

## Tribunal meeting number 291

Case reference: 187522  
Level 2 provider: Embill Services Limited  
Type of service: Fixed line 09 service  
Network operator: Telecom 2 Limited, TalkTalk Business and Square 1 Communications Limited

This case was brought against Embill Services Limited (“**the Level 2 provider**”) under Paragraph 4.5 of the 14<sup>th</sup> Edition of the Code of Practice (“**the Code**”).

### Background and investigation

1. This case concerned a sexual entertainment service provided by the Level 2 provider. The Service was registered and operated under the brand name “Girls Next Door”. The Service provided pre-recorded adult audio content to consumers.
2. The Service operated via fixed line 09 number ranges across two separate value chains. Value chain 1 operated across number ranges 09826520910 – 098265290919 and 09826521300 – 09826521309. The terminating network operator for value chain 1 was Telecom 2 Limited. Value chain 2 operated across number ranges 09095560000 – 09095569790. The network operator for value chain 2 was Square1 Communications Limited and the terminating network operator was TalkTalk Business. The Service operated identically across both value chains. Each call cost £6 on connection plus the standard network operator charges.

### Service operation and value chains

#### Value chain 1

3. Number ranges 09826520910 – 09826520919 and 09826521300 – 0982652130 operated across value chain 1. On 19 June 2020 the Level 2 provider registered the Service with the Executive for number range 09826520910 – 09826520919. The Level 2 provider and Telecom 2 confirmed that traffic first began to flow through the premium rate numbers (“**PRNs**”) on 23 June 2020. On 5 October 2020, number ranges 09826521300 – 0982652130 were registered with the Executive. The number ranges were disconnected on 15 December 2020.

#### Value chain 2

4. Number ranges 09095560000 – 09095560006 and 09095569790 – 09095569799 operated across value chain 2. The Level 2 provider stated the Service started on 23

June 2020. However, Square1 Communications Limited confirmed payable call traffic commenced on 11 June 2020. There was a delay in registering the Service with the Executive due to Square 1 Communications Limited's new working process. The Service was registered on 26 June 2020.

### Service promotion

5. The Level 2 provider stated that the service was promoted through the following journey:

*"Consumer receives free marketing message,*

*a. clicks to call the premium rate number.*

*b. Consumer clicks on advert, links to one of the URL's below, clicks to call the premium rate number."*



6. Telecom 2 explained that the Service was promoted through online banner advertising through an affiliate marketing company. The banner allowed for the consumers to call and connect to pre-recorded messages that were of an adult/ sexual nature. It transpired that the Service was also promoted via SMS marketing, but Telecom 2 stated that they were not made aware prior to the live launch that this form of promotion was being used.
7. The Level 2 provider used affiliate marketing partners, UAB Velar Digital and Mobile Ads Prvt Ltd "Adzmedia" on both value chains.

### Previous relevant cases

8. The Level 2 provider had not previously been the subject of a Track 1 or Track 2 investigation by the Executive.

### The investigation

9. The Executive received 25 complaints regarding the Service, 24 from members of the public and one from a Phone-Paid Services Authority ("PSA") employee between June 2020 and December 2020. The first complaint was received on 28 June 2020.

10. Complainants alleged that they had received an unsolicited message without their consent and that the messages were misleading. The message requested for the consumer to click on a link to retrieve a voicemail from a named individual. Some of the complainants referred to a "Zoom voicemail".

11. A sample of complainant accounts have been provided below:

*"I have just received an unsolicited text message saying the following:*

*To retrieve your voicemail from Donna dial 09095560000 To opt-out email support@prestigecomms.net*

*This is obviously a breach of rules and a scam"*

*"On 25 June 2020, I received an unsolicited text message requesting me to click and dial via a hyperlink with an 090 prefix number in order to retrieve a Zoom voicemail from 'Lily'. I do not have Zoom account and do not know anyone by the name of Lily. I have provided a screenshot.*

*I have never entered a premium rate service and did not access the hyperlink. In my opinion the timing of the message appears to be unethically exploiting the current Covid-19 situation, a time when many people are working remotely and using new applications such as Zoom.*

*The unsolicited message is very misleading as it contains no pricing information or the provider's name. "*

*"I received a text last Friday 6 Nov 2020 which stated I needed to access my voicemail. Unwittingly I clicked on the access your voicemail and a recorded message informed me I was being charged £6.00 for the call. I ended the call immediately. On Saturday 7 Nov I checked my BT usage which showed £6.30 had been charged to my account. I called the customer care number provided 020 3807 9021 but was informed they are a subscription removal service and not customer care. Their records indicated I was not a subscriber. I wish to complain about the random text and a refund of my money - £6.30 The premium rate number was 09826 521306."*

12. The Executive was unable to find any live promotions for the Service. Research was conducted on various websites and the Executive found a number of posts regarding the unsolicited messages consumers had received from the Service, which referenced retrieving voicemails.

