

Tribunal meeting number 276

Case reference: 165558
Level 2 provider: New Level Ventures Limited
Type of service: Lifestyle
Level 1 provider: Dynamic Mobile Billing Ltd
Network operator: O2 and Three

This case was brought against the Level 2 provider under Paragraph 4.5 of the 14th Edition of the Code of Practice (“the **Code**”).

Background

The case concerned a subscription alert service operating under the brand name ‘Fruity Cell’ which was billing on the shortcode 65099 (“the **Service**”).

The Level 2 provider for the Service was New Level Ventures Limited based in Cyprus (“the **Level 2 provider**”). The Level 1 provider was Dynamic Mobile Billing (“the **Level 1 provider**”). Kalastia Consulting Limited (“the **Supplier**”) was identified by the Executive as a Supplier which operated within the value chain.

The Level 2 provider registered the Service with the Executive on 8 September 2017.

On 18 March 2019, the Level 2 provider supplied a summary of the way in which the Service was intended to operate to the Executive. It stated that: *“Fruitycell is a smoothie recipe site. We present original fresh and delicious smoothie recipes and tips as part of a club. The cost costs £4.50 per smoothie recipe alert. There is a maximum of 2 alerts per month. We have only been sending 1 alert per month, and all the other recipes and tips are contained in the portal.”*

Following complaints received by members of the public, the Executive sought derogation, as it was required to do so at that time in accordance with the application of the e-Commerce Directive 2000/31/EC. As the Level 2 provider was based in Cyprus, the Executive was required to refer its concerns to the Member State first before opening a formal investigation, and this was done on 18 April 2019. Derogation was obtained on 23 May 2019 and the Executive decided to conduct an investigation under its Track 2 procedure on 3 July 2019.

The Level 2 provider had not previously been the subject of Track 1 or Track 2 procedure.

The Level 2 provider confirmed on 8 October 2019 that the Service was no longer operating and billing. It also stated that it would continue to offer customer care solutions and that it intended to cooperate with the Executive.

On 13 December 2019, interim measures were sought by the Executive. The Code Adjudication Panel authorised a withhold of service revenue up to £510,000.00.

The investigation

As of 3 September 2020, the Executive had received 293 complaints from members of the public alleging that the Service had charged them without their consent. The complainants variously alleged that the Service charges were unsolicited.

Examples of such complaints are set out below:

*"A charge of £4.50 taken from my mobile phone account after receiving a text from 65099 on 22nd December 2018.
I contacted my phone provider who gave me your contact details.
On checking the text number I sent an email to the Company (New Level Ventures Ltd in Cyprus) informing them that I did not want to receive any communications in future.
I have never subscribed to this service."*

*"I have never subscribed to this service but received a text msg from 65099 at 10.23am on 01/01/19 stating: For fresh and fun smoothie recipes to boost yr lifestyle visit <http://fruitycell.com/login>. Cancel STOP to 65099. help@fruitycell.com 02033184327
Then a further text msg from 'FreeMsg' at 10.48am with a smooth recipe.
I tried to call the provider but there was no answer and the call cut out. I am concerned that from reading the information on the 'FruityCell' website that I will now be charged £4.50 for each msg sent to me. I did not want to risk texting back 'stop' in case this caused me to be charged further.
I have forwarded both text messages to 7727 to alert them also.
To confirm, I have had NO dealing with this company prior To the text msg being received and certainly did NOT consent to receiving a service from them.
Looking online, I can see that many others have experienced the same thing and have been charged £4.50. I have checked my recent charges and can't see that I have been charged yet, however it takes up to 24hours for recent charges to show on my account." [sic]*

"I received my mobile phone bill for January 2019 to find that I had been charged £4.50 for a message. I didn't know what this was so I contacted my phone provider who gave me the details. I found out that I had been charged for a 'smoothie recipe' by a company called 'fruity cell'. This sign up was made on 30/12/2018 at 10.42am. I knew I had not signed up for this and I also knew my EXACT whereabouts at the time of the alleged sign up. I knew this as I was away visiting family and I was not using my phone at all that morning. There is no way that I would have signed up for this myself. Due to being away at the time I am able to be specific about where I was and the fact that I did not use my phone. I was obviously outraged by this and contracted fruity cell. They did not provide an explanation but did refund me £4.50. I would, however, still like to report this company as they took my money without my consent or knowledge! Are they purchasing my number, along with others, to make money. This is fraud. I never requested contact from this company and I never signed up for anything with them."

