Tribunal meeting number 285

Case reference:	169028
Level 2 provider:	Gothamiax Limited
Type of service:	Subscription alert service
Level 1 providers:	Veoo DMB Mobivate
Network operator:	All mobile network operators

This case was brought against Gothamiax Limited, ('**the Level 2 provider**') under Paragraph 4.5 of the 14th Edition of the Code of Practice ('**the Code**').

Background and investigation

1. This case concerned a subscription alerts service called 'Every Day Saves' ('**the Service**'), which provided consumers with links to websites offering discounts and savings.

2. The Service operated via direct carrier billing using two shortcodes: 62150 and 88101 with two value chains.

3. Shortcode 61250 operated with the Level 1 provider Veoo from 01 February until 12 September 2019. Shortcode 88101 operated with the Level 1 provider DMB and Mobivate, which described itself as a Level 1 Second Tier aggregator, from 28 June 2019 and continues to be in operation. The service charges for both shortcodes are stated to be a single charge of £1.50 per message with a maximum of two messages per week.

4. The Level 2 provider is based in Cyprus and in accordance with the E-Commerce Directive that was in effect at the time, the Executive had to notify the Level 2 provider's home member state regulator to ask them to take action in respect of the issues that the Executive had identified prior to the Executive taking action.

5. On 18 June 2019, the Cypriot authority responded that it did not intend to take further measures against the Level 2 provider. The Executive did not consider that the measures taken by the Cypriot authority adequately addressed and remedied the harm and/or the potential harm to UK consumers. The Executive consequently decided to proceed to take its own measures in accordance with Art 3(4)(b) of the E-Commerce Directive 2000/31/EC.

6. The promotional material supplied by the Level 2 provider showed that the Service used a PIN verification system for opt-ins. This means that consumers are sent a PIN after entering their mobile number onto the Service website and that Service charges would commence once the issued PIN is entered onto the Service website.

7. The Level 2 provider had four promotional campaigns as follows:

    - 01 February 2019 – 24 February 2019 (pre-derogation, shortcode 62150)
    - 17 June 2019 – 31 October 2019 (post-derogation, shortcode 88101)
    - 19 December 2019 – 31 March 2020 (post-derogation, shortcode 88101)
    - 18 December 2020 – current (post derogation, shortcode 88101).

8. The Level 2 provider stated that it used Tropocom to verify PIN entries for the Service operating on shortcode 62150 and used both Tropocom and Pintegrity to verify PIN entries for the Service operating on shortcode 88101.

9. On 18 December 2020, the Level 2 provider launched a new promotional campaign using third-party verifier Raw Mobility and their verification system called 'RunAuth'. The PSA's investigation did not relate to this third-party verifier.

10. The Executive considered that the Service breached the PSA Code of Practice 14th edition ('the Code') in relation to the following Code provisions:

    - Breach 1 – Rule 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.*"
    - Breach 2 – Rule 2.3.1 – "*Consumers of PRS must be treated fairly and equitably.*
    - Breach 3 – Rule 2.6.1 – "*Level 2 providers must ensure that consumers of their services are able to have their complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily.*"

Preliminary issue – service and proceeding in absence

11. As the Level 2 provider was not in attendance at the Tribunal, the Tribunal considered as a preliminary issue the issues of service and proceeding in absence.

12. The Tribunal observed that a detailed response to the Warning Notice had been submitted by the Level 2 provider in which it had denied breaches of the Code had occurred. The Level 2 provider had also attached an email from one of the third-party verifiers it had used for the Service, Tropocom, together with screenshots provided by Tropocom of the records for 36 complainants who had responded to the Executive's complainant questionnaire. The Level 2 provider stated that this evidence provided an audit trail that clearly followed the PSA's Guidance on Consent to Charge and Payment Platform Security, in that it recorded the dates, the pricing and other key information that the consumer saw on the relevant website

at the time that they initiated and confirmed that purchase. It also included the consumer's device and mobile network. The Level 2 provider further asserted that a second third-party verifier, Pintegrity, had confirmed pins were sent to a list of 37 numbers it had outlined in its response.

13. The Tribunal further noted that the Level 2 provider stated that the 28 October was a national holiday in Cyprus and as a result it would be unable to attend the scheduled hearing. It stated that in the interest of not having to cancel an already scheduled paper- hearing, it did not object to the hearing taking place in its absence, but reiterated that the evidence demonstrating that no breach of the Code had been committed was contained within its response to the Warning Notice.

14. The Tribunal was satisfied that the Level 2 provider had been given notice of the hearing and that it had voluntarily absented itself from attending the hearing by informing the Executive that it was content for the paper-based hearing to proceed in its absence on 28 October 2021. The Tribunal was therefore satisfied that there had been proper service in the case and that it was fair to proceed in the absence of the Level 2 provider.

Adjournment – 28 October 2021

15. The Tribunal was notified that the Executive wished to correct an inaccuracy in the Tribunal report. The Tribunal had other questions for the Executive and therefore invited the Executive to join the hearing via Microsoft Teams in order to provide oral representations.

16. When the Executive joined the hearing it explained that it wished to make a correction to ensure that the Tribunal was not misled into thinking that the third-party verifier portals for Tropocom and Pintegrity were static pages as opposed to ones that provided real-time access to raw opt-in data. The Executive clarified that both online portals provided real-time access to the opt-in data. Despite this, the Executive stated it was still pursuing the breach of Rule 2.3.3 because it did not consider that the records that had been provided presented the full picture. It explained that the evidence submitted did not provide the timing of when the PIN was sent as compared with the initial interaction with the service and later interactions with the service. The Executive also submitted that it was not possible to see whether there were any repeated opt-ins, and submitted that the portal evidence in isolation was inconclusive. The Executive also highlighted that it had received a large volume of complaints about the Service, 412 complaints in total, with complainants alleging that they had not signed up to, nor agreed to be charged by the Level 2 provider, and were unaware of what the Service was.