13. Additionally, the Executive carried out monitoring by calling the PRNs in July 2021 and found that the Service across number ranges 09826521300 – 09826521309 was still live, despite the assertion from the Level 2 provider that the Service had ceased in December 2020.

## Apparent breaches of the Code

14. The Executive sent a Warning Notice to the Level 2 provider on 17 August 2021 in which the following breaches of the PSA's Code were raised:
  - (1) Rule 2.3.2 – Misleading
  - (2) Rule 2.3.7 – Fairness
  - (3) Rule 2.4.2 – Privacy
  - (4) Paragraph 4.2.2 Concealing or falsifying information
  - (5) Paragraph 4.2.2 Concealing or falsifying information
15. Responses to the Warning Notice were received from the Director of the Level 2 provider (“**the Director**”) and later from Embill's legal representative.
16. On 18 January 2022, the Tribunal reached a decision in respect of the breaches. The Level 2 provider was in attendance to make oral representations to the Tribunal. Embill's legal representative was also in attendance.

## Preliminary issues – Oral Hearing and Informal Representations

17. On 31 August 2021, the Level 2 provider responded to the Warning Notice requesting the case was dealt with by way of an Oral Hearing. The request failed to comply with the requirements of the Code. There was an absence of the required written notification providing details of the Level 2 provider's case in respect of the alleged breaches. There were no written submissions as to the matters in dispute nor the evidence that may have been required at the Oral Hearing. The Executive extended the deadline for providing the required information to 3 November 2021, but the information was not provided to the Executive. On 10 November 2021 Embill's legal representative requested a further extension in order to make a compliant request for an Oral Hearing. The request for the extension was not granted.
18. There was a further request from Embill's legal representative on 12 November 2021. The request was for both Embill's legal representative and the Level 2 provider to attend the paper-based hearing in order to “set out a detailed factual account of the Provider's case” and to make informal representations, as well as an extension of the time permitted for those representations from 30 minutes to 60 minutes. The request was referred to the Chair of Tribunal. The request for an extension of time from 30 minutes to 60 minutes was refused as the Level 2 provider failed to provide an adequate reason.

## Submissions and conclusions

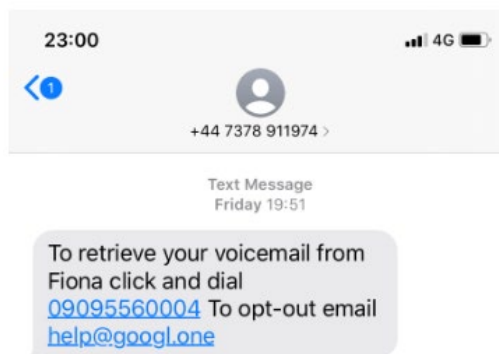
### Alleged breach 1

#### Rule 2.3.2

*"PRS must not mislead or be likely to mislead in any way."*

19. The Executive asserted that the Level 2 provider had breached rule 2.3.2 of the Code as members of the public were misled by the Service into calling a PRN to retrieve a voicemail, which was in fact a connection to a pre-recorded audio message of an explicit nature.
20. In support of its argument, the Executive relied on the complaints received from consumers and the monitoring and research obtained.
21. The Executive received 24 complaints from members of the public and one complaint from a PSA employee. 20 of the complainants alleged that they were contacted by SMS to retrieve a voicemail or a zoom voicemail; a sample of the complainant reports are provided below.

*"I was sent a text message telling me to call a number to retrieve a voicemail from my friend Fiona. It was stupid of me to fall for it but sometimes friends text the landline and you get a text message telling you, so I called it and it was a premium line. I hung up straight away but was charged over £5. It was completely fake, there was no voicemail message."*



*"Text message received "You have a recorded message from Helen please call 09095560005 To opt-out email help@googl.life" Googled this number and the forums say it is a scam charging £6 per minute. I did not ring or reply. "*

*"Sent spam email encouraging me to call premium rate number. " To retrieve your Zoom voicemail from Jen22 click and dial 09095569791 To opt-out email [support@prestigecomms.net](mailto:support@prestigecomms.net)"*

"I received an unsolicited SMS message from "Zoom Mail" which read: "To retrieve your Zoom voicemail from Donna click and dial 09095569794 To opt out email support@prestigecomms.net". I do not use Zoom, so presumably this is a premium-rate scam; hence I have not attempted to call or email the details provided. From searching online I can see that this message with the same 09 number has been reported as a scam by many other people."