"I have twice in January received an unsolicited text from a premium message service, for which I have been charged £4.50 + VAT. The texts say they come from a company called fruitycell and say

they provide a link to a smoothie recipe. I have never been on such a company's website and have never signed up for a premium message service. I am a professional person, well used to reading contracts, and simply would not have done this. I have emailed the company to dispute their entitlement to take payment and have reported it to Three. Three told me to contact you also about this, although I am unsure what your role is, maybe just in checking companies about whom multiple complaints are made. Anyway, as advised I am reporting this to you. I should say I have now texted STOP to the company, which I didn't do initially as my guess had been the text was a text to lure me in to confirm my mobile number and that I would be charged for replying. I now know better."

On 27 November 2019, the Executive sent a customer survey to complainants. The Executive received responses from 45 complainants who stated they never inserted their mobile number into the online promotion and never entered a four-digit PIN onto the website. Complainants either received full refunds, partial refunds, or no refunds. Some of the refunds were received from Network Operators.

Following complainant accounts regarding the level of customer service received, the Executive sent a test email to the Level 2 provider's customer service email address to monitor whether customer service emails were being responded too. The Executive had received a response from the Level 2 provider's customer service a day later. However, the monitoring email was sent after the Level 2 provider was already aware of the investigation and after the Service had stopped being promoting and operated.

On 15 May 2019, the Level 2 provider confirmed to the Executive that all 53 complainants referred to in the Executive's informal enquiry sent on 19 February 2019 were refunded and that it had permanently suspended advertising the Service in April 2019.

The Executive noted that on 8 October 2019 the Level 2 provider confirmed that "*the fruity cell service is no longer operating; it is not billing and that New Level Ventures are no longer operating service in the UK market.*"

Although the Level 2 provider had provided some information about the Service when responding to initial enquiries, it had failed to provide substantive responses to the directions that had been issued, including the Executive's requests for financial information.

As the Level 2 provider did not respond to the Warning Notice, the Executive attempted to contact the Level 2 provider on its customer service number. The representative who answered the phone call stated it was the responsibility of another organisation entirely to stop subscriptions and that it had not heard of the Level 2 provider. Later in the call the representative recognised the Service. The Executive was of the view that the call demonstrated a lack of a customer service function as it seemed that the representative would not have been able to handle the complaints about the Service.

Apparent breaches of the Code

The Executive emailed and posted a Warning Notice to the Level 2 provider on 23 October 2020 in which the following breaches of the Code were raised:

Rule 2.3.3 – Consent to charge

Rule 2.6.1 – Complaint handling

Paragraph 4.2.3 – Failure to provide information.

On 28 January 2021, the Tribunal reached a decision in respect of the breaches.

Submissions and conclusions

Preliminary Issue – Service and proceeding in absence

The Tribunal considered as a preliminary issue whether the Level 2 provider had been served with the Warning Notice and was satisfied that the necessary documents had been properly served by a post and email.

The Tribunal noted that the Warning Notice had been delivered to the Level 2 provider by post on 27 October 2020 and the email was downloaded via Thru on 9 November 2020. The Tribunal was therefore satisfied the Executive had complied with its obligations in relation to service of the Warning Notice.

The Tribunal noted that the Level 2 provider had not responded to the Warning Notice. The Tribunal further noted that the Executive notified the Level 2 provider of the Tribunal date and time by email on 4 January 2021. The email explained that the Tribunal would be held via Microsoft Teams and outlined the instructions on how to join.

The Tribunal also noted that the Executive had attempted to call the Level 2 provider on 6 January 2021, but the calls were unsuccessful.

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

Alleged breach 1

Rule 2.3.3 of the Code

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

1. The Executive 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 complainants had been obtained. Furthermore, complainants had stated that they did not enter a PIN onto the Service website, which indicated that no consent to charge had been held by the Level 2 provider. The Executive placed reliance on the PSA’s Guidance Note on Consent to Charge (“**the Consent to charge guidance**”) and asserted that consumers must be issued with a PIN after entering their mobile telephone number onto the Service website and in turn entering the PIN onto the Service website when prompted.

As of 3 September 2020, the Executive had received 293 complaints from members of the public alleging that the Service charges were unsolicited. Sixty-one of these complaints were received post derogation.

