

Tribunal meeting number: 260  
Case reference: 145440  
Level 1 provider: MobBill (UK) Limited  
Level 2 provider: Izesoft, Netherlands  
Network operator: Hutchinson 3G UK Limited, operating under the brand name Three.

This case was brought against the Level 1 provider under Paragraph 4.5 of the 14<sup>th</sup> edition of the Code of Practice.

## **Background**

The case concerned the Level 1 provider MobBill (UK) Limited (the "**Level 1 provider**"). The Level 1 provider had been registered with the Phone-paid Services Authority ("**PSA**") since 6 March 2013. Previously the Level 1 provider had operated as a Level 2 provider for an adult subscription service.

On 1 August 2015, the Level 1 provider signed an agreement with Hutchison 3G UK Limited, that operated under the brand name Three (the "**Mobile Network Operator**"). The agreement permitted MobBill (UK) Limited to become a Level 1 provider. Consequently MobBill (UK) Limited became a payment intermediary for merchant services to charge consumers by charge to direct billing.

## **The Service**

The Service was a subscription service called Gamazing (the "**Service**") charged at £4.50 per week and operated as a pilot for a single-click opt-in model, approved only on the Mobile Network Operator Three's network. The Level 2 provider was Izesoft (the "**Level 2 provider**").

Prior to the commencement of the Service, the Level 1 provider met with the Executive on 13 January 2017. At this meeting the Level 1 provider proposed a new adult service with a single-click payment model. The Executive made the Level 1 provider aware that Special conditions on adult services prohibited single-click models. In light of this, the Level 1 provider adapted its proposal to running a single-click payment model on a service type which carried less risk.

During a meeting in January 2017, the Executive and the Level 1 provider agreed that a single-click model could be operated on a gaming service instead of an adult service.

The Level 1 provider worked with both the Executive and the Mobile Network Operator to develop the user journey.

Between 17 January 2017 and 23 January 2017, the Level 1 provider continued to correspond with the Executive and the Mobile Network Operator in relation to the single-click payment model. During those discussions the Executive referred the Level 1 provider to the requirements of the Code regarding transparency, pricing and fairness which were fundamental for the untested Service model.

In an email dated 23 January 2017 the Executive said the following:

*Technically we don't sign off on any promotional copy we're given. This is in order not to prejudice any possible future Tribunal judgement as part of an investigation into a service. However, if you make these changes/follow these instructions then in our view what you have supplied would be capable of compliance with the Code*

It was decided that the Service should be operated as a pilot due to the single-click payment model which was proposed. The single-click payment model was at that time an untested model which had the potential to increase the risk of consumers inadvertently subscribing to a service.

Due to the untested nature of the single-click payment model, the Executive provided some guidance to the Mobile Network Operator in respect of Key Performance Indicators ("**KPIs**") it might wish to consider using in the pilot. As the Service posed an obvious high risk, the KPIs set were more stringent than usual in an attempt to minimise any risk.

The Mobile Network Operator included clauses within its contract with the Level 1 provider which required the Level 1 provider to comply with the Executive's Code and which specified that the Level 1 provider should adhere to the following KPIs:

- Call to Activations (CTA) to be less than 2%

The number of calls received by MobBill customer care relative to the number of activations generated including the % increase/decrease week on week as a % of end user calls.

- Seven day churn rate to be less than 30%

First week opt out/cancellation ratio % to activations (physical opting out). The goal was to have no more than 30% per week for normal services and no more than 50% for free services.

- Refund to end user spend ratio to be less than 1%

- Service usage tracking

Time stamps of all user interaction had to be kept on file and reported on after first 14 days and monthly thereafter. This was defined as being the number of times on average that users (customers) engaged with the platform post subscription and before they unsubscribed.

- Customer survey

Within 14 days of launch and monthly thereafter, a customer survey of 10% of active user base was to be carried out regarding the satisfaction of service. The goal was for 50% of sample base to be satisfied.

- Refund to activation ratios

This measured the ratio of the number of refunds issued in proportion to the number of new subscription activations.

- Immediate churn (less than 20 minutes) to be less than same day churn

This KPI measured how many users unsubscribed from the Service within the first 20 minutes or on the first day of the service.

- Traffic IDs ('TIDs') must be passed to MobBill as normal to aid optimisation

Traffic IDs tracked the sources of the Service promotions, allowing the Level 1 provider to identify which promotional campaigns generated increased interactions with the service.

- General "big up" report

This KPI related to reports on the other KPIs being provided to the Mobile Network Operator and was set as an opportunity for the Level 1 provider to show how the product and flow was good for all of the parties concerned.

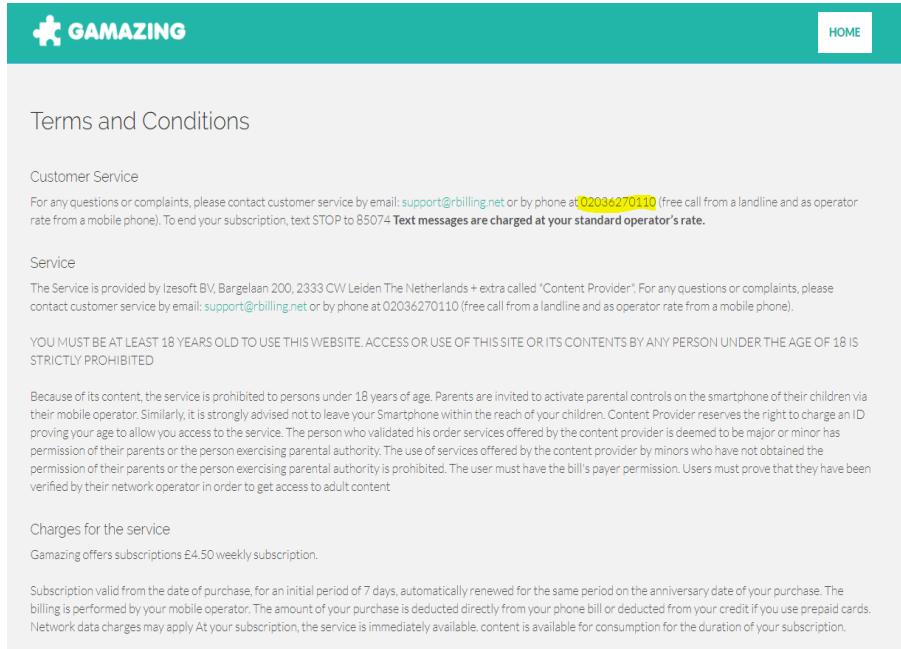
- Three monthly online check in form to be filled in once a month.

Based on the information received from the Mobile Network Operator, transactions began on 16 June 2017.

On 3 August 2017, the Executive asked the Level 2 provider to confirm the way in which the Service was intended to operate. The Level 1 provider responded on behalf of the Level 2 provider with the following description and screenshots of the service flow:

***“User subscribes to play HTML5 games for 4,50/week. Games are supplied unlimited for duration of paid subscription until user unsubscribes from service.” [sic]***

## **Terms and Conditions**



The screenshot shows the 'Terms and Conditions' page on the GAMAZING website. The page has a teal header with the GAMAZING logo and a 'HOME' button. The main content is on a light grey background. It includes sections for 'Customer Service', 'Service', 'YOU MUST BE AT LEAST 18 YEARS OLD TO USE THIS WEBSITE...', 'Charges for the service', and a paragraph about subscription validity and billing.

**GAMAZING** HOME

### Terms and Conditions

**Customer Service**  
For any questions or complaints, please contact customer service by email: [support@rbilling.net](mailto:support@rbilling.net) or by phone at 02036270110 (free call from a landline and as operator rate from a mobile phone). To end your subscription, text STOP to 85074. **Text messages are charged at your standard operator's rate.**

**Service**  
The Service is provided by Izesoft BV, Bargelaan 200, 2333 CW Leiden The Netherlands + extra called "Content Provider". For any questions or complaints, please contact customer service by email: [support@rbilling.net](mailto:support@rbilling.net) or by phone at 02036270110 (free call from a landline and as operator rate from a mobile phone).

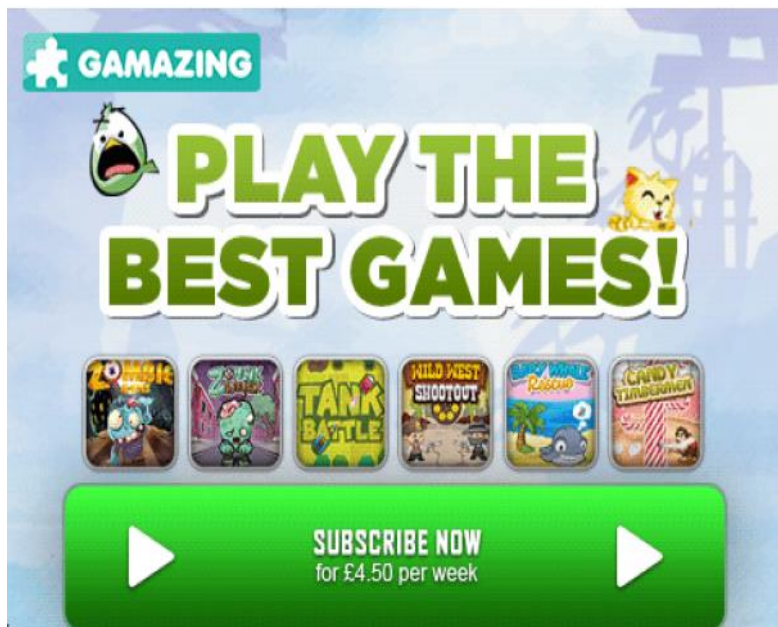
**YOU MUST BE AT LEAST 18 YEARS OLD TO USE THIS WEBSITE. ACCESS OR USE OF THIS SITE OR ITS CONTENTS BY ANY PERSON UNDER THE AGE OF 18 IS STRICTLY PROHIBITED**

Because of its content, the service is prohibited to persons under 18 years of age. Parents are invited to activate parental controls on the smartphone of their children via their mobile operator. Similarly, it is strongly advised not to leave your Smartphone within the reach of your children. Content Provider reserves the right to charge an ID proving your age to allow you access to the service. The person who validated his order services offered by the content provider is deemed to be major or minor has permission of their parents or the person exercising parental authority. The use of services offered by the content provider by minors who have not obtained the permission of their parents or the person exercising parental authority is prohibited. The user must have the bill's payer permission. Users must prove that they have been verified by their network operator in order to get access to adult content

**Charges for the service**  
Gamazing offers subscriptions £4.50 weekly subscription.

Subscription valid from the date of purchase, for an initial period of 7 days, automatically renewed for the same period on the anniversary date of your purchase. The billing is performed by your mobile operator. The amount of your purchase is deducted directly from your phone bill or deducted from your credit if you use prepaid cards. Network data charges may apply. At your subscription, the service is immediately available. content is available for consumption for the duration of your subscription.

