Tribunal meeting number:	234
Case reference:	142651
Level 1 provider:	Zamano Solutions Ltd (Dublin, Ireland)
Level 2 provider:	FlipCove Ltd (Bury, UK)
Network operator:	All mobile network operators

Background

The case concerned a glamour subscription service operating on shared shortcodes 84514 and 78686 under the brand name Score that Girl (the "**Service**").

The Level 2 provider for the Service was FlipCove Ltd (the "**Level 2 provider**"). The Level 2 provider had been registered with the Phone-paid Services Authority ("**PSA**") since 9 March 2016.

The Level 1 provider for the Service shortcode 82225 was Zamano Solutions Limited ("**Veoo**").

The Service was stated to be a glamour subscription service charged at £4.50 per week.

The Level 2 provider stated that the Service commenced operation on 16 September 2016.

The Service was no longer promoted, marketing has ceased in August 2017. The Level 2 provider confirmed that it was no longer charging existing subscribers**.** All billing for the Service ceased on the Level 1 providers platform on the 20 November 2017.

On 13 June 2017, the Level 2 provider was asked to confirm the way in which the Service was intended to operate. The Level 2 provider supplied the following description and screen shots of the service flow:

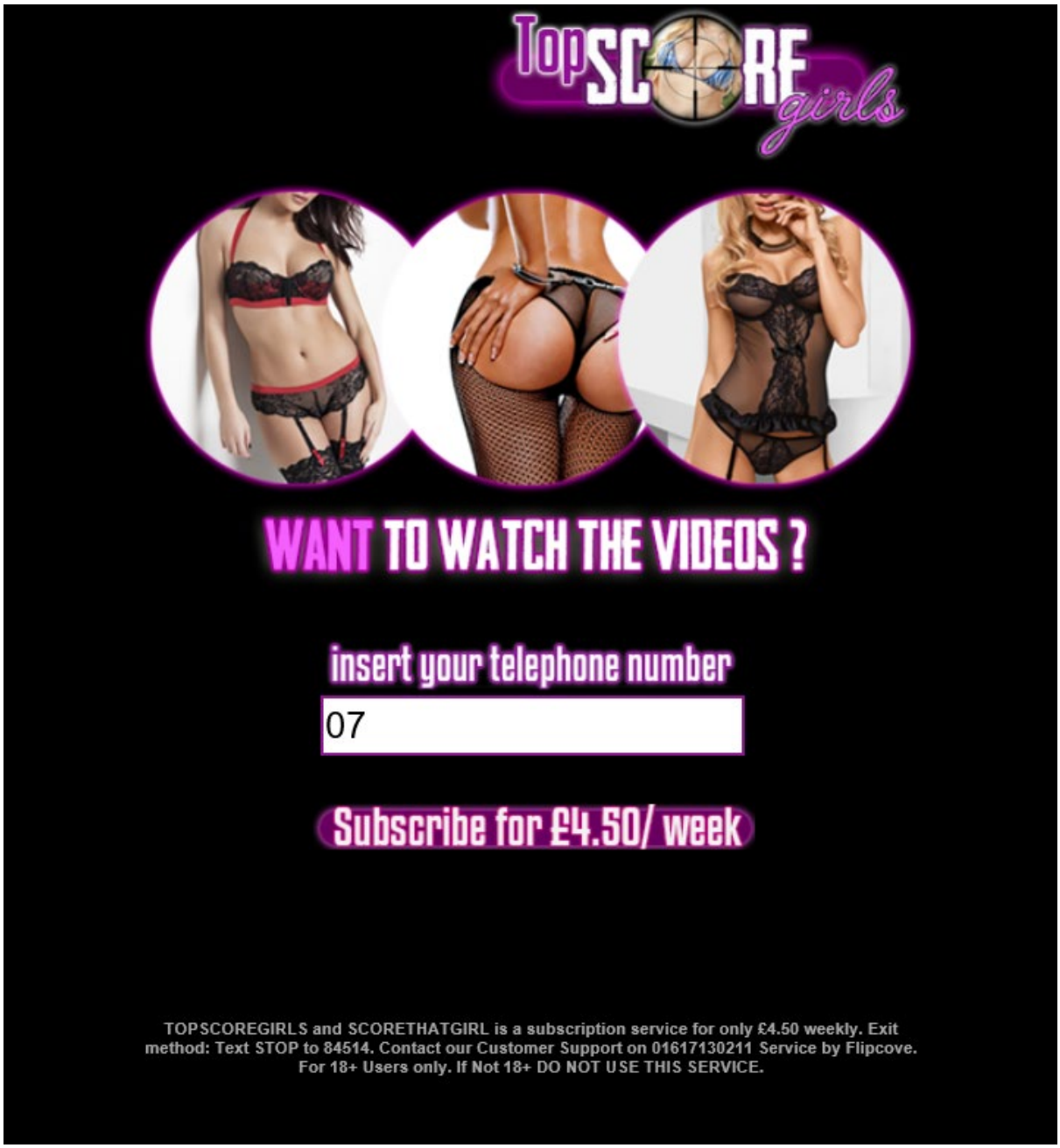
"Score That Girl is a service that was promoted with the use of a third-party provider. The third-party verification provider was called Compact IT. Cost of service was £4.50 per week that was sent using shortcode 84514. Monthly reminders were sent informing the user that a subscription was active. Subscription allowed access to videos."