17. The Tribunal questioned the Executive regarding its view on the validation of the PIN opt-in evidence it had received from the Level 2 provider. The Executive repeated that the portal evidence in isolation was not sufficient in its view to provide robust verification of consent to charge particularly in light of the large number of complaints that had been received by the Executive. The Tribunal asked about the adjudication that the Level 2 provider referred to in its response to the Warning Notice and the Executive explained that the other case was TCS Combined Solutions Limited and it could be distinguished from the facts of this case. It explained that the Executive, in that other case, had abandoned its argument that consumers had been charged without their consent because the third-party verifiers had provided specific PIN opt-in verification information for all 100 complainants showing that those consumers did in fact consent to be charged. The Executive explained that the case against TCS Combined Solutions Limited could be distinguished because firstly there were 100 complainants as opposed to 412 complainants and secondly because opt-in verification had been supplied for all 100 complainants, which was not the case here. The Executive emphasised that although the Level 2 provider had supplied evidence from the third-party verifier Tropocom in its response to the Warning Notice, it had not provided opt-in evidence from the second third-party verifier, Pintegrity.

18. The Tribunal questioned the Executive regarding a screenshot that it had taken of the online portal for Pintegrity, which was contained on page 666 of the bundle. It wanted clarification from the Executive as to whether this screenshot was for demonstration purposes or if it related to a particular consumer who had complained about the service. The Executive confirmed that this related to a complainant's mobile number that was purportedly signed up to the Service without the complainant's knowledge. The Tribunal questioned how this complainant could allege that they did not opt in when the screenshot from the portal said otherwise. The Executive stated that it had concerns about the veracity of the opt-in process because according to the logs that had been provided for this particular consumer, it showed that they had originally been opted in by Tropocom, and not Pintegrity, on 24 July 2019 and opted out in September 2019. The Executive clarified that the complainant alleged that they had never opted into the Service at all.

19. The Tribunal questioned the Executive regarding the Level 2 provider's response that it had contacted both Pintegrity and Tropocom about the customer questionnaire response it had received from 73 consumers and that the third-party verifiers had provided independent evidence and confirmed that all 73 complainants had received a PIN to their handsets and entered their unique PINs to start a subscription. The Tribunal wanted to understand whether the Executive agreed or disagreed with this. The Executive responded that the Level 2 provider had not provided evidence of opt in for all 73 complainants. The Tribunal asked the Executive about the evidence that the Level 2 provider had provided from Tropocom and why this evidence was not acceptable in light of the PSA's own guidance on Consent to Charge and Payment Platform Security ('**the Guidance**') and particularly paragraphs 3 and 4 of the Guidance. The Executive was unable to give a reason save to say

that robust evidence of consent to charge had not been provided from the Level 2 provider in relation to opt-ins through Pintegrity. It did however confirm to the Tribunal that it was not alleging that some fraud had occurred that made it appear that consumers had subscribed to the Service when they had not.

20. The Tribunal was troubled by the case because on the face of it there was evidence that suggested that complainants had legitimately opted into the service. However, an unusually large number of complainants had alleged that they had never subscribed to the service despite the opt-in evidence that had been provided. The Tribunal was concerned that it had not been given all of the evidence, which it believed would make a significant and fundamental difference to the case. The opt-in evidence that had been presented by the parties was not easy to follow and there were gaps. The Tribunal pondered whether it was the case that the Level 2 provider could not consistently provide the evidence that the Executive had requested it to provide, or that it had simply not provided the evidence, which in its view would have an impact on severity, if the breach was upheld. It considered that as a Tribunal of enquiry it should take a positive role in requesting information that it thought to be of importance and material to the issue of consent to charge and the case as a whole and that this was fair to all of the parties concerned. It applied the principles outlined in NMC and Jozi [2015] EWHC 764 and Ruscillo v CHRE [2005] 1 WLR 717 and made the following directions:

- the Executive to confirm which complainant numbers it requested the Level 2 provider to provide opt in evidence for and
- the Level 2 provider to serve the evidence confirming the particular opt-ins for the complainant numbers as confirmed by the Executive above, by 10 November 2021.

21. The Tribunal adjourned the case part heard until 9.00am on 9 December 2021.

Reconvened hearing – 9 December 2021

22. The paper-based hearing was reconvened on the morning of 9 December 2021 via Microsoft Teams.

Preliminary issue – service and proceeding in absence

23. As the Level 2 provider was not in attendance, the Tribunal first considered the matters of service and proceeding in absence.

24. The Tribunal was satisfied that the Level 2 provider was aware of the hearing, having responded to the Tribunal's direction. The Tribunal noted that although the Level 2 provider had responded to the direction in writing, it had not completed the informal representation

form and had not requested the logging in details for the hearing. It had last corresponded with the Executive on 6 December and did not convey any intention to attend the reconvened hearing.

25. The Tribunal was satisfied that it should proceed with the hearing in the absence of the Level 2 provider. It did not consider that there would be any or any sufficient benefit in adjourning the matter, as it appeared unlikely that such an adjournment would secure the Level 2 provider's attendance at any future hearing. As such, the Tribunal was satisfied that it was fair and reasonable to proceed in the absence of the Level 2 provider.