## **Banner**



The banner features the GAMAZING logo at the top left. The main text reads 'PLAY THE BEST GAMES!' in large, bold, green letters with a white outline. Below the text are five game icons: 'ZOMBIE BATTLE', 'TANK BATTLE', 'WILD WEST SHOOTOUT', 'RASCALS', and 'CANDY TUMBLERMAN'. At the bottom is a large green button with a white play icon on the left and right, and the text 'SUBSCRIBE NOW for £4.50 per week' in the center.

**GAMAZING**

# PLAY THE BEST GAMES!

ZOMBIE BATTLE TANK BATTLE WILD WEST SHOOTOUT RASCALS CANDY TUMBLERMAN

**SUBSCRIBE NOW**  
for £4.50 per week

## **Payment Page**



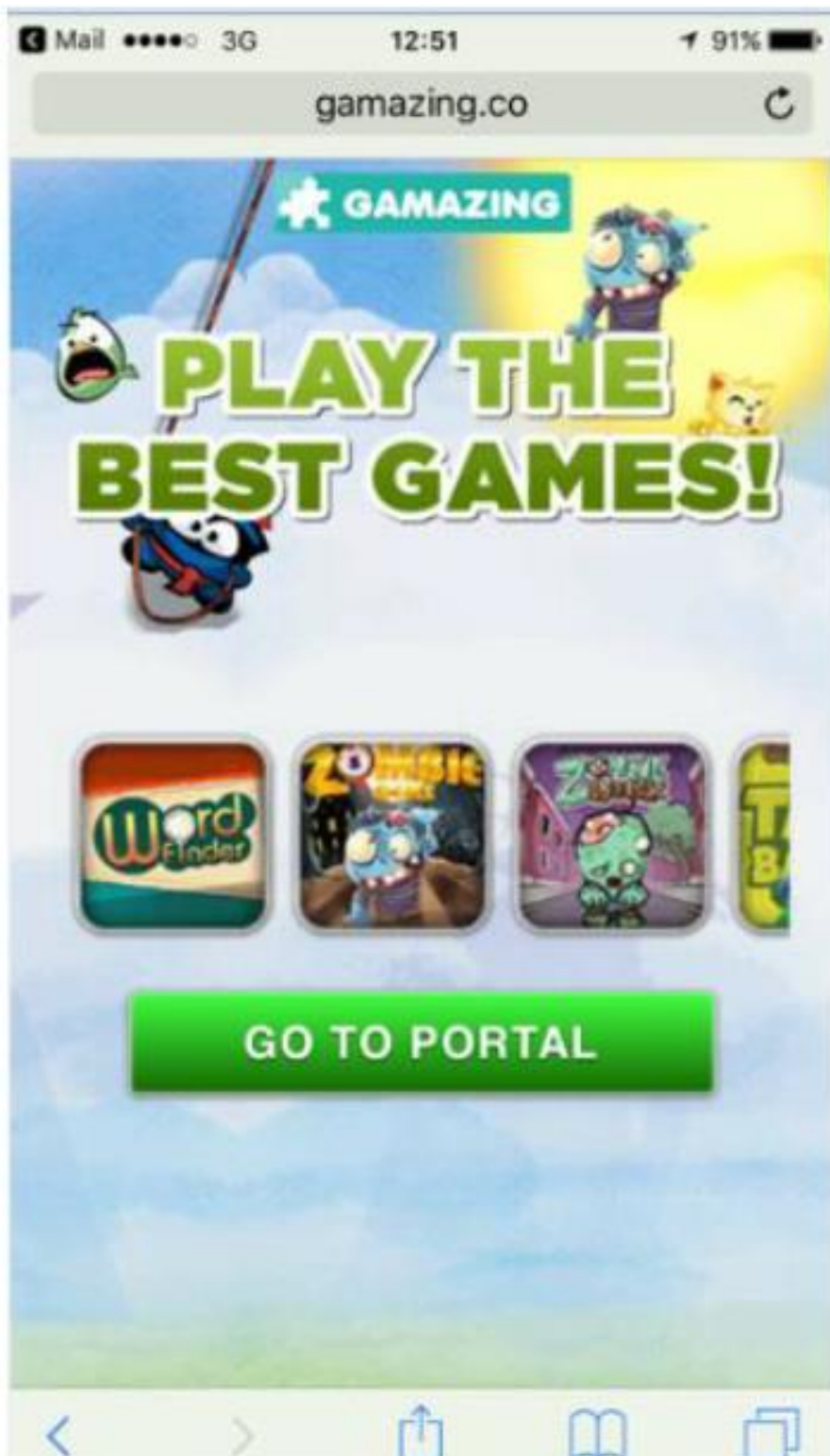
Service will be charged to your mobile phone account.

**SUBSCRIBE NOW**  
£4.50 per week

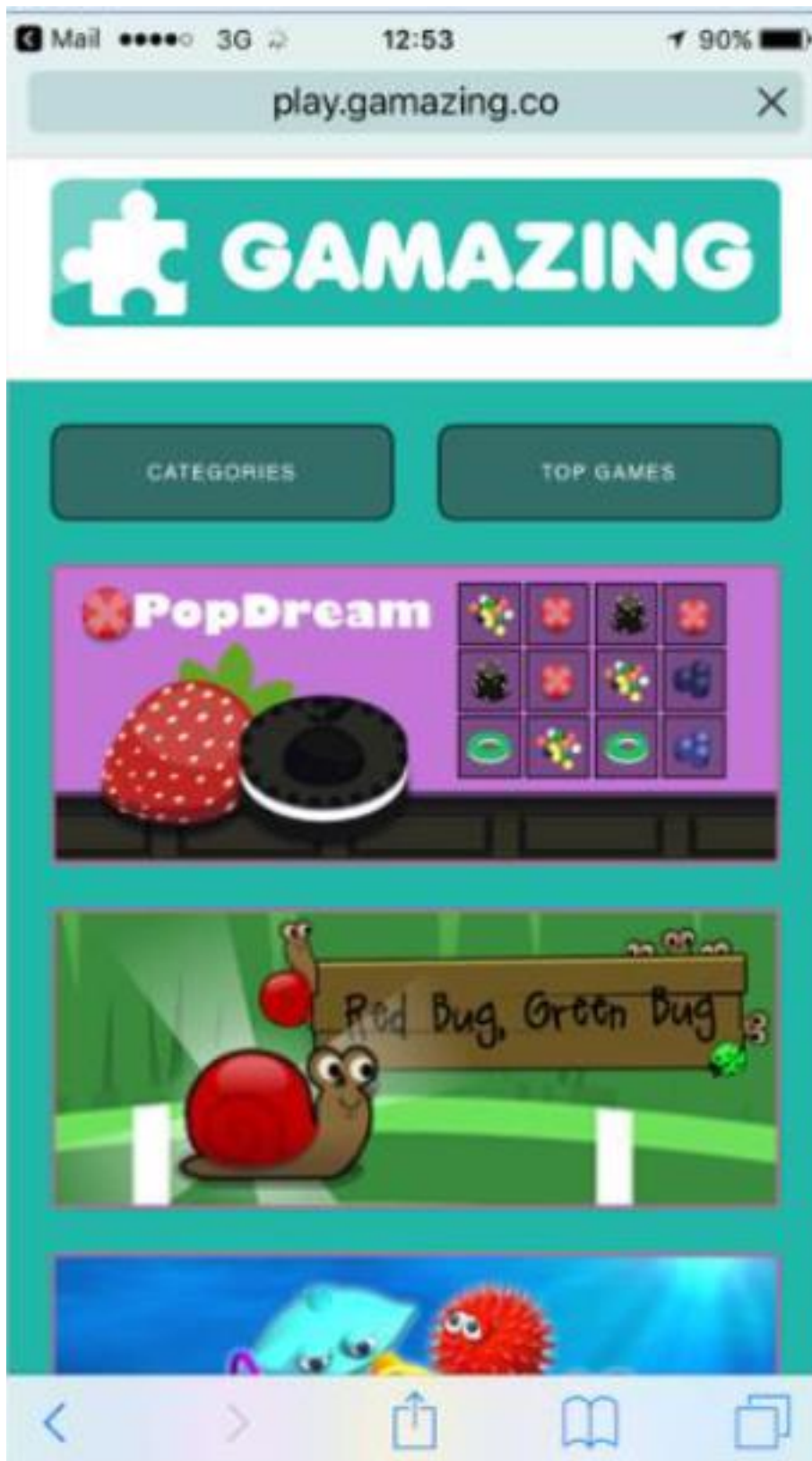
Help: 0203 62 70110. Purchase subject to gamazing Terms. Subscribe until you Text Stop to 85074.

\*This is a subscription service; You will be billed £4.50 per week, charged directly to your mobile bill or credit, until you text STOP to 85074. By signing up for and/or using the service you acknowledge and confirm that you have read the Terms and Conditions and Privacy Policy, that you are a resident of the United Kingdom, are 18 years or older and are authorized mobile account holder or have their consent. To stop receiving marketing info opt out via this page. Helpdesk: 02036270110 | Email:

Service portal page



Subscriber content page



## Text message subscription confirmation



On 30 June 2017, the Executive received the first complaint relating to the Service. From that time onwards the number of complaints about the Service continued to rise and peaked



between September and November 2017 during which time the Executive received 190 complaints from consumers. In total the Executive received a total of 281 complaints about the Service.

