

## **Tribunal meeting number 281**

Case reference: 145055  
Level 2 provider: Mobtech UG  
Type of service: Subscription alert service  
Level 1 provider: txtNation Limited  
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**

1. This case concerned a subscription alerts service called 'Secret Sales Codes', which provided consumers with voucher codes for retail stores.
2. The service operated on short code 60031 and the cost was stated to be a single charge of £4.50 per month.
3. The promotional material supplied by the Level 2 provider indicated that the service used two opt-in methods – a PIN verification method and a MO (Mobile-Originated) keyword method. However, the Level 1 provider confirmed that no opt-ins had taken place via the MO keyword method.
4. For the PIN verification method, consumers were sent a PIN after entering their mobile number onto the service website and service charges would commence once the issued PIN was entered into the service website. The Level 2 provider stated that it used Lexington Verify to verify PIN entries.
5. The Level 1 provider stated that the service commenced operation on 22 December 2017.
6. The Level 1 provider stated that the service was suspended on 30 October 2018.
7. The Executive started to receive complaints about the service on 23 December 2017. However, 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.
8. 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.

9. Accordingly, on 7 June 2018, the Executive sent an e-commerce referral to the German Federal Ministry of Economic Affairs and Energy. On 30 August 2018, the German authority confirmed that it could not take measures to investigate, allowing the Executive to investigate the matter. The Executive took derogation on 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.
10. The Executive received 92 complaints concerning the service of which 14 complaints were received after derogation. The first complaint was received on 23 December 2017 and the first complaint after derogation was received on 29 September 2018. The main complaint period post derogation was between September 2018 and November 2018. The complainants variously alleged that they had not signed up to the service nor agreed to be charged by the Level 2 provider and were unaware of the service or what they had been charged for.

### **Apparent breaches of the Code**

11. The Executive sent a warning notice to the Level 2 provider on 23 March 2021 in which the following breaches of the PSA’s Code were raised:  
Rule 2.3.3 – Consent to charge  
Rule 2.3.2 – Misleading  
Paragraph 4.2.3 – Failure to provide information.
12. The Level 2 provider did not acknowledge receipt of the warning notice.
13. On 21 May 2021, the Tribunal reached a decision in respect of the alleged breaches.

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

14. The Tribunal considered as a preliminary issue whether the Level 2 provider had been served with the warning notice and whether it had been notified of the hearing date.
15. The Tribunal noted that the warning notice had been sent by post on 23 March 2021 to the Level 2 provider’s registered address. It was also sent by email, and 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 have registered their up-to-date and active contact details with the PSA.

16. The Tribunal further noted that the Tribunal case report had been sent to the Level 2 provider's registered address by post, and also by email. On 7 May 2021, UPS confirmed that the Tribunal case report had been delivered to the Level 2 provider's registered address. The Executive had also successfully emailed a copy of the Tribunal case report to the email address for the Level 2 provider's director on 5 May 2021. The Tribunal further noted that the Executive had notified the Level 2 provider of the Tribunal date and time by email on 5 May 2021. The email explained that the Tribunal would be held remotely via Microsoft Teams.
17. The Tribunal also noted that the Executive had attempted to call the Level 2 provider on 16 April 2021 and 19 May 2021, but its calls were unsuccessful.
18. The Tribunal had some questions for the Executive and called the investigator to provide further explanation about service.
- The Tribunal questioned whether the Executive had given instructions to the Level 2 provider on how to join the paper-based hearing via Microsoft Teams.
19. The Executive presented the informal representation form to the Tribunal that was sent to the Level 2 provider on 23 March 2021, which asked the Level 2 provider to complete the attached form if it wished to make informal representations at the Tribunal.
20. The Tribunal was 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 and instructions to the Level 2 provider on what steps it would need to take to participate in the proceedings. 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 2.3.3

*"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 the following regarding consent to charge:

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

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

## 2. What is robust verification of consent to charge?

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

### **(...) For charges generated by entering a mobile number on a website**

2.6 Some services are initiated by a consumer entering a mobile number on a website, or a mobile website (i.e. a website browsed on the mobile handset). This is most frequently where the consumer browses the site on a laptop or tablet, or where they browse via wi-fi – and not their mobile network's internet provision – on their phone. Consumers do not always appreciate that entering their number can result in a charge being generated to their mobile device, or that the entry of their number can be understood as being consent to future marketing by the provider concerned.

