

Tribunal meeting number: 253

Case reference: 153966

Level 2 provider: Prime Platforms Solutions Ltd

Type of service: Subscription alert service

Level 1 provider: Veoo Ltd

Network operator: Hutchison 3G UK Limited and Telefonica UK Limited

This case was brought against the Level 2 provider under Paragraph 4.5 of the 14th Edition of the Code of Practice.

Background and investigation

This case concerned a subscription alert service operating under the brand name 'Voucher SMS' on shortcode 61450 ("**the Service**").

The Level 2 provider for the Service was Prime Platform Solutions Ltd (the "**Level 2 provider**"). The Level 2 provider registered with the Phone-paid Services Authority (the "**PSA**") on 20 May 2018. The Level 2 provider's registration with the PSA was not renewed and lapsed on 19 May 2019. The Level 2 provider is currently unregistered with the PSA.

The Level 1 provider in respect of the Service was Veoo Ltd (the "**Level 1 provider**").

The Service was stated to be a voucher codes service providing consumers with access to discount codes for various brands and retailers. The service charges were £4.50 per message with up to two messages received per month.

The Service commenced operation in June 2018. The Level 1 provider confirmed that it suspended new consumer signups and ongoing Service billing on 20 November 2018.

In response to the Executive's requests for text message logs for complainants, the Level 2 provider supplied information on the Service, which provided the following information:

"Get £100s off your favourite brands and retailers, using our often exclusive and in-the-know voucher codes service - direct to your phone, so you need never miss out on sell-out offers again!"

In addition to the above description, the Level 2 provider supplied the following consumer Service flow:

Flow:

- 1) user arrives at Voucher-SMS Website from a co-registration site or via Google Direct advertising (keyword driven)
- 2) user inputs MSISDN

- 3) user receives a unique PIN
- 4) user registers by PIN entry
- 5) PIN entry is verified by the third-party verifier
- 6) user is subscribed to receive Voucher-SMS weekly for a monthly fee of £4.50 until they send STOP to 60770.



Voucher-SMS

Get bigger savings and freebies by using discount codes
To get the latest discount codes just sign up below

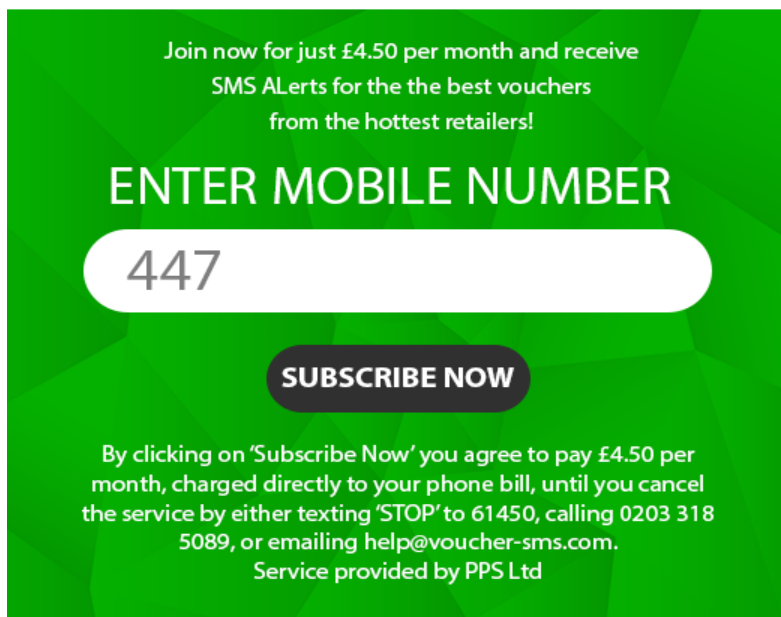
SIGN UP

£4.50 per month



Voucher-SMS

SAVE MONEY AT YOUR FAVOURITE REATILERS!



Join now for just £4.50 per month and receive
SMS ALerts for the the best vouchers
from the hottest retailers!

ENTER MOBILE NUMBER

447

SUBSCRIBE NOW

By clicking on 'Subscribe Now' you agree to pay £4.50 per month, charged directly to your phone bill, until you cancel the service by either texting 'STOP' to 61450, calling 0203 318 5089, or emailing help@voucher-sms.com.
Service provided by PPS Ltd

Join now for just £4.50 per month and receive
SMS ALerts for the the best vouchers
from the hottest retailers!

