Review Tribunal meeting number:	**220**
Case reference:	**117561**
Applicant:	**Intrugo Limited (Level 2 provider)**
Type of service:	**Video subscriptions service**
Level 1 provider:	**Veeo limited (UK), Zamano Solutions (Ireland)**
Network operator:	**All Network Operators**

This was a review against the decision of the Tribunal of 2 August 2017.

Background

The underlying Track 2 case against the Applicant, heard on 17 September 2016 (case reference 71971), concerned a glamour video subscription service (the "Service") operated and promoted by the Applicant.

Following an initial dispute of the breaches and the commencement of an oral hearing process, case 71971 proceeded as an adjudication by consent ("the Consent Order"). Breaches of Paragraph 4.2.4 and Rule 2.3.3 of the Code were admitted by the Applicant in respect of the Service. The breaches were each agreed to be "**very serious"** and the overall severity level of the case was agreed to be "**very serious**". It was agreed the following sanctions be imposed:

- a formal reprimand
- a requirement to remedy the breach by ensuring that the Respondent (the Applicant) 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
- a fine of £250,000; and

- a requirement that the Respondent 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 [*as the PSA was known at the time*] that such refunds have been made.

The Consent Order required the Applicant to pay the legal and administrative charges incurred by the PSA in relation to the oral hearing proceedings in the sum of £19,906.11, within 30 days of the date of the Consent Order.

The total sum, representing both the fine and the administrative charge, owed to the PSA was £269,906.11.

Compliance with sanctions agreed in the Consent Order

The fine and administrative charge

With interim measures in place, payment of the fine and administration charge were settled in full by 3 November 2016 in the following increments:

- £54,761.20 Withheld revenues from Veoo Limited;
- £180,294.89 Withheld revenues from Zamano Solutions Limited; and
- £34,850.02 Payment made by the Level 2 provider

The refund sanction

Following publication of the Consent order, the PSA provided complainants in respect of the Service with details of how to contact the Level 2 provider and claim their refund. The PSA did not subsequently receive any complaints regarding the issuance of refunds by the Level 2 provider, and there was no evidence to suggest that refunds were not paid.

Non-compliance of a sanction imposed by the Consent Order of 17 September 2016

Remedy the breach sanction

The Consent Order imposed sanction requiring the Applicant to:

> *"remedy the breach by ensuring that the Respondent (the Applicant) 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".*

On 23 September 2016, the PSA directed the Applicant to read the Tribunal's decision carefully and to confirm that it had remedied the stipulated breach by no later than 5pm on Friday 30 September 2016. On 3 October 2016, the Applicant responded stating:

> *"We confirm that the remedy to the breach has been fulfilled and Intrugo is in contract with 3rd party that provides PIN method for opt in for all services and all subscribers".*

After the sanctions came into effect on 17 September 2016 (allowing for a one-month grace period given by the PSA), the PSA received 14 new complaints from members of the public regarding the Service.

The PSA requested message logs from the Applicant and contacted the Applicant's third-party verifier to enquire as to whether any of the 14 consumers had consented to the service charge.

The Applicant's message logs identified that 10 of the 14 message logs showed that complainants appeared to have opted-in prior to the original adjudication but were still being charged after 17 September 2016. Further, the third-party verifier informed the PSA that it held no evidence of consent for the service charges incurred by the consumers.

Breach of Sanctions case

In light of the above evidence, the PSA commenced a further Track 2 investigation for breach of a sanction (case reference 117561).

On 6 April 2017, the Code Adjudication Panel ("CAP") considered an application by the Executive for the imposition of interim measures. Accordingly, an interim measure to withhold service revenue was imposed.

The Executive alleged that the Level 2 provider had contravened the PSA Code of Practice, 14th Edition ("the Code") in its failure to comply with the remedy the breach sanction and raised the following potential breach under the Code:

> 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.*"

The Tribunal of 2 August 2017 upheld the breach of paragraph 4.8.6(b) and its initial assessment was that this was **"very serious"**.

