Tribunal meeting number 279

Case reference:	147804
Level 2 provider:	Globo Mobile Kommunikation UG
Type of service:	Digital payments
Level 1 provider:	Dynamic Mobile Billing Limited
Network operator:	All networks

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

The case concerned a voucher subscription service called "Voucher Promotions", which operated on a PIN-opt in flow using shortcode 65202 ("**the Service**"). The Level 2 provider for the Service was Globo Mobile 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 brands and retailers via text message (SMS) to a mobile phone number (MSISDN). 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 Code does not recognise "Sub-L1s".

The Level 2 provider stated that the Service commenced operation on 23 January 2018. It also said 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: that consumers opted in by entering 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 PSA received its first complaint about the Service on 23 January 2018. Since the Level 2 provider was based in Germany, the Executive was required to refer its concerns to the Member State in which the Level 2 provider was based before opening a formal investigation. Prior to the United Kingdom's exit from the European Union and the Single Market, and the government's introduction of the Communications Act (e-Commerce) (EU Exit) Regulations 2020, the PSA was first required to take additional steps prior to taking any measures against a provider of an "information society service" based in an EEA country.

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 the 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 112 complaints about the Service, of which 80 of these complaints were received after obtaining derogation on 30 August 2018. The main complaint period was between September 2018 and January 2019. The complainants variously alleged that they did not sign up to nor agreed 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 112 consumers who had complained about the Service. A total of 21 consumers responded to the questionnaire. 18 consumers provided comprehensive answers, but 3 consumers could not remember any details about the matter or provided incomplete responses to the questions asked.

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. The sixth direction requested information in relation to the revenue generated by the Service. The Level 2 provider failed to provide this information or give an explanation for its lack of response.

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 did not acknowledge receipt of the Warning Notice.

On 16 March 2021, the Tribunal reached a decision on the breaches.

Preliminary issue – service and proceeding in absence

The Tribunal considered as a preliminary issue whether the Level 2 provider had been served with the Warning Notice.

The Tribunal noted that the Warning Notice had been sent to the Level 2 provider's registered address by post. It also noted it had been sent by email and that the email had been successfully delivered to the email address for the Level 2 provider's director. The Tribunal further noted that the Level 2 provider's office was closed and so the Warning Notice had not been delivered by post, however, the Level 2 provider had not updated its address on the PSA's Registration system. The Tribunal noted that providers have a responsibility to register their up-to-date and active contact details with the PSA.

The Tribunal also noted that the Executive had attempted to call the Level 2 provider on 4 March 2021, but its calls were unsuccessful.

The Tribunal further noted that the Executive had notified the Level 2 provider of the Tribunal date and time by email on 9 March 2021. The email explained that the Tribunal would be held remotely via Microsoft Teams and outlined the instructions on how to join.

The Tribunal was therefore satisfied that the Executive had made all reasonable efforts to try to secure the participation of the Level 2 provider, and that it had provided clear details to the Level 2 provider on what steps it would need to take to participate in the proceedings remotely. In light of this, the Tribunal was satisfied that the necessary documents had been properly served by post and by email. The Tribunal was also satisfied that it was fair to proceed in the absence of the Level 2 provider.

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 implied that it had a connection with the well-known brands and retailers it included within the promotional material of the Service and did not make it clear to subscribers that it did not have any affiliation with the brands and retailers it advertised and supplied codes for

    - the Level 2 provider purported to possess exclusivity through a paid subscription in relation to the codes. However, the discount codes were freely available online.

- the Level 2 provider included well-known brands within its promotional material and misled consumers into believing that if they subscribed to the Service, they would be able to obtain codes related to the brands and retailers included within the promotion.

