actions to hide that shortcode from the Executive. The Tribunal did not find the breach to be very serious, because it had no clear evidence on the impact of the breach, and could not be satisfied that the withholds would have been extended earlier if 78484 had been registered in accordance with the Code. The registration may well have passed without notice until a later date.

Aggravating and mitigating factors

119. The Executive suggested three aggravating factors:

- (i) Failure to follow available guidance
- (ii) Continuing nature of the breaches after the Respondent had become aware of them
- (iii) A failure to fully co-operate with the investigation

120. The Tribunal did not find failure to follow available guidance to be an aggravating factor, because in this case that failure was an inherent part of the breaches considered.

121. The Tribunal did find almost all of the breaches to have been of a continuing nature. It considered that a failure to fully co-operate with the investigation was inherent to breaches 4-6, but it did find there was a broader pattern of non-cooperation, which was part of the reason this investigation took so long. The Tribunal therefore accepted these as aggravating factors.

122. The Executive suggested there were no mitigating factors. The Tribunal found the following mitigating factors:

- (i) With respect to consent, the Respondent did work with independent third-party verifiers to implement a PIN system and attempt to gain consent;
- (ii) Some breaches had been remedied. Spend reminders were now being sent out, and some customers who complained had been refunded.

123. The Respondent suggested that Mr Hodes remorse and insight were mitigating factors. The Tribunal did not agree. The PSA's purpose is to ensure the safety of consumers and ensure a fair, proportionate and robust regulatory regime for industry.

124. The Tribunal did carefully consider the length of time the investigation had taken, and found that not all of the delay could be attributed to the Respondent. The Tribunal considered this could have led to unfairness, especially given the withholds in place and that one of the Level 1 providers has gone into administration. In the event, the Tribunal has found the vast majority of the Executive's case to be proved, however it wished to register its concerns about the length of the investigation and whether the Executive is adequately resourced to conduct timely investigations and enforcement. It is in both consumer's interests and the industry's that investigations and any adjudication under the Code are completed within a reasonable time.

Overall seriousness

125. Given the finding of three very serious breaches of the Code as described above the Tribunal considered the overall seriousness of the case to be very serious.

Revenue and deterrence

126. The Tribunal considered the Respondent's considerable revenue figures. However, it was not of the view that the service was wholly illegitimate or without value. It did not find a need to increase the penalties to remove all of the Respondent's financial benefit. The sanctions based purely on seriousness were sufficient to deprive the Respondent of any revenue obtained as a result of the breaches.

Sanctions

127. The Executive recommended the following non-financial sanctions:

- (i) A Formal Reprimand
- (ii) A prohibition on the Respondent from providing, or having any involvement in, any premium rate service for a period of 3 years, starting from the date of the publication of the Tribunal decision, or until payment of the fine and the administrative charges, whichever is the later.
- (iii) A requirement that the Respondent 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.

128. The Tribunal found these sanctions to be appropriate and proportionate given the seriousness of the breaches found proved.

129. Taking into account all of the circumstances explored above, the Tribunal found the following fines to be appropriate on each breach:

Breach 1	£100,000
Breach 2	£40,000
Breach 3	£175,000
Breach 4	£250,000
Breach 5	£125,000
Breach 6	£100,000
Breach 7	£20,000
Breach 8	£75,000

130. This led to a total fine of £885,000. The Tribunal considered that to be appropriate and proportionate in all the circumstances of the case. It did not accept that a fine of this level, which was lower than sought by the Executive, was out of all proportion to other fines imposed by the CAT.

131. The Tribunal considered the impact the fine would have on the Respondent and Mr Hodes' evidence that a fine in the order of that sought by the Executive would put the

Respondent out of business, but it considered the totality of the sanctions to be appropriate given the very serious nature of the case and proportionate in the circumstances.

132. The Tribunal recommends that the Respondent should pay 100% of the administrative charge.

Professor Ian Walden

Chair of the Oral Hearing Tribunal

18 December 2020