Having considered the aggravating and mitigating factors, the Tribunal decided that the final overall assessment of the case should be regarded as '**very serious**' and imposed the following sanctions:

- a formal reprimand;
- a fine of £250,000;
- a prohibition on the Applicant 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 Applicant 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.

In addition to the sanctions imposed, the Applicant was also liable for 100% of the administrative charges totalling £5,476.50.

The Applicant's grounds for requesting a Review

On 11 September 2017 the Applicant submitted an application for review setting out the following grounds:

1. The Tribunal came to a decision that no reasonable Tribunal could have reached in that the £250,000 fine was "above and beyond proportionate" for the following reasons:

- From the date of signing the Consent Order it had issued refunds to every consumer that had contacted it;
- It issued refunds to 1,245 consumers; and
- The final figure for these refunds totalled £89,005.00; this figure was not before the Tribunal of 2 August 2017 and its decision was therefore not a reasonable and informed one.

2. The Tribunal came to a decision that no reasonable Tribunal could have reached given that the Applicant had paid the full fine and administrative costs associated with the case:

    - The Applicant had suffered a detriment, having paid in excess of £260,000 to cover the fine and administrative charge. There was a massive impact on the cash flow for the Applicant, which could only operate on a skeleton staff. The company concentrated its limited resources on issuing refunds; and
    - The previous fine had "forced" the Applicant to make severe cuts to all aspects of its business. The Tribunal's decision to impose the maximum fine on 2 August 2017 did not take this into consideration and was therefore not a reasonable and informed decision.

3. The Tribunal came to a decision that no reasonable Tribunal could have reached in that the Applicant had engaged with the Executive in order to agree the Consent Order, further:

    - After agreeing the Consent Order, the applicant immediately took to work removing campaigns and subscriptions that it was aware did not have robust verification of consent to charge. This was a difficult task as many marketing campaigns had been merged for administrative reasons, particularly as it was operating with fewer staff than before the Consent Order; and
    - The Applicant's revenues were reduced dramatically which demonstrated that it had attempted to remedy the breach. It had to continue billing subscribers for whom it did have robust opt ins for. The Applicant's "systems are set up in a complicated complex way, which would not enable it to simply switch numbers off from billing."; and

- On the whole, as there were only 14 further complaints made to the Executive after the Consent Order, it is argued that the work it was doing was effective. For the PSA to impose a sanction of £250,000 and administrative costs did not amount to a reasonable and informed decision.

The Chair's decision on the application for review

The Chair considered the Applicant's grounds and granted the application. In doing so, he made the following observations:

> *The thrust of the application for a review comes down to a complaint about the proportionality of the level of fine imposed by the Tribunal on 2nd August 2017. In its application for Review, the Applicant lays no challenge to the findings of fact or the evidential foundation for them but in summary, submits that insufficient weight has been given to the following features:*
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> - *that the full fine of £250,000 imposed by reason of the Consent Order (17th September 2016) has been paid;*
> - *the Tribunal was aware of refunds having been made but not the amount (£89005);*
> - *that the breach of sanction was admitted;*
> - *that the impact on the business the Applicant, of the fine and administrative charges has had a severe, although no up to date financial information is provided;*
> - *that notwithstanding the findings of fact, that the Applicant had made an attempt to comply with the other aspects of the Sanctions (refunds and fines) and co-operated with the PSA.*
>
> *In addition, whilst the applicant contends that there were "only 14 complaints" as a mitigating feature, I find that submission to have no merit because of the ongoing risk of serious harm to consumers caused entirely by the failure of the applicant to remedy an earlier breach (admitted by the Applicant) and to comply with the Sanctions fully.*
>
> *The Tribunal was correct in its finding that the breach of sanctions fell into the "very serious" category, in terms of the overall assessment. This was taking into account the Tribunal's finding that the Applicant had provided the Executive with false information as it explicitly confirmed to the Executive, on 3rd October 2016, that it had complied with the*

sanction but during October 2016, 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.

The Tribunal took into account, as a mitigating feature, 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 or. He also noted that approximately £89,005.00 has been paid out in refunds as well as the financial penalty. A schedule in support of all refunds made has been provided with the application for a review.