The Executive noted from the Level 2 provider's description flow submission that in order to consent to Service charges and subscribe to the Service, consumers must be issued a PIN after entering their mobile telephone number onto the Service website and in turn enter the PIN onto the Service website when prompted. Additionally, the Level 2 provider had only submitted one subscription flow showing the consumer journey on a Wi-Fi connection and not on a mobile data connection. The Executive considered that the flow was likely to be different in order to consent to Service charges and subscribe to the Service when a consumer was connected via mobile data. There were references to the receipt of PIN messages in only 13 complainant accounts. Noting this, and in the absence of robust evidence of consent to charge from the Level 2 provider, on 27 November 2019 the Executive contacted all 293 current PSA complainants requesting further information in the form of a questionnaire.

The Executive received 45 responses to the survey of which:

- 40 complainants stated that they had not viewed or interacted with Service promotional material before their subscription occurred
- four complainants indicated they had seen the promotional material or similar, but they had not interacted with the promotional material
- one complainant did not provide a detailed response to the survey.

In relation to the receipt of PIN messages and entering the PIN onto the Service website:

- 30 complainants stated they did not receive a PIN or enter a PIN onto the website
- ten complainants did recall receiving a PIN message but had not entered any PIN online
- four complainants were unsure whether they had received a PIN but stated they definitely had not entered any PIN online
- 44 complainants said that they did not enter their mobile number onto the Fruity Cell website.

Of particular interest to the Executive was a complainant who stated that they did not know their MSISDN as it was used as a 4G hotspot and the SIM was always in a router. The consumer therefore stated they did not enter their MSISDN onto the Fruity Cell website.

In light of complainants alleging that the Service charges were unsolicited, and more specifically the responses from 44 complainants that stated they did not enter a PIN onto the Service website, along with the absence of any robust evidence of consent to charge from the Level 2 provider, the Executive submitted that no consent to charge consumers was held by the Level 2 provider.

On 26 September 2019, the Executive requested evidence of consent to charge for 186 complainant mobile numbers from the Level 2 provider, but the Level 2 provider failed to provide the requested evidence.

The Executive noted that on 4 March 2019, the Level 2 provider supplied a list of ten MSISDNs with URLs purporting to link to the verifier's portal to evidence the opt-in record for each of ten MSISDNs. When the Executive clicked the URL the Executive was presented with an opt-in record that displayed the MSISDN, the date and time a PIN was requested and verified, the transaction ID and the PIN number. The Level 2 provider did not give the Executive the ability to log into the portal and check the opt-in record for each complainant. However, the Executive could not rely upon the information submitted by the Level 2 provider as evidence for consent to charge, as it did not have access to the platform but instead had been provided with links to the static pictures without any functionality of logging in. Further, the Executive considered that the information in relation to just ten MSISDNs was not sufficient considering the large number of complaints it had received from consumers.

In light of the fact that the purported verification links to a HTML page and the PINs shown were not alphanumeric and therefore were easy to manipulate, the Executive submitted that the purported links to the verifier's portal did not demonstrate robust evidence of consent to charge complainants and raised concerns that the information might not have been independent or tamper proof.

As noted above, the Executive relied on the Consent to charge guidance, and brought the following paragraph to the Tribunal's attention:

"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."

The Executive submitted that as the Level 2 provider had not been able to provide evidence establishing that robust consent to charge had been obtained, it concluded that consumers had been charged for premium rate services (PRS) without their consent and therefore a breach of rule 2.3.3 had occurred.

2. The Level 2 provider did not make representations or provide a response to the Warning Notice.
3. The Tribunal carefully considered the Code, the Consent to charge guidance and all of the evidence before it.

The Tribunal was of the view that the static links, without any functionality of logging in, could easily be manipulated and the Level 2 provider was required to provide the dynamic links. The Tribunal also agreed with the Executive's view that information provided by the Level 2 provider in relation to only ten MSISDNs did not demonstrate consent to charge, particularly given the large number of complaints received. The Tribunal further noted that the Level 2 provider had failed to provide the information it was required to provide under rule 2.3.3 despite repeated requests from the Executive.

For the reasons advanced by the Executive, the Tribunal was satisfied on 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 2.6.1 of the Code

“Level 2 providers must ensure that consumers of their services are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily”.