2.7 The risk of harm is increased where a consumer enters a mobile number belonging to someone else (either by mistake or deliberately) and generates a charge to a second – unwitting – consumer. Even if there are no chargeable messages, just free marketing messages, the second consumer often feels that their privacy has been invaded (see Part Two for further information around marketing).

2.8 So in these circumstances we recommend that consumers should always be encouraged to initiate services, or future marketing, with an MO message.

2.9 If alternative means of initiation are considered, the following factors must be considered:

- All costs and other charging information should be clearly stated and be proximate and prominent to the field where the consumer is to enter their number;
- After entering the number, a Mobile Terminating message ('MT') should be sent to the consumer. As an example this should state:

"FreeMsg: Your PIN is [we would suggest an alphanumeric format for better security], please delete if received in error"

2.10 Instructions on the website should make clear that the consumer has to enter the PIN they have received back into another field (preferably directly below the first field where they have entered their mobile number). If the PIN entered matches the PIN which was sent by text to the consumer, this would be considered to verify consent to a charge provided that:

- A record is taken of both elements of the opt-in process (i.e. the entry of the number and the generation of a text with a unique PIN, and the re-entry of that PIN back into the

website), and data is time-stamped in an appropriately secure web format (e.g. via https, VPN or SQL protocols);

- The PIN is not indefinitely valid – i.e. if no PIN is entered into the website within three hours of the MT message being sent, then the PIN should cease to be valid to that consumer;
- The records are taken and maintained by a third-party company which does not derive income from this PRS. We may consider representations that allow a third-party company which receives no direct share of PRS revenue from the transaction, but does make revenue from other PRS, to take and maintain records. 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; and
- 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.

2.11 While it is not a requirement of compliance with the PSA's Code of Practice, we would recommend that providers using PIN-based opt-in to verify purchases of PRS, or an opt-in to marketing, also keep such screenshot records as to link opt-ins to the web-based advertising which the consumer will have seen, prior to giving consent to be charged. This provides certainty, where there is a complaint, that not only has the consumer opted into charging but also that they could not have been misled by any advertising when they did so."

## The Executive

21. The Executive stated that the Level 2 provider had breached rule 2.3.3 of the Code as it had failed to provide robust evidence that established that consent to charge had been obtained from the consumers. Furthermore, The Executive had received 92 complaints from members of the public. Complainants had stated that the charges they had incurred were unsolicited and were adamant that they did not agree to be charged by the service and did not know how the Level 2 provider obtained their MSISDNs.

22. A selection of complaints which stated that consumers did not consent to be charged by the service are below:

"I have never heard of this company before. I never sent them my details, and certainly did not 'trigger' the service by messaging them and i've checked to make sure. They just started texting me for no reason and claim they were charging me for the privelege and its showing as billed on my o2 app." [sic]

"I have never subscribed to the Secret Sales code service. I find it unacceptable that someone can potentially charge my phone account without my permission."

"I HAVE NO IDEA WHAT THIS SERVICE REFERS TO AS I HAVE NOT SUBSCRIBED TO ANYSERVICE OR HEARD OF THIS WEBSITE."

"I don't know who is this company and never subscribed to anything."

"I never subscribed to this company, it's the second time they have ripped me off..."

"I never signed up for this "service", I have no idea how they got my mobile number (especially with the extra emphasis on GDPR these days), and I understand even less how they were able totake money out of my account by sending ME a text! If I had replied in order to be charged I could in theory understand more how that would work, but to simply RECEIVE a text from a stranger and be charged for it?? That just screams scam! I honestly can't even fathom how this is in any way legal."