Submissions and conclusions

Alleged breach 1

Rule 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."

26. The Executive asserted that the Level 2 provider had breached Rule 2.3.3 of the Code because it had failed to provide robust evidence that established consent to charge had been obtained from the consumers.

27. The Tribunal considered that in light of its decision to adjourn the hearing on the previous occasion, and the additional information that had been provided by the Level 2 provider in the interval, it was necessary to call the Executive to understand what the Executive's position was now.

28. Upon questioning by the Tribunal, the Executive stated that having reviewed and considered the additional evidence supplied by the Level 2 provider post adjournment, it conceded that in respect of some of the opt-ins there was robust evidence of consent to charge in line with the PSA's Guidance. However, it was not withdrawing the breach because opt-in evidence had not been provided by the Level 2 provider for four MSISDNs. The Executive stated that it had entered these four MSISDNs on both live portals, and neither portal provided any data for them. It stated that its case was that there were some instances of consumers being charged without their consent because the Level 2 provider had failed to provide robust evidence of consent to charge, and this might explain why the PSA had received such a high level of complaints about the Service. The Executive added that it was unable to speculate as to how many MSISDNs had robust evidence of consent to charge and how many did not, and this might be something that the Tribunal would have to consider at sanctioning, if the breach was upheld.

29. The Tribunal asked the Executive to further discuss the four MSISDNs of concern and point to the evidence in the bundle relating to them. The Executive referred the Tribunal to the

post adjournment correspondence and explained that the four MSISDNs were initially mistyped by the Level 2 provider in its response to the Warning Notice. The Executive subsequently referred to those misspelt MSISDNs in its email to the Level 2 provider dated 29 October 2021. When the Level 2 provider queried the four MSISDNs, the Executive responded on 15 November 2021 that the four MSISDNs had been taken from annex page 885, which formed part of the Level 2 provider's response to the Warning Notice. The Executive then corrected the MSISDNs, inserting the missing digit, but did not explicitly ask the Level 2 provider to supply opt-in evidence for those four MSISDNs, and there was no further response from the Level 2 provider on this point although it had emailed on 6 December 2021 attaching the evidence in an Excel spreadsheet allowing clear identification of the information for each number.

30. The Tribunal asked the Executive to provide its view on the percentage of non-compliant opt-ins and the Executive suggested that the extent of non-compliance with the Code could amount to a fifth of complainants on the basis that four out of 36 MSISDNs were not verified. The Tribunal questioned the Executive about the evidence of opt-in for the other 32 MSISDNs and whether they had been correctly verified in line with the Guidance. The Executive confirmed that evidence of consent to charge had been provided for those 32 MSISDNs. The Tribunal corrected the Executive that its calculation should be four out of 73 MSISDNs, which was over one tenth. The Executive accepted this and reiterated that the four MSISDNs did not appear on either portal whereas the other 69 MSISDNs did. It stated that the Level 2 provider had supplied message logs for those four MSISDNs and so there was no doubt that the complainants were entered into the Service despite the lack of verification by an independent third-party verifier.

Response from the Level 2 provider

31. The Level 2 provider was not in attendance at the reconvened hearing. It had, however, responded to the Warning Notice denying the breach of Rule 2.3.3 and had provided further opt-in evidence as requested by the Tribunal.

32. The Level 2 provider stated that the complainant evidence did not represent the flow of the subscription. It explained that when a consumer lands on the landing page and entered their mobile number, they were sent an SMS with a PIN by the third-party PIN provider and the PIN was then entered into a PIN verification page. It stated that the Service used three independent PIN providers and that it had no way or control of identifying the unique PIN sent to each consumer by each verification company.

33. The Level 2 provider stated that the complainant evidence was not reliable. It submitted that technical records and consumer feedback contradicted many of the responses to the PSA's questionnaire and argued that this called into question the validity of the complainant responses.

34. It stated that it had contacted both Tropocom and Pintegrity about the complainant questionnaire responses for the 73 numbers and confirmed that all 73 complainants received a PIN to their handset, having entered the unique PIN to start their subscriptions. The Level 2 provider again stressed that there was no way it could know the unique PIN that was sent.

35. The Level 2 provider acknowledged that some consumers might not be completely satisfied with the Service and that was why they tried to refund every consumer that complained to them. It emphasised that the complainants who had responded to the PSA's questionnaire stated that they had received refunds. The Level 2 provider advised that it would be happy to work with the PSA in contacting consumers who had yet complained to them and offer them a refund.

36. Post adjournment, the Level 2 provider supplied further information received from the third-party verifiers in relation to the MSISDNs sought. It further stated that as changes to the Service were made to satisfy the PSA's special conditions introduced in November 2019, it had stored and provided additional information that it had on the numbers subscribed following this period including user agents for each number.

Conclusions

37. The Tribunal carefully considered all of the evidence before it, including the responses submitted by the Level 2 provider.

38. It noted that the Executive had conceded that robust evidence of consent to charge had been provided for all but four out of the 73 MSISDNs that the Executive had sought and requested opt-in evidence for. Therefore, the case was effectively about those four MSISDNs and the extent that this issue was replicated on a broader scale, if any. The Tribunal also considered the weight of the complainant evidence, as a surprisingly large number of complaints had been received by the PSA about the Service.