The Applicant had argued before the Tribunal that the financial penalty should be in the region of £75,000 but later submitted that it should be in the bracket of £100,000-£150,000, as against the level suggested by the Executive of £250,000, more so, if the features summarised in paragraph 31 above, were weighed into the balance. The period in the immediate aftermath of the Sanctions being imposed and the subsequent discovery of breaches, is within a matter of 8-10 weeks, which, in my judgement, is an additional feature that should have been taken into account in setting the level the starting level of the fine. In effect, what is being argued is that insufficient weight has been given to the "totality principle". Therefore, whilst I find that the Tribunal acted reasonably throughout its fact finding process and it had a range of fine levels available to it, the starting point of £250,000 is at the upper end and did not give enough weight to the mitigation set against the whole of the conduct.

In my judgement, even taking £250,000 as the starting upper bracket and then taking account of the mitigating features as well as the additional mitigation set out in the letter of Mr Ian Lister, Director, (dated 12th September 2017, albeit without any details of the financial hardship), taken together and making appropriate adjustments for proportionality, would achieve the appropriate level of fine.

Accordingly, on the facts of this particular case, the history and the additional mitigation now available (on refunds) which was not fully placed before the original Tribunal, I am satisfied that there are there are reasonable grounds to conclude that the Application for a review of the original decision by the Tribunal on 2nd August 2017 is merited, having regard to para. 4.10.2 of the Code.

The Chair made it clear that the review was limited to the proportionality and level of financial penalty only and none of the other sanctions, including the administrative charge. The Chair also granted a suspension of the fine sanction, under para. 4.10.5 of the Code, pending the outcome of a review. The Chair made clear that the decision was "very much on the particular facts" of the case.

The review

In advance of the Review Tribunal, the Executive made written submissions in response to the Applicant's grounds which were as follows:

> *The Executive submits that the sanctions imposed by the Tribunal of 2 August 2017 should be upheld. It is submitted that it was reasonable for the Tribunal to impose the maximum level of fine (£250,000) for the breach for the following reasons:*
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> *The preliminary assessment of the breach was that it was "**very serious**". It is submitted that this was appropriate in the circumstances.*
>
> *The Tribunal correctly identified the aggravating factor in the case, namely that the Level 2 provider had supplied false information to the Executive:*
>
> - *The original breach was that the Level 2 provider did not have robust evidence of consumers' consent to charge, a very serious matter;*
> - *The Level 2 provider informed the Executive, following the original adjudication that it had remedied this breach;*
> - *Following this confirmation, the Executive received 14 complaints from consumers that they had been charged by the Level 2 provider without their consent;*
> - *The Executive contacted the third- party verifier that the Level 2 provider stated it was using but the third- party verifier stated that it did not have evidence of consent to charge for any of the 14 MSISDNs for which there had been complaints;*
> - *The Level 2 provider was informed of the Executive's concerns but made no response;*
> - *The Tribunal had before it details of the revenues generated by the Level 2 provider following on from the Track 2 adjudication by consent on 17 September 2016. These were not available to the Chair who granted this review but show that the Level 2 provided continued to generate substantial sums of money from the Service after the*

date on which it stated that it had remedied the breach. This indicated that the Level 2 provider had not taken sufficient steps to remedy the breach;

- *Based on the evidence, it is submitted that the Tribunal was justified in concluding that false information had been provided to the Executive and treating it as a significant aggravating factor; and*
- *Bearing in mind the preliminary assessment of the seriousness of the breach and the significant aggravating factor, it is submitted that the Tribunal was justified in arriving at a figure at the upper end of the range.*

It was appropriate and proportionate for the Tribunal to give limited weight to the identified mitigation. The only breach of the Code alleged by the Executive, and upheld by the Tribunal, was that the Level 2 provider had failed to remedy the original consent to charge breach. The maximum fine available to the Tribunal, for this specific breach, was £250,000. That the other sanctions had been complied with is of limited significance as, had they not been, the Executive would have been entitled to raise further breaches accordingly. As such, the Tribunal was right to take into consideration as mitigating factors that the original fine had been paid and that the refund sanction had been complied with but acted reasonably in apparently giving these factors limited weight.

