

## Tribunal meeting number 277

Case reference: 147802  
Level 2 provider: Entertainmob Kommunikation UG  
Type of service: Digital payments  
Level 1 provider: Dynamic Mobile Billing Ltd  
Network operator: All networks

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

### Background and investigation

The case concerned a voucher subscription service called “Voucher Bonanza”, which operated on a pin opt-in flow using shortcode 60444 (“**the Service**”). The Level 2 provider for the Service was Entertainmob Kommunikation UG (the “**Level 2 provider**”). The Service was charged at £4.50 per month to receive monthly discount voucher codes and sale notifications, for leading brands and retailers via text message (SMS) to a mobile phone. The Service was registered with the PSA on 17 January 2018.

The Level 1 provider in respect of the Service was Dynamic Mobile Billing Ltd (the “**Level 1 provider**”).

The Level 1 and Level 2 providers both stated that the value chain consisted of a third party named Kalastia Consulting Limited (the “**Supplier**”). The Supplier had referred to itself as the “Sub-L1”. The PSA’s Code of Practice does not recognise “Sub-L1s”. As at the date of this adjudication, the Executive is of the view that the Supplier is not a Level 1 provider for the Service and does not fall within the remit of the Code.

The Level 2 provider stated that the Service commenced operation on 23 January 2018. It also advised that the Service was promoted through co-registration promotion offers for shopping vouchers between 23 January 2018 and 1 December 2018 and would not be promoted again in the future. The Level 2 provider also supplied the following information on the Service, namely that consumers opted in by inputting their mobile MSISDN into a confirmation box within a promotion. Following this, they received a PIN to their mobile MSISDN which they were required to enter into a second box to verify their entry into the subscription. From that point on, consumers received discount voucher codes straight to their mobile MSISDN within a monthly SMS.

At the beginning of the investigation, the Level 2 provider advised that the Service was dormant (obtaining no new subscribers but still billing existing subscribers). Subsequently, the Service was described by other parties in the value chain as being disconnected (gaining no new subscribers and no longer billing existing subscribers). The Level 1 provider informed the

PSA that a request was made to cancel the shortcode on 7 July 2019. The Service was terminated on 8 August 2019.

The PSA received its first complaint about the Service on 24 January 2018. At the time of this investigation, the UK had not yet left the EU and the Communications Act (e-Commerce) EU Exit) Regulations 2020 were not in force. Because the Level 2 provider was based in Germany, the PSA needed to take additional steps before it could take any measures against it. Accordingly, on 26 July 2018 the Executive informed the Level 2 provider of its intention to send a formal referral to Germany. The Executive duly sent an e-Commerce referral to Germany. On 30 August 2018, the German authority confirmed that it did not intend to take its own measures against the Level 2 provider. The Executive therefore took derogation as of 30 August 2018 and informed the Level 2 provider of its intention to take its own measures in accordance with Article 3(4)(b) of Directive 2000/31/EC.

The Executive received a total of 132 complaints about the Service, of which 109 of these complaints were received after obtaining derogation on 30 August 2018. The main complaint period was between September 2018 and December 2018. The complainants variously alleged that they did not sign up to nor agree to be charged by the Level 2 provider and were unaware of the Service or what they were being charged for.

The Executive sent out a questionnaire on 29 October 2019 to the 132 consumers who had complained about the Service to the PSA. A total of 29 consumers responded to the questionnaire; 20 provided comprehensive answers and nine consumers could not remember any details about the matter or provided incomplete responses.

While the Level 2 provider communicated with the Executive for most of the investigation, it regularly requested extensions to the deadlines set by the Executive. In addition, when responses were received, they appeared incomplete and did not provide sufficient detail. The Executive did not receive a response to the sixth direction, about whether consumers had consented to the charges or not. The Level 2 provider failed to provide this information nor an explanation for its lack of response.

### **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 were raised:

- Rule 2.3.2 – Misleading
- Rule 2.3.3 – Consent to charge
- Paragraph 4.2.3 – Failure to provide information

The Level 2 provider acknowledged receipt of the Warning Notice but stated that the company was not in operation since December 2019 and there were no staff left to agree or disagree with the case.

On 28 January 2021, the Tribunal reached a decision on the breaches.