23. During the informal stage of the investigation, the Level 2 provider was asked to provide a clear step-by-step user flow of the full consumer journey into the service, to which the Level 2 provider supplied the following screenshots:

## Steps 1-2 – Initial promotion pages

**Win a £250 Amazon Gift Card**  
To which address can we send the prize?

☐ Mr ☐ Ms

First Name  
Surname  
E-Mail  
Postcode City  
- Please select -  
United Kingdom  
Date of birth  
Phone

I agree that the competition's host and its prize sponsors may contact me by email, phone, SMS or post with more interesting offers. I can withdraw from this at anytime. For more information please click here. Entry to the competition without acceptance to the receipt of advertising via E-Mail or telephone is only possible for written entries.

>> Continue <<

**What is your marital status?**

☐ Single  
☐ Living together  
☐ Married

**What is your combined household income?**

☐ Less than £30K  
☐ £31K - £44K  
☐ £45K - £69K  
☐ More than £70K

**What is your residential status?**

☐ Home owner with mortgage  
☐ Home owner without mortgage  
☐ Tenant

**How do you currently pay for your energy bills?**

☐ Direct debit  
☐ Prepayment card  
☐ Other  
☐ Not applicable

**Have you been with the current provider for over 12 months and interested in updating your Broadband, TV or telephone contract? If you would like to receive a call from a Simplify Digital agent who could help you save up to £457 tick yes now.**

☐ Yes  
☐ No

simplifydigital

>> Continue <<

Imprint Data protection Opt-out

### Step 3 – Website landing page

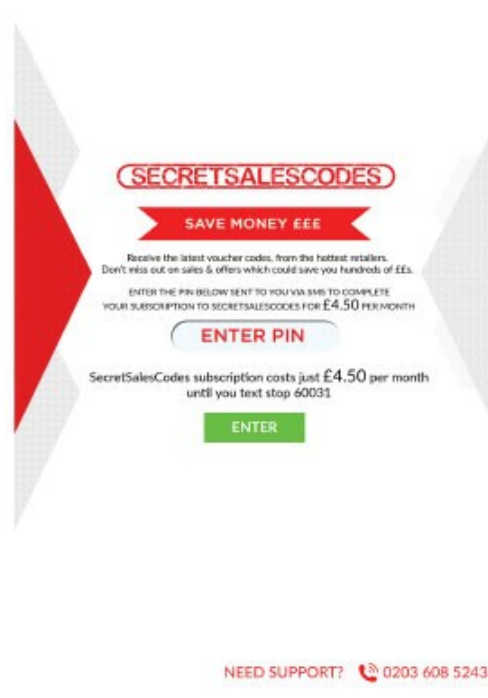


### Step 4 – Mobile entry page



NEED SUPPORT? ☎ 0203 608 5243

### Step 5 – PIN entry page



NEED SUPPORT? ☎ 0203 608 5243



24. The Executive noted from the above flow chart that to opt into the service the consumer would have had to:
- input their MSISDN into the first page of the service website,
  - 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 service website to verify their opt-in and consent to be subscribed and charged by the service.
25. During the informal stage of the investigation, the Level 2 provider was also asked on 26 January 2018 to supply the evidence that the consumers who made complaints to the PSA consented to be charged. The Level 2 provider was asked to provide evidence of how it robustly verified consent to charge. The Level 2 provider responded on 9 February 2018 by supplying web links for each MSISDN that had been obtained from the third-party verifier, Lexington Verify.
26. The Executive advised that the Lexington Verify links led to what appeared to be a static page within the verifier's online portal, that revealed the date and time the PIN message was sent to the consumer and the date and time the PIN was purportedly entered into the website page to initiate the subscription to the service. Furthermore, the Executive observed that the online portal pages were simply database records, which did not allow interaction with the portal. As sufficient access to the third-party verifier's portal had not been provided, the authenticity of the opt-in evidence could not be examined robustly.
27. The Executive also stated that the opt-in evidence did not comply with paragraph 2.10 of the Consent to charge guidance which states 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;"*.
28. On 17 May 2019, the Executive attempted to obtain the following evidence from the Level 2 provider: all correspondence with the verifier, copies of contracts, evidence of all invoices and payments made to verifier and evidence of consent to charge for an additional 12 MSISDNs. On 10 June 2019, the Level 2 provider supplied a copy of the contract with the verifier, however the additional information requested was never supplied.
29. The Executive submitted from the evidence highlighted above that the Level 2 provider's tendering of 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 asserted that this, together with the complaints received by the PSA, demonstrated that on the balance of probabilities consumers were charged without their consent and that the Level 2 provider did not hold robust evidence of consent to charge consumers, in breach of rule 2.3.3.