39. The Tribunal discussed the Executive's email of 15 November 2021 to the Level 2 provider and the fact that the Executive had not explicitly requested opt-in evidence for the four MSISDNs. It considered that the Executive should have explicitly requested the Level 2 provider to provide opt-in evidence for the four MSISDNs but noted that this ought to have been obvious to the Level 2 provider, given the reason for the adjournment. In any event, the Tribunal considered that the Executive's lack of direction was irrelevant in a sense because it was not possible to provide any evidence of verification for those four MSISDNs, as they did not feature on either portal.

40. The Tribunal was not comfortable with the concept of upholding a breach on the basis that robust evidence of consent to charge had not been provided for four out of 73 MSISDNs. Taking a holistic point of view, it considered that the Service was operating compliantly with Rule 2.3.3 on the whole. It did not find the missing opt-in evidence for the four MSISDNs conclusive, or demonstrable of a wider consent to charge issue. The reason for the missing opt-in evidence could have been related to a technical failure. Similarly, it might have been a deliberate act on the Level 2 provider's part to enhance its revenue by not passing a smaller percentage of MSISDNs through any independent third-party verifier. However, the Tribunal was unable to reach a firm conclusion as to why there was no evidence of consent to charge for the four MSISDNs. It was, however, satisfied that in relation to 69 out of 73 complainants who had responded to the Executive's questionnaire, the Level 2 provider had provided robust evidence of consent to charge in line with the Guidance.

41. Looking at the matter in the round, the Tribunal was satisfied that the Level 2 provider was more likely than not operating a verified system with approved third-party verifiers. Although there had been no explanation for why opt-in evidence had not been provided for those four MSISDNs, the Tribunal was nonetheless satisfied that there was a process of verification in place, and that the Level 2 provider had supplied robust evidence of consent to charge for 69 MSISDNs, and this included real time access to the requested opt-in data.

Decision: NOT PROVED

Alleged breach 2

Rule 2.3.1
"Consumers of PRS must be treated fairly and equitably."

42. The Executive submitted that the Level 2 provider had breached Rule 2.3.1 of the Code because some consumers who were subscribed to the Service had not been provided with:

- billed messages providing the Service despite being charged for the Service
- the free message informing them that they had subscribed to a premium rate subscription service
- the free subscription reminder message(s) and
- the free message informing them they had been unsubscribed from the Service.

43. The Executive relied on the PSA Sector Specific Guidance Note on Subscription Services and particularly paragraphs 2.1, 2.2 and 4 of that Guidance Notice. It further relied on the Notice of Specified Service Charges and Durations of Calls (in respect of the Service's first and second promotional campaigns) and SS8 and SS9 of the PSA Special Conditions for subscription services (in respect of the third promotional campaign for the Service).

44. The Executive noted that in addition to complainants reporting the receipt of unsolicited messages, some complainants had also reported being unable to stop the Service even after texting STOP/STOP ALL. Upon reviewing the message logs, the Executive discovered that the problem was not with the failure of the STOP command since subscriptions had stopped, but instead complainants were not being informed that that their subscription had ended.

45. The Executive subsequently reviewed the other free messages that were sent by the Service. Some complainants had also reported having received no messages at all. It noted that one complainant had described the texts as 'phantom' texts, as they were being billed for a Service they were not receiving.

46. The Executive's initial review of the complainant message logs identified certain patterns, such as the frequency of the undelivered free messages and undelivered billed messages. The free messages included the initial joining confirmation message, the spend reminder message, and un-subscription confirmation messages. This led the Executive to undertake an in-depth analysis of all the message logs it had received from the Level 2 provider. As part of its analysis, the Executive reviewed the content and frequency of all the free Service messages.

47. The Executive conducted a data analysis of the message logs to ascertain the success and failure rate of the free messages. The Executive analysed 382 message logs supplied by the Level 2 provider for complainants. The analysis identified that at least 178 complainants were affected by free messages not being delivered between 8 February 2019 to 22 November 2020. The level 2 provider had sent a total of 1,125 free messages to complainants, of which only 791 were successfully 'delivered' and 334 were 'undelivered'. The Executive submitted that this was a high failure rate of key service information messages.

48. Having noted patterns in the frequency of failed messages, the Executive examined the failure rates per message type. These results showed that the highest failure rates occurred for the first subscription reminder message. This was followed by lowering failure rates for the second to fifth subscription reminder messages, then a sharp increase occurring after the fifth subscription reminder messages, peaking at a 72% to 78% failure rate for the eight, ninth and tenth subscription reminder messages.

49. The Executive submitted that its analysis showed that 44 complainants did not receive the initial free message informing them that they had joined the Service. It was asserted by the Executive that those 44 complainants, who had reported the receipt of unsolicited charges, would not have been aware that they had entered a premium rate subscription service. They would not have known the cost of the Service or be able to stop the Service until they were in receipt of the first subscription reminder message a month later, or until they checked their mobile telephone bill.

50. The Executive further submitted that out of the 44 complainants who did not receive the initial free message informing them that they had joined the Service, 18 complainants did not receive the first free monthly subscription message as required by the Code. For some complainants, the first free message they received from the Service was the third subscription reminder message, three months after they were subscribed to the Service.

51. Furthermore, the Executive submitted that the data showed that some complainants received the free initial joining message and the subscription reminder messages for a few months, but then did not receive any further subscription reminder messages until cessation of the Service.

52. The Executive summarised its case that there was a high failure rate of the delivery of free messages containing key service information. The effect of this resulted in some complainants being deprived of key information pertaining to their entry into a premium rate subscription, the financial impact of that subscription and how to exit the Service. It stated that this was compounded by the fact that some complainants also failed to receive billed messages between March 2019 to August 2021. The Executive asserted that the frequency and timing of the pronounced spikes of message failures suggested that the message failures were not a mere anomaly.