Full terms and Conditions below:

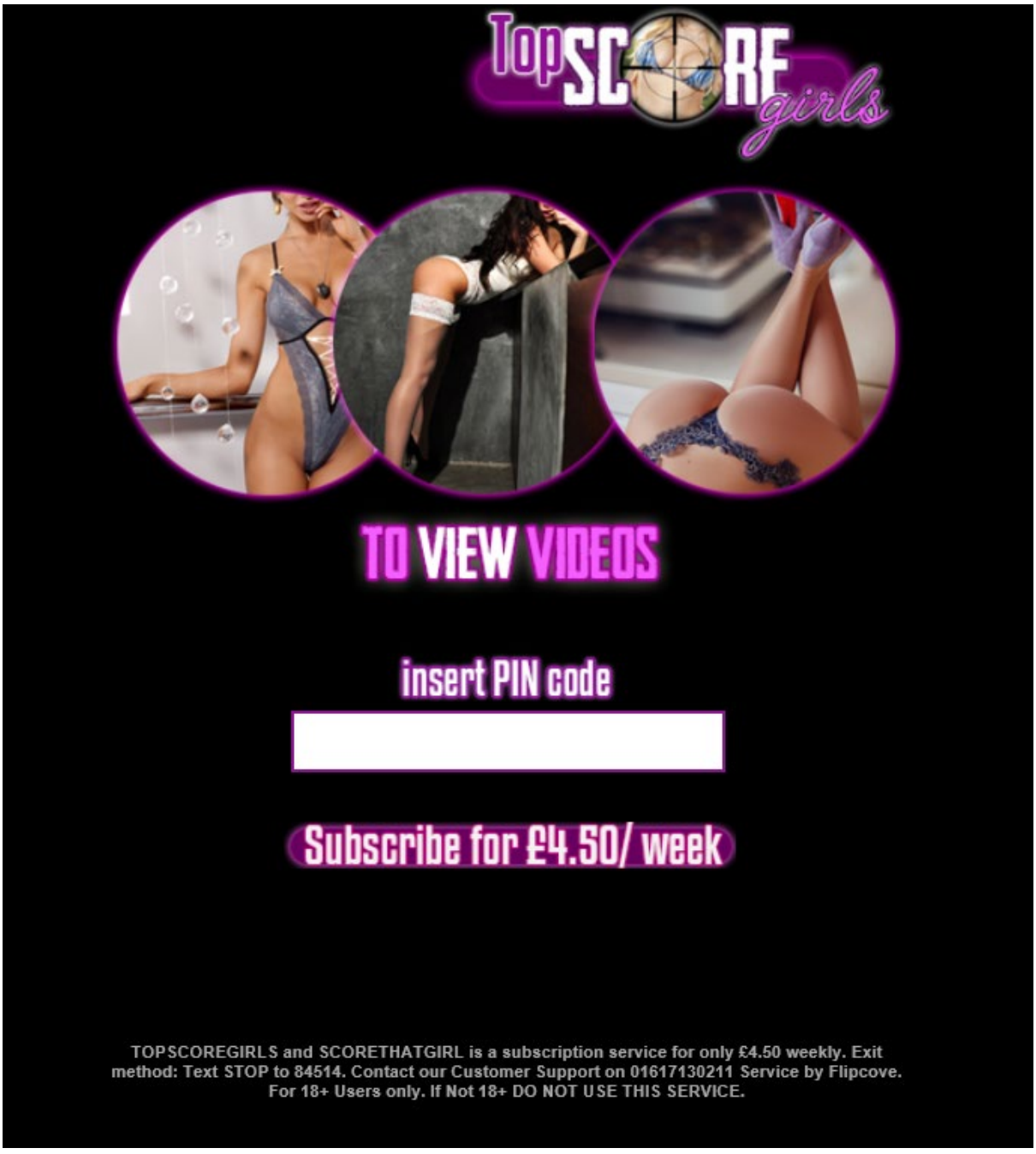
"Using our video subscription service costs £4.50 per week or until you send STOP to 84514. Service Provided by FLIPCOVELTD.COM. Customer Support Line: 0161 713 0211 or if you prefer you can email us at support@flipcoveltd.com. You must be at least eighteen years of age to use this service. By continuing with this service, you can confirm that we may at any time send similar or new promotional services that we think you may be of similar interest to you. If you do NOT wish to be sent similar or new promotional material then please send STOP to 84514. By clicking on content you confirm you have fully read, understand and agree to all terms and conditions above of the services offered at this point and in the future. © FLIPCOVELTD.COM 2016" [Sic]

Landing page

First call to action page



Second call to action page



Subscriber content page

Summary of complaints

The Executive had received 6 complaints from members of the public alleging that they had been charged for a Service they had not signed up to or otherwise given their consent to be charged. Complainants relating to this case had been migrated onto the Level 2 provider's database from that of another Level 2 provider, SMS Avalanche.

A case had been brought against SMS Avalanche by the PSA which was heard at a Tribunal on 4 February 2016. It was understood by the Executive that, following that Tribunal, 5518 consumers were migrated from SMS Avalanche to FlipCove Ltd. On the 1 May 2017, SMS Avalanche novated all rights and obligations to FlipCove Ltd.

For all complaints received post 1 May 2017, the Level 2 provider responsibility was FlipCove Ltd.