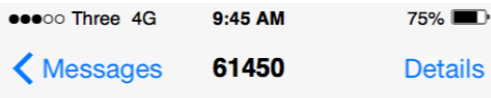
ENTER PIN NUMBER

1234

SUBSCRIBE NOW

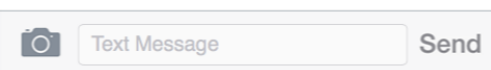
By clicking on 'Subscribe Now' you agree to pay £4.50 per month, charged directly to your phone bill, until you cancel the service by either texting 'STOP' to 61450, calling 0203 318 5089, or emailing help@voucher-sms.com.

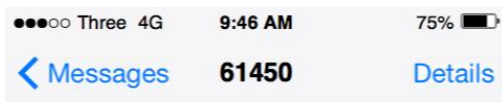
Service provided by PPS Ltd



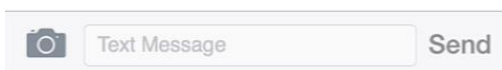
FreeMsg: You are subscribed to Voucher-SMS.com charged at £4.50 per msg/max 2 per month until you send STOP to 61450. help@voucher-sms.com 0203 3185089

To access your latest Voucher-SMS discount codes, visit our site at www.voucher-sms.com/login help@voucher-sms.com





FreeMsg: Reminder: You are subscribed to Voucher-SMS.com charged at £4.50 per msg/max 2 per month until you send STOP to 61450. help@voucher-sms.com 0203 3185089



Summary of complaints

The Executive had received 75 complaints from members of the public concerning the Service since 24 June 2018.

Complainants had alleged that the Service charges were unsolicited. A sample of complainant accounts is provided below:

*These are ENTIRELY unsolicited, I have never subscribed to this and I am being charge £4.50 a month for July and August.
The messages don't indicate that I am being charged nor is there an unsubscribe link.
No contact details exist on the website (Or ones that can be easily found!) [sic]*

I have no idea why I was sent this text or signing up for the contract. Also I can't STOP it because I have always had my PREMIUM texts disabled on my account. I just want the account stopped so I don't get charged again. If possible the charges repaid to me [sic]

*voucher sms
<http://voucher-sms.com/>
once a month
£9 to date (4.50 a month)
this is a unwanted service, i did not sign up or agree to this as im aware, i have not received any text but i have been charged [sic]*

*Charged to receive an unsolicited premium rate SMS
The first I heard of their service was when I received the SMS,
I have so far received one SMS, after which I replied with STOP which failed to send. I then
emailed the company asking to be removed. I was charged £4.50.*

Interim measures in place

On 09 January 2019, the Code Adjudication Panel (“CAP”) imposed interim measures, namely a withhold of Service revenue.

Apparent breaches of the Code

The Executive sent a Warning Notice to the Level 2 provider in which the following breaches of the PSA’s Code of Practice, 14th Edition (the “Code”) were raised:

- Rule 2.3.3 – Consent to charge
- Rule 2.3.1 – Fair and equitable treatment
- Paragraph 4.2.3 – Failure to provide information
- Rule 2.3.2 – Misleading

The Level 2 provider did not respond to the Executive’s Warning Notice. Liquidators acting on behalf of the Level 2 provider informed the Executive by email on 16 September 2019 that “...I have review the correspondence you have brought to our attention and I have forwarded the same to the Company’s director requesting her comments, however, no response has been received to date” [sic].

On 11 October 2019, the Tribunal reached a decision on the breaches.

Preliminary issue – Service

The Tribunal was satisfied that the sending of the documents had been properly served by email and by post. The Tribunal noted the contents of the email sent by the liquidators on 16 September 2019 and found that there had been good service and the date and location of the hearing had been properly conveyed.

Alleged breach 1

Rule 2.2.3

“Consumers must not be charged for 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 2.2.3 of the Code because:
 - The Level 2 provider had failed to provide evidence that established consent had been obtained to charge complainants; and

- Complainants advised that they did not enter a PIN onto the Service website, indicating that no consent to charge was held by the Level 2 provider.

The Executive relied on complaints that stated unsolicited Service charges had been incurred; responses to the Executive's survey; and the content of the PSA's Guidance on Consent to Charge (the "**Consent to Charge Guidance**").

Reason one – The Level 2 provider had failed to provide evidence that established consent had been obtained to charge complainants

The Executive understood from the information supplied by the Level 2 provider about the Service that in order to subscribe to the Service, consumers were required to enter their mobile telephone number into the Service website and would then be issued a PIN by SMS, which must then be entered into the Service website prior to the issuing of Service charges.