53. The Executive stated that it forwarded almost 400 complaints to the Level 2 provider, and in response, the Level 2 provider supplied message logs for those complainants. Despite the fact that the Level 2 provider was in possession of the message logs, the Executive asserted that the Level 2 provider failed to identify the multiple message failures until notified by the Executive. The Executive argued that this allowed the issue to continue over a prolonged period of time. While the Level 2 provider stated that the failure of delivered messages was not down to its platform, the Executive submitted that the failure on the Level 2 provider's part to monitor and rectify the issue, until the matter was brought to its attention by the PSA, demonstrated a failure on its part to take reasonable steps to ensure consumers were receiving the information they were entitled to, to ensure that consent to charge applied and continued to apply.

54. Given the Level 2 provider's contention that the failure of delivered messages was not down to its platform, the Executive contacted one of the mobile networks with the highest levels of complainants. The network explained that generally the main reason a bulk message would not have been delivered is because the handset was turned off for a period of time. It stated that this would also impact the delivery of the subscription charges for the Service. The network was asked to comment on complainants' numbers, but as the system only allowed it to view the last 90 days of messages and the majority of numbers stopped receiving any further charges in 2019 or 2020, it could only review one complainant's number. It stated that it could see that the premium charges had been successfully delivered and charged. It therefore assumed that the mobile telephone was in use during the term of the subscription and delivery messages would have been successfully sent if initiated by the merchant or aggregator. It stated that it was not an issue with the network operator.

Response from the Level 2 provider

55. The Level 2 provider argued that some of the complainant responses to the Executive's questionnaires were not entirely accurate and could be considered false. It stated that the comment 'phantom' texts made by one complainant was entirely misleading because it suggested that the Level 2 provider had a method to send messages for a Service at the cost of £1.50, but the messages were never seen by consumers. The Level 2 provider categorically refuted this, stating it was technically impossible. It submitted that message logs with the status 'delivered' were only possible when its Level 1 provider confirmed that they had landed on a handset. This also meant that the network could see these messages and consequently the messages could not be 'phantom' messages. It pointed out that the network operator had confirmed to the PSA that the messages were sent as did their Level 1 provider.

56. The Level 2 provider argued that the Executive had not shown any pattern as to why the messages had failed to send. It stated that there were many reasons that messages may fail, but stressed it was not because they had not sent them. It also stated that the Executive could not have investigated the message failure on shortcode 62150 since the Level 1 provider went into liquidation on 28 September 2019 and thus would not have been able to contact the Level 1 provider for any further detail including any reason they might have for the message failures. The Level 2 provider stated that revenue share statements from the Level 1 provider had been provided and clearly showed a bulk message charge which would have included Free Join messages and Reminder messages. The Level 2 provider reiterated that when the consumer entered the Service on its platform the relevant message was sent.

57. The Level 2 provider further stated the Executive sent 51 complaints to the Level 2 provider on 23 July 2020, almost a year after they had been received. It argued that if these complaints had been sent promptly, it was very possible that an investigation into the message failures could have commenced and the Level 2 provider could have notified operators of both shortcodes of a potential problem.

58. The Level 2 provider also stated that it was unaware of a Level 1 provider in the value chain. It stated that this increased the risk that messages would not be sent correctly to a consumer's handset because there were now three stages were errors might occur. It submitted that it was also not obvious at any time that there were problems with messages not sending. It stated that every month it received bulk messages costs that showed that they were sending or attempting to send messages to every consumer.

59. In summary, the Level 2 provider stated that it had attempted to send messages to every consumer including a 'Join Message', 'Subscription Reminder' or 'Billing Message'. It submitted that the majority of messages were sent correctly but accepted that there had been a number of failed messages of all types of message, but nothing noticeable at any particular time. It argued that had the Executive sent the 51 complaints at the time they had been received, it may have identified any issues sooner. It argued that if the Executive had initiated the investigation sooner, there may have been a response from the Level 1 provider in the first value chain. It argued that had it been aware of the Level 1 provider in the second value chain, they could have asked them about the message failures on shortcode 88101. It reiterated that messages can fail for a number of reasons but the Level 2 provider always sent the messages to land on consumers' handsets. It emphasised that it still wanted to work with the Executive and would take its advice on how to deal with consumers that may not have received the intended sent messages. It stated that it was willing to do whatever it took to benefit consumers and ensure that they were treated fairly.

Conclusions

60. The Tribunal considered all of the evidence before it including the Level 2 provider's lengthy written submissions. The Tribunal further considered the information that had been provided by the network operator, which clearly stated that the issue was not a network fault and that non delivery could happen if the consumer's handset was turned off for a period of time.

61. The Tribunal considered the table that the Executive had produced on page 40 of the Warning Notice, which it believed put into picture the extent of the volume of failed messages. The Tribunal was persuaded by the Executive's analysis of the evidence and the complainant evidence in respect of this specific breach. It did not consider it likely that the affected complainants had all switched off their handsets for a period of time.

62. The Tribunal believed that, on the balance of probabilities, the messages were not sent. It did not consider that there was a need for a pattern for the breach to be upheld, it was satisfied that, on balance, the messages the Executive had identified from the message logs had not been sent. It therefore rejected the Level 2 provider's submissions in light of the credible analysis undertaken by the Executive, the complainant evidence, and the responses from the Level 1 provider and the network operator.