## **Preliminary issue – service and proceeding in absence**

The Tribunal was satisfied that the documents had been properly served by email and by post. This was evidenced by the fact that the Level 2 provider had acknowledged receipt of the Warning Notice on 7 January 2021.

The Tribunal was also satisfied that the Level 2 provider was notified about the hearing date and time, and that it had been given appropriate details about how to participate in the hearing if it wished to do so.

The Tribunal considered that it was fair and appropriate to proceed in the Level 2 provider's absence, particularly as the Level 2 provider had not expressed any desire to participate in the proceedings and had instead informed the Executive on 7 January 2021 that the company was no longer operational, the director and staff had left, and it would not be responding again because it had "nothing to say".

## **Submissions and conclusions**

### **Alleged breach 1**

#### **Rule 2.3.2**

*"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 for the following three reasons:

- the Level 2 provider purported to possess exclusivity in relation to the discount voucher codes through a paid subscription and did not make it clear to subscribers that it did not have any affiliation or expressed permission from the brands and retailers it supplied vouchers and codes for
- the Level 2 provider was charging consumers for a Service that supplied information which was free to obtain readily online
- the Level 2 provider had included well-known and popular brands within its promotional material and had misled consumers into believing that if they subscribed to the Service, they would be able to obtain discount vouchers for the brands used within the promotion.

#### **Reason one – purported exclusivity**

The Level 2 provider had supplied examples of the promotional material it had used to promote the Service. The Executive noted that the Level 2 provider had used logos and names of well-known brands and retailers such as ASOS, Tesco, John Lewis, and Apple within the promotional material for the Service. The Executive asked the Level 2 provider whether it had obtained permission from the retailers to promote the Service

in this way. The Level 2 provider responded to the Executive's informal enquiry stating that: *"We have permission to promote the Voucher Code including the name of under certain circumstances, branding of the retailer."* The Executive then requested that the Level 2 provider supplies evidence that it had permission to supply voucher codes for the brands it advertised within its promotions. The Level 2 provider responded: *"Entertainmob is in the business of promoting voucher codes. These are issued to the wider market by retailers/brands in order to promote their goods and services. It is not common practice for said retailers/brands to sign individual contracts with the various promoters of those voucher codes. It is common practice in the voucher codes industry to use the brand name when promoting the voucher. This has not traditionally required any formal consent in the form of a written agreement. It is more of a common/accepted industry practice. We would use the term "implied consent", rather than "permission"."*

The Executive asserted that the Level 2 provider had failed to demonstrate that it had received permission from the retailers. The Executive considered that the Level 2 provider was not given express permission to use the brands and retailers' logos and trademarks within its promotional material. The Executive considered that by failing to inform consumers that it was not affiliated with the brands and retailers advertised on its promotional material, the Level 2 provider had misled consumers into believing that the discount voucher codes supplied were exclusively available only to subscribers of the Service. The Executive asserted that the Level 2 provider had failed to explain and inform consumers of the full scope of the Service within the promotional material and stopped them from making a well-informed decision to opt into the Service.

In response to questioning by the Tribunal as to whether the voucher codes for the well-known brands would work, the investigator clarified that it was understood by the Executive that the voucher codes would still work despite the fact that the Level 2 provider did not have express permission from the various brands to use the voucher codes. The investigator clarified that it believed that consumers would still get a discount, but its case was that the Level 2 provider had not stated it was not affiliated in any way with the brands in question. The Tribunal queried what consumer harm was caused as a result of the Level 2 provider failing to stipulate its lack of affiliation with the brands. The investigator stated that the brands were well-known, and consumers had trust worthiness in them and the Level 2 provider was offering a false sense of security by purporting that the voucher codes were exclusive to the Service thereby enticing consumers to sign up. The investigator further stated that the Level 2 provider was not delivering on what it had promoted.