Following receipt of complaints alleging that Service charges were unsolicited; the Executive contacted the Level 2 provider on 03 October 2018 requesting evidence of consent to charge for ten complainants' mobile telephone numbers. Despite an acknowledgement from the Level 2 provider on 08 October that it had received the request, the evidence of consent to charge was not supplied to the Executive.

On 15 November 2018, the Level 1 provider was directed to provide evidence of the due diligence, risk assessment and risk control ("**DDRAC**") it had performed on the Level 2 provider and the Service. On 03 December 2018, the Level 1 provider responded to the Executive's direction supplying the DDRAC it had conducted on the Level 2 provider and the Service. Within its response, the Level 1 provider supplied an Excel spreadsheet with URLs purporting to link to the Verifier's portal. In the absence of any explanatory information from either the Level 2 provider or the Level 1 provider how the information in the spreadsheet represented evidence of consent to charge, the Executive submitted that the purported links to the Verifier's portal did not represent evidence of consent to charge complainants and that the Executive preferred to rely on the complainant's accounts.

On 01 May 2019, the Executive directed the Level 2 provider to supply evidence of consent to charge all complainants who had contacted the PSA regarding Service charges. Despite downloading the electronic copy of the direction and signing for the posted copy of the direction, the Level 2 provider failed to supply the required consent to charge information (or respond at all to the Executive) as required under rule 2.3.3 of the Code.

Reason two – Complainants advised that they did not enter a PIN onto the Service website

The Executive noted from the Level 2 provider's submissions that in order to consent to Service charges and subscribe to the Service, consumers must be issued a PIN after entering their mobile telephone number onto the Service website and in turn enter the PIN onto the Service website when prompted.

The Executive noted an absence of references to receipt of PIN messages in the complainant accounts. Noting this, the Executive contacted all the PSA complainants requesting further information. In response to the survey, the Executive received thirteen responses. Out of the thirteen responses, twelve complainants stated that they had not

viewed or interacted with Service promotional material. One complainant was unsure whether they had viewed or interacted with Service promotional material. In relation to the receipt of PIN messages and entering the PIN onto the Service website, eleven complainants stated that they did not receive a PIN or enter a PIN onto the Service website. One complainant was unsure whether they had received a PIN and entered it online. Another complainant stated that an unrequested PIN was received but that they did not enter the PIN onto the Service website.

In light of complainants alleging that Service charges were unsolicited, and more specifically the responses from twelve complainants that they did not enter a PIN onto the Service website, together with the absence of any evidence of consent to charge from the Level 2 provider, the Executive submitted that no consent to charge was held by the Level 2 provider.

The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code for (i) not providing evidence of consent when requested to do so following receipt of complaints and (ii) that on the balance of probabilities consent to issue Service charges to complainants was not held at all by the Level 2 provider.

2. The Level 2 provider did not respond to the Warning Notice. Liquidators who had been appointed for the Level 2 provider had advised the Executive that “*...I have review the correspondence you have brought to our attention and I have forwarded the same to the Company's director requesting her comments, however, no response has been received to date*” [sic].
3. The Tribunal considered the Code, the Consent to Charge Guidance, and all the evidence before it.

The Tribunal was of the view that the evidence was clearly explained and presented in a well-understood format. The Tribunal considered that the responsibility for ensuring that consumers were not charged without consent rested with the Level 2 provider.

Accordingly, the Tribunal was satisfied that there was cogent evidence presented by the Executive. Applying the civil standard of proof, it found that it was more likely than not, that the affected consumers had not given their informed consent to be charged and upheld a breach of Rule 2.3.3 of the Code.

Decision: UPHELD

Alleged breach 2

Rule 2.3.1 of the Code

“Consumers of PRS must be treated fairly and equitably.”

1. The Executive asserted that the Level 2 provider had breached rule 2.3.1 of the Code because subscribers to the Service were charged but not provided with access to the Service.

The Executive relied on its own monitoring and information supplied by the Level 2 provider, which included Service text message logs for complainants' mobile numbers. The purported method of accessing the Service was provided within text messages issued to subscribers.

An example Service message was provided as follows:

"To access your latest Voucher-SMS discount codes, visit our site at www.voucher-sms.com/login help@voucher-sms.com."

The Executive noted that an alternative method of accessing the discount vouchers appeared to have been supplied by the Level 2 provider under the heading "SMS Examples". However, the Executive noted from the message logs supplied by the Level 2 provider that messages which provided access to discount vouchers in the manner outlined in the "SMS Examples" did not feature in the message logs. The Executive therefore submitted that the method of accessing the Service appeared to be through the link supplied in the message logs to the Service website www.voucher-sms.com/login.