1. The Executive stated that the Level 2 provider had breached rule 2.6.1 of the Code as it had failed to quickly, easily and fairly handle complaints and provide redress to complainants. The Executive relied on 32 consumer accounts that variously stated that they could not get through to the customer service number or they had not received a response to messages left.

The Executive relied on the Guidance note on complaint-handling (**“the Complaint-handling guidance”**) which outlined desired outcomes of good complaint handling and consumer complaints evidence.

When contacting the Level 2 provider about the receipt of unsolicited Service charges and to receive redress, 32 complainants stated that they had experienced difficulties as set out below:

“I’ve been charged 3.75 for a special sms service i did not sign up to.i contact 02 who gave me this companies number but when i try to call it says error with the phone service and ends the call.” [sic]

“On 28/12/18 my Three mobile phone account was charged £4.50 as a result of an unsolicited premium rate text received from a company claiming to be “fruitycell.com” using the short code 65099.”

“I have not in any way subscribed to this service. The customer care number on their website is an answer phone & the number listed on the PSA site is unobtainable. My network provider have told me there is nothing they can technically do to prevent this from happening which I find totally unsatisfactory.”

“I have emailed the company to explain that their privacy notice does not comply with GDPR (you have to opt out not in) and that they have charged me 3 times for text messages for a service I do not want and have never subscribed to. The email address above and listed on their website is false and does not go through to the company but automatically bounces back.”

“I have emailed the company to request that they don’t send me anymore texts and that I requested a refund but they haven’t got back to me about it at all. Please note the charge is the £4.50 but tesco mobile don’t give me a detailed number but told me that it was this number 65099.”

“I received a text from this company telling me a smoothie recipe that I never signed up for (I work in marketing and am very careful what I subscribe to). They charged me £3.75 for receiving that text which I never requested), and a further 8p for replying STOP to unsubscribe, which 02 told me to do. I have sent them an email asking them to refund and

unsubscribe me, but have not heard back, and don't expect to based on other people's feedback. I don't want to phone them as expect that will be a chargeable number."

"If I find the telephone number on their contact page I just get an answer phone." [sic]

The Executive received 45 responses to the survey it sent out to 292 complainants. A summary of the complainant responses is provided below:

- 16 complainants said they had attempted to complain or request a refund from the Level 2 provider directly
- seven complainants confirmed that they made a complaint via email (the remaining nine did not answer this question)
- four complainants said that they were unable to get through to the Level 2 provider or contact it directly
- two complainants did not receive a response to their email
- 11 complainants were given refunds
- two complainants did not receive a response
- two complainants were not comfortable with supplying the Level 2 provider with their details.

The Executive noted from the message logs supplied by the Level 2 provider that a customer service email address and telephone number were supplied within messages sent to subscribers.

The Executive emailed the Level 2 provider customer service email address in an attempt to establish whether consumer emails were being responded to.

The Executive noted that in response to the Executive's initial requests for information, the Level 2 provider responded from the same email address given to consumers within the message logs. On 11 December 2019, the Executive sent an email to this address purporting to be from a consumer and received a response on 12 December 2019 which stated: *'Can you please send on your mobile number and we will look into this for you?'* The Executive did not respond to the request for a mobile number and no further emails were received from the Level 2 provider on this matter.

Additionally, on 10 December 2019 the Executive called the number provided within the message logs and asked to speak to the Level 2 provider's CEO/Director. The representative had never heard of the Level 2 provider and stated that the Executive was connected to a different organisation whose role was to stop subscriptions on consumers' phones. After explaining that the Level 2 provider previously operated the Service called "Fruity Cell" the representative provided an email address for that Service which the Executive already had on file.

The Executive noted that between 4 January 2019 and 21 July 2019, 32 out of 292 complainants cited difficulties contacting the Level 2 provider. In April 2019, the Executive had received its highest number of complainant reports about the Service in a month totalling 107 complaints.

The Level 1 provider stated that the service began on 8 November 2018 and the last billing date on this short code was 7 October 2019. The Executive had tested the contact details in December 2019 and found that the email address was effective and quickly accessible.

Based on the 32 complainant accounts, the Executive submitted that the Level 2 provider had breached rule 2.6.1. of the Code as it had failed to resolve all complaints quickly and easily during the period at which the service was at its busiest.