Reason one

The Level 2 provider had supplied examples of the promotional material it had used to promote the Service. The Executive observed that the Level 2 provider utilised logos of well-known brands and retailers within the promotional material for the Service. This suggested an affiliation between the Level 2 provider and the promoted brands/retailers on the promotional material. To establish whether the Level 2 provider had express permission to use these logos within its promotional material, the Executive asked the Level 2 provider to confirm whether it had obtained permission to use these materials. In response to the informal enquiry that was sent regarding the Service, the Level 2 provider stated that: "*We have permission to promote the Voucher Code including the name of under certain circumstances, branding of the retailer* [sic]." At the formal stage of enquiry, the Level 2 provider was asked to supply evidence to verify that it had permission to distribute the voucher codes of these brands and retailers. The Level 2 provider responded with the following:

"*Globo is in the business of promoting voucher codes. These are issued to the wider market by retailers/brands in order to promote their goods & 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"* [sic]."

The Executive asserted that the Level 2 provider had failed to demonstrate that it had permission from the brands and retailers to use their logos within its promotional material. The Executive considered that the Level 2 provider had deliberately included the logos of well-known retailers and brands to entice consumers into interacting with the Service and to give them a false sense of security due to the trust consumers attribute to these retailers and brands. 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 Level 2 provider was linked to these brands. 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.

Reason two

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 Globo, 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. In reality the codes were not exclusive and were widely available online at no cost. The Executive emphasised that the Level 2 provider had admitted it had obtained the codes online to send to subscribers of the Service. It was the Executive's view that by omitting this information within the promotional material, the Level 2 provider had given the impression that it alone had possession of these codes. In addition, the Level 2 provider used the words "Voucher Promotions subscription Club" which suggested that the codes were exclusive to its members alone and consumers would only have access to the codes by subscribing to the Service when this was not the case.

Reason three

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-Promotions".

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 in the first five months of their subscriptions, consumers did not receive codes for any of the brands and retailers depicted within the promotional material for the Service. If a consumer was subscribed to the Service for six months, then they probably would receive a discount code for Domino's Pizza (a brand that was depicted on the promotional material) but this was not the case for every consumer. Where consumers were subscribed for longer than six months, the Executive noted that consumers would not receive any other codes relating to the brands and retailers advertised on the promotional material. Instead,

consumers were sent codes for other brands that were not advertised. In addition, the Executive observed that two out of 27 MSISDN logs supplied by the Level 2 provider received identical codes in two months of their subscription to the Service. MSISDN 1 was subscribed to the Service for a total of 11 months and in the ninth and tenth month of their subscription they were issued with the same buy one get one free Pizza Hut voucher. To rectify this mistake, the Level 2 provider sent a free SMS to MSISDN 1 during February 2019 with a different code for the Fragrance Shop; however the Executive noted that the consumer had already received a voucher code for this retailer in the seventh month of their subscription. MSISDN 2 was sent the Pizza Hut code in two consecutive months and was also sent a replacement discount code for the Fragrance Shop despite the fact that the Level 2 provider had attempted to send the consumer a discount for the Fragrance Shop earlier on in their subscription, but the code was not successfully delivered.

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 submitted that subscribers only received one discount code that related to the brands and retailers depicted on the promotional material. Where a consumer had been subscribed for nine months or more, some consumers received the same codes for the same brands on more than one occasion. By supplying the same discount code or sale notification on more than one occasion, the Level 2 provider misled consumers by failing to fulfil its Service description to issue a new discount code every month.

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 easily obtainable 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 reality was that the voucher codes for the promoted brands were not provided to consumers and were merely used to entice consumers to opt-in to the Service.

2. The Level 2 provider did not make representations or 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 some of the formal directions sent by the Executive. In response to the informal enquiry that was sent regarding the Service, the Level 2 provider stated that it had "*permission to promote the Voucher Code including the name of under certain circumstances, branding of the retailer"[sic]*. At the formal stage of enquiry, 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 the Level 2 provider's suggestion that consumers would get vouchers codes from particular brands did not mean that the Level 2 provider had any affiliation with these companies.

The Tribunal was persuaded by both reasons two and three and particularly found that the Level 2 provider had given consumers the impression that they had exclusive use of the voucher discount codes provided and that the codes were only available to those who had subscribed to the Service which was highly misleading.

The Tribunal was of the view that the words "Voucher Promotions Subscription Club" implied an exclusivity that consumers would get codes that were not available anywhere else, but in reality, the voucher codes were not exclusive and they were widely available online at no cost.