The Executive visited the website www.voucher-sms.com/login and upon arrival was required to enter a username and password. The Executive noted from Service text message logs supplied by the Level 2 provider that at no point were Service subscribers provided with a username and password to access the Service. In addition, the information that had been supplied by the Level 2 provider made no reference to the generation or provision of a Service username and password as part of the Service flow.

The Executive asserted that the evidence indicated on a balance of probabilities that all subscribers incurred Service charges purportedly in order to access a discount voucher service but without having the means to access the Service or its content. The Executive submitted that this failure to provide a way to allow all Service subscribers to access the discount vouchers amounted to the unfair and inequitable treatment of the subscribers to the Service.

Accordingly, the Executive submitted for the reasons outlined above that the Level 2 provider had breached Rule 2.3.1 of the Code by not treating Service subscribers fairly and equitably.

2. The Level 2 provider did not provide a response to the Warning Notice.
3. The Tribunal considered the Code and all the evidence before it, including the message logs and the Executive's own monitoring. It concluded that there was cogent evidence presented by the Executive and applying the civil standard of proof, that it was more likely than not, that whilst the Level 2 provider had supplied a link in the message logs to the Service website, this did not demonstrate that subscribers had been given access to them. In addition, the consumer Service flow that had been supplied by the Level 2 provider failed to mention that consumers would need to generate a Service username and password.

The Tribunal therefore concluded that consumers were not treated fairly or equitably and accordingly it upheld a breach of rule 2.3.1 of the Code.

Decision: UPHELD

Alleged breach 3

Paragraph 4.2.3 of the Code

“Where a direction is made pursuant to paragraph 4.2.1 a party must not fail to disclose to the PSA, when requested, any information that is reasonably likely to have a regulatory benefit in an investigation.”

1. The Executive asserted that the Level 2 provider had breached paragraph 4.2.3 of the Code for failing to provide Service information when directed to do so.

On 01 May 2019, the Executive issued a direction to the Level 2 provider requesting the following information about the Service:

“1. The Executive has previously been advised by Prime Platform that the opt-in to the Service was via the issuing of a PIN to consumers mobile handsets, which was in turn entered onto a website. Please provide [sic] properly verifiable evidence that the following mobile numbers had consented to the Service charges. By ‘properly verifiable’ we mean a clear audit trail that categorically cannot have been initiated by anything else than a consumer legitimately consenting and cannot have been interfered with since the record was created...

...2. We note that Prime Platform has previously stated that refunds of Service charges have been provided to consumers. Please supply documentary evidence that refunds were provided to complainants.”

The Executive considered the above information to be of regulatory benefit in the investigation as, given that complainants alleged that the Service charges were unsolicited, the Executive considered it important that the Level 2 provider should provide information evidencing that it held consent to charge complainants.

In addition, in light of the fact that the Level 2 provider had stated within its text message logs that it had refunded complainants, the Executive considered it important that the Level 2 provider should provide evidence substantiating its statements that refunds had been supplied.

The Level 2 provider was directed to provide the above information by 5pm on 08 May 2019. Despite the Executive receiving confirmation that the electronic direction was downloaded by the Level 2 provider and that the hard copy of the direction was successfully delivered by UPS and signed for, the Level 2 provider failed to respond.

The Executive wrote to the Level 2 provider on 20 May 2019 advising that a response to the Executive’s direction dated 01 May 2019 had not been received and that the Executive was now considering raising a breach of the Code. Despite the Executive receiving confirmation that the electronic copy of the Executive’s letter was downloaded, the Level 2 provider failed to respond.

The Executive therefore submitted that the Level 2 provider’s failure to provide information as directed had resulted in a breach of paragraph 4.2.3 of the Code.

2. The Level 2 provider had not provided any representations or response to the Warning Notice.
3. The Tribunal considered the Code and all the evidence in relation to this alleged breach. The Tribunal found that the questions asked of the Level 2 provider in the formal direction of 01 May 2018 were properly asked and capable of being answered. The Tribunal considered that the information requested was reasonably likely to have had a regulatory benefit to the investigation as it would have assisted in the investigation. The Tribunal therefore concluded, on the balance of probabilities, that the Level 2 provider had failed to disclose information to the Executive in breach of paragraph 4.2.3 of the Code.