### **Reason two – the voucher codes were widely available online for free**

The Executive relied on the Level 2 provider's response to an enquiry, namely: *"By issuing a voucher code the retailer/brand is providing implied consent for said code to the re-marketed. The retailer/brand is generally willing for said remarketing/promotion to occur as it is driving (free) traffic to their retail environment and creating sales. The promoter of the voucher code is either incentivised by advertising sales or from other revenue streams. In the case of vouchercodes.com, their business model is to drive traffic to their website due to the*

*presence of the retailer vouchers, and then sell advertising. In the case of entertainmob, its business model is to drive users into a low-cost monthly subscription package based on the presence of the retailer vouchers, but we do not then push advertising to the user base [sic]."*

The Executive submitted that the Level 2 provider had given consumers the impression that they had exclusive use of the voucher discount codes provided and had accordingly misled consumers into believing that the codes were only available to those who had subscribed to the Service. The reality was that the codes were not exclusive and were actually widely available online at no cost.

### **Reason three – failing to issue a new voucher every month**

The Executive relied on another example of the Level 2 provider's promotional material that subscribers would "Get a new voucher every month from Voucher-Bonanza".

The Executive asked the Level 2 provider to supply the text message logs between the Service and consumers from a sample of affected MSISDNs in order to confirm whether discount voucher codes were being issued to subscribers, whether new vouchers were issued every month, and to confirm whether the codes for the well-known brands and retailers, which were present on the promotional material, were being supplied by the Service. The Level 2 provider supplied a PDF transcript of logs for each MSISDN it was given. The Executive considered the logs and observed that the discount voucher codes that were issued to the consumers did not include any of the brands that were displayed in the promotional material for the Service. MSISDNs that had been supplied for between seven to nine months had not received a discount voucher code for the brands present on the promotion but received discount voucher codes for other brands that were not advertised. The Executive further noted that several MSISDNs within the sample, which related to separate consumers, received codes and sale notification text messages in different months for the same brand. The Executive asserted that this demonstrated that some consumers were receiving the same code or sale notification for the same brand on more than one occasion while being subscribed to the Service. The Executive provided an example of one consumer who received a discount code for adidas for 15% in one month and then received a new code also giving a 15% discount code for adidas in the following month.

The Executive submitted that while discount voucher codes were being issued to subscribers of the Service, it was of the view that subscribers were being misled since the Level 2 provider had failed to fulfil its Service description to issue a new voucher every month. The Executive further submitted that the Level 2 provider had misled subscribers by including popular brands and retailers within its promotional material which were absent from all the message logs provided.

The Executive submitted that the Level 2 provider had breached rule 2.3.2 of the Code by advertising that the Service supplied "1000's of Voucher Codes from the top stores". This had misled consumers into believing that the discount voucher codes were

exclusive to subscribers of the Service, but the codes it supplied were available for free online as stated by the Level 2 provider. In addition, the Executive submitted that the Level 2 provider had misled consumers by possibly enticing them to subscribe to the Service by falsely advertising the availability of voucher codes for well-known brands and retailers which were not actually obtainable. The Executive argued that the voucher codes for the promoted brands were not provided to consumers and were merely used to entice consumers to opt into the Service.

In response to questioning by the Tribunal, the investigator clarified that while consumers appeared to be receiving one voucher code per month, they were not getting a variety of different codes. The investigator explained that the promotional material advertised many brands, but consumers were not receiving voucher codes from these brands.

2. Although the Level 2 provider acknowledged receipt of the Warning Notice, it did not provide a response to the breaches raised or sanctions that were sought by the Executive. The Level 2 provider had, however, responded to informal enquiries and formal directions sent by the Executive as has been noted above. The Level 2 provider had informed the Executive that it was not common practice for retailers or brands to sign individual contracts with various promoters of voucher codes, but it was common practice in the voucher code industry to use the brand name when promoting the voucher. The Level 2 provider went on to say this had not traditionally required any formal consent in the form of a written agreement and was more of a common or accepted industry practice and that by issuing a voucher code the retailer or brand was providing implied consent for the said code to be re-marketed.
3. The Tribunal considered the Code and all of the evidence before it.

The Tribunal was not persuaded by the Executive's first reason. It considered that if the discount worked then the Level 2 provider stating that it was not affiliated with the companies and brands in question did not amount to much. However, it was persuaded by both reasons two and three and particularly found the Level 2 provider's advertisement of "1000's of Voucher Codes from the top stores" highly misleading. The Tribunal considered that an ordinary consumer reading the promotional material on their phone would view the large type face heading advertising "1000's of Voucher Codes from the top stores" and be misled into believing that they would receive voucher codes from an assortment of household brand names and possibly a lot more vouchers than one per month, but the evidence demonstrated that this was not the case.