A sample of complainant accounts have been provided below:

I've been with Vodafone for 4 years and my bill has always been just around the £46-£47 per
I have never knowingly registered for any text services. I can only see my last 12 months bills for which this company have charged me on average £15 a month!I expect this has been going on since I started this phone contract with Three in april 2015. I would very much appreciate your help in helping me reclaim the money stolen from me. [sic]
I rang Vodafone and apparently my number was registered for these premium rate texts from 'Foxy ladies', naw that's hardly something I'd of signed up for being a gay man. I'm a gay man I obviously have no use for this 'Foxy ladies' service. I know the number was 'recycled' because I've been getting calls for a Mr Johnston over the last 4 years. The only thing I can assume is that these charges have been carried over from the previous owner of the number. Over £700 in charges over 4 years. I feel like I've been scammed and unknowingly been robbed out of hundreds of pounds. The number in question is xxxxxxxxxxx. I got a bar placed on my phone so I'll no longer be charged. I have filled out the complaint form on the Vodafone website and the issue is being looked into. I requested to know the total amount of the charges and from what date the first charge was taken. They informed me the changed their computer system two years ago and were not able to say when the charges started but charges were on my account as far back as they could access them. I would like a full and complete refund for these charges that I was unaware of. [sic]

Dear Madam and Sir, I have only found out now when I have enquired about my bills with Vodafone that I have been receiving premium paid text messages from the above service sind June 2016. I have never signed up to anything and never had any dealings with this company. I have invoices to proof this. The total amout I have been charged is 216 GBP. [sic]

Interim measures in place

On 14 June 2018 the Code Adjudication Panel ("**CAP**") considered an application by the Executive for the imposition of interim measures. The Tribunal imposed a Withhold in respect of £262,000 of the Service's revenue. A copy of the interim measures adjudication is attached at Annex A.

Apparent breaches of the Code

The Executive asserted that the service contravened the PSA Code of Practice 14th Edition (the "**Code**") and the following Code provisions:

- Code Rule 2.3.3 – Consent to Charge

Alleged Breach 1

Rule 2.3.3 of the Code

"Consumers must not be charged for premium rate services [PRS] without their consent. Level 2 providers must be able to provide evidence which establishes that consent."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code. The evidence which had been provided by the Level 2 provider to establish that complainants who had entered the Service had consented to be charged was not verified by an independent third party; or in a way that meant that it could not be tampered with. Accordingly, the Executive argued that the Level 2 provider had not provided sufficient evidence to establish consumers' consent to be charged.

   The Executive relied on correspondence exchanged with the Level 2 provider, the Level 1 provider, complainant accounts, consumer message logs and the PSA's Guidance on consent to be charged.

   The Executive relied on the content of the PSA Guidance on Consent to Charge. The Guidance states:

   "1. ***Why is the capability to verify your right to charge important?***

   1.1 *Premium rate services allow a charge to be generated to a consumer's phone bill, whether pre-paid or post-paid as part of a contract with an originating network, directly and remotely. A major concern then is that they can be charged without having requested or consented to any purchase.*

1.2 *It is important to understand the need for transparency when establishing any consent to charge a consumer via PRS payment. The key service information necessary to comply with rule 2.2.4 of the Phone-paid Services Authority's Code of Practice must be presented clearly and with suitable proximity and prominence. This is to ensure any action on the consumers part reflects a genuine intention to consent to the charges triggered by the action.*

1.3 *We treat matters such as these with the utmost seriousness and will always work closely with the appropriate authorities (such as the Serious Fraud Office and the local police) and continue to provide them with the evidence they require in order to prosecute those who commit offences.*

1.4 *Without prejudicing the primacy of such criminal cases, where a Phone-paid Services Authority Tribunal finds that a service has breached the Code in this respect they can also order refunds for all those consumers affected, whether they have made a complaint to the Phone-paid Services Authority or not, and the Phone-paid Services Authority will generally do its best to ensure that the perpetrators of unauthorized charges do not profit from them at the expense of the PRS market's reputation.*

1.5 *For this reason, it is essential that providers can provide robust evidence for each and every premium rate charge.*

2. What is robust verification of consent to charge?

2.1 *Robust verification of consent to charge means that the right of the provider to generate a charge to the consumer's communication bill is properly verifiable. By 'properly verifiable', we mean a clear audit trail that categorically cannot have been initiated by anything else other than a consumer legitimately consenting and cannot have been interfered with since the record was created."*

The complainants in the case had contacted the PSA regarding charges on their phone bill associated with the Service 'allfoxyladies', operated by SMS Avalanche. A case was brought against SMS Avalanche and adjudicated in February 2016. The Executive had asserted, in that case, that the Level 2 provider had breached rule 2.3.4 of the Code, as logs showed that consumers had opted into the Service but had consistently not received messages which were required in order to access the Service content. Consumers had therefore not received Service content for a significant period of time. Accordingly, the Tribunal had found that the provision of the Service was unduly delayed.

The Tribunal had imposed the following sanctions in the SMS Avalanche case:

"*a formal reprimand, a fine of £35,000, a requirement to remedy the breach by ensuring adequate processes are established and implemented to prevent undue delay of Service provision in future, with such processes to be established by no later than 18 March 2016 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 PhonepayPlus that such refunds have been made."

Following the SMS Avalanche 'allfoxyladies' adjudication, the Executive had continued to receive complaints regarding the Service. While numerous requests for information were sent to SMS Avalanche and the relevant Level 1 provider, the Executive had received no response from the Level 2 provider. On 11 December 2017 the PSA received a complaint regarding the allfoxyladies Service, which expressed how difficult it was to contact SMS Avalanche. The Executive investigated the matter and found that SMS Avalanche had in fact dissolved in June 2017. Before its dissolution, SMS Avalanche had novated all rights and obligations over to FlipCove Ltd, who inherited its full subscribers database.