Decision: UPHELD

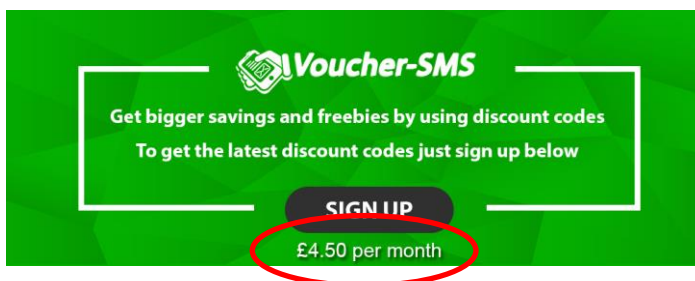
Alleged breach 4

Rule 2.3.2 of the Code

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

1. The Executive asserted that the Level 2 provider had breached rule 2.3.2 of the Code because Service promotional material misled consumers by providing incorrect pricing information.

The Executive relied on the Service promotional material and Service text message logs. The promotional material listed the Service price point as £4.50 per month.





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ENTER PIN NUMBER

1234

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However, the spend reminder messages in Service text message logs stated:

"FreeMsg: You are subscribed to Voucher-SMS.com charged at £4.50 per msg/max 2 per month until you send STOP to 61450. help@voucher-sms.com 0203 3185089"

"FreeMsg: Reminder: You are subscribed to Voucher-SMS.com charged at £4.50 per msg/max 2 per month until you send STOP to 61450. 0203 3185089"

In addition to the discrepancy between the Service promotional material and the spend reminder messages, the Executive noted from text message logs that there were examples of complainants receiving two chargeable Service messages in a month at a total cost of £9 per month, and not the advertised cost of £4.50 per month.

The Executive noted that promotional material supplied by the Level 1 provider to the Executive listed the price point as “you will be charged £4.50 pre [sic] text message. You may receive up to 2 text alerts per month...”. In addition, the Executive noted that the third-party verifier’s portal displayed a purported screen shot of the Service opt-in page containing the following pricing information: “...*you will be charged £4.50 per text message. You may receive up to 2 text alerts per month...*”. Notwithstanding this, the Executive asserted that it preferred to rely on the Level 2 provider’s promotional material, rather than promotional material displayed on the Verifier’s portal for the following reasons:

- i) one example promotional material supplied by the Level 1 provider did incorrectly state the Service price as “£4.50 per month”
- ii) the Executive had concerns about the validity of the information supplied by the Verifier
- iii) the Level 2 provider had provided promotional material to the Executive in response to requests for complainant message logs during the complaint period (June 2018-February 2019) which stated the incorrect price point of £4.50 per month
- iv) no explanation had been provided by the Level 2 provider for the discrepancy between the promotional material and the spend reminder messages which did state the correct Service cost.

The Executive submitted that promotional material contained an incorrect price point for the Service and therefore, on a balance of probabilities, at least some consumers were misled about the total monthly Service charge.

2. The Level 2 provider did not provide a response to the Warning Notice.
3. The Tribunal considered the Code and all the evidence before it.

The Tribunal noted that there was no explanation from the Level 2 provider whatsoever about the discrepancy in the cost information that had been submitted by them and what had been supplied by the Level 1 provider. The Tribunal further noted that complainants had stated that they had sometimes been billed £4.50 per month and sometimes £9 per month. The Tribunal noted that the double charging appeared to occur after the Level 2 provider was put on notice about the PSA’s investigation and thus appeared to be a deliberate construct designed to generate higher revenues.

Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

Sanctions

Initial assessment of sanctions

The Executive's initial assessment, before any potential uplift or downgrade in light of aggravating or mitigating features, 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 payment of the fine and the administrative charges, 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 that such claims are not valid, and provide evidence to PSA that such refunds have been made
- a fine of £850,000 broken down as follows:
 - Rule 2.3.3 - £250,000
 - Rule 2.3.1 - £250,000
 - Paragraph 4.2.3 - £250,000
 - Rule 2.3.2 - £100,000

The Tribunal agreed with the Executive's initial assessment of sanctions.

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 2.2.3

- this breach was **Very Serious**
- the nature of the alleged breach would have damaged consumer confidence in premium rate services
- the Service had very limited or no scope or ability to provide the purported value to consumers
- consumers have incurred a very high or wholly unnecessary cost
- the breach was of a significant or lengthy duration
- the breach demonstrated a fundamental disregard for the requirements of the Code.