## The Level 2 provider

30. The Level 2 provider did not make representations or provide a response to the breach raised by the Executive in the warning notice. The Level 2 provider had, however, partially responded to informal enquiries and formal directions sent by the Executive as noted above.

## The Tribunal

31. The Tribunal carefully considered the Code, the Consent to charge guidance and all of the evidence before it.
32. The Tribunal was of the view that the static links, without any functionality on the third-party verifier's portal, could easily be manipulated and the Level 2 provider was required to provide dynamic links. The Tribunal also agreed with the Executive that information provided by the Level 2 provider did not demonstrate consent to charge, particularly given the content of complaints received. The Tribunal was of the view that the evidence from complainants was clear and convincing. It considered that the complainant evidence was extremely reliable. The Tribunal further noted that the Level 2 provider had failed to provide the information it was required to under rule 2.3.3, despite requests from the Executive. In the absence of a meaningful response from the Level 2 provider there was nothing to disprove the strong evidence from complainants.
33. For the reasons advanced by the Executive, the Tribunal was satisfied on the balance of probabilities that a breach of rule 2.3.3 of the Code had occurred. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: **UPHELD**

## Alleged breach 2

### Rule 2.3.2

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

The PSA guidance on Promoting PRS stipulates the following regarding promotions:

#### Paragraph 2.3

*"...the following information is considered key to a consumer's decision to purchase any PRS, and should be included in promotional mechanics for any PRS:*

- *Cost*
- *Brand information*
- *Product or service information*
- *How it is delivered or used*

- *How it is paid for – one off payment, recurring charges, etc.*
- *How to get help where necessary”*

#### Paragraph 7.1

*If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, a key term or condition likely to affect a consumer’s decision to use the service.*

### The Executive

34. The Executive stated that the Level 2 provider had breached rule 2.3.2 of the Code as promotions of its service did not provide consumers with all key information prior to purchase.
35. The Executive sent a request for the information to the Level 2 provider regarding each consumer complaint that the PSA had received. The Level 2 provider was asked to supply a message log showing all transactions between the consumer’s mobile number and the service as well as any promotional material for the service.
36. The Executive observed that the promotional material supplied by the Level 2 provider for web opt-ins did not indicate the number of voucher offers a subscriber would receive. In the Executive’s view, the language used in the promotions implied that numerous vouchers would be provided. However, the message logs supplied by the Level 2 provider showed that subscribers to the service received only one text message with a voucher offer per month.

The examples of language used in the promotions are below:

*“Save your money on the latest shopping vouchers sent direct to your handset”* *“Receive the latest vouchers codes, from the hottest retailers.”*

*“Don’t miss out on sales & offers which could save you hundreds of ££s.”*

37. The Executive was of the view that promising a number of voucher offers per month was key information to a consumer’s decision to subscribe to the service.
38. The Executive was of the view that the absence of clear information may have resulted in consumers making an uninformed decision when opting into the service. The Executive considered that it would be fair for consumers to assume that they would receive a number of voucher offers per month and not just one offer.
39. The Executive noted that the terms and conditions of the promotions for MO opt-ins stated that subscribers would receive a minimum of one voucher per month, however the Level 1 provider confirmed that no consumers had ever opted into the service via MO.

40. The Executive submitted from the evidence above that the Level 2 provider's web opt-in promotions did not provide all the relevant service information required for consumers to make an informed decision to use the service and therefore a breach of rule 2.3.2 had occurred.

#### **The Level 2 provider**

41. The Level 2 provider did not make representations nor did it provide a response to the breach raised by the Executive in the warning notice.