Additionally, the Tribunal agreed with the Executive that the Level 2 provider's advertisement of "1000's of Voucher Codes from the top stores" was highly misleading. The Tribunal considered that an ordinary consumer would 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 commented that a consumer would need to live until their 80s and be subscribed from birth to get 1000 voucher codes.

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 the majority of the promoted brands were not provided to consumers.

The Tribunal further considered that the Level 2 provider had failed to fulfil its Service description to issue a new voucher every month. It examined the logs and the Tribunal was satisfied that in the first five months of their subscriptions, consumers did not receive codes for any of the brands and retailers depicted within the promotional material for the Service. It also was satisfied that some consumers were issued with codes for the same brand for more than one occasion and by supplying the same discount code or sale notification on more than one occasion, the Level 2 provider had misled consumers by failing to fulfil its Service description to issue a new discount code every month.

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;
    - PSA complainants who responded to the questionnaire advised that they did not enter a PIN into the Service website.

    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 112 complaints about the Service, of which 80 of these complaints were received after obtaining derogation on 30 August 2018. The main complaint period was between September 2018 and January 2019. 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:
"The reason I am reporting this issue is that I'm being unfairly and illegally charged £3.75 monthly for a 'service' that I did not knowingly sign up to and I receive no benefits from. I certainly did not agree to be charged for this (or any) amount by this company. I want the payments to stop and I want to be reimbursed for the amounts I have paid to date. Please note that I did not find this 'service' promoted. I did not actively seek out this 'service'. I am unaware as to how the company obtained my details in order that my bank account has been repeatedly debited – it is for this reason I state I have been illegally charged" [sic].

"*So far I've been billed for the last 3 months (June, July and August) £13.50 in total. Please find attached. I've never subscribed to this service so I have no idea why I'm getting these texts from 65202*" [sic].

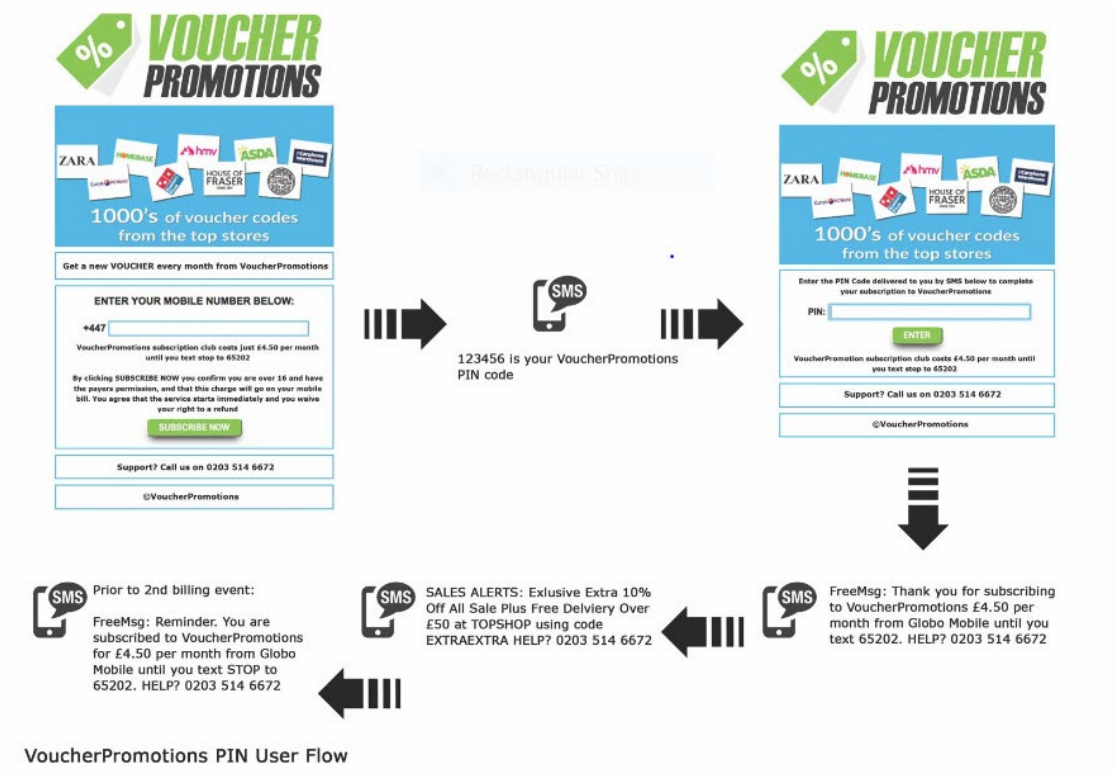
"*Once a month since May however no charge for June. It has been £4.50 each month. The company is voucher promotions which is again I haven't heard of this company prior to looking them up. I definitely have not signed up to anything and I am very careful when browsing the web*" [sic].