Rule 2.3.1

- this breach was **Very Serious**
- the Tribunal considered that the nature of the breach was likely to severely damage consumer confidence in premium rate services

- the Tribunal was also of the view that the Service was incapable of providing the purported, or any, value to consumers.

Paragraph 4.2.3

- this breach was **Very Serious**
- the Tribunal considered that the information requested from the Level 2 provider was clear and was plainly related to the investigation. The Level 2 provider did not respond to the Executive or offer any explanation for failing to provide the information it had requested. The Tribunal was of the view that this was a deliberate failure on the part of the Level 2 provider
- the Tribunal also believed that the Level 2 provider's failure to disclose information that had a regulatory benefit in the investigation demonstrated a fundamental disregard for the requirements of the Code and completely undermined the regulatory system.

Rule 2.3.2

- this breach was **Serious**
- the Tribunal considered that the breach was committed intentionally and not recklessly as had been submitted by the Executive
- the Tribunal further considered that the Service had the potential to generate higher revenues as a result of the breaches and noted that some complainants were charged double
- the Tribunal also considered that the Service would have damaged consumer confidence in premium rate services.

Proportionality Assessment

Assessment of mitigating and aggravating factors

Mitigation

The Executive submitted that there were no mitigating factors. The Executive noted that the Level 2 provider had stated that it had provided refunds to complainants, but the Level 2 provider had failed to provide evidence of refunds that it had actually paid out.

The Level 2 provider did not make representations.

The Tribunal noted that it was not assisted by the fact that the Level 2 provider had not made any response to the Warning Notice.

The Panel noted that complainants had made different statements in their responses to the Executive's questionnaire. The Panel noted that some complainants had stated that they had received refunds, but complainants on the whole were unable to advise which company had refunded them. A complainant had stated that they received a "*refund via SMS Vouchers for £18, through Post Office*", which suggested that there was some evidence that the Level 2

provider had facilitated the payment of some refunds. As there was some evidence that complainants were refunded although it was largely inconclusive as to whom had refunded them, the Panel found that there was some limited mitigation that the Level 2 provider had made some refunds to consumers in an effort to relieve consumer harm.

Aggravation

The Executive submitted that it was an aggravating factor that the Level 2 provider had failed to follow the Consent to Charge Guidance.

The Executive submitted that it was an aggravating factor that the breaches continued after the Level 2 provider became aware of them until the Service was suspended by the Level 1 provider on 20 November 2018.

The Executive submitted that it was an aggravating factor that charges for some Service users increased to £9 per month in November 2018. The Executive asserted that given that the Level 2 provider was on notice of the Executive's concerns on 03 October 2018, the increased Service charges in November 2018 was an attempt by the Level 2 provider to maximise Service revenue prior to the Service's termination.

The Level 2 provider did not make representations.

The Tribunal agreed with the Executive's submissions as to the aggravating factors going to the case as a whole. The Tribunal was very concerned that the Level 2 provider had apparently started to charge consumers double once it was put on notice about the Executive's concerns and agreed that this was an aggravating factor. Although the Tribunal considered that there was a lack of cooperation by the Level 2 provider throughout the investigation, it agreed with the Executive that the Level 2 provider's failure to fully cooperate with the investigation and in particular its failure to respond to the Executive's directions for information was part and parcel of the breach of paragraph 4.2.3.

Financial benefit/ Need for deterrence

The Executive asserted that the Level 2 provider generated an estimated £55,271.98 (out of a total Service revenue of £173,223.00) from the breaches in the case and argued that there was a need to remove this financial benefit in order to achieve the sanctioning objective of credible deterrence. The Executive acknowledged that no Service revenue was paid out to the Level 2 provider.

The Level 2 provider did not make any submission in relation to the financial benefit, as it did not respond to the Warning Notice.

The Tribunal decided that it was necessary to remove the financial benefit made as a result of the breaches and that there was also a need to prevent the reoccurrence of such breaches by the Level 2 provider or the wider industry. The Tribunal acknowledged that the fine amount in its initial assessment, namely £850,000, exceeded the revenue proved to have flowed from the breaches and took into account that any fine would have a financial impact on the Level 2 provider. Nonetheless, the Tribunal believed that there was a need to remove the entire

revenue and impose an appropriate fine that was both reasonable and proportionate for reasons of credible deterrence.

Sanctions adjustment

The Executive stated that, although there was a very high breach severity, it had considered the Level 2 provider's revenue and the fact that the Level 2 provider had yet to receive that revenue, and believed that the fine amount should be adjusted and decreased to £250,000 in the interests of proportionality.