#### **The Tribunal**

42. The Tribunal carefully considered the Code, the PSA guidance on promoting PRS and all of the evidence before it.
43. The Tribunal agreed with the Executive's submission that the language used in the web-based promotion was misleading because it created a false impression that consumers would receive more than one voucher code per month.
44. The Tribunal further noted that the Level 2 provider had displayed voucher codes for the 'leading retailers' in its promotional material. However, the Tribunal was of the view that this also created a false impression because some of the icons for 'leading retailers' were not technically retailers but online coupon websites.
45. The Tribunal considered that the Executive's case was made out since the language used in the promotional material was misleading and created a false impression that more than one voucher code per month would be issued.
46. Taking all of the evidence into account, the Tribunal was satisfied on the balance of probabilities that a breach of rule 2.3.2 of the Code had occurred. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

### **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."*

#### **The Executive**

47. The Executive stated that the Level 2 provider had breached paragraph 4.2.3 of the Code as it had failed to provide information when directed to do so, which was likely to have a regulatory benefit in this investigation.

#### **Financial information**

During the investigation, the Level 2 provider was asked on 15 November 2018 to supply general service information and the financial information including but not

limited to: audited accounts, bank statements, details of any overdraft facility, evidence of sources and amounts of recent/projected income, any other information that may assist the Executive.

After several requests for extensions, on 13 December 2018 the Level 2 provider's solicitors supplied a profit and loss statement covering the relationship with the Level 1 provider. However, this did not comply with the direction, as none of the additional information requested in the direction for information (namely accounts, unredacted bank statements, details of any overdraft facility, and confirmation of other revenue streams and businesses in other jurisdictions) was included.

On 21 December 2018, the Executive informed the Level 2 provider's solicitors that the limited financial information provided (the profit and loss statement) was not sufficient for it to make a proper assessment of the financial status of the Level 2 provider. Furthermore, the Executive explained that the profit and loss statement which could not be verified was not sufficient to enable the Executive to assess the financial status of the Level 2 provider, such as its current cash and asset position, any other sources of credit available to it (such as an overdraft facility) or other revenue streams. The Executive provided a further extension until 31 December 2018 to supply the outstanding information and explained that it was considering raising a breach of paragraph 4.2.3 of the Code for the failure to supply the information requested.

On 29 December 2018, the Level 2 provider's solicitors requested a further extension until 4 January 2019, however no further information was ever supplied.

#### Service information

In the direction sent to the Level 2 provider on 17 May 2019, the Level 2 provider was asked to provide information relating to the service.

On 20 May 2019, the Level 2 provider's solicitors requested an extension until 31 May 2019 to comply with the direction, citing language issues with its client. The Executive confirmed that it would consider the request upon receipt of evidence regarding any communication and translation issues. No evidence was supplied by the Level 2 provider's solicitors and the direction was not responded to by the deadline.

On 6 June 2019, the Executive reminded the Level 2 provider's solicitors that the direction was not responded to and that it was considering raising a breach of paragraph 4.2.3 of the Code for the failure to supply the information requested.

The Level 2 provider's solicitors responded to the direction of 17 May 2019 on 10 June 2019. The Executive noted that the response did not include all the information requested, namely: a full summary of the way in which the service was intended to operate, pre-derogation opt-in figures, evidence of consent to charge for an

additional list of 12 MSISDNs, correspondence with the verifier, and evidence of invoices and payments made to the verifier.

On 12 July 2019, after the Executive granted a further extension request, the Level 2 provider's solicitors provided two responses, however, the responses did not include correspondence with the verifier, evidence of invoices and payments made to the verifier or evidence of consent to charge for the additional 12 MSISDNs.

On 16 August 2019, the Executive received confirmation that the Level 2 provider's solicitors were no longer instructed to represent their client in the matter.

On 27 August 2019 and 6 December 2019, the Executive sent further emails to the Level 2 provider advising it that information was still outstanding, and that a failure to supply the information may result in a breach of paragraph 4.2.3 of the Code being raised. The Level 2 provider did not respond to this correspondence or acknowledge it.

The Executive considered the required information to be of regulatory benefit as it would have assisted the Executive with the investigation.

In conclusion, the Executive submitted that the Level 2 provider had failed to provide information that would have allowed the Executive to make an overall assessment on whether the Level 2 provider would have been able to pay any potential financial sanctions imposed by a Tribunal.