Complaints to the Executive generally alleged that children had signed up to the service when using the bill payer's phone, that consumers were unknowingly subscribed to the Service, or that they were unable to contact the Level 1 provider to unsubscribe from the Service.

Consumers with concerns about the Service were given the Level 1 provider's contact details for complaint handling by the Mobile Network operator and the Executive also received the Level 1 provider's contact details when sent reminder text messages from the Service.

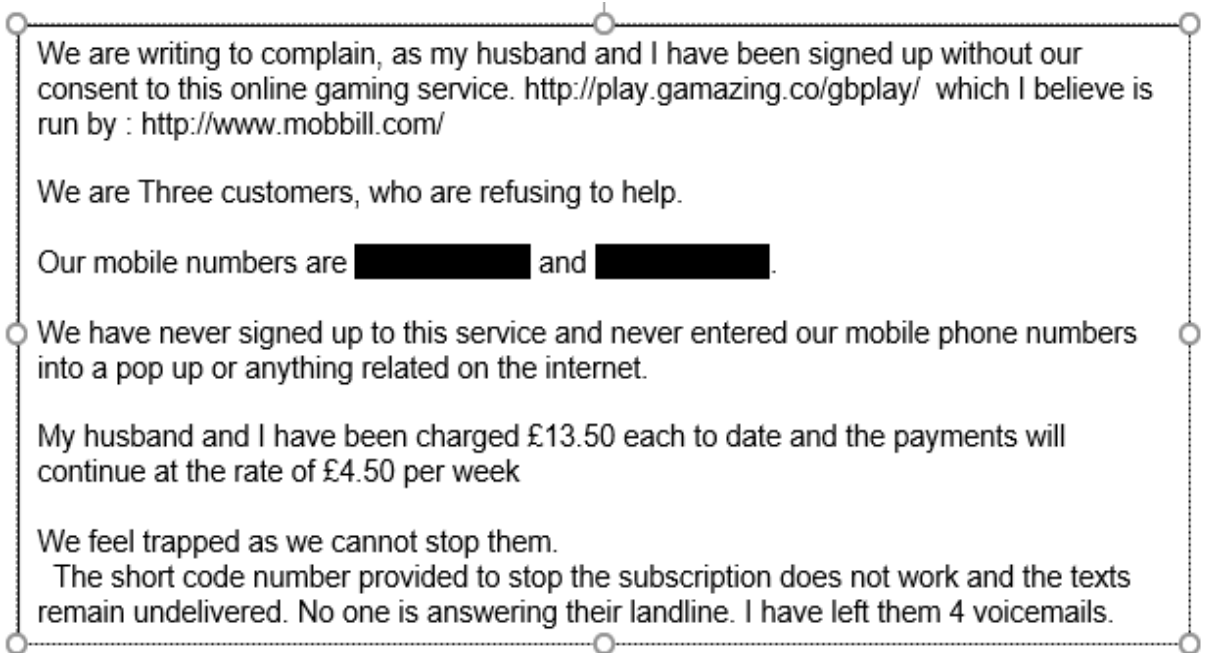
When attempting to unsubscribe from the service by text message, consumers stated that their messages repeatedly failed to send, meaning that they were unable to unsubscribe. As consumers were unable to unsubscribe by text message, they attempted to call and email the Level 1 provider, however these attempts were not responded to and the consumers continued to be billed.

The Executive sent information requests to the Level 1 provider for each complaint which was received and recorded.

A sample of complainant accounts are set out below:

Whilst my son was on my phone I received a text message saying I had subscribed to the service. I initially thought my son had signed up but he has only just turned four cannot read or write. I checked my phone and pages visited and there was no sign that he had visited any site that could have initiated the subscription. I emailed the company and received no response back. I tried calling customer services but again no response even after leaving voicemail. From reading the forums it appears that a lot of three customers who did not sign up have had the same problem. I find this very bizarre has there been a breach of data by three?

This needs to be stopped as this was an unwarranted charge and a waste of my time.  
[sic]

A screenshot of a text message enclosed in a dashed border with circular corner markers. The text is as follows:

We are writing to complain, as my husband and I have been signed up without our consent to this online gaming service. <http://play.gamazing.co/gbplay/> which I believe is run by : <http://www.mobbill.com/>


We are Three customers, who are refusing to help.

Our mobile numbers are [REDACTED] and [REDACTED].

We have never signed up to this service and never entered our mobile phone numbers into a pop up or anything related on the internet.

My husband and I have been charged £13.50 each to date and the payments will continue at the rate of £4.50 per week

We feel trapped as we cannot stop them.  
The short code number provided to stop the subscription does not work and the texts remain undelivered. No one is answering their landline. I have left them 4 voicemails.

A small icon in the top right corner of the screenshot, consisting of a blue square with a white circle and horizontal lines.

I received the message shown above on the 20th Sept and text STOP immediately. I then checked by account/bill online around 30 minutes later, which showed that I had been charged £4.50. I had at no point subscribed to Gamazing, so I contacted Three to notify them. They advised to contact Gamazing directly, as they could not take action, and if this failed to contact psa. The contact number used by Gamazing goes straight through to answer phone, and despite calling several times over several weeks, there is nobody available to dispute the subscription and charge. [sic]

The Mobile Network operator also received complaints about the Service, which peaked between August and October 2017. The Mobile Network Operator received a total of 4,712 complaints from consumers.

On 7 August 2017, the Mobile Network Operator contacted the Level 1 provider about the number of complaints it had received regarding the Service as set out below:

*"It seems we have seen an influx of calls at the contact centre but as there was no number we couldn't send them through previously to MobBill but now that the number is available its becoming evident that the calls are higher than what we would have expected.*

*I believe our Contact Centre should have engaged with [redacted] who will need to make a decision on whether this trial is to continue as is or if the flows need to change to either one with MSISDN entry or the standard full page flows."*

The Mobile Network Operator and Level 1 provider identified that during the initial weeks of the Service operating, the Level 1 provider's customer contact number for the Service had

been missing digits when it appeared on consumers' phone bills. On 14 August 2017, the Level 1 provider stated that the issue had been corrected approximately six weeks after the first Service transaction:

*"We are also concerned about all escalations we' ve been receiving lately due to missing digits in MobBill customer care number on users bill description*

*This issue has been fixed as soon as Three notified us (27th of July), and unfortunately I expect we will receive more escalations in the next weeks."* [sic]

Several weeks later, on 26 September 2017, the Mobile Network Operator contacted the Level 1 provider in relation to requests for refunds:

*"I have spent some hours today speaking to the customer care team to get to the bottom on things and the situation is quite bad and we definitely need to come to resolution when we meet later this week.*

*Attached you will find a list of **1893** MSISDNs – this list of 3UK customers who have contact our customer care team since August to date to ask to cancel the service and request a refund."*

On 25 October 2017, the Level 1 provider contacted the Executive with concerns about the number of requests for information that were being sent to the Level 1 provider by the Executive as a result of the complaints that were being registered by the Executive.

*"We are getting very concerned about the number of escalations we are receiving from you."*

On 30 October 2017, the Executive responded informing the Level 1 provider that 80 complaints were made to the Executive in two months. The Level 1 provider responded with the following:

*"We increased marketing investment."*

On 7 November 2017, in response to the high number of complaints to the Executive, the Level 1 provider stated the following to the Executive:

*"In July we received a lot of complaints due to the error in the bill description and phone number of the customer care.*

*In August number of new subscribers increased a lot, which would explain the number of requests*

*Number of calls seem to decrease since September, and we are also reducing the marketing budget on this specific service as it seems to generate complaints*

*We also have added new agents in the customer care team in order to be able to take more calls as the line tends to be busy and people don't leave messages usually" [sic]*

Partly in response to the number of complaints the Executive noted that the Level 1 provider had introduced a free 24-hour trial period while reducing the marketing for the immediate charge model. The Level 1 provider responded with the following explanation:

*"Basically we have noticed that the 24 hour free trial was generating less complaints (see below), this is the reason why we are now focusing on this service and slowing down the generic service*

*We have regular catch up calls with Three. The pilot period is extended, but we are trying to diversify the portfolio of services like E learning and Wellness services to target an adult audience."*

The complaint levels continued to increase despite the measures taken by the Level 1 provider after the Mobile Network operator raised the issues in August 2017 and September 2017, and warnings regarding complaint levels from the Executive. Consequently, the Mobile Network Operator suspended the Service on 17 November 2017 and stated the following to the Level 1 provider:

*"The matter has today been escalated to senior management which has resulted in a decision to suspend the Gamazing service with immediate effect.*

*The current concerns are focused on customer care and today we had confirmation that a significant amount of all contacts to our customer care team relate to the Gamazing service. That is disproportionately high in comparison to other service provider. Currently we have 4712 outstanding customer complaints, and many are still pending resolution because our CS team and/or the customer have been unable to contact your CS team for resolution within a reasonable timeframe."*

The Mobile Network Operator suspended the promotion of the Service on 15 November 2017. However, billing continued for existing subscribers up to February 2019 when all subscribers exited the Service.

The Level 1 provider ceased trading in March 2019 after entering into voluntary liquidation.

## **Investigation**

The Executive conducted a formal investigation into the Level 2 provider which was concluded on 3 July 2018 using the Track 1 process.

During the investigation the Executive asked the Level 2 provider to clarify the roles and responsibilities of the Level 2 provider and the Level 1 provider in relation to the service. With assistance from the Level 1 provider, the Level 2 provider listed where the responsibilities for different aspects of the Service lay.

The Level 1 provider's responsibilities in relation to the Service were listed as:

- customer care
- handling the billing
- initial subscription
- reminder messages
- stop requests
- making any changes to the service
- sending MT's [mobile terminating messages] to consumers
- hosting the landing page
- hosting the user flow
- Pay-for-it and billing intermediary.