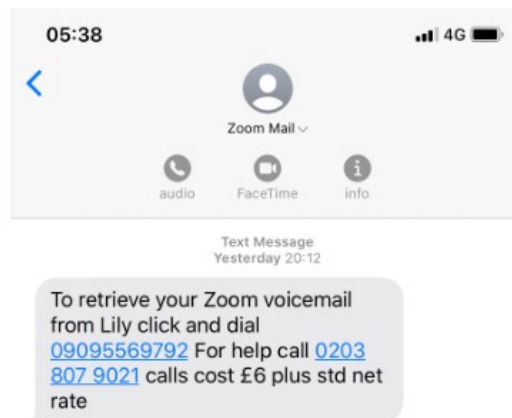
"Sending misleading text messages encouraging you to call their service:

To retrieve your voicemail from Donna click and dial 09095569794 To opt-out email support@voicemailfantasies.co.uk

Message came from 07378 911150"

"I have received an unwanted promotion sms from zoom mail? I have been offshore this week and without signal then when I came back into signal range I received this unwanted sms.

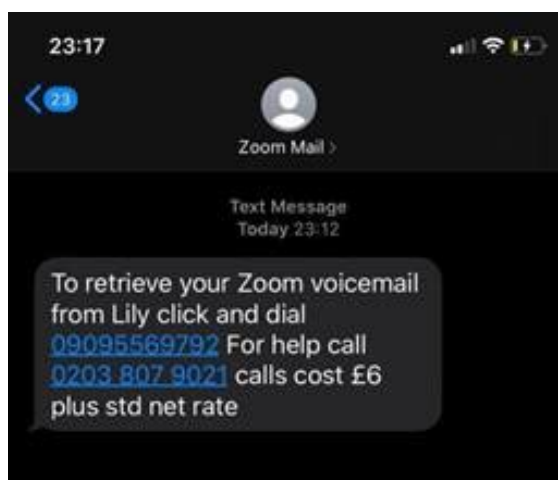
"I do not know where it came from. The message asked me to call back the number as I had been left a message. Then it had the costing of being £6 a minute. I have a screen shot of the message."



"On 25 June 2020, I received an unsolicited text message requesting me to click and dial via a hyperlink with an 090 prefix number in order to retrieve a Zoom voicemail from 'Lily'. I do not have Zoom account and do not know anyone by the name of Lily. I have provided a screenshot.

I have never entered a premium rate service and did not access the hyperlink. In my opinion the timing of the message appears to be unethically exploiting the current Covid-19 situation, a time when many people are working remotely and using new applications such as Zoom.

*The unsolicited message is very misleading as it contains no pricing information or the provider's name."*



22. As demonstrated above the complaints stated that the consumers were contacted via SMS message which stated that they had been left a voicemail. The wording within the SMS messages used common names. The Executive submitted that the Level 2 provider relied upon the prevalence of the names used in the messages as consumers were likely to know someone with those names and this appears to be a deliberate attempt to mislead consumers into calling the PRNs.
23. Furthermore, the reference to “ZoomMail” was seeking to capitalize on the wide user of Zoom due to Covid-19, which led many more consumers to use applications like Zoom.
24. The Executive also relied upon the fact that the wording of the promotional material misled consumers into believing that they were retrieving a personal voicemail when in fact there was no personal voicemail for them to retrieve, it didn't exist. Consumers were connected to a pre-recorded audio content of a sexual nature.
25. The SMS message made no reference to sexual entertainment service, company name or brand. Additionally, the opt-out information provided on some of the messages seems unlikely to be a legitimate company's email address for example, “help@googl.life” and “help@googl.one.
26. In support of its argument the Executive drew attention to the research conducted online and the posts within the anti-cybercrime community. The Service was mentioned in one particular post:

*“I received a text message that claimed I have a Zoom voicemail from Freya27 and to call 09095569793 to retrieve the message, or for help call 02038079021, which costs £6.00. I also received another text message that claimed to be a Zoom voicemail from Jenn22 to call 02038079021 to retrieve the message. These numbers are being used with different names. Recipients of these fake text messages are asked not to follow the instructions in them because they are simply a trick to get potential victims to call a premium rate number”*

