

Tribunal meeting number 212 / Case 1

Case reference: 117561
Level 2 provider: Intrugo Limited (UK)
Type of service: N/A
Level 1 provider: N/A
Network operator: N/A

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

Background

A service provided by the Level 2 provider Intrugo Limited (the “**Level 2 provider**”) was the subject of a Phone-paid Services Authority (“**PSA**”) investigation and adjudication by consent (case reference: 71971), which resulted in sanctions being agreed between the parties and imposed by a Tribunal on 17 September 2016. The sanctions imposed by the Tribunal were a formal reprimand, a fine of £250,000, a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer’s consent to be charged before making any further charge to the consumer, including for existing subscribers to the service; and a requirement that the Level 2 provider refund all consumers who claim a refund, for the full amount spent by them on the service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to the PSA that such refunds had been made. In addition, an administrative charge of £19,906.11 was imposed.

The Level 2 provider was informed of the sanctions imposed in a formal notification, which included an invoice for payment of the fine of £250,000, and it was sent by email and by post on 23 September 2016. On 3 November 2016, payment of the fine, legal and administrative costs were settled in full from withheld revenues and payment by the Level 2 provider.

On 3 October 2016, the Level 2 provider confirmed that, in accordance with the sanction, it had remedied the consent to charge breach, as it was now in contact with a third party verifier that provides “PIN method for opt-in for all services and all subscribers”. Having received a further 14 complaints from consumers and conducted further enquiries, the Executive was of the view that the Level 2 provider had not remedied the breach and on 31 January 2017 the Executive issued a direction to the Level 1 providers to suspend the Service for non-compliance under paragraph 4.8.6 (a) of the Code.

The Investigation

The Executive conducted this matter as a Track 2 procedure in accordance with paragraph 4.5 of the Code of Practice (14th Edition).

The Executive sent a Warning Notice to the Level 2 provider on 8 June 2017 with a deadline for response of 15 June 2016. Within the Warning Notice the Executive raised the following breach of the PSA Code of Practice (the "Code"):

- Paragraph 4.8.6(b) – Failure to comply with a sanction

The Level 2 provider provided a response to the Warning Notice on 16 June 2017. On 2 August 2017, the Tribunal reached a decision on the breach raised by the Executive. The Tribunal considered the following evidence in full:

- The post adjudication notification sent to the Level 2 provider, including the fine and administrative charge invoices and the refund request;
- The Consent Order of 17 September 2016;
- Post adjudication correspondence between the Executive and the Level 2 provider between 23 September 2016 and 30 January 2016;
- Complainant evidence;
- A sample of the complainant message logs and the Executive's breakdown of the message logs;
- A creditsafe report for the Level 2 provider;
- Service revenue;
- The case report including the Warning Notice dated 8 June 2017 and the Level 2 provider's responses of 16 June 2016, 20 June 2016 and 21 June 2016;
- Proof of service of the Warning Notice;
- The Tribunal decision in relation to an application for interim measures dated 6 April 2017.
- The Level 2 provider's representations in relation to the application for interim measures dated 4 April 2017.

Submissions and Conclusions

Alleged Breach 1

Paragraph 4.8.6(b) – “The failure of any relevant party to comply with any sanction within a reasonable time will result in: a further breach of the Code by the relevant party, which may result in additional sanctions being imposed.”

1. The Executive noted that on 17 September 2016, the Tribunal considered a consent order agreed between the Executive and the Level 2 provider relating to a service operated by the Level 2 provider that had been the subject of a PhonepayPlus (now the PSA) investigation (case reference: 71971). The adjudication by consent resulted in the

imposition of sanctions, including a requirement for the Level 2 provider to remedy the consent to charge breach by ensuring that it had robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service.

As explained in the "Background" section above the Level 2 provider confirmed to the Executive on 3 October 2016 that it had remedied the breach. On 4 October 2016, the Executive advised the Level 2 provider that it would continue to monitor the service and if it found evidence that the Level 2 provider did not hold robust verification of consent to charge before making a charge to a consumer, then the Executive would take further action.

In October 2016, the Executive started to receive complaints about the Service. The complainants alleged that they had received unsolicited messages and were being charged without their consent. An example of the complaints received are as follows:

"...I have received a random, unwanted and unrequested text message every Friday night since March 2016 and I have just found out that they have charged me £3 per week. I have complained to Vodafone and they dealt with it as a complaint recording it and telling me to contact you for a full refund of the £120 that has been charged..."