The Tribunal agreed with the Executive that the fine amount should be reduced to ensure that it was proportionate. It considered that a fine of £250,000 was proportionate and justified, given the need to remove the financial benefit and deter similar misconduct. The Tribunal was satisfied that the amount of the fine was necessary to achieve the sanctioning objective of achieving credible deterrence.

The Tribunal concluded that the seriousness of the case should be regarded overall as **Very Serious**.

Final overall assessment

Sanctions imposed

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

- 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 payment of the fine and the administrative charges, 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 that such claims are not valid, and provide evidence to PSA that such refunds have been made
- a fine of £250,000.

Administrative charge recommendation: 100%

Application for interim measures pursuant to Code of Practice paragraph 4.6

Case reference:	153966
Level 2 provider:	Prime Platform Solutions Ltd
Type of service:	Subscription alert service
Service name:	Voucher SMS
Level 1 provider:	Veoo Ltd
Network operator:	All mobile network operators
Cost:	£4.50 per message

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 **£210,613.80** of the Service revenue should be withheld.

Background:

2. The Tribunal has paid full regard to the material supplied by the Executive. The Tribunal noted in particular:
 - a) there have been 62 complaints received about the Voucher SMS service ("the Service") from members of the public alleging that they had been signed up to it without their consent
 - b) the nature of the apparent breaches referred to by the Executive
 - c) the information in the Track 2 Withhold Assessment.
3. The Tribunal was content that the Interim Warning Notice and Track 2 Withhold Assessment had been properly served on the Level 2 provider. The Level 2 provider made a brief response in an email dated 7 January 2019, which the Tribunal has considered and taken into account.
4. The Tribunal has considered 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.
5. 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 be imposed by a future Tribunal.

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

The apparent breaches

7. It appears, at this stage (and subject to evidence, arguments or information being later supplied and/or tested), that there have been breaches of rules 2.3.3, 2.3.1 and paragraph 4.2.3 of the Code by the Level 2 provider.
8. In reaching this decision, the Tribunal has considered the Executive's representations in the Interim Warning Notice and the Withhold Assessment.
9. The Level 2 provider stated the following in its response on 7 January 2019:

"We reject the allegations concerning consent to charge or that our access to the end portal was in any way unfairly restricted to end users by the use of a username/ password.

We will defend these allegations once given the opportunity to do so."

10. The Tribunal considers that there is a good arguable case that there has been a breach of rule 2.3.3 of the Code. It notes, in particular, the 62 consumer complaints about the Service as well as the failure of the Level 2 provider to supply evidence of consent to charge which is sufficiently robust to meet the requirements set out in the PSA's Guidance on Privacy and Consent to Charge. The Executive had sent 10 complainant mobile numbers to the Level 2 provider and requested that it provide evidence of consent to charge these complainants. The Level 2 provider did not provide any such evidence. The Tribunal notes the denial of this breach by the Level 2 provider but finds that this is a bare assertion with no supporting evidence. The Tribunal considers that there is sufficient evidence of an apparent breach of rule 2.2.3 of the Code.
11. The Tribunal finds that there is a good arguable case that there has been a breach of rule 2.3.1 of the Code. It noted the Executive's case, and supporting evidence, that it had visited www.voucher-sms.com/login which required a username and password in order to proceed any further. The Tribunal also viewed the complainant message logs which did not at any stage show that a username or password was sent to consumers. The Tribunal again notes the denial of this breach by the Level 2 provider but finds that this is a bare assertion with no supporting evidence. The Tribunal finds that there is evidence that consumers were being charged without being given a means of accessing the Service, in breach of rule 2.3.1.

12. The Tribunal considers that there has been an apparent breach of paragraph 4.2.3 of the Code. The Tribunal has reviewed the 4.2.1 direction issued to the Level 2 provider on 15 November 2018 and notes the deadline for responding was 22 December 2018. It finds that there is evidence that the Level 2 provider did not respond to this direction by the deadline and did not request an extension for supplying the information requested. However, on 8 December 2018 the Level 2 provider did respond, stating that it had not received any UK service revenue, supplying a bank statement to evidence this. The Tribunal is of the view that, although brief, this amounts to a response to the 4.2.1 direction. However, this was only provided several weeks after the deadline and following a chasing email from the Executive. The Level 2 provider did not make any submissions in relation to this breach in its email of 7 January 2019. The Tribunal finds that there is a good arguable case the Level 2 provider had breached paragraph 4.2.3 of the Code by supplying the directed information late; it was required to provide the information *when* requested.