27. There were 73 comments attached to this post echoing the complaints made directly to the Executive regarding the Service. In July 2021 the Executive checked all 37 PRNs allocated to the Service and found complaints totaling 1,271.
28. On 10 August 2020, shortly after the case was allocated to a Track 2 procedure, the Level 2 provider contacted the Executive for compliance advice and confirmed the method of marketing: *"Marketing – UK MSISDN opt in via a co-registration web-site. The opt-in signifies an interest in adult / recorded fantasy. MSISDN will receive a free message to their handset which informs them there is a voicemail fantasy message to listen to, which can be heard by dialling the 09 number. Upon connection the caller will pay £6 plus any network access charge. We confirm we do not use the word 'Zoom' in any of our marketing messages to consumers."*
29. While the Executive was unable to provide specific advice due to the lack of information provided, they did highlight some potential concerns, including the use of the word "voicemail" which could pose a risk of consumers being misled.
30. Despite being made aware in August 2020 that the use of the word "voicemail" could mislead consumers, the Level 2 provider retained the use of the word.
31. On 02 February 2021, in response to the Executive's notification the Level 2 provider stated: *"The service which referenced a Zoom call was ceased on 8th August 2020 and has never been used or mentioned ever since. We took this decisive action ourselves after receiving notification of concerns via the PSA and in conversation with our network operator partners. To me, it would seem very harsh to launch a formal investigation on a service in which we recognised the PSA concerns, and took this decisive action immediately, and that it has never been used since."* The Provider also confirmed the following *"No connection to Zoom platform. When we found out about the use of the word Zoom in marketing we immediately terminated our contract with the marketing affiliate."*
32. On 17 February 2021, the Executive requested the company details for all the third parties used to promote the Service and in response the Level 2 provider stated: *"I attach an affiliate contract of our then marketing partner - They provided that information and they are not entities with which we have had any direct involvement whatsoever - It is a 4th party relationship"*. The Executive further queried what the Level 2 provider meant by a 4<sup>th</sup> party relationship and the Level 2 provider confirmed *"We understand the 4th party relationship to be a downstream contractual relationship between a 3rd party and another entity. We may not know who that entity is but we would understand it as providing support to our 3rd party marketing partner at the time."*
33. The Executive asserted that the Level 2 provider was accountable for all the affiliates promoting its Service and continued use of the term voicemail was misleading consumers, in breach of Rule 2.3.2.
34. The Level 2 provider provided a response to the breach raised by the Executive on 12 November 2021 and reiterated that they used a marketing affiliate agency, and it was the affiliate who failed to comply with the Code, unbeknown to the Level 2 provider. When they were made aware they ceased the use of the word "Zoom" within the



promotional material. The Level 2 provider submitted that they should not be held responsible for the breach as the wording within the promotional material was the action of the affiliate.

35. The Level 2 provider argued that the use of the word “voicemail” was an accurate description of the Service, as it was technically correct.
36. The Tribunal carefully considered all the evidence before it, including written responses and informal representations made by the Level 2 provider at the Hearing.
37. The Tribunal noted the Level 2 provider’s arguments in respect of the term “voicemail” but found that its use was not in isolation. It was the use of the term in unsolicited SMS text messages coupled with the use of the word “Zoom” that gave rise to consumers being misled. The gravamen of the issues led to the conclusion that the consumers did not consent to the Service that was provided, as calling the PRN led to a sexually explicit pre-recorded message. The common threads that ran through the complaints regarding the unsolicited message, references to Zoom and the recognisable names led to the Tribunal concluding that consumers were misled.
38. Additionally, the Tribunal found that the reference to “your voice message” was misleading as the wording suggested that there was an individualised personal message specific to that consumer, as opposed to a generic recording of a sexual nature.
39. The Tribunal raised additional concerns regarding the pricing information in terms of the proximity to the helpline details and the lack of information on the actual cost of the call, as it was unclear if the £6 was a flat rate or just the cost of connecting the call.
40. The Tribunal rejected the submission that the responsibility fell with the affiliate marketing agency and noted that the harm continued long after the Level 2 provider suggested they had asked the marketing affiliate to stop.
41. The Tribunal was satisfied on the balance of probabilities that a breach of rule 2.3.2 of the Code had occurred.

Decision: UPHELD

## **Alleged breach 2**

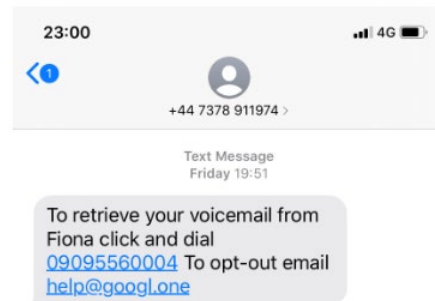
### **Rule 2.3.7**

*“Level 2 providers of sexual entertainment services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age.”*

42. The Executive asserted that, the promotional SMS message that the consumers received failed to inform them that they must be 18 or over to use the Service and the pre-recorded audio messages told consumers to hang up if they are under 16 years old rather than 18 years of age thereby breaching Rule 2.3.7 of the Code as the Level 2

provider failed to take all reasonable steps to prevent the use of the Service by those under the age of 18.

43. A number of the complaints made to the Executive included screenshots from consumers:



44. The Executive relied on the complaints to demonstrate the failure of the Level 2 provider to include wording to inform consumers that they must be aged 18 or over to use the Service in the promotional messages sent out.
45. The Executive asserted that the Code is clear that providers of sexual entertainment services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age from using the Service and the Executive asserted that the Level 2 provider did not do so on promotional SMS messages.
46. The Executive reviewed the audio recordings and found them to all be identical scripts, of an explicit, sexual nature, that stated *"If you are under 16, please hang up now"*. The Executive would have expected the recordings to refer to the age of 18, not 16, to discourage those under the age 18 from using the Service and to discourage use by non-bill payers.
47. Additionally, the Executive clarified during the Hearing that the consumers were charged £6.00 on connection which resulted in any underage callers being charged even if disconnected the call, irrespective of how long they were on the call for.
48. On 17 February 2021, the Executive asked the Level 2 provider to explain what measures were in place to discourage non-bill payers and to prevent those under 18 from engaging with the Service. The Level 2 provider responded *"The service terms and conditions were clear that it was for 18 plus only. Other than that, the MNO can place an adult bar on under 18s use of a mobile phone."*
49. In response to the breach, the Level 2 provider made admissions, but stated it was an administrative error that was not deliberate. The Level 2 provider asserted that there was no evidence that anyone under age 18 accessed the Service and there was nothing to be gained from offering the Service those under the age of 18.