On 12 December 2017 the Executive sent a direction for information to FlipCove Ltd, the responsible Level 2 provider, questioning the novation and data migration. It was confirmed that "*the novation took place during May 2017*". It was further confirmed that 5518 subscribers were migrated from the 78686 shortcode, used by SMS Avalanche, to the 84514 shortcode. Upon migration, the 'allfoxyladies' Service had ceased to operate and all migrated users then received the 'Scorethatgirl' content.

The Level 1 provider had failed to highlight the novation to the Executive and initially advised the Executive that SMS Avalanche remained the Level 2 provider for those concerned complainants. In a Direction for information, the Executive questioned the Level 1 provider regarding the novation and its apparent lack of transparency with the regulator. The Level 1 provider in response to the direction stated the following;

"We note your concerns regarding the migration of the allfoxyladies.com services on short code 78686 to the scorethatgirl.com service on short code 84514. Flipcove did not request permission from, or inform Zamano that they were migrating subscribers from 78686 to 84514. When this came to our attention we deactivated the short code 78686 and notified Flipcove that we were putting a revenue withhold in place for short code 78686.

We also note your concerns regarding the scorethatgirl.com and allfoxyladies.com services. Flipcove Limited started billing on the Zamano platform in September 2016 on the short code 84514. In May 2017 SMS Avalanche novated to Flipcove Limited. The service provider for 78686 was still listed as SMS Avalanche on our customer care front end system."

The Level 1 provider told the Executive that:

"Flipcove did not inform Zamano that the 'allfoxyladies' service on short code 78686 was being migrated onto the 'scorethatgirl' service on 84514."

Complainants stated that they did not sign up to the Service or give consent to be charged for the Service. In response to these claims, the Level 2 provider informed the Executive that it used the services of COMPACT IT who had acted as a third-party verifier.

On 12 December 2017, the Executive directed the Level 2 provider to confirm how it obtained consent to charge for the users migrated from the SMS Avalanche service, along with all related documentation, including its most recent contract with COMPACT IT.

The Level 2 provider stated in response:

"Mobile number has opted into service and completed process of using third party verification platform (Compact IT)"

As this explanation was unsatisfactory to the Executive, a further direction was sent to the Level 2 provider explaining the PSA's expectations regarding robustly verifiable evidence of consent to charge and requested that the Level 2 provider provide such evidence for the 6 complainants'.

The Level 2 provider responded on 25 January 2018 as follows:

"Opt In 23/02/2017 – MSISDN has opted into service and completed process of using third party verification platform (Compact IT)."

The Executive submitted that no adequate evidence of consent to charge had been provided by the Level 2 provider.

On 17 July 2018 the Executive contacted COMPACT IT's former director, Mr James Marshall. The Executive made Mr Marshall aware of its investigation into the Service and requested COMPACT IT's assistance in the Executives enquiries; Mr Marshall agreed to assist. As discussed and agreed, a request for information was sent requesting that COMPACT IT confirm its role and function, provide copies of all communications with the Level 2 provider and copies of any invoices to verify payments made by the Level 2 provider.

In response to the request for information, COMPACT IT stated the following;

"Thanks for your email. Compact IT ceased trading well over a year ago. Flipcove were informed of this at the time and all details you've requested would have been passed onto them upon termination of contract, for me to provide them now I would have to approach Flipcove in a personal capacity, ask them to forward me the requested information and then forward to you, which would, I'm sure you'll appreciate, be both extraordinary and impracticable. One point of note, Compact IT merely hosted its own pages for the input of mobile numbers and the input and verification of pins which it sent and did not otherwise have any control over the supplier's products and services or associated charges."

The Executive noted that COMPACT IT had dissolved on 28 February 2017.

Following the above response, a further direction for information was sent to the Level 2 provider requesting copies of all correspondence between it and COMPACT IT and copies of the invoices sent by COMPACT IT.

On the 26 July 2018, the Level 2 provider responded to the Executives direction with the following:

"As far as communication regarding "Score That Girl" this was never mentioned to Compact IT, we simply signed up to use their verification platform and integrated it into our system and

service. Compact IT were not required to identify with this service other than to provide the robust verification for each customer Opt In".

The Level 2 provider supplied payment invoices for payments to COMPACT IT in order to add additional PINs to its account. It was the Executives understanding that COMPACT IT's function was to provide verification PINs, yet not a single PIN had been supplied to the Executive by the Level 2 provider, nor did any PIN feature in the complainant message logs or any other MO message that could be a method of a re-opt in.

In addition to the Level 2 provider's failure to provide consent to charge evidence, the 'Score that Girl' Service was charged at £1.50 more per week than the SMS Avalanche Service 'allfoxyladies'. The Executive questioned the Level 2 provider regarding the steps taken to ensure these consumers responded or agreed to be charged more for the Service. In response to the these enquires, the Level 2 provider stated:

"We sent out a Free Message to all the migrated database stating that pricing was changing and how to Opt out or contact us. When this message was sent out there was a 24-hour delay before implementing the new charge. Message can be seen in the excel logs sent over for (xxxxxxxxxx /xxxxxxxxxx) this was the same for all migrated numbers".

Based on the Level 2 provider's responses and lack of evidence supplied, the Executive submitted that the Level 2 provider's actions were intentional and that the Level 2 provider had purposefully failed to highlight the subscriber migration between services to the Level 1 provider, allowing billing to continue without any restriction from the Level 1 provider. As a result, 5518 consumers had been migrated and billed without their consent, allowing the Level 2 provider to profit.