Additionally, the Executive submitted that the Level 2 provider had failed to supply correspondence and evidence of any invoices and payments in relation to the verifier and evidence of consent to charge for 12 MSISDNs. The information requested would have allowed the Executive to understand the nature of the relationship between the parties, and ultimately to make a more in-depth assessment of the provider in relation to rule 2.3.3 and the Code guidance on consent to charge.

48. The Executive submitted from the evidence above that the Level 2 provider failed to provide information which was likely to have regulatory benefit in this investigation as directed, and therefore a breach of rule 4.2.3 had occurred.

### **The Level 2 provider**

49. The Level 2 provider did not make representations or provide a response to the breach raised by the Executive in the warning notice. The Level 2 provider had, however, supplied some of the information requested in the formal directions sent by the Executive as noted above.

### **The Tribunal**

50. The Tribunal considered the Code, and all the evidence before it.

51. The Tribunal considered that the Level 2 provider was aware of its obligation to supply the requested information as it had asked for several extensions to supply the information, but no meaningful information was supplied.
52. The Tribunal considered that the information requested was reasonably likely to have had a regulatory benefit in the investigation. The Tribunal was of the view that the Executive had shown convincing evidence, which clearly demonstrated that the Level 2 provider did not provide the required information, and this information was significant to the Executive's investigation.
53. The Tribunal also considered that the Level 2 provider deliberately failed to provide the requested information. It remarked that it was noteworthy that the Level 2 provider had not responded to the Executive even after it had requested further time to do so.
54. In light of the above, the Tribunal was satisfied, on the balance of probabilities, that a breach of paragraph 4.2.3 of the Code had occurred.

## Sanctions

### Representations on sanctions made by the Executive

#### Assessment of breach severity

55. 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 2.3.3**

This breach was **very serious**.

The Tribunal considered that the breach had a clear and highly detrimental impact directly on consumers who may unknowingly and unwillingly be being signed up to, and charged for, a service.

The Tribunal considered that consumers had incurred wholly unnecessary costs as they did not intend to sign up for the service. The Tribunal also considered that the breach occurred over a lengthy period of time. The Tribunal was of the view that the breach was likely to severely damage consumer confidence in premium rate services.

- **Rule 2.3.2**

This breach was **serious**.

The Tribunal considered that the breach had a clear and highly detrimental impact directly on consumers, as the information within the promotional material did not clearly state what was being provided.

The Tribunal considered that the nature of the breach was likely to severely damage consumer confidence in premium rate services, who may have signed up to a service without being fully informed.

The Tribunal considered that the breach occurred over a lengthy period of time.

- 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 supply the financial information and verifier information to the Executive which the Tribunal considered to be 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 deliberately.

### Initial overall assessment

56. 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 £600,000 broken down as follows:
  - Rule 2.3.3 - £250,000
  - Rule 2.3.2 - £100,000
  - Paragraph 4.2.3 - £250,000

57. The Level 2 provider did not make representations or provide a response to the warning notice.



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

## **Proportionality assessment**

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

#### **Aggravation**

##### **The Executive**

59. The Executive submitted that it was an aggravating factor that the Level 2 provider had failed to follow the Consent to charge guidance.

60. The Executive further submitted that it was an aggravating factor that the service continued to operate and charge consumers for nine months after correspondence was sent to the Level 2 provider. The last charge on the service shortcode occurred when it was suspended by the Level 1 provider.

61. The Executive also submitted that it was an aggravating factor that the Level 2 provider failed to provide financial information even after numerous extensions had been granted. The Level 2 provider's responses to the directions were often delayed and incomplete. Ultimately the Level 2 provider did not supply all the information requested.

62. The Executive was of the view that although these points were raised in Breach 3, they should be considered over and above the breach, as it extended to the Level 2 provider's general conduct.

##### **The Level 2 provider**

63. The Level 2 provider did not make any representations or respond to the warning notice.

##### **The Tribunal**

64. The Tribunal did not accept the Executive's submission that failure to follow published guidance was an additional aggravating factor to the case, deciding instead that this factor was inherent to the breaches themselves.

65. The Tribunal, however, agreed that continuing to charge users without their consent up until October 2018 was an aggravating factor to the case.