63. The Tribunal noted that the Level 2 provider stated that there could have been many reasons for the failed messages, but it was not due to its failure to try to send them. It also noted that the Level 2 provider contacted its Level 1 provider about the message failures on 23 March 2021. Notwithstanding this, the Tribunal considered that the Executive's case was persuasive and it was not appropriate for the Level 2 provider to attempt to blame the Executive for not bringing the issue to its attention sooner. Although the Level 2 provider

was being billed by its Level 1 provider for bulk messages, it should have identified that there was a very high failure rate of failed messages from the message logs in its possession.

64. The Tribunal was satisfied that complainants had not been treated fairly and equitably because key information about the Service had not been sent and/or received by the complainants. This had been demonstrated by the Executive's analysis of the complainant message logs. Although the Tribunal did not find the complainant evidence credible in respect of the first breach, it considered that the complainant evidence was reliable in respect of the second breach. It considered that it was possible that complainants had forgotten that they had signed up to the Service, particularly in the absence of free messages being received by them that reminded them of their subscription and the Service charges.

Decision: UPHELD

Alleged Breach 3

Rule 2.6.1
"Level 2 providers must ensure that consumers of their services are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily."

65. The Executive submitted that the Level 2 provider had breached Rule 2.6.1 of the Code because complainants stated that they were unable to quickly and easily contact the Level 2 provider about the Service. The Executive relied on complaints received and the PSA's Complaint Handling Guidance.

66. The Executive noted from the promotional material supplied by the Level 2 provider that a customer service telephone number and email address were supplied. The Executive also noted that 47 complainants had stated that they had experienced difficulties in contacting the Level 2 provider to complain about the receipt of unsolicited charges and to receive redress. The Executive noted that these complaints peaked in October 2019 and between March and April 2020. A sample of complainant accounts included:

> *"Called the provider on 1/11/19. The provider said they were going to call her back, but consumer has not heard nothing from them. "*
>
> *"I have contacted the company liable and they've passed it over to another company to take the calls and they say they've passed the details over but I feel like it's a deliberate attempt to ignore calls requesting a refund…"*

"Subscribed to a premium rate text messages without my consent. Charged £12 in total after being sent 8 premium rate text messages during October and November. I am awaiting a response from the company following a request for a refund. This is my second mobile phone account that has been affected by unwanted premium rate text messages and the companies appear to be linked. I would like to report the company as I did not sign up to this service and feel my details have been used fraudulently for a second time."

"According to my phone bill, I have received 33 premium messages since Sept 2019, totalling £41.25. I do not know what this service is and I have no recollection of signing up to any message service. I contacted the company, Gothamiax Ltd, to provide me with proof of me signing up and they have not responded."

67. The Executive undertook monitoring of some of the contact methods available to consumers. It called the customer care helpline on 6 February 2021. The call was connected to an Interactive Voice Response (IVR) with an option to unsubscribe from the Service. The Executive selected the option to unsubscribe from the Service and when invited to enter its phone number in an international format followed by the hash key, randomly entered the number 7 eleven times on the telephone keypad. The automated message stated: "You have successfully unsubscribed from our services. You can join us again at any time by following any of the links we have sent to your phone."

68. The Executive then redialed the customer care number again, listened to the IVR message and selected the option 'for anything else'. This resulted in the following IVR message: "Your call will be recorded for training and monitoring purposes please hold and your call will be answered by the first available agent." After being on the call for one minute, the automated message stated: "Please continue to hold, the person you have called knows you are waiting. Do not hang up or you will lose your place in the queue." The Executive disconnected the call after waiting 3 minutes and 55 seconds.

69. The Executive carried out further monitoring on 2 and 3 September 2021. On 2 September, the call connected to voicemail asking for a message to be left, but the Executive did not leave a message. On 3 September, the call connected to an IVR message stating: "Your call will be recorded for training and monitoring purposes please hold and your call will be answered by the first available agent". After a few seconds it connected to an operator who answered: "Thank you for calling mobile support how can I help?"

70. In addition, the Executive sent an email to the customer care email address requesting to be unsubscribed from the Service. The Executive received a response from the Service requesting further details about the complaint.

71. The Executive looked at the website link for the Service and clicked on the web address for the customer care website. It was directed to the landing page primarily aimed at business-to-business customers. The Executive found the contact details for the Level 2 provider at the bottom of the landing page. The Executive noted that the phone number provided was a Cypriot dialing code which was a completely different number to the customer service number.

72. The Executive submitted that while monitoring demonstrated that it was possible to contact customer service, the cancellation service allowed and confirmed an unsubscription from the service for a fictitious set of digits. The monitoring call also showed that there were other options available, however, there was a lengthy wait without connection, which would require consumers to either hold for longer or call back. More recent monitoring of the customer care number appears to demonstrate that the availability of the customer care number changes depending on the time of the day. An operator is not always available to speak to consumers and there is an option to leave a voicemail instead. The Executive confirmed that it did receive a response to its monitoring email.

73. The Executive asserted that the differing monitoring outcomes and consistent complainant accounts were persuasive in showing that consumers had experienced difficulty in contacting both the customer helpline and in using the email address. This appeared to have continued after 18 December 2020, as demonstrated by the complaints received following this date. The Executive asserted that the Level 2 provider had failed to ensure that consumers were able to have their complaints resolved quickly, easily and fairly, which resulted in a breach of Rule 2.6.1 of the Code.

Response from the Level 2 provider

74. The Level 2 provider stated that it had been operating its Service for a number of years and had always maintained a high level of customer care for every user of its Service. It stated that complaints were always handled with high importance and a refund was always offered to the consumer.