The Tribunal acknowledged that the Executive had not put its case on the number of voucher codes that were issued, as it was accepted by the Executive that consumers would receive one voucher code per month through the Service. Nonetheless, the Tribunal considered that consumers viewing the promotional material on their mobile phones particularly would possibly fail to appreciate that they would only receive one voucher code a month. The Tribunal also considered that consumers would believe that

they would get voucher codes from the brands that were being promoted and the promotional material that they had viewed was very likely to have enticed them to subscribe to the Service. However, the evidence demonstrated that voucher codes for those promoted brands were not provided to consumers. The Tribunal also found that the fact that the Level 2 provider did not stipulate that the voucher codes were already readily available online for free was misleading to consumers who were likely to think that they were signing up to a Service that offered some added value. In addition, the Tribunal considered that those consumers who received the same discount voucher code month after month, as demonstrated by the evidence, were not receiving a “new” code each month and this was also misleading.

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 been misled and upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD.

## **Alleged breach 2**

### **Rule 2.3.3**

*“Consumers must not be charged for PRS without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”*

The PSA Guidance on Consent to Charge (the “**Consent to charge guidance**”) stipulates that when acquiring consent to charge: *“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”*.

The Consent to charge guidance goes on to state that the consent obtained must be robust and properly verifiable. The guidance also provides advice concerning services that generate charges through the entering of a mobile number on a website.

1. The Executive asserted that the Level 2 provider had breached rule 2.3.3 of the Code because:
  - the Level 2 provider had failed to provide evidence that established it had obtained consent to charge consumers
  - PSA complainants stated that they had not signed up for the Service and it was unsolicited.

The Executive relied on evidence provided by complainants who informed the PSA that they did not recall consenting to a subscription or agreeing to be billed by the Level 2



provider and stated that they did not enter a PIN into the Service website, thereby signifying that no valid consent had been obtained by the Level 2 provider.

The Executive received 132 complaints about the Service, of which 109 of these were received after obtaining derogation on 30 August 2018. The main complaint period was between September 2018 and December 2018. In their complaint descriptions, complainants variously alleged that they did not sign up nor agree to be charged by the Level 2 provider and were unaware of the Service or what they were being charged for.

A selection of complaints which specifically state they did not consent to be charged by the Service are below:

I did not sign up for their services and I do not know who they are. They sent me 5 text so far and chard £3.75 every time. I want my money back and I think they are conning people and giving them a service what they did not ask for [SIC]

I am being charged every time a text is sent from this number. I have not signed up to anything from this company and I am being charged £3.75 a text message, this has now happened 4 times, I have tried to contact the company with no response, I just want the texts to stop please. [SIC]

This is a marketing company that I have definitely not signed up for! They have obtained my mobile number by some means or other which is unknown to me. They have so far texted me twice at a cost of £4.50 each, total cost to me £9.00. The money is taken off my account without any input by me. I have never contacted them in any way or given them permission to take money from my account. Please help me to stop this continuing. I am very concerned over this matter and feel helpless to stop. This is definitely a scam! [SIC]

I have received two texts from the number 60444 that I have not requested. This month I found out that I have been charged £3.75 for this service which I did not request. I contacted O2 to query what it was, they told me to text STOP to this number which I have done today (I'm not sure if I will be charged again for this!), and report the issue to PSA.O2 have now put a third part block on my account to hopefully avoid this happening again. [SIC]