"...My Account has been subscribed to a pornographic texting service without my knowledge or consent. I have no website address. Billing frequency was twice a week on a Friday & Saturday from 18/11/16 to 10/12/16 Exactly £50 was billed...[sic]"

"...I was about to upgrade my phone service and noticed an out of allowance bill, I thought it was strange so investigated this further and have discovered that I have been charged for a premium rate text message service that I was fully unaware of! totaling 114.25 (ex vat) from the months of Jan 2016 to present day! after looking it appears that it is a HOT_Babes text I have been receiving, I believed this to be marketing and was not aware I was getting charged for these messages!...[sic]"

The Level 2 provider was requested to provide message logs for the complainants, which indicated the following:

- 10 of the 14 message logs showed that the complainants appeared to have opted in to the Service prior to the original adjudication, but were still being charged after 17 September 2016 (the date sanctions came into effect allowing for a one month grace period given by the PSA); and
- Further, of the 10 consumers who had opted-in prior to the Consent Order and were being charged after the sanctions came into effect, only one consumer had terminated the Service by themselves by texting 'STOP' (and who would likely otherwise still have been charged), three consumers were still being charged in October 2016, two were being charged in November 2016 and five were being charged in December 2016.

On 26 January 2017, the Executive contacted the third party verifier that the Level 2 provider stated it had engaged to provide robust verification of consent to charge to enquire whether any of the complainants had consented to the service charge. In response, the third party verifier stated that it held no evidence of consent to the Service charges for any of the complainants' MSISDNs.

On 30 January 2017, the Level 2 provider was informed of the Executive's concerns and given an opportunity to provide an explanation, the Level 2 provider failed to respond.

The Executive noted that the Level 2 provider had been clearly advised of the requirement to remedy the consent to charge breach in the summary of the admitted breach of Code rule 2.3.3 and was well aware of its obligations under the Code.

The Executive submitted that, the Level 2 provider had failed to put in place robust verification of each consumer's consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service. Further, the Executive submitted that the Level 2 provider had not remedied the breach in accordance with a sanction imposed by a Tribunal on 17 September and accordingly had acted in breach of paragraph 4.8.6 (b) of the Code.

During the Tribunal, the Executive were asked to explain why it contacted the third party verifier for robust verification. The Executive stated that the Level 2 provider had stated during the investigation that it was a client of the third party verifier. The Tribunal queried whether the Executive had any evidence to establish whether the Level 2 provider had implemented robust verification with the third party verifier for consumers who had opted-in to the Service post the Tribunal adjudication of 17 September 2016. The Executive explained that it had no indication that there were any new subscribers post adjudication. Of the 14 complaints received, ten opted-in to the Service prior to the Tribunal adjudication by consent and the opt-in date for the remaining four was not known, as the Executive had not received message logs for those consumers.

The Tribunal asked the Executive whether the other sanctions imposed by the Tribunal of 17 September had been complied with. The Executive confirmed that the financial sanctions had been complied with and it had no evidence to suggest that the refund sanction had not been complied with.

2. The Level 2 provider provided a response to the Warning Notice and stated that it admitted the breach alleged by the Executive. The Level 2 provider did not provide any further explanation on the circumstances of the breach.

As part of its response, the Level 2 provider made representations to the Executive on settlement, which were subsequently considered and rejected by the Executive.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted that the Level 2 provider had admitted that a breach of paragraph 4.8.6 (b) had occurred. The Tribunal concluded that there had been a further breach of the Code due to non-

compliance with the remedy the breach sanction on the basis that it had not implemented robust verification for existing consumer's consent to be charged before making any further charge to the consumer. Accordingly, the Tribunal upheld a breach of paragraph 4.8.6(b) of the Code.

Decision: UPHELD

SANCTIONS

Representations on sanctions made by the Executive

1. The Executive submitted that the following sanctions were appropriate:
 - A formal reprimand;
 - A fine of £250,000;
 - 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 this decision;
 - A requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to the PSA that such refunds have been made.

This was based on a preliminary assessment of the breach as “very serious”.

Representations on sanctions made by the Level 2 provider

The Level 2 provider submitted that having considered the Tribunal adjudication of DSLB Ltd (case reference: 79449) of 21 April 2017 sanctions of a formal reprimand and a fine of £75,000 would be appropriate in the circumstances. The Level 2 provider later submitted that sanctions of a formal reprimand and a fine of between £100,000 - £150,000 would be appropriate in the circumstances.

Initial overall assessment

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

Rule 4.8.6(b) – Failure to comply with a sanction

The initial assessment of the breach of paragraph 4.8.6(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider's failure to comply with the remedy the breach sanction demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

The Tribunal's initial assessment was that, overall, the breach was **very serious**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal found the following aggravating factor:

- The Level 2 provider provided the Executive with false information, as it explicitly confirmed that it had complied with the sanction but despite this, the Executive later discovered that was not the case and the Level 2 provider had been charging existing consumers without robust evidence of their consent.

In determining the final overall assessment for the case, the Tribunal found the following mitigating factor:

- The Level 2 provider had complied with the financial penalties imposed by the Tribunal of 17 September 2016 (albeit part payment was from withheld funds) and the Executive had no evidence to suggest the refund sanction had also not been complied with.

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £250,000;
- 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 this decision; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to the PSA that such refunds have been made.