The Level 2 provider listed its responsibilities as follows (Annex 3 pages 118-119):

- service owner
- platform and consent provider
- platform host
- designing the service logo
- supplying images featured on service page
- customising background images
- designing the landing pages
- managing the content portal where users play the game.

The Level 2 provider registered with the PSA Registration Scheme to provide premium rate services on 12 June 2017, four days before the service commenced operation. The Level 2 provider was therefore new to the market.

Although new to the market, the Level 2 provider was part of a wider corporate structure and shared the same parent company named Creative Clicks (the '**Parent Company**') as a number of other Level 2 providers.

A number of these Level 2 providers had been the subject of previous adjudications by the Executive which had resulted in breaches being upheld against them. These adjudications were published on the Executive's website and therefore readily available. The Level 2 provider for

the Service also shared the same Directors/Responsible Persons as some of the other Level 2 providers under the Parent Company who had breach histories with the Executive.

The Level 1 provider had requested due diligence reports from the Executive in the past (in 2013 and 2014) but had not requested any due diligence reports for the Level 2 provider's Parent Company or for the other Level 2 providers which shared the same Parent Company.

On 18 May 2018, the Executive requested evidence of the risk assessment that the Level 1 provider had carried out on its client the Level 2 provider. The Executive referred the Level 1 provider to PSA Guidance on due diligence and risk assessment, in particular due diligence on knowing the directors and other associated individuals of the Level 2 provider. In response, the Level 1 provider stated the following.

*"Please note, we are trying to confirm with previous employees the documentation around PSA case reviews undertaken. We believe these were done."*

The Level 1 provider also said the following:

*"Creative Clicks was a known client to MobBill having been a client of Reporo (part of the MWA group) for several years. To evidence this, initial invoices and Reporo's credit assessment can be provided upon request. See Attachment C: MobBill Final Onboarding Form 03.05.2017-GAMAZER.docx*

*Furthermore, we also spent considerable time with Creative Clicks doing due diligence on a potential M&A transaction (we can provide the signed NDA to show intent here from a few months earlier if required).*

*We also spent several visits to each others [sic] offices and meetings to validate commercial reputation and engagement.*

*As evidenced by the commercial contract, there were several key amendments to the basic T&CS which demonstrate the commitment on both sides to this service and the way the product would be run and marketed (and knowing it was a trial)."*

On 16 November 2017, the Executive requested evidence of the risk assessment and controls that the Level 1 provider had out in place in relation to the Service. The Level 1 provider stated:

*"We use Three On Boarding document as a due diligence and on boarding information"*

On 28 August 2018, in response to questions by the Executive about the risk assessment of the method of promotion, the Level 1 provider acknowledged that no formal risk assessment had been undertaken in relation to the promotion of the pilot Service:

*"Industry knowledge, experience in mobile ad network business, feedback from merchants : mobbill and its directors/ management team have been working in mobile marketing for years and have built up experience, relationships etc so while a formal assessment of risk was not undertaken, it was increasingly evident (and exemplified by contract terms to that effect) that direct marketing was a more secure approach to customer acquisition than affiliation."*

## KPIs

During its investigation, the Executive asked the Level 1 provider for evidence of adherence to the KPIs which had been set by the Mobile Network Operator.

On 7 November 2017, the Level 1 provider supplied figures on the number of telephone calls in relation to the number of subscriptions (calls to activations ratio "**CTA**") for the Service:

	Revenue	Activations	Complaint calls	CTA
	842,544.75	61619	667	1.08%
October 2017 only	Revenue	Activations	Complaint calls	CTA
	266,134.50	4628	156	3.37%

The KPI required the CTA not to exceed 2%, however the Executive noted in October it reached 3.37%. When asked, on 20 February 2018, what steps were taken as a result of this KPI being exceeded the Level 1 provider responded with the following reference to the free 24-hour trial and the suspension of the Service promotion by the Mobile Network Operator

*"KPI weren't exceeded – until gross complaints raised, then action was already taken in two instances in Sep and Nov 17."*

On 1 June 2018, the Level 1 provider supplied evidence to demonstrate how the KPIs were monitored. The Level 1 provider supplied a PowerPoint presentation it had sent to the Mobile Network Operator. An extract from the presentation has been included below:

Date	Vendor	Content	Operator	Activations	Cancel 20m	Cancel 60m	Cancel 24h	Cancel 48h	Cancel	Active	Churn	Trans.	Rev.	Avg. Rev.	Avg. Len. Days
Week 0 2017-07-17 2017-07-23	Izesoft	450GBP- Gamazing	three	3475	370	499	709	746	1006	2469	28.95%	2233	GBP 10048.5	GBP 1.31	0.96
Week 1 2017-07-24 2017-07-30	Izesoft	450GBP- Gamazing	three	0	0	0	18	46	1080	1389	43.74%	1339	GBP 6025.5	GBP 0.61	3.77

The Executive observed that KPIs set by the Mobile Network Operator clearly stated that the rate at which consumers unsubscribe from the service over seven days (“**seven day churn rate**”) must not exceed 30%. The above image provided by the Level 1 provider showed that on Week 1, 24 July 2017- 30 July 2017, the churn rate was 43.74%.

The Service Usage Tracking KPI was intended to measure how often users engaged with the Service while subscribed and before unsubscribing. When the Executive requested evidence of this KPI on 23 November 2017, the Level 1 provider responded stating:

*“We make adhoc requests and provide information as needed.”*

The Level 1 provider listed an example of the usage statistics on the top ten most played games and top ten users, including how many times they had accessed the content.

The Level 1 provider, as part of the KPIs, was required to conduct a customer survey of 10% of the user base within the first 14 days of the Service launch and monthly thereafter. The customer survey was intended to identify users’ satisfaction of the Service with a target of 50% satisfaction. When the Executive requested the customer survey from the Level 1 provider, the Level 1 provider responded with the following:

*“We never initiated a user survey upon reviewing stats and due to service cessation after five months.”*

The refund to activation ratio measured the ratio of the number of refunds that were issued in proportion to the number of new subscription activations. The Executive requested information about the number of refunds that had been provided, but was sent figures by the Level 1 provider which did not take into account the refunds that had been provided by the Mobile Network Operator or unanswered complaint calls. The Churn Rate monitored the number of users who unsubscribed within the first 20 minutes, or on the same day of joining the Service. The Executive noted that the Level 1 provider made two submissions to the Mobile Network Operator in relation to this KPI as set out in the two tables below:

Date	Vendor	Content	Operator	Activations	Cancel 20m	Cancel 60m	Cancel 24h	Cancel 48h	Cancel	Active	Churn	Trans.	Rev.	Avg. Rev.	Avg. Len. Days
Week 0 2017-07-17 2017-07-23	izesoft	450GBP- Gamazing	three	3475	370	499	709	746	1006	2469	28.95%	2233	GBP 10048.5	GBP 1.31	0.96



# Churn and Retention Free Trial service



Date	Vendor	Content	Operator	Activations	CX20m	CX60m	CX24h	CX48h	Cancel	Active	Churn	Trans.	Rev. (GBP)	Subs. Billed	Avg. Rev. (GBP)	Avg. Len. (Day)
Week 0 2017-08-01 2017-08-07	Izesoft	450GBP- Gamazing- 24-hour- free	three	1333	118	161	242	252	264	1069	19.80%	579	2605.5	579	0.69	1.04
Week 1 2017-08-08 2017-08-14	Izesoft	450GBP- Gamazing- 24-hour- free	three	0	0	0	1	11	554	515	51.82%	423	1903.5	423	0.56	2.66

The Executive noted that this KPI was monitored between 17 and 30 July and 1 and 14 August 2017, however the Level 1 provider did not provide evidence of how this KPI continued to be monitored after these dates.

On 26 January 2018, the Level 1 provider supplied evidence of Traffic IDs. Traffic IDs tracked the sources of the Service promotions and allowed the Level 1 provider to identify which promotional campaigns generated increased interactions with the Service.

The Level 1 provider supplied a spreadsheet of Traffic IDs dated between 1 June 2017 to 30 November 2017, which covered the period in which the Service was promoted. However, the Level 1 provider indicated that they considered Traffic IDs to be separate from other KPIs.

The monthly check-in forms were designed to monitor consumer interactions and network traffic in relation to the Service. On the 19 January 2018, the Level 1 provider responded to the Executive regarding the KPI which required monthly online check in forms to be completed:

*"No specific forms were designed or provided. MobBill engaged with Izesoft on the basis of wanting to make sure that Izesoft would provide whatever Three-UK may ask for in the future (which we anticipated, might be an exhausted list). In practical / real terms, the data we requested was always available to us and Three-UK as needed and we either abstained or didn't require the full extent of the contract demands based on real / live activity/feedback etc. We*

*spoke to Three-UK regularly and managed the relationship with the carrier in this way meaning we did not create fully compliant contract deliverables as it was not needed."*

In relation to the General "big report" the Executive was able to verify that the Level 1 provider had supplied PowerPoint presentations to the Mobile Network Operator summarising the KPIs during the operation of the Service as required.

## Revenue

The Level 1 provider first supplied revenue figures to the Executive on 9 August 2017 following an informal request for further information.

**Figure 1**

Month/Year	Billings	Consumer price	Revenue	Payout	Subscriptions
Jun-17	1082	£ 4.50	£ 4,869.00	£ 3,170.26	995
Jul-17	23666	£ 4.50	£ 106,497.00	£ 69,341.38	17695
Aug-17	3903	£ 4.50	£ 17,563.50	£ 10,889.37	2659

On 7 November 2017, the Level 1 provider supplied the following revenue statistics within correspondence regarding complaint levels:

**Figure 2**

Month (2017)	Revenue	Activations
July	£114,118.25	18,753
August	£174,253.50	17,062
September	£256,036.50	21,167
October	£266,134.50	4,628

On that same day, the Level 1 provider supplied additional revenue information generated from the free 24-hour flow:

**Figure 3**

Month (2017)	Revenue	Activations
August	£28,318.50	8,319
September	£123,180.00	16,276
October	£278,707.50	29,378

On 19 January 2018, the Level 1 provider supplied revenue information again in response to an informal enquiry

**Figure 4**

Month (2017)	Revenue	Activations
July	£114,188.25	18,753
August	£174,253.50	17,062
September	£256,036.50	21,167
October	£266,134.50	4,628
November	£157,509.00	22

The Executive noted that the revenue figures previously supplied by the Level 1 provider in August 2017 (*Figure 1*) did not match the above figures. However, it did match figures supplied in November 2017. The Executive noted that the revenue figures that had been provided did not always include the revenue for the free 24-hour trial Service.