On 2 August 2018 the Executive directed the Level 2 provider to supply evidence of verification of consent to charge for all subscribers to the "Score that Girl" Service. The Level 2 provider supplied a list of dates of opt-ins for 860 MSISDNs despite having a total subscriber base of 24,907.

In addition to the list of opt-in dates, the Level 2 provider also stated the following:

"I have been working to be able to pull the MSISDNs that have entered the Score That Girl Service. I have provided you with the information that I have, As I mentioned as this company is no longer trading and ceased employing any staff at this stage I am may not be able to provide any additional information on Opt Ins as those who subscribed and then Opted Out have done so quite some time ago and this information has been archived

The Opt Ins requested had all been done using the company Compact IT which I have provided the contract for and the invoices showing continued payment for additional pins." [sic]

From the Level 2 provider's response, the Executive submitted that the Level 2 provider was unable to evidence consent to charge for all subscribers of the Service. The Executive considered that a list of dates and times of 860 MSISDNs did not sufficiently demonstrate evidence of consent to charge for 24,907 subscribers.

The Executive submitted that it did not regard the above responses to, in any way, evidence consent to charge. No adequate information was provided to show the Level 2 provider held robust evidence of consent to charge the subscribers. At each stage of the investigation the Level 2 provider had been unable to provide evidence of verifiable consent to charge, despite detailed explanation from the Executive as to the nature of the evidence that should be provided. While the Level 2 provider had contracted with COMPACT IT, it had failed to provide any evidence or documentation to substantiate its claims that COMPACT IT carried out its function as a third-party verifier. The Executive further noted that none of the complainant logs featured a Mobile Originating message containing a PIN or any other form of a re-opt in. The Executive could not therefore accept that the third-party verifier had carried out the work the Level 2 provider had claimed, or that it held robustly verified evidence of consent to charge for all migrated subscribers. It was the Executives view that, based upon the available evidence, the Level 2 provider had failed to provide sufficient evidence to establish consumers' consent to be charged. It was the obligation of the Level 2 provider to supply evidence, when directed, of such consent.

In response to questions, the Executive confirmed that its understanding was that the Level 2 provider had purchased PIN credits from Compact IT as it intended to verify 2,000 MSISDNS. However, there was no evidence that these credits had been used. The Executive also confirmed that there was no evidence that PIN verification had been utilised as Compact IT had stated that it no longer held this information, it having been passed back to the Level 2 provider.

2. The Level 2 Provider denied the breach and argued that it had consent to charge for every subscriber that entered into the Score That Girl service. They asserted that the list of 6 numbers that had been sent over could either be verified by the third part company Compact IT or had been reviewed and accepted by PhonepayPlus in a previous tribunal decision (Case Reference 72412) by implication, since the issue of consent to charge had not been raised, with the conclusion that consumer consent to charge was evident in the logs.

   Compact IT provided third party verification at this time. The Level 2 Provider had, when requested, provided a contract with Compact IT and a number of paid invoices from its bank showing that it actively used the services of Compact IT. There could be no doubt about the services supplied by Compact IT as the Executive would have encountered this company previously and the services that it provided. There could be no doubt that it had utilised this service greatly, as shown by the number of invoices that it had provided on request and the payments made from its bank accounts. Of the 6 complaints, MSISDN xxxxxxxx682 and xxxxxxxx286 had opted into the service using Compact IT. This could not be doubted as the only way to enter into the service was through using third party verification, which it had shown it had paid for and used.

   The Level 2 provider further stated that SMS Avalanche was a company that the PSA or at the time PhonepayPlus had investigated previously. After the investigation, SMS Avalanche were found guilty of one breach and that was Un-Due Delay in delivery of the service (case reference 72412, published on 18 February 2016). If the Executive had any concerns regarding consent to charge it would have been raised as a breach in this

previous case, but no breach was raised. The numbers (xxxxxxxx845 / xxxxxxxx531 / xxxxxxxx837 / xxxxxxxx080) all related to a service that was investigated and where consent to charge concerns were never raised. On that basis alone, it had novated these numbers and consent to charge could not now be a breach as it should have been raised in case reference 72412.

The Level 2 provider stated that the Code could not be altered to suit the current breach as the Executive at the time of case reference 72412 would have had to raise the breach for these numbers at that time. Given that the Executive had not felt the need to raise a consent to charge breach then and had allowed SMS Avalanche to continue to send chargeable subscription messages to these numbers, it could not raise a breach now as it was the Executive that allowed these numbers to continue to be charged by SMS Avalanche. The Level 2 provider relied upon the following statement of the Executive at page 17 of the Warning Notice:

"The Executive asserted, in that case, that the Level 2 provider had breached rule 2.3.4 of the code, as logs showed that consumers had opted-in to the Service but had consistently not received Service content for a significant period of time. Accordingly, the provision of the service was unduly delayed'.

The Level 2 provider further stated that it had acknowledged to both Zamano and the Executive that its responsibility to highlight the novation was not met and accepted that it was at fault for not communicating this information correctly and it accepted responsibility for this.

In response to the Executive's submission that no PIN was forwarded by the Level 2 provider, the Level 2 provider stated that this was entirely correct. It had used Compact IT to send and verify a PIN for it – at no stage did it know that the PIN would defeat the whole purpose of using an independent third-party verifier. The Executive will have had communication from Compact IT in the past and would have known exactly how the service operated and the PIN function used.

