

Settlement case report for Kalastia Consulting Limited

Introduction

1. The Phone-Paid Services Authority ('PSA') opened an investigation into Kalastia Consulting Limited ('Kalastia') on the 27 April 2021.
2. Kalastia contracted with a number of merchant providers who provided subscription-based alerts service. Between January 2018 and 14 November 2020, the PSA received a combined total of 3,047 complaints across the relevant merchant providers. A number of investigations were opened in respect of the merchant providers, some of which resulted in Tribunal adjudications which upheld breaches.
3. The PSA noted that while all of the merchant providers were separate legal entities who operated different premium rate services, the nature of the complaints being received as well as the nature of the potential non-compliance as evidenced within those complaints raised concerns regarding the level of due diligence, risk assessment and control that was being performed by Kalastia.
4. By way of background, Kalastia contracted with all of the merchant providers directly and also contracted with an intermediary, Dynamic Mobile Billing ('DMB'). DMB did not contract directly with any of the merchant providers. In addition to this, Kalastia also contracted with a third party which was not involved in the provision of any premium rate service ('PRS') but which funds were paid to before being paid to any of the merchant providers (Mobile Affiliated Limited 'MAL').
5. Following initial directions and requests for information to Kalastia by the PSA, it appeared that there was a dispute as to the role of Kalastia within the value chain. Kalastia initially maintained that it only acted as a re-seller with no technical function and that it did not therefore fall within the remit of the 14th edition of the Code of Practice ('Code 14') which was the Code of Practice in force at the time.
6. Based on the responses provided by Kalastia, in May 2020 the PSA initially determined that Kalastia fell outside of the remit of Code 14. However after being provided with further evidence from DMB, the PSA revised this determination and concluded that Kalastia was a Level 1 provider under Code 14 in April 2021.
7. Following this determination, the PSA opened a case in respect of Kalastia. Although the PSA was originally concerned about the effectiveness of Kalastia's due diligence, risk assessment and control on its merchant providers, by this time the merchant providers had ceased operating and DMB had terminated its contract with Kalastia. The PSA's investigation therefore focused on the failure of Kalastia to provide information when directed to do so and also its concealment/provision of false and misleading information regarding its role within the value chain and the compliance monitoring that was undertaken in respect of the merchant providers.

8. Following the conclusion of the investigation the PSA and Kalastia have now reached a settlement agreement comprised of the following:

Breaches agreed

Breach 1 – Paragraph 4.2.3 of Code 14

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

Breach 2 Paragraph 4.2.2 of Code 14

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)."

9. The parties have agreed that the case severity overall is **very serious** and that the following sanctions should be imposed:

Sanctions agreed

- formal reprimand under paragraph 5.8.5(b) of Code 15
 - a prohibition on Kalastia Consulting Limited from providing or having any involvement in PRS or promotion for five years and/or until all sanctions have been complied with, whichever is the later under paragraph 5.8.5(g) of Code 15
 - a fine of £350,000 under paragraph 5.8.5(d) of the Code 15, comprised of the following amounts for each breach:
 - Breach 1 (failure to disclose information pursuant to paragraph 4.2.3 of Code 14) - £150,000
 - Breach 2 (concealing and providing false and misleading information pursuant to 4.2.2. of Code 14 - £200,000
10. As the settlement between the parties was reached after Code 15 came into force, in line with paragraphs 5.5.1 and 5.5.2 of Code 15, the PSA has exercised its discretion to settle the matter and the settlement and that both the breaches and sanctions agreed between the PSA and Kalastia will have the same effect as though they had been imposed by a Tribunal.
- The investigation**
11. There was initially some delay in opening the investigation into Kalastia due to the conflicting information regarding its role within the value chain from Kalastia and from the intermediary provider DMB.
12. In May 2019, Kalastia asserted that it was a “sub-Level 1 provider” (a term not recognised in Code 14) that it acted as a pure re-seller without any technical facilities.