In order to clarify the entire service revenue, the Executive directed the Level 1 provider to supply revenue information again. On 1 June 2018, the Level 1 provider again supplied revenues for the Service. The Executive has summarised the revenues supplied below:

**Figure 5**

Month/Year	Gross consumer spend	The Mobile Network Operator outpayment to L1	L1 outpayment to L2
June 2017	£4,765.00	£3,812.00	£3,094.65
July 2017	£104,870.00	£83,896.00	£68,047.20
August 2017	£193,840.00	£155,072.00	£119,731.85
September 2017	£358,695.00	£286,956.00	£224,253.77
October 2017	£477,330.00	£381,864.00	£295,949.16
November 2017	£365,642.00	£292,513.60	£224,889.48
December 2017	£141,320.00	£113,056.00	£81,808.44
January 2018	£33,621.00	£26,896.80	£12,421.31
February 2018	£19,827.00	£15,861.60	£7,056.27
March 2018	£41,454.00	£33,163.20	£23,942.21
April 2018	£14,436.00	£11,548.80	£7,854.68

<b>Total</b>	<b>£1,755,800.00</b>	<b>£1,404,640.00</b>	<b>£1,037,252.13</b>

When the Executive had previously asked the Level 2 provider to supply revenues on 8 March 2018, it stated the following figures (**Annex 3, page 141**):

**Figure 6**

Month/Year	Subscr ptions	Billings	Cons umer price	Gross Revenue	Payout to Izesoft	Refunds
June 2017	987	1,082	£4,50	£4.869,00	£3.018,78	£148,50
July 2017	17,510	23,666	£4,50	£106.497,00	£66.028,14	£882,00
August 2017	25,403	45,841	£4,50	£206.284,50	£127.896,39	£2.169,00
September 2017	37,824	85,673	£4,50	£385.528,50	£239.027,67	£1.413,00
October 2017	33,943	116,732	£4,50	£525.294,00	£325.682,28	£8.010,00
November 2017	11,570	106,884	£4,50	£480.978,00	£298.206,36	£27.036,00
December 2017	0	66916	£4,50	£301.122,00	£186.695,64	£104.715,00
January 2018	0	45857	£4,50	£206.356,50	£127.941,03	£144.387,00
February 2018	0	25533	£4,50	£114.898,50	£71.237,07	£88.551,00

The Executive noted that the only occasion when the Level 1 provider's provision of revenue matched the Level 2 provider's account was in *Figure 1* for the revenue months of June 2017 and July 2017. The Level 1 provider's purported gross revenue did not match any of figures supplied by the Level 2 provider for the remaining months (August 2017 to February 2017).

Furthermore, the Executive noted discrepancies between all the sets of revenue information provided by the Level 1 provider to the Executive. One example of this was for the month of August 2017. The Level 1 provider first stated the revenue for August 2017 to be £17,563.50 (*Figure 1*) but in its final provision stated £193,840.00 (*Figure 5*).

In order to verify the revenue figures, on 13 September 2018 and 18 March 2019 the Executive asked the Mobile Network Operator to provide a breakdown of revenues. The Executive has summarised the figures provided below:

**Figure 7**

Month/Year	Gross consumer spend	The Mobile Network Operator outpayment to L1
June 2017	4,923.00	4,769.10

July 2017	106,499.50	105,620.12
August 2017	203,810.50	201,653.57
September 2017	385,348.50	383,931.00
October 2017	547,357.50	482,136.04
November 2017	486,351.00	365,629.53
December 2017	301,783.50	141,310.82
January 2018	208,170.00	33,392.16
February 2018	115,141.50	19,950.76
March 2018	72,427.50	44,514.44
April 2018	33,939.00	23,357.44
My 2018	15,277.50	8,968.05
June 2018	8,716.50	5,090.85
July 2018	5,341.50	3,281.90
August 2018	3,361.50	1,817.00
September 2018	1,773.00	972.00
October 2018	963.00	585.00
November 2018	598.50	594.00
December 2018	333.00	279.00
January 2019	301.50	215.50
February 2019	31.50	31.50
<b>Total</b>	<b>2,502,449.00</b>	<b>1,828,099.78</b>

The figures provided by the Mobile Network Operator differed for every month from the figures supplied by the Level 1 provider. Between June 2017 and April 2018 there was a difference for the gross consumer spend of £709,951.50 between the figures supplied by the Level 1 provider and the Mobile Network Operator's provision of revenues and a difference of £401,624.98 for the outpayments to the Level 1 provider, despite the Mobile Network Operator already deducting £659,486.52 for refunds during this period.

### **Complaint calls**

In response to correspondence with the Executive regarding the high number of complaints received by the Executive, the Level 1 provider offered to supply its KPIs to demonstrate the analysis it was carrying out on the Service. On 7 November 2017, the Level 1 provider first shared the below KPI statistics with the Executive:

	<b>Revenue</b>	<b>Activations</b>	<b>Complaint calls</b>	<b>CTA</b>
	842,544.75	61619	667	1.08%
October 2017 only	Revenue	Activations	Complaint calls	CTA
	266,134.50	4628	156	3.37%
September 2017 only	Revenue	Activations	Complaint calls	CTA
	256,036.50	21167	110	0.52%
August 2017 only	Revenue	Activations	Complaint calls	CTA
	174,253.50	17062	200	1.17%
July 2017 only	Revenue	Activations	Complaint calls	CTA
	114,188.25	18753	201	1.07%

Gamazing free trial KPIs:

October 2017 only	Revenue	Activations	Still active after 24H			Complaint calls	CTA	Refunds	Refunds / rev
	278707.5	29378	0	0	0	112	0.38%	2803.5	1.01%
September 2017 only	Revenue	Activations			Refunds	Complaint calls	CTA	Refunds	Refunds / rev
	126,180.00	16276	7187	3904	7.454245444	29	0.18%	306.00	0.24%

August 2017 only	Revenue	Activations			Refunds	Complaint calls	CTA	Refunds	Refunds / rev
	28,318.50	8319	5756	2563	9.069069803	16	0.19%	481.50	1.70%

On 23 November 2017 the Executive asked the Level 1 provider to supply evidence of all the KPIs stipulated by the Mobile Network Operator including the churn rate, refund to user spend ratio and refund to action ratio.

	<b>Revenue</b>	<b>Activations</b>	<b>Complaint Calls</b>	<b>CTA</b>	<b>Refunds</b>	<b>Refunds / rev</b>	<b>7DAYS churn</b>	<b>7 days %</b>
Since July	<b>968,121.75</b>	<b>61632</b>	<b>997</b>	<b>1.62%</b>	<b>22221</b>	<b>2.30%</b>	<b>16317</b>	<b>20.15%</b>
November only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	157,509.00	22	330	NA	13298	8.44%	1	4.55%
October only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	266,134.50	4628	156	3.37%	5211	1.96%	2157	46.61%
September only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	256,036.50	21167	110	0.52%	1,107.00	0.43%	5,225.30	24.69%
August only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	174,253.50	17062	200	1.17%	1,615.50	0.93%	4,220.00	24.73%

On 19 January 2018, the Level 1 provider responded with the following information:

On 23 November 2017 the Executive asked the Level 1 provider to supply evidence of all the KPIs stipulated by the Mobile Network Operator including the churn rate, refund to user spend ratio and refund to action ratio.

On 19 January 2018, the Level 1 provider responded with the following information:

	<b>Revenue</b>	<b>Activations</b>	<b>Complaint Calls</b>	<b>CTA</b>	<b>Refunds</b>	<b>Refunds / rev</b>	<b>7DAYS churn</b>	<b>7 days %</b>
Since July	968,121.75	61632	997	1.62%	22221	2.30%	16317	20.15%
November only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %

	157,509.00	22	330	NA	13298	8.44%	1	4.55%
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	256,036.50	21167	110	0.52%	1,107.00	0.43%	5,225.30	24.69%
August only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	174,253.50	17062	200	1.17%	1,615.50	0.93%	4,220.00	24.73%

July only	Revenue	Activations	Complaint Calls	CTA	Refunds	Refunds / rev	7DAYS churn	7 days %
	114,188.25	18753	201	1.07%	-994.50	-0.87%	4,713.00	25.13%

On 20 February 2018, the Executive asked the Level 1 provider to supply evidence of correspondence with the Mobile Network Operator regarding the ongoing assessment of the KPIs and a month-by-month breakdown of how many complaints had been received in relation to the Service.

The Level 1 provider supplied correspondence between the Mobile Network Operator and itself in which the Level 1 provider had informed the Mobile Network Operator of the KPIs on 26 July 2017.