50. The Tribunal found that the breach was clearly made out. Even if the pre-recorded message had referenced the correct age as being 18, as opposed to 16, there were additional steps the Level 2 provider could have taken which would have been reasonable in the circumstances. The Tribunal also noted that consumers were charged at the point of connection. So even if the consumer was under the age of 18 and terminated the call upon hearing the part of the message that referenced suitability of age, the bill payer would have still incurred the £6 connection fee.
51. The Tribunal was of the view that the banner advertisements did not contain clear warning that the Service contained material of a sexual nature and the description as a fantasy service did not go far enough and was potentially misleading.
52. The Tribunal noted that the Level 2 provider had made admissions but found whether actual harm had been caused irrelevant. The risk of harm to a vulnerable group was enough and there should have been greater clarity in the marketing material.
53. The Tribunal was satisfied for the reasons set out above that on balance of probabilities that a breach of Rule 2.3.7 had occurred. Accordingly, the Tribunal upheld the breach.

Decision: UPHELD

### **Alleged breach 3**

#### **Rule 2.4.2**

*“Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a PRS, the Level 2 provider of that service must be able to provide evidence which establishes that consent.”*

54. The Executive asserted that the Level 2 provider breached Rule 2.4.2 of the Code as consumers have received unsolicited messages from the Level 2 provider.
55. The Executive relied upon the 24 complaints received from members of the public and the one complaint from a PSA employee to evidence the breach. Many of the complainants indicated that the promotional message was unsolicited.
56. A sample of the complainant reports are provided below:

*“I have received an unwanted promotion sms from zoom mail? I have been off shore this week and without signal then when I came back into signal range I received this unwanted sms. I do not know where it came from. The message asked me to call back the number as I had been left a message. Then it had the costing of being £6 a minute. I have a screen shot of the message.”*

*"Unsolicited text message stating to contact a premium number in order to hear a voicemail, this is a premium number. Never registered with them."*

*"I have just received an unsolicited text message saying the following: To retrieve your voicemail from Donna dial 09095560000 To opt-out email support@prestigecomms.net This is obviously a breach of rules and a scam."*

57. The Executive also conducted research and found online post regarding the Service on [www.onlinethreatalerts.com](http://www.onlinethreatalerts.com), who are an anti-cybercrime community alerting the public to web or internet threats. A member of the community indicated they did not consent to marketing, and they were unable to find out how the Level 2 provider obtained their number.
58. The Level 2 provider initially asserted that consumers had consented to receive the messages through various collocation adult websites. However, when the Level 2 provider received notification that the case had been allocated to a Track 2 procedure, they then informed the Executive of marketing partners and affiliates. Later in the investigation the Level 2 provider asserted that adverts were free SMS marketing to consumers who had approved adult marketing via co-registration sites and consent was given via the co-registration sites or when consumer actively clicked on the advert.
59. The Level 2 provider also stated, *"an affiliate contract of our then marketing partner - They provided that information and they are not entities with which we have had any direct involvement whatsoever - It is a 4th party relationship"*.
60. The Executive relied upon on the Digital Marketing and Promotions Guidance and asserted that the Level 2 provider was responsible for all its affiliate marketer's activities (whether they are third- or fourth-party affiliates) and it should have ensured that it was able to obtain robust consent to market.
61. The Executive also relied upon the response received from Square 1 Communications and Telecom 2 during the investigation. The companies were directed to provide DDRAC information on the Level 2 provider and they stated the following:
- Telecom 2 stated: *"Embill Services promoted via online banner advertising through an affiliate marketing company. The banner allowed for the consumer to call and connect to recorded stories. We are also aware that Embill promoted via SMS marketing. This form of promotion was not divulged to Telecom2 during the onboarding process prior to live launch."*
  - Square 1 Communications stated: *"When the service proposal and description was submitted to SQ1 by Embill the promotion was described as web-based marketing using the attached example artwork. On 30/06/2020 we received an email from Eric Gyapong inquiring about the service in relation to unsolicited SMS as a promotional channel. In light of this enquiry we suspended the 09 number and*

*queried the client who confirmed that SMS marketing was also being used as a promotional tool.”*