75. It suggested that it appeared that the Executive did not follow up on any of the complaints it received. It stated that if the Executive had followed the complaints up, it would have been evident that when the Level 2 provider receives a Request for Information from the PSA, it acts on it promptly and tries to ensure that the customer complaint is dealt with as a priority. The Level 2 provider supplied examples for 8 complainants stating that it had contacted all but one of the complainants and issued them with a full refund. It submitted that it had demonstrated that its customer service team was determined to contact consumers who complain, and arrange and provide refunds. It reiterated that had the Executive followed up on these complaints, complainants would have confirmed that they had spoken to the customer service team and were refunded.

76. In relation to the Executive's monitoring, the Level 2 provider stated that while it would expect all consumers, who wanted to call the customer care helpline in order to opt out of the Service, to submit their correct mobile number, a link was also sent to the platform of the 'IVR unsubscribe request'. This meant that the customer service team could manually ensure that the customer number entered was unsubscribed as requested.

77. The Level 2 provider stated that it searched its database for records of the Executive's call on 6 February 2021 but could not find any. It stated that the call should have gone directly to a customer service operator but with no evidence of the call being made it was hard to determine how or why this did not occur. It queried why the Executive did not make a second attempt on the same day.

78. The Level 2 provider stated that at the beginning of September 2021 its provider had a large-scale distributed denial-of-service (DDoS) attack. As a result of this, the Level 2 provider stated that it did everything within its power to have the telephone lines backed up and operating, and consequently transferred telephone calls to its call answering service provider instead. It stated that the voicemail message facility was in place as a backup service. It explained that had the Executive left a message, the Executive would have received a link to the Level 2 provider's IVR recording, and the Level 2 provider would have followed up the call as with any other consumer.

79. The Level 2 provider commented that the Executive's telephone call to the customer care helpline on 3 September 2021 worked exactly as it should have, with an operator answering the telephone call. Similarly, the Executive's email to customer care worked exactly as it should have. The Level 2 provider explained that the website link contained a Cypriot number due to it being a company based in Cyprus.

80. The Level 2 provider summarised that it has its own support staff who manage incoming calls. It also has a 24/7 call answering provider, which takes calls on its behalf. Details are then passed on by the call answering provider, and the Level 2 provider returns the call within 24 hours, apart from at weekends, when the call is made on the following Monday. In the event that a call goes unanswered, there is a voicemail facility where consumers can leave voicemails that are picked up on by its staff very quickly. It stated that it ensures that all enquiries are dealt with quickly and courteously and a full refund is offered, if required. Should consumers require a refund, it takes the consumer's refund details and passes them to the finance department. All refunds are processed in a timely manner, which they ensure is within five working days.

Conclusions

81. The Tribunal considered all of the evidence before it, including the complainant accounts, the Executive's monitoring, and the Level 2 provider's written submissions. It considered that much more weight could be given to the complainant evidence because complainants ought to have known and recalled what had happened when they complained about the Service. In its opinion, the complainant evidence was strong and compelling and demonstrated that there were issues with complaint handling.

82. The Tribunal also focused on the wording of Rule 2.6.1 that complaints are '*resolved quickly, easily and fairly*' and that '*any redress is provided quickly and easily*'. Although it considered that the Level 2 provider had given a reasonable effort of rebuttal in its response to the Warning Notice, and there was clearly a customer service function in place, with refunds being made, there was nonetheless evidence of a breach of the Code. The evidence showed that complainants did not have their complaints resolved quickly, easily and fairly and that redress was not provided quickly and easily. Instead there were instances of numerous complainants stating that they had contacted the Level 2 provider, but could not get through or did not receive a reply. The Tribunal acknowledged that the Level 2 provider stated that it followed up on the complaints and refunded the complainants, but considered that there was still a breach of the Code because the complainant evidence demonstrated that it was not always a quick or easy or fair process. Instead of the complaint process being straightforward and timely, it appeared that the consumer experience was that it was arduous and unnecessarily drawn out.

83. The Tribunal considered that the Executive's own monitoring could have gone further. For instance, it could have left a message when it called the customer service telephone line on 2 September 2021. As such, the Tribunal did not attach much weight to the Executive's monitoring evidence.

84. In light of all of the above, the Tribunal concluded that, on the balance of probabilities, a breach of Rule 2.6.1 had occurred.

Decision: UPHELD

Sanctions

Representations on sanctions made by the Executive

Assessment of breach severity

85. The Tribunal's initial assessment of the breaches of the Code was that they were, overall, **serious**. In making this assessment, the Tribunal found the following:

Rule 2.3.1

86. This breach was **serious**.

87. The Tribunal considered that there was a clear detrimental impact, directly or indirectly, on consumers.

88. The Tribunal also considered that the Service would have damaged confidence in the premium rate services and that the breach was of a significant duration.

89. The Tribunal noted that the Executive had recommended that this breach was very serious, on the basis that the breach was compounded by the consent to charge issues. However, the Tribunal did not uphold the consent to charge breach.

Rule 2.6.1

90. This breach was **significant**.

91. The Tribunal was of the view that whilst there was some evidence of the Level 2 provider refunding some consumers, it was clear from the complainant evidence that the Level 2 provider had not dealt with their complaints quickly, easily and fairly and/or provided any redress quickly and easily.

92. The Tribunal noted that the Executive had recommended that this breach was serious however the Tribunal was of the view that there was a complaint handling function in place unlike other cases where it was impossible to complain. It also appeared to the Tribunal that the breach had been committed negligently rather than deliberately.