*"Attached to this email are the latest KPI stats with included data as promised. This is for the date range of 27th June to 20th July.*

*As you will see, KPIs continue to bat those guidelines in the normal PFI scheme rules for regular flows, and is doing so with consummate ease which is good news.*

*KPI guidelines set out by PFI as limit's are:*

*Complaint calls to activation ratios - 2% (we are at about half that)*

*Refunded amount to total gross revenue - 1% (as you know, our policy is that we do not dispute ANY complaint's n any capacity as a policy. If we were to defend our position then this would obviously be lower. I am happy with this number as we are below the KPI limit even with our generous policy)*

*First week churn - 50% (we are at 26%)*

*All in all I am very happy with first month performance. Obviously I'd like to be paying less back in refunds but £500 from over £50k in end user spend is palatable for now. "[sic]*



Day	Gross end user spend	Activations	Complaint calls	Complaint call to activation ratio %	Refunds	Refund to revenue %	7 day churn	7 day churn %
Total	53299.25	10152	116	<u>1.14%</u>	522	<u>0.98%</u>	2497	<u>26.20%</u>

Further in the chain of correspondence supplied on 2 August 2017, the Level 1 provider presented the KPI statistics to the Mobile Network Operator:

*"Please see below the latest KPIs for July for our service Gamazing. We are below the KPIs ratios"*

Day	Gross end user spend	Activation's	Complaint calls	Complaint call to activation ratio %	Refunds	Refund to revenue %	7 d churn	7d churn %
Total	108 725.3	18050	193	<u>1.62%</u>	936	<u>0.98%</u>	4504	<u>24.95%</u>

The Executive sought to verify the information provided by the Level 1 provider to the Executive. The Executive wrote to Magrathea Telecommunications Ltd (the Network Operator for the Level 1's customer care number) for this information. Based on the information provided by Magrathea Telecommunications Ltd the true volume of calls for July was 4,568.

A summary of the information provided by Magrathea Telecommunications Ltd can be found below:

Date period	Total number of calls to 02036270110
27 Jun -30 Jun 2017 ( <i>Service commences</i> )	171
01 Jul – 31 Jul 2017	4,568
01 Aug - 31 Aug 2017	12,391
01 Sep - 30 Sep 2017 ( <i>Marketing increased</i> )	18,990
01 Oct - 31 Oct 2017 ( <i>Marketing increased</i> )	26,576
01 Nov - 30 Nov 2017 ( <i>Promotion ended on 15<sup>th</sup></i> )	16,757
01 Dec – 31 Dec 2017	12,711
01 Jan – 31 Jan 2018	8,268
01 Feb – 28 Feb 2018	3,383
01 Mar – 31 Mar 2018	2,388
01 Apr – 30 Apr 2018	1,427

01 May – 31 May 2018	675
01 Jun – 30 Jun 2018	599
01 Jul – 31 Jul 2018	545
01 Aug – 01 Aug 2018	11
	109,460 total

The Level 1 provider continued to supply conflicting figures to the Executive on the number of complaints received in regard to the Service. On 9 March 2018, the Level 1 provider listed the complaint figures as below.

	<b>Gamazing Complaint Calls</b>	<b>24H Gamazing Complaint Calls</b>
June 2016	10	
July 2016	191	
August 2016	200	18
September 2016	110	27
October 2016	156	112
<b>total</b>	<b>667</b>	<b>157</b>

In response to the Executive's direction of 14 August 2018, the Level 1 provider supplied figures on complaint calls regardless of whether they had been answered or not. On 28 August 2018, the Level 1 provider supplied the following figures for the total amount of calls:

<b>Month</b>	<b>Answered Inbound Calls</b>	<b>Unanswered Calls (inclusive of voicemail messages)</b>	<b>Total</b>
June 2017	46	38	84
July 2017	987	594	1581
August 2017	812	2541	3353
September 2017	868	2279	3147
October 2017	1104	2174	3278
November 2017	1859	1220	3079

Additionally, the Executive asked the Level 1 provider to clarify the number of activations and complaint calls.

Month	First 24hrs Free Activations	Complainant calls	Standard Flow Activations (Immediate charge)	Complainant calls
June 2017			46	9
July 2017	68	12	919	45
August 2017	96	17	716	92
September 2017	138	10	730	28
October 2017	564	42	540	169

The Executive noted that the figures on complaint calls differed on both tables, despite being supplied in the same response of 28 August 2018. Additionally, the data on complaint calls supplied on 28 August 2018 significantly differed from the data previously supplied to the Executive in November 2017 and January 2018.

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

The Executive believes that the Level 1 provider has contravened the PSA Code of Practice 14<sup>th</sup> Edition ("the Code") and in particular the following Code provisions:

- Paragraph 3.1.3 – Due Diligence, Risk assessment and control (14<sup>th</sup> Edition)
- Paragraph 4.2.2 – Provision of false revenue information to the PSA (14<sup>th</sup> Edition)
- Paragraph 4.2.2 – Provision of false information on complaint numbers to the PSA (14<sup>th</sup> Edition)

### **Preliminary issue - Service**

The Tribunal noted the proof of service documents contained in the bundle and the correspondence sent by the Executive to the Level 1 provider, dated 19 December 2019, notifying it of the date of this hearing. The Tribunal was satisfied, on the balance of probabilities, that there had been good service of both the Warning Notice, and notification of the hearing time and date.

### **Proceeding in absence**

The Tribunal considered the response that had been provided by the Liquidators of the Level 1 provider dated 20 February 2020. The Tribunal noted that the response had been provided following consultation with the Level 1 provider and after the Liquidators' review of the books and records of the Level 1 provider.

The Tribunal noted that in this response the Liquidators confirmed that they would not be in a position to attend the Tribunal on behalf of the Level 1 provider to make representations. In light of this the Tribunal proceeded in the absence of the Liquidators and any representatives of the Level 1 provider.

## Submissions and conclusions

### Alleged breach 1

#### Paragraph 3.1.3

***“All Network operators, Level 1 providers and Level 2 providers must assess the potential risks posed by any party with which they contract in respect:***

***a) of the provision of PRS; and***

***b) the promotion, marketing and content of the premium rate services which they provide or facilitate,***

***and take and maintain reasonable continuing steps to control those risks.”***

1. The Executive asserted that the Level 1 provider had breached paragraph 3.1.3 of the Code for the following reasons:
  - The Level 1 provider failed to conduct thorough due diligence on the Level 2 provider and therefore failed to assess the potential risk of non-compliance by the Level 2 provider with the Code. Additionally, the Level 1 provider did not assess the risks associated with the responsible individuals for the Level 2 provider and the individual's association to companies with a history of Code breaches.
  - The Level 1 provider failed to take sufficient steps to identify and assess the potential risks of inadvertent subscriptions. This resulted in Code breaches in relation to the promotion and operation of the Service being raised in a Track 1 Action plan in relation to the Level 2 provider.
  - Having identified increased complaint levels in relation to the Service, the Level 1 provider failed to take adequate steps to control the risk, thereby contributed to further consumer harm.

The Executive noted that the Level 1 provider had not supplied the Executive with evidence of any due diligence that had been carried out in relation to the Parent Company or the other associated Level 2 providers.

The Executive submitted that by not performing thorough due diligence checks on the Level 2 provider, the Level 1 provider had failed to recognise the breach history of the companies under the Parent Company of the Level 2 provider. The Executive further submitted that as the Level 1 provider had not identified the associated breach history of the Level 2 provider, it had not considered that there was an increased risk of non-compliance with the Code by the Level 2 provider.

The Executive also observed that the Level 1 provider had not provided copies of any risk assessments on the individuals associated with the Level 2 provider. Based on the lack of evidence of any risk assessments, the Executive submitted that the Level 1 provider did not perform a proper risk assessment in relation to the Directors and associated individuals of the Level 2 provider.

The Executive submitted that the Level 1 provider also failed to take adequate steps to identify and assess the potential risks of non-compliance associated with the single-click pilot Service model.

The Executive relied on the correspondence which had been sent in by the Level 1 provider. On 16 November 2017, the Executive requested evidence of the Level 1 provider's risk assessment and control in relation to the Service. The Level 1 provider stated:

*"We use Three On Boarding document as a due diligence and on boarding information"*

Within the onboarding document, the Level 1 provider stated the service was 'low risk', however no further documentation was provided to support this assessment.

On 28 August 2018 the Level 1 provider said the following:

*Industry knowledge, experience in mobile ad network business, feedback from merchants : mobbill and its directors/ management team have been working in mobile marketing for years and have built up experience, relationships etc so while a formal assessment of risk was not undertaken, it was increasingly evident (and exemplified by contract terms to that effect) that direct marketing was a more secure approach to customer acquisition than affiliation."*

In light of the above the Executive asserted that the Level 1 provider had failed to conduct a thorough risk assessment of the Service.

The Executive observed that in relation to risk control measures the Mobile Network Operator had put in place KPIs which the Level 1 provider was required to adhere to for the pilot Service to continue.

In response to questioning by the Tribunal, the Executive confirmed that the KPIs which had been put in place by the Mobile Network Operator were not risk control measures set by the Executive. However, the KPIs had formed part of the

investigation as the Level 1 provider had used them to control the risk presented by the Service.

The Executive observed that when asked to, the Level 1 provider was unable to provide evidence that all KPIs had been met, despite previous meetings and discussions which highlighted the necessity of the KPIs being adhered to in light of the untested nature of the Service.

The Executive also asserted that the Level 1 provider failed to take effective steps to minimise and control risk, and it failed to measure and record the KPIs accurately. The end result was that the Mobile Network Operator was not presented with accurate data in order to assess whether the agreed KPIs had been met and the Level 1 provider did not identify and take measures to control the risk.

The Executive agreed that some steps had been taken by the Level 1 provider in response to the number of complaints that were being received from consumers in relation to the Service. These included:

- On 24 August 2017 the Level 1 provider confirmed that they had rectified the error with the customer care number which had appeared on users' bills.
- The Level 1 provider had hired more customer care agents to handle calls as they had noticed a large volume of calls.
- The Level 1 provider introduced a free 24-hour trial period while reducing the marketing for the immediate charge model. The Level 1 provider responded with the following explanation:

*"Basically we have noticed that the 24 hour free trial was generating less complaints (see below), this is the reason why we are now focusing on this service and slowing down the generic service*

*We have regular catch up calls with Three. The pilot period is extended, but we are trying to diversify the portfolio of services like E learning and Wellness services to target an adult audience".*

The Executive submitted that these measures were ineffective and did not control the risk. The Executive noted that complaints to the Executive in relation to the Service and calls to the Level 1 provider's customer service number both peaked in October 2017. which was after the measures such as the introduction of the free 24-hour model and an increase in customer care agents were put in place by the Level 1 provider. In light of the above the Executive submitted that the measures put in place by the Level 1 provider did not result in the risk to consumers being reduced.