Inability/unwillingness to comply with a sanction

13. The Executive's application for a withhold is made on the basis that there is a risk that the Level 2 provider would be unable and unwilling to pay a financial sanction if one is imposed following a final adjudication.

14. The Tribunal has taken into account the information and representations contained within the Interim Warning Notice and the Withhold Assessment.

15. The Tribunal has also taken into account what the Level 2 provider stated in its brief response, including:

"Prime Platform has received no revenue from the operation of this service to date. Total service revenue generated amounts to less than £100,000."

16. The Tribunal is satisfied that there is evidence demonstrating that the Level 2 provider would be unable to comply with any likely financial sanctions.

- a. The Tribunal finds that the Level 2 provider has insufficient available funds to comply with any likely financial sanction on the grounds that:
 - i. It had informed the Executive that it had not been paid any of the revenue for the operation of its premium rate Service
 - ii. even if the revenue for the operation of the Service were paid over by the Level 1 provider, they would not be sufficient to cover the likely financial sanctions
 - iii. the bank statement submitted by the Level 2 provider showed a zero balance as of 16 November 2018
 - iv. there was no evidence of the Level 2 provider having any material, alternative revenue streams.

17. Having considered the Level 2's conduct in the course of the Executive's enquiries and investigation into the Service, the Tribunal determines that there is evidence suggesting that it may be unwilling to comply with a likely financial sanction, although the evidence falls short of being determinative of such an unwillingness. It notes in particular:
- i. the Level 2 provider did not respond to the Executive's informal enquiry, dated 3 October 2018, which put the Level 2 provider on notice of its concerns and requested important information about the Service
 - ii. the Level 2 provider failed to respond to the Executive's 4.2.1 direction within the deadline.
18. The Tribunal notes that the Level 2 provider has suggested a withhold amount of £125,000. The Tribunal does not consider that this demonstrates or suggests that it would be willing or able to pay a fine as there is no evidence of it having any funds or other revenue streams. The Level 2 provider has stated, in correspondence with the Executive, that it had issued refunds to complainants. However, it did not supply any evidence to substantiate this and again the Tribunal does not consider that it indicates a willingness to comply with a financial sanction if one is imposed.
19. The Tribunal's overall assessment is that the evidence in the round is sufficient to satisfy the Tribunal on the balance of probabilities that the Level 2 provider will be unable to pay any financial sanctions which may be imposed in due course.

Withhold amount

- a. The Tribunal has considered the Executive's assessment of the likely future final sanctions, together with the 62 complaints generated by the Service to date and the gross Level 2 provider revenue of £41,732.24.
- b. In relation to the withhold amount, the Level 2 provider made the following representations:

"We would submit that a withhold amount of substantially more than the Network operator revenue generated by the service is without merit and designed to force Prime Platform Solutions Ltd out of business rather than meeting reasonable regulatory objectives.

In this case we would respectfully request that the withhold amount be set at no more than £125,000 plus the internal administration costs, until the matter has been formally decided upon."

- c. The Tribunal has considered the breaches on which it concluded that there was a good arguable case. It has determined that the apparent breaches of rule 2.3.3 and 2.3.1 are very serious. It considers that the apparent breach of paragraph 4.2.3 is moderate in terms of its severity.

d. The Tribunal considers that a future Tribunal would be likely to impose the following initial fines:

1. Rule 2.3.3: £250,000
2. Rule 2.3.1: £250,000
3. Paragraph 4.2.3: £20,000

e. The Tribunal considers that the initial fines would likely be reduced for proportionality at the final sanctions stage to a total of £150,000. When considering proportionality, the Tribunal has taken into account the Service revenue and the conduct of the Level 2 provider over the course of the proceedings. The Tribunal notes the Level 2 provider's submission that a withhold of more than £125,000 would have a severe impact on the business, but considers that the figure of £150,000 for a likely fine is proportionate and justified when viewed in the context of the apparent consumer harm, the nature and seriousness of the breaches and, in particular, the sanctioning aim of appropriate deterrence.

f. The Tribunal is of the view that there would also likely be an administrative charge of £10,000 and that the Executive's estimation of general refunds, given the number of complaints and charges incurred as of today's date, of £613.80, is reasonable.

20. The Tribunal is of the view that the risk of non-compliance cannot be remedied without the imposition of this level of withhold, particularly given its findings on the Level 2 provider's complying with any future financial sanction.

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

- a) the PSA is authorised to direct a withhold of up to £160,613.80
- 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
Tribunal Chair
9.1.2019