13. As there was material doubt as to whether Kalastia fell within the remit of the Code, the PSA exercised its discretion under paragraph 5.3.8(c) of Code 14 to determine whether Kalastia was a PRS provider and/or a Level 1 provider ('intermediary' under Code 15). On 29 May 2020, the PSA wrote to the parties to inform them that it had determined, based on the evidence available at the time that Kalastia acted as a re-seller with no technical capabilities. The effect of this determination was that Kalastia fell outside of the remit of Code 14.
14. Following its initial determination, the PSA received further evidence from DMB in July 2020 which indicated that Kalastia acted as more than a re-seller and that it managed a technical gateway meaning that it should be treated as a Level 1 provider. In addition to this, Kalastia's legal advisors wrote to the PSA on 22 October 2020 confirming that Kalastia contracted with a third party which was engaged by Kalastia to manage its technical platform. This letter stated that the role played by Kalastia within the value chain was not easily explained or defined but *"that the simplest way forward for all involved is to recognise KCL as a Level 1 Provider. By virtue of their arrangements with DMB, they effectively allow access to a platform which is allocated to them by DMB, and managed by a third-party technical company, enabling the Premium rate services to be used."*
15. In April 2021, the PSA re-determined Kalastia as falling within the definition of a Level 1 provider under paragraphs 5.3.8(a) and (c) of Code 14 as there was sufficient evidence to show that Kalastia provided a platform which, through arrangements made with a network operator or another Level 1 provider, enables the relevant PRS to be accessed by a consumer or that it provided any other technical service which facilitates the provision of the relevant PRS.
16. In subsequent correspondence between the parties, the PSA also confirmed that it considered Kalastia to fall within section 120(9)(d) of the Communications Act 2003 and therefore within the remit of regulation. This was as a result of Kalastia providing a facility comprised within the service within the meaning of section 120(9)(d) of the Communications Act 2003. The facility provided by Kalastia consisted of a platform (managed by a third party, WebMobiTech Pty, engaged by Kalastia) which enabled consumers to access (and be charged for) the services provided by the merchants with Kalastia retaining a share of the revenue. The PSA confirmed that the existence of the third party did not alter this position where that third party was engaged by Kalastia to perform its functions due to provisions of section 120(13) of the Communications Act 2003.
17. Kalastia was notified of the re-determination on 22 April 2021 and it subsequently received a formal notification which set out that the PSA had opened an investigation into concerns that Kalastia may have provided false and misleading information to the PSA.
18. It is now agreed between the parties that Kalastia does fall within the remit of the PSA's regulation by meeting the definition of a Level 1 provider under Code 14 ('intermediary' under Code 15) and through also falling within section 120(9)(d) of the Communications Act 2003.

Breaches

19. The parties have agreed that the following breaches occurred and should accordingly be upheld.

Breach 1 – Paragraph 4.2.3 of Code 14

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

20. Throughout the investigations into the merchants contracting with Kalastia, the PSA repeatedly directed Kalastia to provide information relating to the service revenue of the individual merchant providers under investigation. Throughout the different investigations into the merchant providers which took place in 2019, Kalastia repeatedly stated that it was unable to provide this information as it did not pay its merchants directly, but made one aggregate payment to another company, MAL, for all of the merchant providers. Kalastia maintained that it was not able to separate out the revenue share for each merchant provider, nor could it confirm the funds that it retained as a party within the value chain.
21. In March 2022 as part of its ongoing investigation into Kalastia, the PSA again requested the outstanding financial information. On this occasion Kalastia's legal advisors responded to the direction. While the response from the legal advisors indicated that some of the figures provided were not "100% accurate", the figures provided on this occasion did take account of the deductions made by the parties within the value chain as a result of the contractually agreed revenue shares and short code rental costs.
22. The PSA asserted that a breach had therefore occurred for the following reasons:
- on multiple occasions between July and December 2019 Kalastia failed to disclose information regarding the revenue of its merchant providers. Although further information was provided in the context of this investigation, as these figures were stated to be not 100% accurate, the information requested has not to date been disclosed in full.
 - the PSA did not consider the explanation provided by Kalastia as to why it did not have these figures as plausible. It was also unclear as to why Kalastia could not have obtained these figures from MAL.
 - the information requested was reasonably capable of having a regulatory benefit. The service revenue for the merchant providers was necessary in order to allow a Tribunal to assess a commensurate and proportionate level of financial penalty. Additionally, the revenue of the merchants was also required in order to make an assessment of whether those merchants were unable to pay any likely financial penalty and accordingly whether any interim measures consisting of a withhold should be imposed.

- the effect of the failure to provide this information was that the Tribunal adjudicating on some of the merchant cases only had the gross figures provided by DMB available to it when assessing the proportionality of any fine. These figures did not take account of the deductions that were made to MAL or Kalastia.
- the failure to provide this information led to some delay in the PSA applying for interim measures in respect of a number of the merchant providers.

Parties agreement on the breach

23. Kalastia accepted that it had not provided the information requested. Kalastia asserted that it had not initially provided the breakdown of the figures in 2019 which it subsequently provided in March 2022 as it had been concerned about the accuracy of those figures. After receiving legal advice, Kalastia considered that it should provide the estimated breakdown of figures when it was requested to do so in the context of this investigation.

24. The parties therefore agreed that a breach of paragraph 4.2.3 had occurred.

Breach 2 – Paragraph 4.2.3 of Code 14

“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).”