In addition to the above The Executive noted that the Level 1 provider did not direct the Level 2 provider to take any action in relation to the Service. The Executive further observed

that none of the measures that were put in place by the Level 1 provider aimed to address the underlying issues with the Service including the risk of consumers inadvertently subscribing to the Service due to the single-click payment model.

In light of all of the above the Executive was of the view that the Level 1 provider had failed to fully assess the potential risks associated with the Level 2 provider, or the Service itself at its inception. In addition to this the Executive submitted that the Level 1 provider failed to take adequate steps to control the on-going risks associated with the Service and that this directly contributed to the high level of consumer complaints which occurred over a significant period of time.

For those reasons, the Executive asserted that a breach of paragraph 3.1.3 of the Code has occurred and that the Level 1 provider failed to perform adequate due diligence, risk assessment and control on the Level 2 provider and the Service.

2. The Level 1 provider denied the breach.

The Liquidators for the Level 1 provider stated that guidance by the Executive did not prescribe the risk assessment and control measures that had to be put in place by providers. They confirmed that the Level 1 provider considered itself to be "*thorough, experienced and competent in the assessment risk for what was a trial flow*". They further asserted that the Level 1 provider had issued refunds to consumers and that they had monitored the service carefully throughout.

In addition to this the Liquidators observed that the Level 1 provider had worked closely with the Executive at the time of the service's inception and that the Executive had not raised concerns about the measures that were being proposed to risk assess and control any risk.

The Liquidators argued that the trial flow lasted for five months and that refunds were issued to consumers in this time. The Liquidators also confirmed that the Level 1 provider monitored the situation carefully and acted swiftly to resolve any issues that were identified.

The Tribunal considered the Code and all of the evidence before it. The Tribunal was satisfied on a balance of probabilities that a breach of paragraph 3.1.3 had occurred.

The Tribunal agreed with the Executive that the steps carried out by the Level 1 provider to assess the risks posed by the Service and/or the Level 2 provider were insufficient.

The Tribunal noted that there was no evidence of the Level 1 provider having obtained any due diligence reports from the Executive in relation to the Level 2 provider's Parent Company and the associated Level 2 providers. The Tribunal further noted that there was nothing to suggest that the Level 1 provider had considered the breach history of any of the Level 2 providers that were associated with the Parent Company of the Level 2 provider for the Service.

For the reasons advanced by the Executive, the Tribunal was also of the view that the risk assessment and control measures that had been put in place by the Level 1 provider were not sufficient particularly given the low friction model of the Service.

The Tribunal carefully considered the representations that had been made by Liquidators on behalf of the Level 1 provider.

The Tribunal accepted the submission by the Liquidators that the guidance issued by the Executive was not prescriptive as to risk assessment and control measures that providers needed to put in place. The Tribunal also agreed that the Level 1 provider had put some measures in place to control the risk posed by the Service.

The Tribunal was not however persuaded that the measures put in place were adequate. The Tribunal noted that the KPIs were the only risk control measures that had been put in place by the Level 1 provider to monitor and control any risks presented by the Service. The Tribunal agreed with the Executive that despite using the KPIs to monitor and control risk, the Level 1 provider had failed to adhere to them either through not acting when required to and/or through not recording the information that was required to enable the system to be effective.

The Tribunal noted the measures that the Level 1 provider had put in place to aim to control the risk, such as increasing the number of staff working in customer care and introducing the 24-hour free trial model. However, the Tribunal was not of the view that these measures were adequate as they did not address the reasons why the complaints arose, nor did they result in a reduction in the number of complaints regarding the Service.

Accordingly, the Tribunal was satisfied on a balance of probabilities that breach of paragraph 3.1.3 of the Code had occurred as the Level 1 provider had failed to assess the potential risks posed by the Level 2 provider and the Service and as the Level 1 provider had not taken adequate steps to control those risks.

## **Decision: UPHELD**

### **Alleged breach 2**

#### **Paragraph 4.2.2**

***“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to the PSA (either by inclusion or omission).”***

1. The Executive asserted that the Level 1 provider breached paragraph 4.2.2 of the Code as the Level 1 provider had provided inaccurate revenue information.



The Executive noted that the Level 1 provider supplied five sets of revenue data to the Executive. The Level 2 provider and the Mobile Network Operator also supplied revenue data to the Executive.

The Executive observed that there were significant disparities within the revenues supplied by the Level 1 provider on the various dates. The Level 1 provider's provision of revenues to the Executive also did not match the revenues provided by the Level 2 provider or Mobile Network operator. The Executive summarised the discrepancies in the revenue that had been provided in the table set out below:

	Figure 1 (L1 supplied in Aug 2017)	Figure 2 (L1 supplied in Nov 2017)	Figure 3 free 24hr flow only (L1 supplied in Nov 2017)	Figure 4 (L1 supplied in Jan 2018)	Figure 5 (L1 supplied Jun 2018)	Figure 6 (L2 supplied in Mar 2018)	Figure 7 (MNO supplied in Sep/Mar 2018)
Jun 2017	£4,869.00	-	-	-	£4,765.00	£4,869.00	£4,923.00
Jul 2017	£106,497.00	£114,118.25	-	£114,188.25	£104,870.00	£106,497.00	£106,499.50
Aug 2017	£17,563.50	£174,253.50	£28,318.50	£174,253.50	£193,840.00	£206,284.50	£203,810.50
Sep 2017	-	£256,036.50	£123,180.00	£256,036.50	£358,695.00	£385,528.50	£385,348.50
Oct 2017	-	£266,134.50	£278,707.50	£266,134.50	£477,330.00	£525,294.00	£547,357.50
Nov 2017	-	-	-	£157,509.00	£365,642.00	£480,978.00	£486,351.00
Dec 2017	-	-	-	-	£141,320.00	£301,122.00	£301,783.50
Jan 2018	-	-	-	-	£33,621.00	£206,356.50	£208,170.00
Feb 2018	-	-	-	-	£19,827.00	£114,898.50	£115,141.50
Mar 2018	-	-	-	-	£41,454.00	-	£72,427.50

Apr 2018	-	-	-	-	£14,436.0 0	-	£33,939.0 0
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The Executive argued that given the disparities within the sets of information, it should have been apparent to the Level 1 provider that the information was inaccurate. The Executive emphasised that it did not appear as though the Level 1 provider had verified the information with the Mobile Network Operator prior to sending the information to the Executive.

The Executive therefore submitted that the Level 1 provider had either knowingly supplied inaccurate information or at the very least been reckless in supplying inaccurate information. Accordingly, the Executive submitted that the Level 1 provider has acted in breach of paragraph 4.2.2 of the Code.

2. The Level 1 provider denied the breach. The Liquidators acting for the Level 1 provider stated that there was a natural delay in gathering information from the Mobile Network Operator.

The Liquidators further stated that they had been advised that the Level 1 provider had provided accurate information which was available at the time of the requests but that due to strained trading conditions and high staff turnover there may have been some inconsistencies in the responses that were given.

3. The Tribunal considered the Code and all of the evidence before it. The Tribunal was satisfied on the balance of probabilities that a breach of paragraph 4.2.2 had occurred.

The Tribunal accepted the Executive's case that the information supplied by the Level 1 provider in relation to revenue was inaccurate given the number of discrepancies.

The Tribunal carefully considered the representations that had been made by Liquidators. The Tribunal noted that the Level 1 provider accepted that there may have been some inconsistencies in the information that had been provided to the Executive but that the Level 1 provider denied the suggestion that this was done deliberately.

The Tribunal considered the reasons that were given by the Level 1 provider for the inconsistencies and accepted that the provision of false and misleading revenue information was not done deliberately. However, the Tribunal was still of the view that the Level 1 provider had failed to ensure that the information provided to the Executive was accurate, it should have been apparent to the Level 1 provider that the information it had provided on different occasions to the Executive differed and there was no evidence that it had sought to check the accuracy of the information t supplied. The Tribunal therefore concluded that the Level 1 provider had acted recklessly.

Accordingly, the Tribunal was satisfied on a balance of probabilities that breach of paragraph 4.2.2 of the Code had occurred on a reckless basis.

## Decision: UPHELD

### Alleged breach 3

#### Paragraph 4.2.2

***“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to the PSA (either by inclusion or omission).”***

1. The Executive asserted that the Level 1 provider had breached paragraph 4.2.2 of the Code based on the Level 1 provider’s provision of complaint call numbers to the Executive.

In response to questioning by the Tribunal, the Executive explained that the KPIs had been put in place by the Mobile Network Operator but that it was important for the Executive to understand the KPIs that related to complaint levels. The Executive confirmed that this was because monitoring complaints and responding to complaints was an indication of how the Service was operating and how the Level 1 provider was assessing and responding to the complaint levels which were indicative of consumer harm.

The Executive, when questioned, confirmed the information that had been provided by the Level 1 provider in relation to the KPI statistics on complaint calls as follows:

- On 7 November 2017 the Level 1 provider supplied KPI statistics which included figures for revenue, activations, complaint calls and CTA. The Level 1 provider provided separate KPI statistics for the Gamazing free trial at the same time.
- On 23 November 2017 the Executive asked the Level 1 provider to supply evidence of all the KPIs stipulated by the Mobile Network Operator including the churn rate, refund to user spend ratio and refund to action ratio. This information was provided by the Level 1 provider on 19 January 2018.
- On 20 February 2018, the Executive asked the Level 1 provider to supply evidence of correspondence with the Mobile Network Operator regarding the ongoing assessment of the KPI and a month-by-month breakdown of how many complaints had been received for the Service. The Level 1 provider supplied correspondence between the Mobile Network Operator and itself in which the Level 1 provider had

informed the Mobile Network Operator of the KPIs on 26 July 2017. This information included complaint call statistics.