2. The Level 2 provider did not make representations or provide a response to the Warning Notice.
3. The Tribunal carefully considered the Code, the Complaint-handling guidance and all of the evidence before it.

The Tribunal was persuaded by the complainant evidence before it, remarking that the complainant accounts were overwhelmingly believable. While it considered that it could not draw conclusions on the Executive's monitoring, it was satisfied that the breach of rule 2.6.1 was made out based on the complainant evidence. In light of the number and nature of complaints received by the Executive, the Tribunal was satisfied that consumers were not getting an effective response in respect of their complaint handling.

Taking all of the evidence into account, the Tribunal was satisfied on the balance of probabilities that a breach of rule 2.6.1 of the Code had occurred as consumers had not had their complaints resolved quickly, easily and fairly and/or redress provided.

Decision: UPHELD.

Alleged breach 3

Paragraph 4.2.3 of the Code

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

1. The Executive stated that the Level 2 provider had breached paragraph 4.2.3 of the Code as it had failed to provide Service information when directed to do so.

The Executive relied on directions issued to the Level 2 provider on 16 August 2019 and 26 September 2019, and its responses/ holding responses. The Level 2 provider was required to supply financial information about the Level 2 provider's business and the operation of its Service.

The Level 2 provider responded on 10 September 2019, questioning the PSA's legal basis for conducting its investigation and requesting sight of correspondence from the Cypriot regulator relating to the derogation of this matter. The Executive responded on 26 September 2019, confirming derogation was correctly obtained as of 23 May 2019 and confirming the PSA's powers under the Code and the e-Commerce Directive. A further direction was enclosed with this response to the Level 2 provider, requesting the same information as requested on 16 August 2019. The Level 2 provider was given until 3 October 2019 to respond. As the Executive did not receive a response, a further email was sent on 8 October 2019 giving the Level 2 provider until 11 October 2019 to respond. The Executive observed that initially the Level 2 provider appeared cooperative and willing to provide the information, but required an extension to do so as outlined below:

"I am advised by New Level management that a response is being drafted and will be with you in time for the 11th October. Kindly note that the fruity cell service is no longer operating, it is not billing and that New Level Ventures are no longer operating service in the UK market".

The Level 2 provider did not respond to the direction and did not provide an explanation for missing the further deadline of 11 October 2019.

In light of what the Executive submitted was an intentional lack of response to formal directions issued by the PSA, the Executive submitted that the Level 2 provider had breached paragraph 4.2.3 of the Code.

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

The Tribunal considered that the Level 2 provider was aware of its obligation to supply the requested information as it had indicated that a response was being drafted and would be supplied by 11 October 2019.

The Tribunal was of the view that the evidence produced by the Executive clearly demonstrated that the Level 2 provider did not provide the required information, and this information was significant to the Executive's investigation and was information that did have a regulatory benefit in the investigation.

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.

Decision: UPHELD

Assessment of breach severity

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 unknowingly had been signed up to and charged for a service. The Tribunal considered that consumers had incurred very high and 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 2.6.1

This breach was **significant**.

The Tribunal considered that although complainants did receive some redress the breach had a clear material impact on consumers and the potential of risk of substantial harm to consumers. The Tribunal also considered that the breach would have likely caused a slight impact on consumer confidence in premium rate services where they were unable to have their complaints resolved in a satisfactory manner.

Paragraph 4.2.3

This breach was **very serious**.

The Tribunal considered that the information requested from the Level 2 provider was clear and clearly relevant to the investigation. The Tribunal was of the view that this breach was committed deliberately by the Level 2 provider failing to respond to the Executive despite stating it would respond and failing to respond to the regulator seriously undermined regulation. The Tribunal considered that the breach was repeated on three occasions when the Executive's directions for information were sent. The Tribunal was of the view that the breach was committed intentionally and demonstrated a fundamental disregard for the requirements of the Code.

Sanctions

Initial assessment of sanctions

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**:

- formal reprimand
- that the provider is prohibited from providing or having any involvement in, any premium rate service for a period of five years, starting from the date of publication of the Tribunal decision, or until payment of the fine and the administrative charges, whichever is the later
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made
- a fine of £550,000 comprised of:
 - Rule 2.3.3 - £250,000
 - Rule 2.6.1 - £50,000
 - Paragraph 4.2.3 - £250,000

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

Proportionality assessment

Assessment of mitigating and aggravating factors

Aggravation

The Executive submitted that it was an aggravating factor that the Level 2 provider had failed to follow the Consent to charge guidance, which had it been followed could have prevented the breaches from occurring.