The Level 2 provider argued that the Executive was deliberately ignoring the evidence that it had provided showing that contracts were in place with a third-party provider and regular payments had been made to the third-party provider to purchase additional PINs to support regular promotions. There had been a total of 24907 subscribers for this service and only 6 complaints. To say that this was below an accepted industry level of complaints was an understatement. The Level 2 provider stated that the Executive was brandishing around statements like "The providers actions have directly impacted a large amount of consumers" which were simply not true as it had only received 6 complaints.

The Level 2 provider stated that, when it had ended its services in November 2017, it still had over 800 active subscribers with 0 complaints. The Executive was therefore using grossly exaggerated statements to engineer a breach with an inflated fine. The Level 2 provider stated that had it not novated with SMS Avalanche it would have subscribed over 24,000 subscribers from September 2016 with only 2 complaints. This showed that a highly successful service had been operated. It had accepted that it should have notified the Level 1 provider and the Executive that this novation was happening. It believed that

the 4 complaints from this novation had potentially been made due to the service change, forgetting they were subscribed, or the fact they were no longer wanting to incur charges and were looking to get their money back.

The Level 2 provider stated that it wanted to highlight that the Executive had failed to acknowledge that it had left the market, with no intention of returning. The Executive was stating that a refunds sanction should be issued, but the Level 2 provider had proven that for the 6 complaints this had already been done. The Executive was failing to acknowledge these matters, and this had been apparent through all communication that had been sent.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal's view was that the Level 2 provider had misunderstood the issues raised and the Executive's case. The Tribunal considered that the migration of consumers from the SMS Avalanche service to the Level 2 provider's service had essentially created a whole new set of customers for which the Level 2 provider did not, in the view of the Tribunal, hold sufficient evidence of consent to charge for the new service.

   The PSA Guidance was clear that a Level 2 provider should be able to provide "properly verifiable" evidence of consent to charge upon request. The burden was on the Level 2 provider to show that it held robust evidence of consent to charge consumers, yet it had been unable to supply sufficient evidence of consent to charge for 6 PSA complainant MSISDNS. The Tribunal was also satisfied that the inability to provide sufficient evidence of consent to charge affected all consumers of the service, not just those that had complained. The Tribunal's reasoning was that the Level 2 provider's service was an entirely different service to the SMS Avalanche service. Yet the Level 2 provider had migrated in the region of 5,000 subscribers and continued to charge them, when it did not hold robust evidence of consent to charge those consumers. While the Level 2 provider had purchased PIN credits from Compact IT prior to novation, it was unable to evidence demonstrating what it had done with those credits, if anything. The Tribunal's was satisfied that, despite Compact IT going out of business prior to the novation, the Level 2 provider had made no attempts to replace the verification company, nor had it taken any other sufficient steps to obtain verifiable evidence of consent to charge for the migrated consumers.

   While the Tribunal noted that it was difficult for the Level 2 provider to produce evidence of consent to charge when the verification company it had contracted with had ceased operating, the Tribunal considered that the Level 2 provider had fully understood its obligations under the Code. The onus was on the Level 2 provider to check that any parties with which it was contracted had been performing their duties appropriately. The Tribunal's view was that the evidence clearly suggested that the service was a significant scale of operation, which the Tribunal was satisfied had generated significant amounts of revenue without robust evidence of consent to charge consumers being held. The Tribunal did not find the Level 2 provider's submissions with regard to the fact that only 6 complaints had been received to be persuasive. In the Tribunal's view and experience, the

number of complaints received by the PSA was not indicative of the level of consumer harm that had occurred. Low complaint numbers did not mean that consumers had consented to be charged and it was clear that consumers often did not even realise that they were being charged.

The Tribunal was therefore satisfied that, in respect of the migrated subscribers, the Level 2 provider had intentionally charged consumers when it knew that it did not hold robust evidence of consent to charge. The fact that a previous case against SMS Avalanche had not involved a breach of the consent to charge provision of the Code, did not equate with there being robust evidence of consent to charge in place, such that the Level 2 provider was absolved of its responsibility to ensure that it held such evidence.

In respect of the Level 2 provider's existing database of subscribers which were not migrated from the SMS Avalanche service, the Tribunal was satisfied that the Level 2 provider had, at the very least, acted recklessly in failing to ensure that it held robust evidence of consent to charge those consumers.

For the reasons set out above, the Tribunal was satisfied on a balance of probabilities that a breach of rule 2.3.3 of the Code had occurred

DECISION: Breach upheld

Service revenue

The Executive submitted that the relevant service revenue for sanctioning purposes was £377,744.

Mitigation and aggravation going to apparent breaches

The Level 2 Provider stated that there was a mitigating factor, which was that the Executive confirmed consent to charge for SMS Avalanche database in case reference 72412. The Tribunal did not consider this to be a mitigating factor because, in the view of the Tribunal, the absence of a consent to breach charge in an earlier case did not amount to confirmation by the Executive that consumers had consented to be charged.

Executive's initial assessment of severity

The Tribunal considered the breach to have been Serious in respect of the billing of the initial subscribers of the service, with the breach becoming Very Serious with the migration of approximately 5,000 additional consumers. The Tribunal gave the following reasons:

- the breach had a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers
- the breach was likely to severely damage consumer confidence in premium rate services

- the migrated consumers had incurred a very high or wholly unnecessary cost

- the breach was committed intentionally in respect of the migrated consumers and had at the least been committed recklessly in respect of the original subscribers.