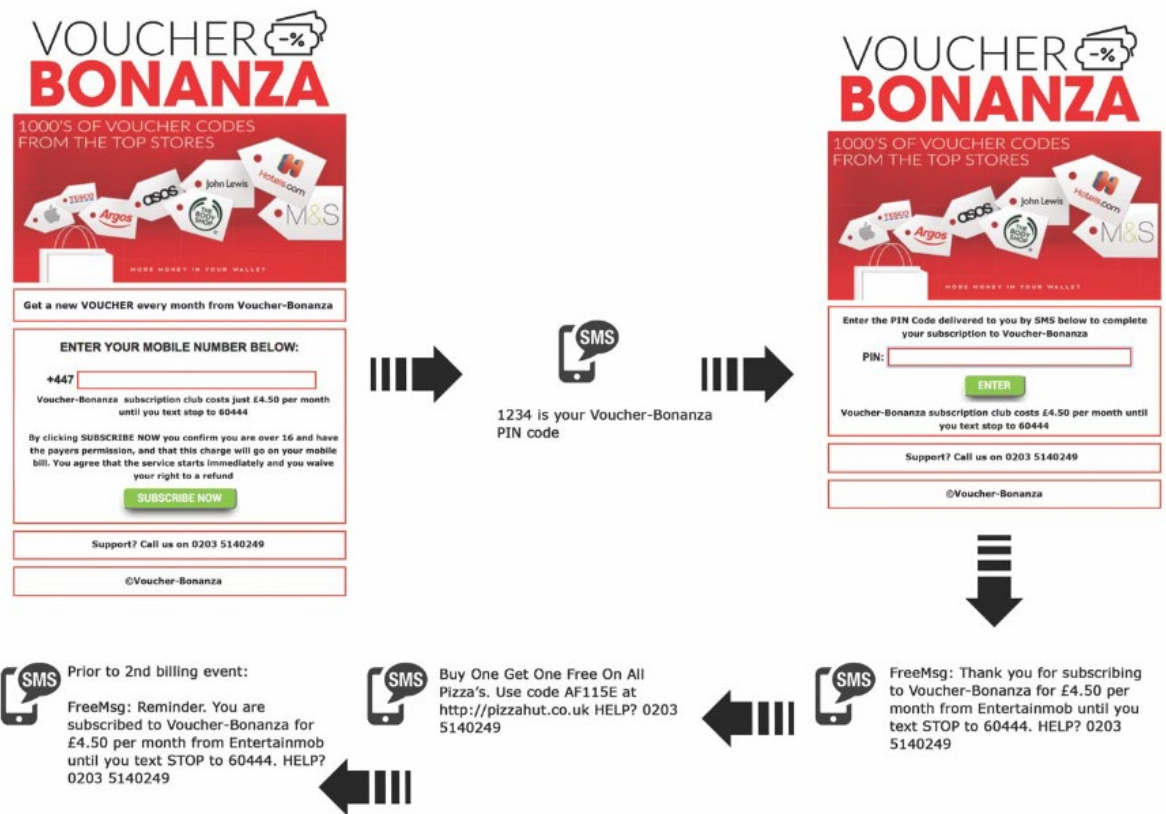
Of the 109 complaints, in 79 the complainant had said they either had not signed up for the service, did not want the service or were not aware of the service.



During the informal stage of the investigation, the Level 2 provider was asked to explain how a consumer opts into the Service, to which the Level 2 provider gave the following description:

*“SMS suits the often last-minute and often secretive nature of voucher code promotions, with brands not wanting to offer widespread discounts, whilst hitting certain monthly or quarterly sales targets, or clearing out certain stock or inventory items. Voucher Bonanza is signed up to by users only by co-registration flow, and costs £4.50 per month billed in advance until the user decides to stop. Voucher Bonanza subscription service billed at £4.50 per month until you send STOP to 60444. By clicking on the button you confirm you are over 16 and have the bill payers permission, and that this charge will go on your mobile bill. The service starts now and you waive your right to a refund.” [sic]*

The Level 2 provider also provided an image-based flow chart as seen below:



Voucher-Bonanza Offline PIN User Flow

From analysing the flow chart, the Executive understood that to be opted into the Service, the consumer would firstly have had to input their MSISDN into the first page of the promotional material. Then, they would have received a text message (SMS) which supplied a PIN code that they would have had to input into the second page of the promotional material to verify their consent to be subscribed and charged.