66. The Tribunal considered that the failure to provide the relevant information to the Executive's directions was part and parcel of the breach of paragraph 4.2.3.

## **Mitigation**

### **The Executive**

67. The Executive submitted that the service was suspended, however this decision was taken by the Level 1 provider and not the Level 2 provider. The Executive therefore did not consider this to be a mitigating factor.
68. The Executive noted the Level 2 provider's statement that several complainants had been refunded, however no evidence had been provided by the Level 2 provider to support these claims. Accordingly, the Executive did not consider this to be a mitigating factor as it was difficult to attach any weight to the Level 2 provider's assertion.
69. The Executive also noted that the Level 2 provider consented to a withhold, however the Executive did not consider this to be a mitigating factor, particularly as the Level 2 provider was generally uncooperative and did not fully respond to requests for information, as demonstrated by the breach of paragraph 4.2.3.
70. In conclusion the Executive did not identify any mitigating factors, a position with which the Tribunal agreed.

### **The Level 2 provider**

The Level 2 provider did not make any representations or respond to the warning notice.

### **The Tribunal**

71. The Tribunal noted that the service was suspended by the Level 1 provider and that it was not the Level 2 provider that had ended the service and therefore the Tribunal did not consider this to be a mitigating factor.
72. The Tribunal was of the view that the Level 2 provider's failure to respond to the Executive's directions was unrelated to the fact it had consented to a withhold. The Tribunal considered that the Level 2 provider's agreement to a withhold was not a mitigating factor.

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

73. The Executive asserted that although the total service revenue was £618,021.00, the relevant amount (post derogation) was £199,899.00.
74. The revenue information had been supplied by the Level 1 provider which showed a total outpayments figure of £264,929.75, of which £26,441.27 was generated post derogation.

75. The Executive noted that the Level 2 provider received a significantly lower percentage of the service revenue post derogation. This was the result of the mobile network EE clawing back (recalling) the service revenue generated in September 2018 and withholding service revenue generated in October 2018 (£154,084.50 in total).
76. The Executive was of the view that all of the post-derogation revenue flowed from the breaches of rule 2.3.3 and rule 2.3.2, as the issue of consent to charge and the omission of key information on service promotions had occurred throughout the operation of the service.
77. The Level 2 provider did not make any representations or respond to the warning notice and failed to respond to the Executive's directions to provide financial information with regards to the service.
78. The Tribunal agreed with the reasons given by the Executive that the relevant gross Level 2 provider revenue was £26,441.27. It agreed that it was correct to only take into account the revenue that had incurred post derogation. It was also satisfied that the post-derogation revenue flowed from the breaches of rule 2.3.3 and rule 2.3.2 for the reasons advanced by the Executive. The Tribunal also agreed that there was a need to remove the financial benefit accrued post derogation from the service given the nature of breaches in order to serve as deterrent to the Level 2 provider and wider industry.

### Sanctions adjustment

79. Considering the seriousness of the breaches and the need to deter conduct of this nature, the Executive's view was that it is proportionate to impose a significant financial sanction. The Executive recommended that a sanctions adjustment should be made in this case and the proposed fine sanction should be adjusted downwards to a total fine of £200,000, given the post-derogation revenue generated by the Level 2 provider as a result of the breaches was £26,441.27. The Executive stated that the recommended fine will remove the financial benefit and reflect the seriousness of the Level 2 provider's conduct.
80. The Tribunal decided that it was necessary to impose a financial penalty on the Level 2 provider in order to ensure that the sanction imposed had a deterrent effect in light of the severity of the breaches.
- The Tribunal agreed that it was appropriate to adjust the initial recommended fine downwards, for the reasons advanced by the Executive. The Tribunal was of the view that the figure of £200,000 was appropriate and proportionate, as it removed the post-derogation revenue which had been generated by the service and was also sufficiently high to achieve the sanctioning objective of credible deterrence in combination with the other recommended sanctions.

## Final overall assessment

81. The Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

## Sanctions imposed

- 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 charge, whichever is the later
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made
- a fine of £200,000.

82. Administrative charge recommendation: 100%