62. The Executive noted that the Level 2 provider did not disclose that it would be promoting via SMS messages to either of the network operators included in the value chains. Additionally, Square1 Communications provided evidence that it had been in contact with the Level 2 provider in September 2020 following a complaint from Vodafone regarding unsolicited SMS messages.
63. The Executive has not received any evidence of robust consent to market, despite the expectation, as set out in the Guidance, being that a hard opt-in should have been used to market to consumers who had not previously purchased from the Level 2 provider or been in “negotiations for a sale”. This should have placed greater emphasis on robust verification opt-in in the event of any complaints, no matter how small or large the scale.
64. In the written response, the Level 2 provider stated they were new to the market and the market affiliates took advantage of this. When consumers requested to opt out of the Service, the request was actioned by the Level 2 provider. The Level 2 provider also asserted that the Executive should not have relied upon the monitoring evidence gathered from [www.onlinethreatalerts.com](http://www.onlinethreatalerts.com). During the Hearing, the Director stated that consumers could have forgotten that they had provided consent.
65. The Tribunal accepted that it was permissible that consent could have been given by some consumers when they visited adult entertainment website. However, the Level 2 provider was unable to provide any evidence of consent to market.
66. The Tribunal noted that there was no opt-out information in the messages sent to consumers and the response received from the Level 2 provider contained partial admissions.
67. The Tribunal also noted that while the Level 2 provider made several assertions regarding the market affiliates, there was a distinct lack of evidence provided to the Executive and to the Tribunal, particularly in relation to the consent to market obtained by the affiliates and the evidence that consumers were actually removed from the Service when they opted out.
68. Taking into consideration the evidence provided by the Executive in contrast to the absence of evidence provided by the Level 2 provider, the Tribunal found that a breach of Code 2.4.2 had occurred on the balance of probabilities.

Decision: UPHELD

## Alleged breach 4

### Paragraph 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).”*

69. The Executive alleged that the Level 2 provider intentionally attempted to conceal information regarding two number ranges when it was directed to provide information regarding all PRNs operating the Service.
70. In the Executive’s Direction dated 17 February 2021, the Executive asked the Level 2 provider to submit a list of all numbers used in relation to the Service. The Level 2 provider responded detailing the number ranges within value chain 2 (number ranges 09095569790 – 09095569794 and 09095560000-09095560006).
71. The Executive also asked whether Square 1 Communications was the Level 1 provider for the Service at all times and if not, to state the name and dates of any other Level 1 Providers associated with the provision of the Service. In response, the Level 2 provider confirmed *“Square1 has been the L1 at all times.”*
72. However, according to complainant records and registration details, the Service used two further number ranges 09826520910 – 09826520919 and 09826521300 – 09826521309 (value chain 1). The Executive asserted that it was clear in its initial Direction that details of all the PRNs operating the Service were to be provided and the Level 2 provider failed to disclose information relating to value chain 1.
73. The Level 2 provider stated that it assumed that the request was only directed at traffic coming through the Level 1 provider, Square 1 Communications Ltd. As the additional number ranges were used through a different network provider, it didn’t believe that they fell within the request from the Executive.
74. The Executive relied upon the fact the Level 2 provider had received requests for information (RFI) for complainants that covered both value chains. Furthermore, in response to the second Direction, the Level 2 provider confirmed 37 refunds had been processed for the Service operating on value chain 1. Therefore, the Executive believed the Level 2 provider was more than adequately aware that the investigation covered all number ranges operating the Service.
75. In the Executive’s third Direction, the Level 2 provider was specifically directed to provide revenue information. However, the Level 2 provider chose to omit the revenue data on value chain 1.

76. Overall, the Executive asserted that throughout the investigation, the Level 2 provider had attempted to conceal information regarding value chain 1.
77. In the written response, the Level 2 provider reiterated that they were new to the market and believed that the correspondence related to the Service linked to Square 1 Communications only. The Level 2 provider also asserted that the number ranges on value chain 1 were registered with the Executive so checks could have been carried out in order to obtain the information.
78. The Tribunal reviewed the Directions sent by the Executive to the Level 2 provider and found them to be clear and explicit. The Tribunal also noted that at the time the Direction was sent, the Service running from value chain 1 had been operational for a significant period.
79. The Tribunal found that there had been a clear breach of the paragraph 4.2.2 as the Level 2 provider had, on the balance of probabilities, concealed information regarding value chain 1 from the PSA

Decision: UPHELD

## **Alleged breach 5**

### **Paragraph 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).”*

80. The Executive alleged that the Provider intentionally attempted to conceal information regarding the status of a number range and the revenues associated with it.
81. In response to the Executive’s third Direction, the Level 2 provider stated for value chain 1: *“Service began on 23rd June. Service disconnected on 15th December 2020.”* However, the Executive checked the line status by dialling the PRNs on 14 July 2021 and found that the number range 09826521300 – 09826521309 was still live. This information coincided with the information given by Telcom 2 on 19 July 2021 who confirmed the following:
- 09826520910 - 09826520919 - Routing ceased 6th July 2020
  - 09826521300 - 09826521309 - Routing ceased 16th July 2021.
82. The Level 2 provider was specifically directed to provide revenue information in the third Direction sent by the Executive. The Executive asserted that the Level 2 provider deliberately attempted to conceal the length of time the Service operated on value chain 1 and the revenue generated. In response to the Direction, the Level 2 provider stated: *“This answer regarding revenues is the same as the Sq 1 service. No revenues have been earned since October. We are still fighting AIT’s*