Due to the number of consumers that stated that they did not give their consent to be charged or did not recall giving their consent to be charged, the Executive requested

that the Level 2 provider supply the evidence that the consumers who made complaints to the PSA consented to be charged. The Executive requested that the Level 2 provider “please supply this evidence of consent for the following MSISDNs...” and provided a list of MSISDNs. The Level 2 provider responded by supplying a spreadsheet containing logs which it stated had been exported from their third-party verifier, Lexington. The spreadsheet supplied by the Level 2 provider contained a list of encrypted mobile MSISDNs accompanied by web links to the Lexington portal. When a link was selected, it led to a page within the portal, that revealed the MSISDNs; time stamp for entry into the Level 2 provider’s website; the date of entry and the time stamp for entry of the consumer’s PIN to initiate subscription into the Service. The link also provided a screenshot of the promotional material the consumer is said to have seen and inputted their MSISDN into, followed by the page they inputted the PIN into, which they would have received to their MSISDN via SMS.

The Executive observed that the link provided in the Level 2 provider’s response was to a static page, which did not allow interaction with the portal. Therefore the Executive was unable to conduct its own search nor explore the portal further. For this reason, the authenticity of the documents linked within the spreadsheet could not be examined robustly.

Furthermore, the documents supplied within the spreadsheet did not comply with point 2.10 of the Consent to charge guidance point, which states that: *“It will have to be proven to the Phone-paid Service’s Authority’s satisfaction that these records cannot be created with faked consumer involvement or tampered with in any way once created.”*

*“The Phone-paid Services Authority is provided with raw opt-in data (i.e. access to records, not an Excel sheet of records which have been transcribed) and real-time access to this opt-in data upon request. This may take the form of giving the Phone-paid Services Authority password-protected access to a system of opt-in records.”*

This means that it is the Level 2 provider that has to prove to the Executive that the evidence provided is tamper proof and could not be falsified to indicate consumer involvement.

On 29 October 2019, the Executive emailed all the consumers that had complained about the Service requesting that they provide a response to questions about the promotional material for the Service.

The Executive received a total of 29 replies from consumers, 20 of which came back providing full answers to the questionnaire, but 9 consumers could no longer recall details of the matter and were unable to provide any conclusive answers to the questions. In addition, 19 out of the 20 consumers who fully filled out the questionnaire said that they had not seen the promotional material or any other material online into which they had purportedly entered their mobile MSISDNs. Likewise, 19 out of 20 said that they had not received a text message to their mobile MSISDNs containing a 4-5-digit personal identification number (PIN).

The Executive submitted from the evidence highlighted above that the Level 2 provider's tendering of a spreadsheet, together with links to a static page on the third-party verifier's portal, did not sufficiently demonstrate evidence of consent to charge complainants for the Service. The Executive submitted that the Level 2 provider supplied evidence of supposed consent in a manner which could not be tested or verified by the Executive and therefore failed to prove that it had obtained verifiable consent from consumers who were subscribed to the Service. In addition, the evidence supplied by the Level 2 provider examined alongside the complaint descriptions received and the responses obtained through the complainant questionnaire, stating that consumers were charged without their consent, proved that the Level 2 provider did not hold robust evidence of consent to charge consumers, in breach of rule 2.3.3. of the Code.

2. Although the Level 2 provider acknowledged receipt of the Warning Notice, it did not provide a response to any of the breaches raised or sanctions that were sought by the Executive. The Level 2 provider had, however, responded to informal enquiries and formal directions sent by the Executive as noted above. This included supplying links to a spreadsheet containing logs which it stated had been exported from their third-party verifier, Lexington. The spreadsheet supplied by the Level 2 provider contained a list of encrypted mobile MSISDNs accompanied by web links to the Lexington portal.
3. The Tribunal considered the Code, the consent to charge guidance and all the evidence before it.

It noted that it was a Code requirement for the Level 2 provider to provide evidence that establishes that consumers had consented to be charged.

It noted that the guidance highlighted that the PSA be provided with raw opt-in data, i.e., access to records and not an Excel sheet of records which have been transcribed, and real-time access to this opt-in data upon request. The Tribunal therefore considered that the Level 2 provider did not provide the required evidence to establish consent.

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 3**

#### **Paragraph 4.2.3**

*“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 by failing to provide Service information when directed to do so.