"*I was getting a text message from 65202, some promotional company which I wasn't aware of signing anything. This message comes once every month and charged 4.50 with a text delivery charge of 1.50. I have a contract with Three and I always check I don't run over my limits and I was with Three for over 17 years. I spoke to Three today and they said they can't block these premium companies instead contact them directly and explain to you. I have contacted this company but the automated message says "all agents are busy" and asking to leave the telephone number to stop the subscription which I have done. I would like to get a refund as I never signed any above and never send any text messages, these are the messages came to me. My bill in Sept £20.30, Nov 19.03 and high in December too. I only use my minimum allowance and never gone over the limit which is £11.00/month*" [sic].

On 19 October 2019, the Executive emailed all the consumers that had complained about the Service requesting that they answer a questionnaire regarding promotional material for the Service. In response to the email, the Executive received a total of 21 replies from consumers. 18 of which came back providing full answers to the questionnaire, but 3 consumers could no longer recall the details surrounding the matter and were unable to provide any conclusive answers to the questions. In addition, 15 out of the 21 consumers who fully filled out the questionnaire said that they had not seen the promotional material or any other material online on which they entered their mobile MSISDNs into. Out of the 21 consumers who fully answered the questionnaire, 18 said that they had not received a text message to their MSISDN containing a 4 digit or 5 digit PIN.

In the informal stage of the investigation, the Level 2 provider was asked to explain how a consumer opted into the Service, to which the Level 2 provider gave this brief 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 Promotions 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 Promotions subscription service billed at £4.50 per month until you send STOP to 65202. 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, which is seen below:



VoucherPromotions PIN User Flow

From the flow chart above, the Executive understood that to be opted into the Service the consumer would have had to: enter their MSISDN into the first page of the promotional material, then they would have received a SMS which supplied a PIN that they would then have to enter into the second page of the promotional material to verify their opt-in and consent to be subscribed and charged by the Service. 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 for the Service, 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 asked the Level 2 provider to supply evidence of consent for charge for a sample number of MSISDNs and the Level 2 provider responded by supplying an Excel spreadsheet containing web links that had supposedly 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 showed the time stamp for entry into the Level 2 provider's website, the date of entry and the time stamp for entry into the Level 2 provider's website, the date of entry and the time stamp for entry of the PIN that the consumer purportedly received to initiate subscription into the Service for that specific MSISDN.

The page also provided a screenshot of the promotional material the consumer purportedly saw and entered their MSISDN into, followed by the page where they enter the PIN which they purportedly received to their mobile via SMS.

The Executive noted that the links provided in the Level 2 provider's response was to a static page, which did not allow interaction with the portal. As a result, the Executive was unable to conduct their own searches or explore the portal further. For this reason, the authenticity of the documents linked within the spreadsheet could not be verified.

The Executive referred to the consent to charge guidance that states at paragraph 2.10 that: "*It will have to be proven to the Phone-paid Services 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.*"

The Executive submitted that the Level 2 provider's tendering of an Excel spreadsheet containing links to a static page to its third-party verifier's portal did not sufficiently demonstrate evidence of consent to charge for the Service. The Executive submitted that it could not test or verify the evidence that had been provided and therefore the Level 2 provider had failed to prove it had obtained verifiable consent from consumers who were subscribed to the Service. The Executive was further much more inclined to rely on the consumer complaints and responses to the questionnaires.