Recommended sanctions - initial assessment

The Executive recommended the following ***initial*** sanctions:

- formal reprimand
- prohibition on the Level2 provider from providing, or having any involvement in, any premium rate service for a period of 3 years from the date of publication of this decision
- general refunds
- a fine of £250,000.

The Level 2 provider stated that the above sanctions were not necessary as it had already left the PRS market and in any event there had only been 6 PSA complainants, all of which had been refunded.

The Tribunal agreed with the Executive's recommended initial sanctions, noting that this was a very serious and intentional breach of the Code that warranted the recommended initial sanctions.

Overall case and proportionality assessments

Mitigating factors going to case as a whole

The Executive submitted that there were no mitigating factors.

The Level 2 provider stated that it felt that the Executive was almost playing double jeopardy by trying to fine for consent to charge breach for a service it had previously reviewed.

The Level 2 provider stated that it was mitigating that it did take steps to end the breach and remedy the consequences in a timely fashion, potentially reducing the level of consumer harm by ending all billing subscriptions in November 2017.

The Level 2 provider stated that it had made refunds to consumers.

The Tribunal did not find the suspension of the service in November 2017 to be a mitigating factor given that billing of subscribers without consent had taken place over a significant period of time. The Tribunal also did not consider the issuing of refunds to be a mitigating factor, noting that the Level 2 provider had not supplied evidence of such refunds being made.

Aggravating factors going to case as a whole

The Executive asserted that the following were aggravating factors:

- the Level 2 provider failed to follow Guidance or take alternative steps. The Guidance states that "*… it is essential that providers can provide robust evidence for each premium rate charge.*" The Level 2 provider had charged consumer in the knowledge that it did not have robust evidence of consent to charge for the consumers opted-in to the Service.
- The Level 2 provider intended to run its Service and bill consumers without obtaining consent to charge and therefore the Level 2 provider was aware of the breach from the outset.

The Level 2 provider disagreed that there was no lack of cooperation and argued that the Executive had included this aggravating factor to draw attention from the fact there was no evidence of any breach.

The Level 2 provider stated that no charge was ever made without the consent to charge being in place.

The Tribunal considered that the Level 2 provider knowingly billed consumers without consent and the failure of the Level 2 provider to follow guidance were part and parcel of the breach finding. While these were aggravating factors, the Tribunal did not propose to increase the sanctions imposed as a result of these aggravating factors.

Proportionality considerations

The Executive submitted that £377,744 was the relevant revenue for sanctioning purposes. The Executive submitted that the migration was carried out solely to generate illegitimate revenue which directly took advantage of consumers. The Executive argued that the actions of the Level 2 provider had caused a clear detrimental impact on consumers and that all revenue generated for the Service should be considered as relevant.

The Executive submitted that there was a need to remove the financial benefit from the provider.

The Executive submitted that there was a need to impose sanctions that achieved the objective of credible deterrence. The Executive stated that the Level 2 provider was aware of the requirements under the Consent to Charge rules in the Code, which was why it had apparently contracted with COMPACT IT and stated that it had PIN verification systems in place. However, the Level 2 provider had purposefully ignored those requirements, allowing it to generate large amounts of illegitimate revenue. The Level 2 provider had shown a complete disregard for regulation by the Executive.

In light of the above the Executive's view was that the recommended initial sanctions were justified. While the fine would have a direct impact on the Level 2 provider, it amounted to less than the total amount of illegitimate revenue generated by the Level 2 provider.

The Level 2 provider stated that it was unjustified to take all of the service revenue into account when there had only been 6 complaints and there was no justification for taking pre-novation revenue into account when there had only been 2 complaints received during this time.

The Level 2 provider argued that this was a diversion tactic by the Executive to cover up that no breach had been committed.

The Level 2 provider stated that consent to charge had always been in place but that this was ignored by the Executive. Compact IT had verified thousands of PINs and subscriptions, hence the reason why only 2 complaints were received pre-migration.

The Level 2 provider stated that it was not realistic for the Executive to recommend a £250,000 fine when only 6 complaints had been received.

Final Sanctions

- formal reprimand
- prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of 3 years from the date of publication of this decision
- general refunds
- a fine of £250,000.

Administrative charge: 100%

ANNEX A: Application for interim measures pursuant to Code of Practice paragraph 4.6

Case reference: 142651

Level 2 provider: Flipcove Limited

Type of service: Adult content subscription service

Service name: Score-That-Girl

Level 1 provider: Zamano Ltd

Network operator: All mobile network operators

Cost: 4.50 per week

PRNs: 84514, 78686

Tribunal meeting number: 226

1. This is an application by the Phone-paid Services Authority's ("**PSA**") Executive seeking a direction in accordance with paragraphs 4.5.1(b) and 4.6.2 and 4.6.5(c) of the PSA Code of Practice (14th edition) (the "**Code**") that up to £262,000 of the Service revenue should be withheld.

Background:

2. 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) that there had been 7 complaints received about the Service from members of the public alleging that they had been signed up to the service without their consent
   b) the nature of the apparent breach referred to by the Executive, namely that consumers who had been migrated to the service had been charged by the provider when it did not hold robust evidence of consent to charge
   c) that despite requests for financial information by the Executive, the Level 2 provider had failed to supply all information requested
   d) the information in the Track 2 Withhold assessment.

