

Tribunal meeting number 205/ Case 1

Case reference: 130053

Level 2 provider: Partner Telecom Limited (UK)

Type of service: N/A

Level 1 provider: N/A

Network operator: N/A

This case was brought against the Level 2 provider under Paragraph 4.5 of the Code of Practice

Background

A service provided by the Level 2 provider Partner Telecom Limited (the “**Level 2 provider**”) was the subject of a Phone-paid Services Authority (“**PSA**”) investigation and adjudication by consent (case reference: 74817), which resulted in sanctions being agreed between the parties and imposed by a Tribunal on 19 October 2016. The sanctions imposed by the Tribunal were a formal reprimand, a fine of £120,000, a requirement that the Level 2 provider remedy the breach by ensuring that it has robust verification of each consumer’s consent to be charged before making any further charge to the consumers, including for existing subscribers to the service; and a requirement that the Level 2 provider 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 provider evidence to the PSA that such refunds had been made. In addition, an administrative charge of £3,681.58 was imposed.

The Level 2 provider was informed of the sanctions imposed in a formal notification, which included an invoice for payment of the fine of £120,000, and it was sent by email and by post on 28 October 2016. On 14 November 2016, the Level 2 provider was issued with a payment reminder, notifying it that payment of the fine was due in two working days. On 22 November 2016, the Executive contacted the Level 2 provider by telephone and was informed by a Director of the Level 2 provider that it was not in a position to pay the amounts outstanding to the PSA. On the same day, the Level 2 provider contacted the Executive by email to request that payment of the amounts outstanding be made from withheld revenues being held by the Level 1 provider and the remainder by way of a payment plan.

On 25 November 2016, the Executive directed the Level 1 provider to release the withheld revenues to the PSA and it notified the Level 2 provider that it was considering its request for a payment plan. On 9 December 2016, the Executive rejected the Level 2 provider’s payment plan offer as the level of the payment instalments were insufficient and it was not willing to permit the Level 2 provider to resume the Service before any payment was made. There was a further exchange of correspondence between the Executive and the Level 2 provider between

9-14 December 2016. The PSA received withheld revenues of £5,052.24 from the Level 1 provider which was used to pay the administrative charge and in part payment of the fine. The Level 2 provider failed to pay the full amount of the fine in the time period specified. The amount outstanding to the PSA is £118,629.34.

On 25 November 2016, the Executive issued a direction to the Level 1 provider to suspend the Service for non-compliance under paragraph 4.8.6 (a) of the Code.

The Investigation

The Executive conducted this matter as a Track 2 procedure in accordance with paragraph 4.5 of the Code of Practice (14th Edition).

The Executive sent a Warning Notice to the Level 2 provider on 23 February 2017 with a deadline for response of 9 March 2017. Within the Warning Notice the Executive raised the following breach of the PSA Code of Practice (the "**Code**"):

- Paragraph 4.8.6(b) – Failure to comply with a sanction

The Level 2 provider provided a response to the Warning Notice on 9 March 2017 and stated that it wished to attend the Tribunal to provide oral representations. However, on 18 April 2017, the Executive received correspondence from the Level 2 provider's appointed insolvency practitioner, notifying the Executive that the Level 2 provider had resolved to enter into liquidation and neither the Level 2 provider nor the appointed liquidator ("**the Liquidator**") would be attending the Tribunal to make representations.

The Tribunal considered the confirmations of delivery of the Warning Notice by post and email to the Level 2 provider, and was satisfied, particularly as the Level 2 provider had provided a response to the Warning Notice that the Executive had made all reasonable attempts to inform the Level 2 provider of the proceedings. On 21 April 2017, the Tribunal reached a decision on the breach raised by the Executive. The Tribunal considered the following evidence in full:

- The post adjudication notification sent to the Level 2 provider, including the fine and administrative charge invoices and the refund request;
- The Interim Consent Order of 18 August 2016 and the final Consent Order of 19 October 2016;
- Post adjudication correspondence between the Executive and the Level 2 provider between 28 October 2016 and 14 December 2016;
- Notification from the Liquidator dated 18 April 2017;
- The case report including the Warning Notice dated 23 February 2017 and the Level 2 provider's response; and
- Proof of service of the Warning Notice including email correspondence with the Level 2 provider between 13 and 17 March 2017.

Submissions and Conclusions

Alleged Breach 1

Paragraph 4.8.6(b) – “The failure of any relevant party to comply with any sanction within a reasonable time will result in: a further breach of the Code by the relevant party, which may result in additional sanctions being imposed.”