The Level 2 provider, in its application for a review, asserted that it had paid out £89,005.00 in refunds to consumers between 19 September 2016 and 23 February 2017. It is the Executive's submission that this is of limited relevance as it would not have been appropriate for the Tribunal to have given any significant weight to the mere compliance by the Level 2 provider with the original refund sanction. The refunds were only made to consumers who had suffered harm as a result of the Level 2 provider's service and were paid following the original track 2 adjudication, as opposed to proactively. As set out above, there is no breach raised in respect of this refund sanction but it should be noted that the Level 2 provider has submitted logs of the payments without supporting these logs evidentially by, for example, supplying bank statements showing the transactions. In light of this, the Executive submits that the compliance with the refund sanction still should not weigh heavily as a mitigating factor.

On 12 December 2017 the Review Tribunal was held. The Applicant attended and was represented. The Applicant, at the outset of the hearing, supplied the Executive with evidence of the payments of the refunds made and this evidence was accepted by the Executive. It was

further accepted by the Executive that there had been 13 complainants since adjudication of case 71971 rather than 14.

The Applicant made further oral submissions to the Review Tribunal, setting out the ways in which he had sought to comply with the "remedy the breach" sanction. The Review Tribunal was informed that significant cuts to staffing levels had been necessary due to the previous fine imposed as part of the adjudication of case 71971. The Applicant is now seeking to diversify its business and expand to work in a different sector, with a view to employing a further 30 staff members. The Applicant asserted that the work required to ensure that there was robust evidence of consent to charge had ben laborious and had been undermined by human error; some MSISDNs had not been put on the correct system in order for them to be verified by the 3rd party verifier. The Applicant confirmed that it had purchased the full version of GoVerifyIt. It was further submitted that the Applicant did not intend to operate Premium Rate Services in the future and would give an undertaking not to do so.

The Tribunal considered all of the evidence in the case, including:

- The case information relating to the underlying Track 2 procedure;
- The case information on the breach of sanctions case;
- Correspondence between the Applicant and the Executive;
- The Applicant's grounds and supporting documents;
- The Chair's decision on the application for review;
- The written submissions of the Executive;
- The oral submissions of the parties.

The Review Tribunal noted the decision of the Chair on the written application for review, namely that the review was limited to the proportionality of the fine sanction. It found that that the Tribunal of 2 August 2017 had not taken into account important mitigating factors, had given insufficient weight to the principle of totality and had not adequately adjusted the level of the fine to ensure proportionality. The Review Tribunal agreed with the Chair that the case was properly categorised as "**very serious**" but considered that the fine of £250,000 was too high in the circumstances.

The Review Tribunal took into account the Applicant's admissions to all of the breaches throughout the process, including the adjudication by consent in case 71971, the prompt

payment of the original fine of £250,000 and the refunds of £89,005 paid to complainants, as well as the asserted attempts to comply with the "remedy the breach" sanction. The Review Tribunal concluded that the Applicant had pro-actively engaged with the PSA in a manner that went beyond the level of cooperation that is generally expected. It had made full admissions to the breaches alleged. Additionally, the period immediately following the imposition of the Sanctions and the subsequent discovery of breaches, was a relatively short period of time. These, together with proper consideration of the overall principle of totality were significant mitigating factors, which had not sufficiently been taken into account by the earlier Tribunal. Accordingly, the Review Tribunal found, with reference to paragraph 4.10.2 (c) of the PSA Code of Conduct, that that the Tribunal of 2 August 2017 had reached its decision based on a material error of process in respect of the PSA Supporting Procedures.

As such, the Applicant's review was made out and the Review Tribunal reduced the fine to **£175,000** to properly reflect the mitigating features of the case and the principles of totality and proportionality.

As the Applicant's review was made out, the Applicant was not required to pay the administrative charge in respect of the review application.

Julian Weinberg
19/12/17