3. The Tribunal has paid regard to paragraphs 4.5.1 (b), 4.6.1 - 4.6.5 of the Code and the Supporting Procedures, including the factors set out at paragraph 80 and paragraph 91 of the Supporting Procedures.

4. The Tribunal notes that the burden of proof remains on the Executive throughout and that it is for the Executive to satisfy the Tribunal that the grounds for the application are made

out, and in particular that the Level 2 provider cannot or will not comply with any financial sanction that may subsequently be imposed by a Tribunal in due course.

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

   a) At first appearance (and subject to evidence, arguments or information being later supplied and/or tested), there is prima facie evidence that a breach of rule 2.3.3 of the Code has occurred.

   b) In reaching this decision, the Tribunal has considered the representations of the Executive. The Tribunal considers that there is clear evidence to support the apparent breach. The Tribunal is satisfied that the Level 2 provider had an obligation to obtain robust and verifiable evidence of consent to charge consumers before running the service, and particularly given approximately 5,000 users were migrated to the Level 2 provider's database from another Level 2 provider: SMS Avalanche Ltd. The Tribunal notes that SMS Avalanche Limited was itself subject to a Tribunal adjudication which determined that SMS Avalanche did not hold sufficiently robust evidence of consent to charge consumers. In the absence of any further steps taken by the Level 2 provider to obtain sufficient evidence of consent to charge, there was a high risk that those consumers would continue to be charged without consent.

   c) The Tribunal further notes that the consumers who were migrated over to the Level 2 provider's service were charged for a markedly different service, which was also charged at a higher price point. The Tribunal considers that, in these circumstances, the Level 2 provider should also have obtained sufficiently robust and verifiable evidence of consumer consent to charge at the point at which the service users were migrated to the new service

   d) The Tribunal notes that, whilst the Level 2 provider indicated that it utilised the services of the third-party verifier Compact IT, it had failed upon request by the Executive to produce any evidence of consent to charge consumers. This failing, coupled with the nature of the complaints received by the Executive, is sufficient to establish a prima facie case that a breach of the Code has occurred.

   e) The Tribunal is not satisfied on the evidence before it that the Level 2 provider will be likely to be unable to pay such refunds, administrative charges and/or financial penalties that may be imposed by a Tribunal in due course. Although the Tribunal has some concerns regarding the Level 2 provider's ability to pay, due to the lack of evidence of currently available funds, the Executive has not proved on a balance of probabilities that the Level 2 provider will be unable to pay. In making this determination the Tribunal notes in particular:

i) The Level 2 provider failed to supply all of the financial information requested by the Executive, namely information about its non-PRS revenue streams and its bank statements. However, the absence of financial information cannot, in and of itself, establish that the provider is unable to pay any future financial sanctions imposed.

ii) The Level 2 provider has received significant revenues in respect of the Service, but it is not clear whether those funds are still available or not.

f) The Tribunal is satisfied that the Level 2 provider will be likely to be unwilling 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:

i) The Level 2 provider was subject to a notice for compulsory strike off filed by Companies House on 31 October 2017. This compulsory strike off action was suspended on the application of the Executive. Had the Executive not applied to suspend the strike off action, the Level 2 provider, which was a limited company, would have dissolved, resulting in there being no legal entity to pay any subsequent financial penalty that may be imposed. The Tribunal considers this to be a very strong indicator that the Level 2 provider would be likely to be unwilling to pay any financial penalty imposed and, further suggests that there may not be company revenue available to pay any subsequent financial penalty.

ii) The Tribunal Level 2 provider failed, without adequate explanation, to fully co-operate with the Executive in supplying the financial information requested. This is suggestive that the Level 2 provider may be unwilling to co-operate in paying any financial penalty subsequently imposed.

iii) The above factors, when taken together, are sufficient to satisfy the Tribunal on the balance of probabilities that the Level 2 provider will be likely to be unwilling to co-operate in paying any financial sanctions which may be imposed in due course.

g) The Tribunal has considered the Executive's assessment of the likely future final sanctions and the £335,605 revenue generated by the service. The Tribunal is persuaded by the Executive's submission that any financial penalty which may be imposed in due course will need to have a sufficient deterrent effect.

h) The Tribunal considers that a Tribunal of the substantive hearing of this matter would be likely to view the apparent breach of the Code as Very serious.

i) The Tribunal considers it likely that a Tribunal at the substantive hearing of the matter will impose sanctions sufficient to deter breaches of this nature and to remove the financial benefit derived from the commission of the breach.

j) The Tribunal therefore considers that a Tribunal at the substantive hearing of this matter would be likely to impose a fine in the region of £250,000, together with a general refund sanction, in order to achieve the sanctioning objective of credible deterrence.

k) The Tribunal is satisfied that the measures set out below are necessary and proportionate to take in the circumstances of this case. In assessing the potential impact of the measures on the Level 2 provider, the Tribunal takes into account that there would have been a dissolution of the Level 2 provider had the Executive not suspended the strike off action. The Tribunal also takes into account the fact that significant service revenue is already being voluntarily withheld by the Level 1 provider. The Tribunal is satisfied that the potential impact on the Level 2 provider of the measures set out below is proportionate and justified when balanced against the very serious nature of the apparent breach and the need to achieve the sanctioning objective of credible deterrence.

l) The Tribunal also agrees with the estimated future administrative costs of £10,000 and the estimated amount of any general refunds sanction as £2,000.

6. Accordingly, in respect of the Service the Tribunal hereby directs that:

a) the PSA is authorised to direct a withhold of up to £262,000

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

14.06.2018