Reason 1

25. During the initial investigations into the merchant providers, Kalastia repeatedly stated that it did not act as a Level 1 provider within the meaning of Code 14. Examples of Kalastia’s assertions are set out below:

Kalastia’s response on 1 May 2020 in relation to Entertainmob and Globo Mobile:

“We do not provide any kind of service at all. All we do is resell shortcodes. Nothing more and nothing less.”

Kalastia’s response to formal 4.2.1 direction on 5 September 2019 in relation to New Level Ventures:

“The Level 1 provider is the Company that allocates and controls the short codes. We have no control over the short code and we are indeed a reseller of their short codes. Our role is to introduce our clients who want to operate services to them. We have no platform. We have no agreements or connections to any mobile network operator. We provide no technical services at all. We do not process any personal data.”

On 15 September 2020 Kalastia stated the following to the PSA regarding its position within the value chain:

“We are a sub level 1 provider as we do all these things but do not have any technical capability at all. We rely on DMB for billing, revenue payments, technical provision and short-code allocation. “We provide good customer services with DMB and help them whenever they need it. Reselling a short code is a natural role of a sub level 1 provider. We know of other companies that do this already.”

On 18 September 2020 Kalastia stated to the following to the PSA:

“We cannot be a level 1 provider because we do not have any technology or agreements with networks.”

26. Based on the representations made by Kalastia regarding its role, on 29 May 2020 the PSA determined that Kalastia did not perform the functions of a Level 1 provider. The rationale for this decision was:

- Kalastia has confirmed that it does not supply a platform or any other technical support, but simply resells shortcodes via its contractual relationship with DMB, passes on mobile network operator reports, GDPR requests, and pays out revenue
- the contracts between DMB, Kalastia and the merchant providers, indicate that DMB provides the platform and the shortcodes used by the Level 2 providers.

27. The effect of the PSA’s initial determination was that Kalastia was considered to fall outside the remit of the PSA’s regulation as it was not considered to be a PRS provider.

28. Following the initial determination by the PSA as to Kalastia’s status, in July 2020 the PSA received correspondence from DMB including evidence of email exchanges. DMB disputed the PSA’s determination on the following grounds:

- Kalastia was the only party that contracted with the billing aggregator / gateway
- it was the only party that sourced & contracted with the involved merchants directly
- it provided full technical API (application programming interface) provisioning for clients using its own platform
- it provided full access to billing control & traffic statistics to its clients
- it receives and forwards funds to the merchant providers after retaining a fee
- it sources full customer care provision for clients and full compliance & guidance provision.

29. DMB provided a number of email exchanges by personnel employed by Kalastia with DMB. One of these emails for example consisted of a request by Kalastia to make direct changes to the HTTP relay connection provided by DMB and referred to Kalastia’s gateway interfaces. In addition to this DMB confirmed that only one IP

address connected with its platform. DMB stated that had the merchants' connected directly with DMB's platform, there would have been multiple IP addresses. The implication of this was that it was only Kalastia which connected with DMB's platform and that it then operated its own platform which connected with the merchant providers.

30. On 22 October 2020, the PSA received correspondence from the legal advisors acting on behalf of Kalastia. This correspondence confirmed that, despite its previous assertions, Kalastia did in fact contract with a third-party company called WebMobiTech Pty who managed technical services on Kalastia's behalf:

"All technical services are provided by a technical host, WebMobiTech Pty. KCL do not [sic] have control over or even access to this platform and it is used by the Level 2 Providers to gain access to DMB's platform. We have enclosed the agreement with WebMobiTech Pty with this letter. The role of WebMobiTech Pty is purely as a technical management intermediary. It plays no part in the provision, marketing or management of any services provided by the Level 2 providers. In effect they are a pure play technical platform management provider."

31. After receiving this information, the PSA re-determined Kalastia as being a Level 1 provider.

Reason 2

32. In response to directions sent by the PSA in relation to the merchant cases on 16 August 2019, 20 August 2019 and 9 October 2019, Kalastia stated the following:

"Monitoring is provided by DMB and we also utilised the services of a 3rd party monitoring company called Reliance Compliancy. During this phase of the monitoring which was in the early stages of our agreement there were no concerns highlighted by Reliance"

33. Kalastia provided the PSA with copies of the Reliance Compliancy Contract which stipulated the nature of the monitoring that was to take place. The contract was signed by Kalastia and Reliance Compliancy (but not by any of the merchant providers).

34. In a response to a direction dated 18 June 2019, Kalastia stated to the PSA that it had told a different merchant provider that *"they must have independent service monitoring and this was done in February 2019 with Reliance Compliancy"*.