Administrative charge recommendation:

100%

Appendix 1



Phone-paid Services Authority

Application for interim measures pursuant to Code of Practice paragraph 4.6

Case ref:	117561
Service:	“Hot New Babes”, “Unlimited Babes” and “Hot Mobi Babes” Glamour video subscription service
Level 2 provider:	Intrugo Limited
Level 1 provider:	Zamano Ltd; Veoo Ltd
Cost:	£3 per week
Shortcodes:	66033, 88150, 82999, 81300, 88222, 80208 and 80252
Tribunal number:	205

Adjudication

- The Tribunal has paid full regard to the material supplied by the Executive. In respect of the material submitted by the Executive, the Tribunal noted in particular:
 - a) The Level 2 provider had a history of previous enforcement action for charging consumers without having robust evidence of their consent and provision of false information, which resulted in an adjudication by consent on 17 September 2016 (“the Consent Order”);
 - b) The Consent Order required the Level 2 provider to remedy the breach by ensuring that it had robust verification of each consumer’s consent to be charged before making any further charge to the consumer, including for existing subscribers to the Service;
 - c) The Executive had received 14 complaints about the Service since 14 October 2016, the latest being on 17 January 2017;
 - d) The nature of the further apparent breach for failing to comply with the remedy the breach sanction, including the Executive’s submissions on the lack of robust third party verification of consent for charges for ten complainants that had been opt-ed into the Service prior to the Consent Order but had been charged post the Consent Order; and
 - e) The information in the Debt Collection Withhold Assessment.

- The Tribunal has paid full regard to the representations provided by the Level 2 provider. In respect of the material submitted by the Level 2 provider, the Tribunal notes in particular:
 - a) The Level 2 provider appeared to acknowledge that it had failed to re-verify consent to charge for existing consumers and that would be a breach of the Code. Although, the Level 2 provider further submitted that it believed the remedy the breach sanction should be complied with within a "reasonable time" and stated that period had not been surpassed. The Tribunal notes that the sanction did not refer to a "reasonable time", and in fact states the breach should be remedied "before making any further charge to the consumer.
 - b) The Level 2 provider's submission that the Tribunal were required to find that there was an ongoing serious risk of harm in order to impose a withhold, and that was not the case as it had suspended all services to UK consumers. The Tribunal notes that the relevant test for a withhold is set out at paragraph 4.5.1 (b) of the Code and that it had duly applied that test in determining the application.
 - c) The Level 2 provider's submission that the Executive's financial assessment was inordinate, that full financial accounts were submitted to PSA in 2016 and could have been relied upon, and that the financial sanctions imposed as a result of the Consent Order were paid in full. The Tribunal was satisfied that the Level 2 provider had previously complied with the financial sanctions imposed in the Consent Order but in response to this application the Level 2 provider had not supported its submissions with evidence of its current financial standing.

- The Tribunal has paid regard to the Supporting Procedures, including the factors set out at paragraph 80 and paragraph 91.

Having considered the evidence before it, the Tribunal has made the following determinations:

- 3) At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there does appear to be sufficient evidence that could support a breach of Code of Practice paragraph 4.8.6(b).

- 4) The Tribunal does consider that the Level 2 provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. The Tribunal notes in particular:
 - a) The Level 2 provider is a company based in the UK with over a 5 year trading history, however;
 - b) The Tribunal takes into account the Executive's comments in its Debt Collection Withhold Assessment regarding:
 - i) the Level 2 provider's lack of a credit rating and up-to-date published filed accounts;
 - ii) that a notice of dissolution had been recently filed at Companies House (although dissolution had since been suspended);

- iii) the Level 2 provider's compliance history, including the adjudication by consent in September 2016;
 - iv) the potential seriousness of the breach, and service revenue, which could result in a higher level of fine;
 - c) The lack of any up-to-date financial information from the Level 2 provider to support its assertion that it was willing and able to make payment of any financial sanctions that may be imposed.
- 5) The Tribunal is satisfied that the Phone-paid Services Authority has made reasonable endeavours to notify the Level 2 provider of its initial findings and the proposed interim measures.
- 6) The Tribunal notes the Level 2 provider's submission that a withhold of £50,000 would be sufficient. Noting the previous cases referenced by the Executive, the Tribunal considers that the estimated fine of £250,000 is a reasonable assessment at this stage of a sanction which may be imposed by a Tribunal in due course, noting the nature of the apparent breach, the previous adjudication for the same mischief and the service revenue. The Tribunal considers that the measures set out below are appropriate and proportionate to take in the circumstances of this case.
- 7) Accordingly, the Tribunal hereby directs that:
- a) The Phone-paid Services Authority is authorised to direct a withhold of up to £260,000.
 - b) The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum authorised in this decision.
 - c) The Executive is given discretion to vary the total directed to be withheld downwards in the event that it is provided with alternative security which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course are paid.
 - d) Such interim measures are to be revoked upon the case being re-allocated to Track 1 or otherwise discontinued without sanction.

LINDA LEE
6 APRIL 2017