The Executive further submitted that it was an aggravating factor that following correspondence sent to the provider, the Service continued to be promoted until 30 April 2019 and continued to charge users without their consent up until October 2019.

The Executive submitted that it was also an aggravating factor that the Level 2 provider had not engaged more fully with the Executive and did not provide substantive responses to its directions issued to the Level 2 provider on 16 August 2019 and 26 September 2019.

The Level 2 provider did not make any representations or respond to the Warning Notice.

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.

The Tribunal, however, agreed that failure to engage fully with the Executive by providing the relevant information was an aggravating factor to the case, and so was continuing to charge users without their consent up until October 2019. The Tribunal considered that in light of the application of the e-Commerce Direction, it would only take into account the Level 2 provider's conduct and lack of engagement from the date when derogation was obtained and onwards.

Mitigation

The Executive submitted that the Level 2 provider permanently suspended advertising of the service in April 2019 and billing was later suspended in October 2019.

The Executive also submitted that the Level 2 provider had supplied a list of ten MSISDNs for which it stated it had issued full refunds to, having been made aware of the complaints by the PSA. One of the ten complainants confirmed that did receive a refund. An additional 14 complainants confirmed they had received refunds from the Level 2 provider, some of which were partial refunds.

The Level 2 provider did not make any representations or respond to the Warning Notice.

The Tribunal recognised that the Level 2 provider had provided some refunds to the complainants. The Tribunal considered this to be a mitigating factor, however it was of the view that it was of limited value as not all of the complainants received the refunds and some of them received partial refunds.

The Tribunal agreed that the Level 2 provider's actions in permanently suspending promotion of the Service and later its billing was a mitigating factor to the case but again attached limited weight to this.

Financial benefit/Need for deterrence

The Executive stated that the Level 2 provider had generated an estimated £91,096.27 (out of a total Service revenue of £461,368.89) of Service revenue post derogation and stated that this flowed from the apparent breach of rule 2.3.3.

The revenue information had been supplied by the Level 1 provider which showed total consumer spend and outpayment to the shortcode supplier of £461,368.89, of which £91,096.27 (June 2019 to October 2019) was generated post derogation.

In response to an informal enquiry, the Level 2 provider responded on 4 March 2019 with a month-by-month breakdown of the gross revenue the Service had generated at that time. However, the Level 2 provider had failed to provide supporting documentation to evidence any payments and did not provide further financial information for the remaining period of the Service's operation despite the Executive directing the Level 2 provider for this information. As a result of this, the Level 2 provider's entire gross revenue post derogation was unknown.

The Supplier informed the Executive that it did not make payments to the Level 2 provider directly. The Supplier stated it made payments to Mobile Affiliates Limited ("MAL") for the total revenue received from a number of different services, which it did not break down individually by company, and it would deduct the management fees and costs from that amount first before paying the Level 2 provider. The Supplier was unable to break down the revenue outpayment to MAL or for the Level 2 provider. Therefore, the Executive relied on the revenue information provided by the Level 1 provider, which contained the gross revenue for the Service paid out to the Supplier rather than the Level 2 provider. The Executive submitted that in the absence of evidence of any further deductions by the Supplier and/or MAL, this figure was the relevant gross Level 2 provider revenue.

The Executive then argued that, in light of the seriousness of the breach of rule 2.3.3, the widespread nature of consumer harm and the intentional nature of the breach, there was a need to remove the financial benefit that accrued from the breach post derogation, through the imposition of a substantial fine.

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.

The Tribunal agreed with the reasons given by the Executive that the relevant gross Level 2 provider revenue was £91,096.27. 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 breach of rule 2.3.3 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 of commission of such breaches.

Sanctions adjustment

The Executive stated that the totality of the recommended sanctions would result in the removal of the Level 2 provider from the UK premium rate industry. The Executive noted that the recommended initial fine amount far exceeded the post derogation revenue generated and that the recommended fine, in combination with the recommended non-financial sanctions, would likely have a significant impact on the Level 2 provider. In light of this the Executive submitted that the recommended fine amount should be adjusted downwards in the interests of proportionality, to a total fine of £250,000.

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 £250,000 was 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.

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 £250,000.

Administrative charge recommendation: 100%