On 6 January 2020, the Executive issued a direction to the Level 2 provider requesting information in relation to the revenue generated by the Service. The Executive sought to establish how much revenue was paid out to the Level 2 provider in relation to the Service. This information was pertinent to the Executive’s investigation as it would have provided clarity on the flow of revenue within a complex value chain. In addition, it would have provided clarity on the specific amount the Level 2 provider had received for the Service. The Executive gave the Level 2 provider the deadline of 13 January 2020 to respond to the direction request, however the Level 2 provider did not reply. On 9 January 2020, the Executive received a notification confirming that the Level 2 provider had downloaded the direction. The Executive sent a reminder email on 14 January 2020 advising the Level 2 provider that the deadline for the direction had now passed and that the information requested was still required. However, the Level 2 provider did not reply with a request for an extension, nor did it advise the Executive that a response was forthcoming.

The Executive therefore submitted that the Level 2 provider had failed to supply information which was likely to have a regulatory benefit to the investigation to the PSA when requested. The Level 2 provider had failed to engage with the Executive concerning the direction that sought to obtain crucial information, specifically a breakdown of the Service revenue the Level 2 provider had received. Accordingly, the Executive 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. Although the Level 2 provider acknowledged receipt of the Warning Notice, it did not provide a response to any of the breaches raised or sanctions that were sought by the Executive. The Level 2 provider had, however, responded to informal enquiries and formal directions sent by the Executive as has been noted above. The Level 2 provider did not respond to the Executive’s formal direction of 6 January 2020.
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 6 January 2020 were properly asked and capable of being answered. The Tribunal considered that the information requested was reasonably likely to have had a regulatory benefit in the investigation. The Tribunal commented that the Executive had shown convincing evidence and that it was a matter of fact that no response was received from the Level 2 provider in response to the direction of 6 January 2020. The Tribunal noted that while the Level 2 provider had engaged with the Executive

previously, albeit not entirely cooperatively and not without issue, it appeared to completely withdraw from engagement at this point.

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.

## Sanctions

### Representations on sanctions made by the Executive

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

- a formal reprimand
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of five years, starting from the date of publication of the Tribunal decision
- a requirement that the Level 2 provider must refund all consumers who claim a refund for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made
- a fine of £750,000 broken down as follows:
  - Rule 2.3.2 - £250,000
  - Rule 2.3.3 - £250,000
  - Paragraph 4.2.3 - £250,000

The Level 2 provider did not specifically comment on the sanctions sought by the Executive. In its email of 7 January 2020, it stated that the company had been closed since December 2019 and there was no office, bank account, director or staff, and queried why the Executive was pursuing the case when the company had stopped trading and the service was no longer operating.

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 2.3.2

- 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

- the Level 2 provider had committed the breach intentionally
- the Level 2 provider had included specific and popular brands within its promotional material but did not have a single voucher or sale code for those promoted brands

### **Rule 2.3.3**

- this breach was **very serious**
- there was a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers
- 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 added, 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.
- the breach was committed intentionally

## **Proportionality assessment**

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

#### **Mitigation**

The Executive submitted that it was a mitigating factor that the Service was disconnected on 30 June 2019, however it noted that this was done by the Supplier for the Service and not the Level 2 provider. It also noted that this occurred 11 months after the Level 2 provider was subject to an informal enquiry in relation to the Service. The Executive also submitted that it was a mitigating factor that the Level 2 provider appeared to have refunded some consumers that had contacted it to request refunds.

The Level 2 provider did not make representations.

The Tribunal attached limited weight to both mitigating factors that had been put forward by the Executive. The Tribunal 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. The Tribunal noted that just over half of the complainants that had responded to the Executive's questionnaire had advised that they had received refunds and some stated they had been refunded by their network while others did not know who had refunded them. As there was some evidence that complainants were refunded, although it was largely



inconclusive who had refunded them, the Tribunal found that there was some limited mitigation because the Level 2 provider had made some refunds to consumers in an effort to relieve consumer harm. The Tribunal commented that the termination of the Service by the Supplier after a considerable length of time would attract limited mitigation weight.

### **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 shortcode was disconnected on 7 July 2019.

The Executive also submitted that it was an aggravating factor that the Level 2 provider failed to respond altogether to the sixth direction it had issued. It also stated that throughout the investigation, the Level 2 provider often provided incomplete responses and the Executive would have to ask it to supply further explanations or clarify responses they had provided and this had an impact on the length of the investigation.