- The Executive noted that there were discrepancies within the information that had been supplied by the Level 1 provider in relation to the number of complaint calls. As a result of this the Executive wrote to Magrathea Telecommunications Ltd (the Network Operator of the Level 1's customer care number) for this information. Magrathea Telecommunications Ltd provided the following information:

Date period	Total number of calls to 02036270110
27 Jun -30 Jun 2017 ( <i>Service commences</i> )	171
01 Jul – 31 Jul 2017	4,568
01 Aug - 31 Aug 2017	12,391
01 Sep - 30 Sep 2017 ( <i>Marketing increased</i> )	18,990
01 Oct - 31 Oct 2017 ( <i>Marketing increased</i> )	26,576
01 Nov - 30 Nov 2017 ( <i>Promotion ended on 15<sup>th</sup></i> )	16,757
01 Dec – 31 Dec 2017	12,711
01 Jan – 31 Jan 2018	8,268
01 Feb – 28 Feb 2018	3,383
01 Mar – 31 Mar 2018	2,388
01 Apr – 30 Apr 2018	1,427
01 May – 31 May 2018	675
01 Jun – 30 Jun 2018	599
01 Jul – 31 Jul 2018	545
01 Aug – 01 Aug 2018	11
	109,460 total

- On 9 March 2018 the Level 1 provider supplied the following complaint call figures:

	<b>Gamazing Complaint Calls</b>	<b>24H Gamazing Complaint Calls</b>
June 2016	10	
July 2016	191	
August 2016	200	18
September 2016	110	27
October 2016	156	112
<b>total</b>	<b>667</b>	<b>157</b>

- Due to the continuing discrepancies in the statistics provided by the Level 1 provider the Executive wrote to the Level 1 provider on 14 August 2018 asking them to supply

further statistics on the number of complaint calls which included calls that had not been answered. The Executive asked the Level 1 provider to supply this information using a templated table. The Level 1 provider responded on 18 August 2018 with the following information:

<b>Month</b>	<b>Answered Inbound Calls</b>	<b>Unanswered Calls (inclusive of voicemail messages)</b>	<b>Total</b>
June 2017	46	38	84
July 2017	987	594	1581
August 2017	812	2541	3353
September 2017	868	2279	3147
October 2017	1104	2174	3278
November 2017	1859	1220	3079

<b>Month</b>	<b>First 24hrs Free Activations</b>	<b>Complainant calls</b>	<b>Standard Flow Activations (Immediate charge)</b>	<b>Complainant calls</b>
June 2017			46	9
July 2017	68	12	919	45
August 2017	96	17	716	92
September 2017	138	10	730	28
October 2017	564	42	540	169

The Executive asserted that the Level 1 provider had provided inaccurate and misleading information in relation to the number of complaint calls as the information provided by the Level 1 provider differed on the volume of complaint calls differed. The Executive further asserted that the complaint call statistics did not accord with the information that had been provided by Magrathea Telecommunications Ltd. The Executive submitted that as a result of the inaccurate information that was provided it had not been possible to determine the true number of complaints that had been received.

2. The Level 1 provider denied the breach. The Liquidators acting on behalf of the Level 1 provider stated that issues had been identified by the Level 1 provider in the reconciliation process as the third-party call centre had different systems in place which included a manual reconciliation system. The Liquidators accepted that the system by its design meant that discrepancies were likely to occur but emphasised that this was not done deliberately.

The Liquidators for the Level 1 provider also submitted that there was a time delay in gathering information from the Mobile Network Operator, and Level 1 and 2 parties especially given the confidential nature of the information that consumers would share when calling the call centre. The Liquidators argued that it was possible for a consumer to call the Mobile Network Operator after recovering a bill and to then ring the Executive and the number provided in the text messages sent by the Level 1 provider. In summary the Liquidators acting for the Level 1 provider submitted that the process was imperfect and allowed discrepancies to occur.

3. The Tribunal gave careful consideration to the Code and all of the evidence. The Tribunal was satisfied on the balance of probabilities that a breach of paragraph 4.2.2 had occurred.

The Tribunal considered the case put forward by the Executive. The Tribunal accepted that the complaint call statistics that had been provided by the Level 1 provider were not consistent. However, the Tribunal was of the view that the Executive only clarified what it meant by complaint calls when it requested information from the Level 1 provider on 14 August 2018. As a result of this the Tribunal did not consider the complaint call data that had been provided by the Level 1 provider up until 14 August 2018 was necessarily inaccurate.

The Tribunal noted that the complaint call statistics which had been provided by the Level 1 provider in their response of 28 August 2018 differed significantly in volume from the call complaint statistics that had been provided by Magrathea Telecommunications Ltd. The Tribunal noted that the Executive had by this stage clarified that it wanted statistics for all complaint calls regardless of whether or not they were answered and that as a result of this there was no explanation for level of the discrepancy between the figures.

The Tribunal considered the representations that were made by the Liquidators in relation this breach. The Tribunal noted that the Liquidators accepted that the system for recording and reconciling call complaint statistics was an imperfect one and that this had allowed discrepancies to occur.

The Tribunal accepted the Liquidator's submission that flaws within the system may have led to the provision of false and misleading complaint call statistics to the Executive however the Tribunal was of the view that the Level 1 provider should have done more to ensure that the information provided was correct and its failure to do so meant that it had acted recklessly.

The Tribunal was accordingly satisfied on the balance of probabilities that the Level 1 provider had recklessly provided false and misleading complaint call statistics to the Executive on 28 August 2018 and upheld a breach of paragraph 4.2.2. on that basis.

## **Decision: UPHELD**

### **Assessment of breach severity**

The Tribunal's initial assessment of the breaches of the Code was that they were, overall, Serious. In making this assessment, the Tribunal found the following:

#### **Paragraph 3.1.3**

This breach was **Serious**.

The Tribunal considered that the breach was likely to damage consumer confidence in premium rate services and that the breach by its very nature meant that there were wider systemic failures in the procedures and controls of the Level 1 provider. The Tribunal was of the view that the breach would have had a detrimental impact on consumers and that the breach was repeated and of a significant duration.

The Tribunal assessed the breach to be Serious as whilst there had been a breach of paragraph 3.1.3 the provider had engaged with the Executive in advance of the Service becoming operational and had subsequently put some measures in place but that these had not been adhered to and therefore proved ineffective.

#### **Rule 4.2.2**

This breach was **Serious**.

The Tribunal was of the view that the breach was repeated and had the potential to undermine the regulatory regime which could in turn damage consumer confidence in premium rate services. The Tribunal was also of the view the breach was indicative of a wider problem in the procedures and controls of the Level 1 provider.

The Tribunal noted that the breach had been committed recklessly.

### **Rule 4.2.2.**

This breach was **Significant**.

The Tribunal considered the breach to be limited to the provision of false and misleading information on only one date (28 August 2018) but was of the view that the breach was indicative of wider problems within the Level 1 provider.

The Tribunal found that the breach had been committed recklessly.

## **Sanctions**

### **Initial assessment of sanctions**

1. 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 fine of £750,000 compromised as follows:

Rule 3.1.3 - £250,000

Rule 4.2.2 - £250,000

Rule 4.2.2 - £250,000

2. The Tribunal adjusted the Executive's initial assessment to reflect its assessment of the breach severity. The Tribunal'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 "serious":

- a formal reprimand
- a fine of £400,000 compromised as follows:

Rule 3.1.3 - £175,000

Rule 4.2.2 - £125,000

Rule 4.2.2 - £100,000



## **Overall case and proportionality assessments**

1. The Executive submitted that there had been no mitigating factors in this case. It noted that the Level 1 provider had taken steps to try to remedy the breach but submitted that these were inadequate. The Executive also acknowledged that a significant number of refunds had been provided but stated that the majority of these had been issued by the Mobile Network operator rather than the Level 1 provider.

The Executive submitted that it was an aggravating factor of the case that the Level 1 provider failed to follow guidance on due diligence, risk assessment and control. In particular, the Level 1 provider did not “know its client” in accordance with the Executive’s guidance and failed to control the risks associated with the client and service.

The Executive also submitted that it was an aggravating factor for the breaches to have continued after the provider became aware of them as a result of communications with the Executive and as a result of the continuing consumer complaints.

The Executive also asserted that the failure of the Level 1 provider to fully co-operate with the investigation was an aggravating factor of the case.

The Level 1 provider and the Liquidators acting on their behalf did not make any representations in relation to mitigating and aggravating factors.

The Tribunal agreed with the Executive that there were no mitigating factors. The Tribunal was however of the view that the aggravating factors identified by the Executive were already captured within the breaches that had been upheld. Accordingly, the Tribunal did not find that there were any aggravating factors that affected their assessment of sanction.

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

The Executive noted that the Level 1 provider’s gross revenue was £790,847.65 taking account of deductions for the Mobile Network Operator in relation to refunds and the outpayment to the Level 2 provider. The Executive argued that a significant proportion of the provider’s revenue should be removed as the provider’s revenue was inflated by the failures to control the harm and risks associated with the Service and that the provider should not benefit from this conduct. The Executive also submitted that the financial benefit should be removed in part from the provider so as to act as a clear deterrent to the provider and to the industry as a whole.

The Tribunal was satisfied that at least some of the Level 1 provider's revenue had been inflated by the breach of paragraph 3.1.3 for the reasons advanced by the Executive. The Tribunal accepted that there was therefore a need for significant proportion of the Level 1 provider's revenue to be removed so as to act as a clear deterrent to the Level 1 provider and the industry as a whole.

### **Sanctions adjustment**

1. The Executive recommended that the initial sanctions recommendation was not adjusted as it was at the appropriate level to achieve the sanctioning objective of credible deterrence.
2. The Liquidators submitted that the proposed fine and the administrative fee was unnecessary and disproportionate given the current circumstances of the Level 1 provider being in Liquidation and the likely level of return to the other creditors in the liquidation.
3. The Tribunal agreed with the Executive that the initial sanctions assessment did not need adjustment. The Tribunal considered the representations of the Liquidators in respect of the level of the fine but were of the view that the level of the fine had already been reduced due to the Tribunal's findings on the severity of the breaches. The Tribunal were also of the view that the fine imposed was necessary to achieve the sanctioning objective of credible deterrence.

### **Final sanctions**

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

- a formal reprimand
- a fine of £400,000.

Administrative charge recommendation: 100%