The Executive therefore submitted that the Level 2 provider had not provided robust evidence of consent to charge in contravention of rule 2.3.3 of the Code.

2. The Level 2 provider did not make representations or 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 some of the formal directions sent by the Executive. This included supplying links to a spreadsheet containing web links 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 established 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 had 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.

   The Tribunal was also persuaded by the evidence of a large number of complainants which it considered was extensive, consistent and detailed.

   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 because the Level 2 provider did not respond to a direction sent by the Executive and the information requested would have had a regulatory benefit in the investigation.

   The Executive sent a direction to the Level 2 provider via email on 9 January 2020 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 that the Level 2 provider had received for the Service. The Executive had been unable to establish the exact amount from the Level 2 provider and the Supplier. The Executive gave the Level 2 provider the deadline of 16 January 2020 to respond to the direction request, however, the Level 2 provider did not reply to the Executive's email or supply any response regarding the information that had been requested. The Executive did

not receive any notifications confirming that the Level 2 provider had downloaded the direction it was sent on 9 January 2020.

Prior to this direction, the Level 2 provider had been responding adequately to the Executive's correspondence. However, following the Executive's sixth direction of 9 January 2020, it was clear that the Level 2 provider had demonstrated an unwillingness to engage or co-operate with the investigation any longer.

The Executive submitted that the Level 2 provider had failed to supply information pertinent to the PSA when requested which was likely to have a regulatory benefit to the investigation. The Level 2 provider had failed to engage with the Executive regarding a direction that it had been sent to produce critical Service revenue information, specifically a breakdown of the Service revenue it received, and for this reason it has breached paragraph 4.2.3 of the Code.

2. The Level 2 provider did not make representations or 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 some of the formal directions sent by the Executive. The Level 2 provider did not respond to the Executive's formal sixth direction of 9 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 9 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 9 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 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 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 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 promoted the codes as being exclusive to the Service, but they were available for free elsewhere online.

Rule 2.3.3

- this breach was **very serious**
- there was a clear and highly detrimental impact or potential impact on consumers, directly or indirectly
- the Tribunal considered that the nature of the breach was likely to severely damage consumer confidence in premium rate services

- the Tribunal considered that consumers had incurred very high and unnecessary costs as they did not intend to sign up for the service.

Paragraph 4.2.3

- this breach was **very serious**
- the Tribunal considered that the information requested from the Level 2 provider was clear and 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 to 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 aggravating and mitigating factors

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 9 October 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 factor, 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 9 October 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. The Tribunal further considered that the Level 2 provider's responses to the Executive's directions had been misleading from day one and this was another aggravating factor to be taken into account. Although the Level 2 provider had given the appearance of cooperativeness by responding to earlier directions, the Tribunal noted that the Level 2 provider had originally stated that it had been given permission to use the retailers' logos and later stated that the consent to use these logos was implied.

Mitigation

The Executive submitted that it was a mitigating factor that the Service was disconnected on 9 October 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 happened 14 months after the Level 2 provider was the subject of 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. However only two out of nine consumers who confirmed they had been refunded specifically named the Level 2 provider as the organisation who had granted their 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 alleviate 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.

Financial benefit/Need for deterrence

The Executive asserted that post-derogation the Level 2 provider generated an estimated gross revenue of £742,344.61 (out of a total Service revenue of £1,206.094.50) in the period from September 2018 to October 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 they could not verify the figures the Supplier provided with the information given by the Level 1 provider. When questioned about this difference, the Supplier stated that it is because it keeps a part of the revenue, did not work for free and that it had bills to pay.

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 issued to MAL were in relation to a number of different services. In addition to this, the Supplier maintained 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, 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, 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 £742,344.61.

The Executive submitted that the entire revenue amassed by the Service post-derogation flowed from the breaches submitted above.

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 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 £742,344.61 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 had 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%