1. The Executive noted that on 19 October 2016, the Tribunal considered a draft consent order agreed between the Executive and the Level 2 provider relating to a service operated by the Level 2 provider that had been the subject of a PhonepayPlus (now the PSA) investigation (case reference: 74817). The adjudication by consent resulted in the imposition of sanctions, including a fine of £120,000.

On 28 October 2016, the Executive sent the Level 2 provider a formal notification of the outcome of the adjudication by consent, which included an invoice for payment of the fine of £120,000 to be made within seven working days.

The Executive directed the Level 1 provider to pay withheld revenues of £5,052.24 to the PSA which was used to pay to the administrative charge and part payment of the fine. Payment of £118,629.234 of the fine was not made within the time period specified (or at all) in breach of paragraph 4.8.6(b) of the Code.

During the Tribunal, the Executive were asked to confirm whether the Level 2 provider had complied with the other sanctions imposed by the adjudication by consent of 19 October 2016. The Executive stated that it had no evidence that the Level 1 provider had remedied the breach, in accordance with the sanction but by virtue of the Level 2 provider’s suspension of the Service on 1 August 2016 and the PSA’s formal direction for suspension on 25 November 2016, the sanction had by default been remedied. In relation to the refund sanction, the Level 2 provider stated that it had refunded all consumers that had complained to the PSA. The PSA had not received any consumer complaints regarding refunds.

2. The Level 2 provider provided a response to the Warning Notice and made representations to the Tribunal not to prohibit the Directors of the company. The Level 2 provider submitted that there were only 28 complaints to the original case and in its view all of which were addressed satisfactorily. The Level 2 provider asserted that the fine to the original case was excessive. It stated that it had complied with the Executive’s requests to ‘cease trading’ during the investigation process, but by doing so, it had not being trading for over nine months and as such it stated it had no ability to pay any fine or administrative charges.

In addition, the Level 2 provider submitted that it had worked very hard with the PSA to settle the sanctions imposed but every opportunity to secure a repayment plan had been rejected. The Level 2 provider submitted that this was a cause for concern as it knew there that had been many precedents which allow for this. It highlighted PSA’s own repayment plan to pay its High Court fine in recent years.

The Level 2 provider stated that it had always been its intention to repay the fine in full, but it required more time. It submitted that naming the directors as Associated Individuals who should be prohibited, would only provide an additional barrier to trading and prevent its ability to raise the money to pay the fine.

It also asked the Tribunal to note that the original Tribunal failed to give any consideration during the adjudication to its ability to pay. As its company accounts show, it had no financial or any other assets. The Level 2 provider urged the Tribunal to reconsider the Executive's position in preventing it from trading and allowing it time to pay the fine owed to the PSA. It stated if this failed, then the company would close and any possibility of a fine or administrative being paid would be eliminated.

Subsequent to this response, the Executive received an email from the Liquidator stating that the Level 2 provider had appointed a liquidator and neither the Level 2 provider or the Liquidator would attend the Tribunal to make representations.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal noted the representations from the Level 2 provider but notwithstanding its financial difficulties, a fine had been imposed and it had not been paid. The Tribunal concluded that there had been a further breach of the Code due to non-payment of the fine sanction. Accordingly, the Tribunal upheld a breach of paragraph 4.8.6(b) of the Code.

Decision: UPHELD

SANCTIONS

Representations on sanctions made by the Executive

1. The Executive submitted that the following sanctions were appropriate:
 - A prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of three years, starting from the date of publication of this decision, or until the breach is remedied by payment of the outstanding fine and original and instant administrative charges, whichever is the later.

based on a preliminary assessment of the breach as "very serious". The Executive noted that the Level 2 provider had stated that it was suffering from financial hardship and it had made some steps in an effort to comply with the sanctions before ceasing to correspond with the Executive.

The Level 2 provider did not comment on sanctions, other than to state that its Directors should not be prohibited as associated individuals.

Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code was as follows:

Rule 4.8.6(b) – Failure to comply with a sanction

The initial assessment of the breach of paragraph 4.8.6(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider’s failure to pay the fine demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

The Tribunal’s initial assessment was that, overall, the breach was **very serious**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating or mitigating factors.

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed

Having regard to all the circumstances of the case (including the fact of the Level 2 provider’s liquidation), the Tribunal decided to impose the following sanctions:

- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of three years, starting from the date of publication of this decision, or until the breach is remedied by payment of the outstanding fine and original and instant administrative charges, whichever is the later.

Administrative charge recommendation:

100%