Initial overall assessment

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

- a formal reprimand

- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of three years, starting from the date of publication of the Tribunal decision, or until all sanctions imposed have been complied with, whichever is the later

- a requirement that the Level 2 provider must refund all consumers who claim a refund for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made

- a fine of £675,000.00 broken down as follows:
  Breach 1 Rule 2.3.3 - £250,000
  Breach 2 Rule 2.3.1 - £250,000
  Breach 3 Rule 2.6.1 - £175,000

94. The Level 2 provider made the following written submissions about sanction. It proposed that any issues highlighted could be resolved using the Track 1 procedure. It did not believe that any breaches of the Code had been committed, but expressed that it was willing to work with the Executive to resolve outstanding customer queries and refunds. It would also welcome working with the Executive to understand why messages had failed and to resolve this issue. It considered that its customer service operated in a very good manner, but was willing to take on board any suggested changes. It did not believe that a fine or a service suspension was appropriate. It stated that it had proven that refunds were provided to all consumers that complain and that this would continue to happen.

95. The Tribunal considered the sanctions recommended by the Executive. The Tribunal did not uphold a breach of Rule 2.3.3 and reduced the severity rating of Rule 2.3.1 to serious and Rule 2.6.1 to significant. As a result, it did not agree with the sanctions recommended by the Executive.

96. The Tribunal accordingly adjusted the initial assessment of sanctions to the following:

- a formal reprimand

- a requirement that the Level 2 provider must refund all consumers who claim a refund for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made

- a fine of £150,00.00 broken down as follows:
  Breach Rule 2.3.1 - £100,000
  Breach Rule 2.6.1 - £50,000.

Proportionality assessment

Assessment of mitigating and aggravating factors

Aggravating factors

97. The Tribunal noted that the Executive had advanced a number of aggravating factors in the case. The Tribunal was of the view that a number of those aggravating factors were an inherent part of the breaches that it had found proved (for example the failure to follow guidance). The Tribunal did not therefore consider these matters to be additional aggravating factors.

98. The Tribunal did, however, agree that it was an aggravating factor that the breaches continued after the Level 2 provider became aware of them. The Executive submitted that it had forwarded a large number of complaints to the Level 2 provider throughout its investigation, however, it continued to receive complaints from consumers about the Service. The Level 2 provider argued that had the Executive provided 51 complaints earlier on in the investigation, potential future consumer harm might have been avoided. The Tribunal considered that there was factual and undisputed evidence that the breaches of Rule 2.3.1 and Rule 2.6.1 continued after the Level 2 provider was put on notice of them, which was an aggravating factor.

Mitigating factors

99. The Tribunal agreed with the Executive that it was a mitigating factor to the case that the Level 2 provider had provided refunds to some consumers (which had been evidenced). The Level 2 provider also agreed that this was a mitigating factor, stating that it issues refunds to all consumers that contact it about the Service.

100. The Tribunal also agreed that it was a mitigating factor that since the launch of the new promotion on 18 December 2020, the PSA had received only one consumer complaint, a stark contrast to the 412 complaints it had received about the Service during the first and second promotional campaigns.

101. The Tribunal considered that the overall picture was one of a company that had got it wrong and was trying to rectify its mistakes in the interests of consumers.

Financial benefit/Need for deterrence

102. The Executive stated that the Service had generated post derogation from July 2019 to February 2021, a total revenue of £1,085,134.19. The Executive, however, sought to rely on the gross revenue generated by the Level 2 provider between July 2019 and November 2020, which amounted to £833,293.69. This was due to the fact that it had discounted the revenue generated as a result of the third promotional campaign, which had attracted only one complaint to the PSA.

103. The Executive submitted that the revenue generated by the Level 2 provider flowed directly from the breach of Rule 2.3.3. It submitted that the percentage of the identified post derogation complainants affected by Rule 2.3.1 was 37%. It applied this percentage to the post derogation revenue of £833,293.69, suggesting that at least £308,318.66 flowed from the breach of Rule 2.3.1.

104. The Executive considered that Service revenue did not flow directly from the breach of Rule 2.6.1.

105. The Level 2 provider did not make any specific representations on this point, but had stated elsewhere in its response that it did not consider that a fine was appropriate.

106. The Tribunal did not uphold the breach of Rule 2.3.3. It agreed with the Executive that the Service revenue did not flow directly from the breach of Rule 2.6.1. It considered the Executive's submissions about removing 37% of the post derogation revenue for the breach of Rule 2.3.1. It did not agree with the Executive's submissions that because 37% of PSA complainants were affected, this meant that 37% of all Service users were affected by the same issues. The Tribunal did not consider that there was a need to remove the financial benefit from the Level 2 provider in the circumstances.

Sanctions adjustment

107. The Tribunal considered that there should be an adjustment on sanctions given the particular circumstances of the case, the mitigating factors it had identified, and the Level 2 provider's willingness to put things right and work with the PSA in the interests of consumer protection.

Final overall assessment

108. The Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions imposed

- a formal reprimand
- a requirement that the Level 2 provider obtains and implements compliance advice to ensure that its customer service and complaint handling function is compliant and complaints are resolved quickly, easily and fairly and that any redress to consumers is provided quickly and easily and free messages and subscription messages are delivered to consumers
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made
- a fine of £100,000.

109. The Tribunal considered that as it had not upheld the breach of Rule 2.3.3, circumstances justified reducing the recovery of the PSA's administrative costs. It therefore recommended that the Level 2 provider be invoiced for two-thirds of the PSA's total administrative and legal costs.

Administrative charge recommendation: 66.7%