*for November and December. I have attached a company bank statement which has been heavily redacted, showing our balance now.”*

83. In the written response dated 12 November 2021, the Level 2 provider asserted that the Service ceased before Christmas 2020 and that no revenues were generated in 2021. It was stated that the fact the network still had the numbers routed was outside of the Level 2 provider’s control and they had no knowledge of this.
84. During the Hearing, the Level 2 provider stated that he had email correspondence that evidenced the requests to the Level 1 provider to terminate the Service. It was stated that the Level 1 providers left the Service routed and apologised to the Level 2 provider, but these records had not been provided to the Executive during the investigation.
85. The Tribunal considered the evidence provided by the Executive which demonstrated that the assertion that no revenue had been generated through value chain 1 in 2021 was untrue. The data provided by Telecom 2 showed that the Service was running and generating revenue until 14 July 2021. The Level 2 provider accepted during the Hearing that revenue was in fact being generated and received between Christmas 2020 and July 2021.
86. The Tribunal took account of the monitoring evidence conducted by the Executive in July 2012 that showed that the lines were still live.
87. Furthermore, the Tribunal noted that the service was disconnected as a result of the action taken by Square 1 Communications Limited and Telecom 2 Ltd, not the Level 2 provider. There was no evidence submitted to the Executive or the Tribunal that the Level 2 provider took any action to stop the Service on its own accord.
88. Accordingly, the Tribunal found that on the balance of probabilities the breach was made out.

Decision: UPHELD

## Sanctions

### Representations on sanctions made by the Executive

#### Assessment of breach severity

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



### Rule 2.3.2

90. This breach was **very serious**.
91. The Tribunal considered that the breach had a clear and highly detrimental impact directly on consumers and was likely to severely damage consumers' confidence in premium rate services.
92. The Tribunal also considered that consumers had incurred wholly unnecessary costs and that the Service was likely to cause distress or offence as the Service provided sexual entertainment but that was not clear in the message sent to the consumers.
93. The Tribunal found that the breach was committed intentionally or recklessly taking account of the continued use of the word voicemail despite the compliance advice received from the Executive.

### Rule 2.3.7

94. This breach was **very serious**.
95. The Tribunal considered that the Service was likely to cause distress or offence and that the breaches demonstrated a fundamental disregard for the requirements of the Code.
96. The Tribunal considered that the breach had a clear and highly detrimental impact directly on consumers and was likely to severely damage consumer confidence in the premium rate services.

### Rule 2.4.2

97. This breach was **very serious**.
98. The Tribunal considered that the breach had a clear and highly detrimental impact directly on consumers and that the Service was likely to cause distress or offence.
99. The Tribunal also considered the breach demonstrated a fundamental disregard for the requirements of the Code and that the Service was designed with the specific purpose of generating revenue streams from an illegitimate reason.

### Paragraph 4.2.2

100. This breach was **very serious**.

101. The Tribunal considered that the Service was designed with the specific purpose of generating revenue streams from an illegitimate reason and that the breach was committed recklessly.

#### Paragraph 4.2.2

102. This breach was **very serious**.

102. The Tribunal that the Service was designed with the specific purpose of generating revenue streams from an illegitimate reason and that the breach was committed recklessly.

103. The Tribunal also considered the breach demonstrated a fundamental disregard for the requirements of the Code.

#### Initial overall assessment

104. The Executive's initial assessment, before any potential uplift or downgrade in light of any aggravating or mitigating factors, was that the following sanctions were appropriate based on a preliminary assessment of the breaches as **very serious**:

- 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 five 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 £1,175,000.00 broken down as follows:
  - Breach 1 – Rule 2.3.2: £250,000.00
  - Breach 2 – Rule 2.3.7: £175,000.00
  - Breach 3 – Rule 2.4.2: £250,000.00
  - Breach 4 – Paragraph 4.2.2 £250,000.00
  - Breach 5 – Paragraph 4.2.2 £250,000.00.

105. The Tribunal noted that the Level 2 provider did not agree with the recommended sanctions. While the Level 2 provider accepted the recommendation for a formal reprimand, it stated that the prohibition was disproportionate, excessive and offered no real deterrence. The general refund was not possible due to the poor financial position of the company.

106. The Tribunal agreed with the sanctions recommend by the Executive. They found that the breach of Rule 2.3.7 was very serious as the pre-recorded message was of a sexual nature and there was a complete failure on the part of the Level 2 provider to take reasonable steps which exposed those under the age of 18 to adult content, particularly 16 and 17 years old, who were not directed to hang up as a result of the pre-recorded message.

107. Furthermore, the use of the word “fantasy” in promotional material was ambiguous and there was no warning to consumers that the Service was adult entertainment of a sexual nature. As a result of the consideration undertaken by the Tribunal, the initial fine amount was increased.