The Level 2 provider did not make representations.

The Tribunal did not agree that failure to follow guidance was an aggravating feature, as it considered that this was part of the breach. The Tribunal considered that it was an aggravating factor that the breaches continued after the Level 2 provider became aware of them but since derogation had been obtained on 30 August 2018 it would only take into account the period between the date of derogation and 7 July 2019. The Tribunal considered that the failure to respond to the Executive's sixth direction was part and parcel of the breach of paragraph 4.2.3, however, it was concerned by the general lack of cooperation by the Level 2 provider throughout the investigation, and accordingly found the Level 2 provider's conduct and subsequent withdrawal of engagement was an aggravating factor as a whole.

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

The Executive asserted that the Level 2 provider generated an estimated £944,194.49 gross revenue (out of a total Service revenue of £1,585,197.00) in the period from January 2018 to June 2019.

The gross revenue information given above was supplied by the Level 1 provider for the Service which it paid out to the Supplier. The Level 1 provider informed the Executive that it made revenue outpayments to the Supplier and not to the Level 2 provider directly. The Executive was unable to confirm the exact revenue figure of outpayments to the Level 2 provider. Although the Supplier provided revenue information, the Executive believed this information to be inconclusive, as it could not verify the figures the Supplier provided with the information given by the Level 1 provider. When the Supplier was questioned about the difference it stated that it kept a part of the revenue itself. The Supplier also informed the Executive that it was instructed to make outpayments of revenue to a third party called Mobile Affiliates Ltd ("**MAL**") at the behest of the Level 2 provider. The Supplier explained further that



the payments it made to MAL included outpayments for a number of different services. The Supplier advised that it was unable to separate the various payments to show what was retained, what was passed on to MAL or what part of it was for the specific Service the Executive was asking about. The Supplier did not confirm the percentage of the revenue share it retained. The Level 2 provider did not supply any bank statements to evidence the outpayments it had received from MAL. The Level 2 provider initially stated that it was unable to supply the bank statements due to its hard drive breaking down and subsequently declined to respond to the Executive's direction for information. As a result of the above, the revenue table provided by the Level 1 provider contained the gross revenue for the service paid out to the Supplier rather than the Level 2 provider. The Executive therefore submitted that, in the absence of evidence of any further deductions by the Supplier and/or MAL, which it argued would in any event amount to the Level 2 provider's business costs, the figure of £944,194.49 was the relevant gross Level 2 provider's revenue.

The Executive submitted that the entire amount of revenue amassed by the Service flowed from the breaches submitted above. However, as derogation was obtained on 30 August 2018, the Executive has altered the amount to reflect the post-derogation revenue generated by the Service which is £659,362.40 (covering the period from September 2018 to June 2019). This is due to the fact that measures taken must apply to the Level 2 provider from the moment when derogation is obtained and not retrospectively.

The Level 2 provider did not make any submission in relation to the financial benefit, as it did not adequately 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 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. It agreed that the relevant figure was £659,362.40 which covered the period post derogation and therefore only took into account the post-derogation harm. The Tribunal further noted that the Level 2 provider did not supply bank statements to evidence the outpayments it had received from MAL, stating initially that it was unable to supply them due to its hard drive breaking down, and subsequently declining to respond to the Executive's direction request.

### **Sanctions adjustment**

The Executive recommended that a sanctions adjustment should not be made in this case. The Executive was of the view that the Level 2 provider's conduct during the operation of the Service was intentional and has potentially negatively impacted the perception of premium rate services for consumers.

The Tribunal agreed with the Executive that there should not be a sanctions adjustment. It considered that a fine of £750,000 was proportionate and justified, given the need to remove

the financial benefit and deter similar misconduct. The Tribunal was satisfied that the level of the fine was necessary to achieve the sanctioning objective of achieving credible deterrence.

### **Final overall assessment**

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
- a requirement that the Level 2 provider must refund all consumers who claim a refund for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made
- a fine of £750,000 broken down as follows:
  - Rule 2.3.2 - £250,000
  - Rule 2.3.3 - £250,000
  - Paragraph 4.2.3 - £250,000.

Administrative charge recommendation: 100%