35. The PSA enquired whether any monitoring was in fact undertaken by DMB as stated by Kalastia. DMB confirmed to the PSA that it did not provide any monitoring function to Kalastia and that was under the impression that Kalastia employed Enarpee (a different legal entity) as its compliance monitoring partner. However on 27 September 2019 Kalastia confirmed that it had not employed Enarpee.

36. The PSA was never provided with any evidence of monitoring being undertaken by either Reliance Consultancy or Enarpee.

37. The PSA submitted that a breach had occurred for the following reasons:

- Kalastia provided false and misleading information regarding the role that it played in the value chain between May 2019 and October 2020 through asserting that it had no technical capability/ did not provide any technical services. In addition to this, Kalastia concealed the existence of its contract with WebMobiTech Pty to manage a technical platform until October 2020 despite being asked about its role/technical capability by the PSA on multiple occasions.
- Kalastia also provided false and misleading information which suggested that compliance monitoring of the merchant services was taking place. This was not in fact the case.

Parties agreement on the breach

38. In respect of the value chain, Kalastia accepted that it did not inform the PSA of its existence of the contract with WebMobiTech Pty regarding the management of its technical gateway until October 2020. Kalastia stated that it had initially responded to the PSA on the basis that DMB alone provided the relevant short codes without providing the full context of its role within the value chain.
39. In relation to compliance monitoring, Kalastia does not accept that it had ever asserted that monitoring was to be undertaken by Enarpee and denied the breach on this basis. In relation to monitoring by Reliance Consultancy however Kalastia accepted that it had made assertions that compliance monitoring was undertaken by Reliance Consultancy but that there were in fact no records available to show that this had taken place.
40. In light of all of the above, the parties agreed that a breach had taken place.

Breach severity

41. The parties agreed that both breaches were very serious for the following reasons:

Breach 1 – failure to provide information:

- the breach was committed recklessly
- the breach was repeated as the information was not provided in response to multiple directions for information and
- the breach was of a lengthy duration beginning with the investigations into the merchant providers.

Breach 2 – concealing and providing false and misleading information:

- the breach was committed deliberately and represented a fundamental disregard for the requirements of the Code to provide full and accurate information to the PSA as the regulator; the effect of the breach as regards the value chain was that the PSA was prevented from taking regulatory action as it was misled into believing that Kalastia did not fall within the remit of Code 14

- the breach was repeated as Kalastia made repeated assertions regarding its lack of any technical capability throughout the course of the investigations into the merchants and its correspondence with the PSA
- the breach was of a lengthy duration beginning in 2019 with the investigations into the merchants.

Initial recommended sanctions

42. The PSA's initial recommendation of the sanction was as follows:

- formal reprimand
- a prohibition on Kalastia Consulting Limited from having any involvement in PRS or promotion for a period of five years and/or until all other sanctions are complied with, whichever is the later
- a fine of £500,000 broken down as follows:
 - Breach 1 - £250,000
 - Breach 2 - £250,000
- Kalastia to pay 100% of the PSA's administrative fees incurred to date.

Financial benefit

43. The parties agreed that while the revenue did not flow directly from the breaches, that the effect of the breaches was to prolong the investigations into the merchant providers and that this may have indirectly led to consumer harm.

44. It was agreed that in light of the severity of the breaches there was a need to impose a financial penalty in order to remove the financial benefit. It was agreed that this was necessary in order to ensure the sanctioning objective of credible deterrence and to uphold and maintain confidence in the PSA as the regulator.

Aggravation and mitigation

45. The parties agreed that there were no aggravating factors going to either the breaches or the case as a whole which were not already covered within the breaches.

46. The parties also agreed that there were no mitigating factors which went to either of the breaches individually or to the case as a whole. However it was agreed that the sanction should be subject to a reduction in light of Kalastia's willingness to settle the matter which would have the effect of expediting matters and saving further administrative costs.

Final agreed sanctions

47. The parties agreed that the following sanctions should therefore be imposed:

- formal reprimand under paragraph 5.8.5(b) of Code 15

- a prohibition on Kalastia Consulting Limited from providing or having any involvement in PRS or promotion for five years and/or until all sanctions have been complied with, whichever is the later under paragraph 5.8.5(g) of Code 15
- a fine of £350,000 under paragraph 5.8.5(d) of the Code 15 comprised of the following amounts for each breach:
 - Breach 1 (failure to disclose information pursuant to paragraph 4.2.3 of the 14th Edition of the Code of Practice) - £150,000
 - Breach 2 (concealing and providing false and misleading information pursuant to 4.2.2. of the 14th Edition of the Code of Practice) - £200,000
- the parties also agree that Kalastia is to pay the PSA's administrative costs in the sum of £8,225.