108. While the Tribunal found breach 3 to be **very serious**, they considered that that it was conceivable that some consumers gave consent when entering adult websites and adjusted their view of the severity within the **very serious** range as a result. Additionally, while breach 4 was a clear and distinct breach, the Tribunal noted it was of a similar wrongdoing to that of breach 5, namely concealing information from the Executive, so while it was correct that both breaches were brought and upheld, there was an adjustment in the initial fine for breach to recognise this point.

109. The Tribunal initial assessment was as follows:

- 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 five 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 £1,150,000 broken down as follows:
  - Breach 1 - Rule 2.3.2: £250,000
  - Breach 2 - Rule 2.3.7: £250,000
  - Breach 3 - Rule 2.4.2: £200,000
  - Breach 4 - Paragraph 4.2.2 £200,000
  - Breach 5 - Paragraph 4.2.2 £250,000.

## **Proportionality assessment**

### **Assessment of mitigating and aggravating factors**

#### **Aggravation**

110. The Executive submitted that there were a number of aggravating factors, but the Tribunal found that a number of those formed part of the nature of the breaches and had already been taken into account.
111. The Tribunal was however of the view that the Level 2 provider's failure to act upon receipt of the compliance advice regarding the use of the word "voicemail" within the promotional material was a clear aggravating factor. Furthermore, the breach continued after the Level 2 provider was aware of the breaches occurring.
112. The Tribunal also noted that the Level 2 provider, on the face of it, cooperated with the investigation, however failed to disclose information relating to value chain 1 which led to further breaches being committed.

#### **Mitigation**

113. The Tribunal agreed with the Executive that it was a mitigating factor that some complainants had received refunds. The Tribunal however noted that the refunds were reactive as opposed to proactive.
114. Additionally, the Tribunal recognised that the Level 2 provider did try to address concerns regarding affiliates that were specifically promoting SMS messages with the word "Zoom voicemail". However, as the messages continued to contain the word "voicemail", which the Tribunal found to be misleading, the Tribunal did not find that the breach was mitigated.

#### **Financial benefit/Need for deterrence**

115. The Executive stated that the Service had generated £74,616.00 from value chain 1 and £203,601.16 from value chain 2. The total revenue therefore generated was £278,217.16.
116. The Executive submitted that all the revenue flowed from breaches of Rule 2.3.2 and Rule 2.4.2. The Executive believed the Service was of little or no value to consumers and was set at a very high price point, which was charged to consumers at the point of connection irrespective of when they then terminated the call.

117. The Executive asserted that the entirety of the financial benefit should be removed from the Level 2 provider taking into consideration the very serious nature of the breaches, the consumer harm and the need to act as deterrent to the Level 2 provider and wider industry.
118. The Level 2 provider stated that the fine and sanctions proposed were both excessive and disproportionate in the extreme.
119. The Tribunal agreed that the revenue from the Service flowed directly from the breaches. The Tribunal carefully considered the impact that the proposed sanctions would have on the company. The Tribunal recognised that a fine could have the impact of closing the business. However, the Tribunal found that the sanction was justified, even if the imposition of the fine resulted in the closure of the business. The Tribunal considered the impact justified and proportionate. There was a need to remove the entirety of the financial benefit from the Level 2 provider.

### **Sanctions adjustment**

120. The Executive submitted that the level of revenue generated by the Level 2 provider warranted a further downward adjustment of the fine to £500,000. The Executive recognised that the fine recommendation exceeded the revenue the Level 2 provider derived from the breaches but asserted that the amount was proportionate when considering the number of aggravating factors and the deliberate attempts it made to conceal information from the Executive.
121. The Tribunal agreed that the removal of the entire revenue was proportionate and appropriate in this case to uphold standards within the industry. The Tribunal was also mindful that the Service stopped due to the proactive approach adopted by Square 1 communications and Telecom 2, as opposed to any proactive action on the part of the Level 2 provider.
122. Furthermore, a fine that exceeds the revenue generated from the Service was justified in order to increase the deterrent effect on services that operate outside the Code. The Tribunal agreed that it was appropriate to adjust the initial recommended fine downwards, for the reasons advanced by the Executive. The Tribunal was of the view that the figure of £500,000 was appropriate and proportionate, as it removed the revenue which had been generated by the service and was also sufficiently high to achieve the sanctioning objective of credible deterrence in combination with the other recommended sanctions. "

### **Final overall assessment**

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

## Sanctions imposed

- 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 five 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 £500,000 broken down as follows:
  - Breach 1 - Rule 2.3.2: £125,000
  - Breach 2 - Rule 2.3.7: £100,000
  - Breach 3 - Rule 2.4.2: £100,000
  - Breach 4 - Paragraph 4.2.2: £100,000
  - Breach 5 - Paragraph 4.2.2: £75,000.

124. Administrative charge recommendation: 100%