

## Application for interim measures pursuant to Code of Practice paragraph 4.6

Case reference: 165558  
Level 2 provider: New Level Ventures Limited  
Type of service: Subscription Alert Service  
Level 1 provider: Dynamic Mobile Billing  
Network operator: All Mobile Network operators

This case was brought against the Level 2 provider under Paragraphs 4.5.1 and 4.6 of the Code of Practice.

1. This is an application by the Phone-paid Service Authority's ("PSA") Executive seeking a direction in accordance with paragraphs 4.5.1(a) and 4.6.2 and 4.6.5(c) of the PSA Code of Practice (14<sup>th</sup> edition) ("the Code") that up to £510,000 of the Service revenue should be withheld.

### Background

2. The Tribunal has paid full regard to the material supplied by the Executive. The Tribunal noted in particular:
  - a. there have been 292 complaints received about the Service from members of the public alleging that the charges for the Service were unsolicited and they had not given their consent to be charged
  - b. the nature of the apparent breaches referred to by the Executive
  - c. that despite requests for financial information by the Executive, the Level 2 provider had failed to supply all information requested
  - d. the information in the Track 2 Withhold Assessment
3. The Tribunal was satisfied that the Interim Warning notice and Track 2 Withhold Assessment had been properly served on the Level 2 provider. The Level 2 provider did not respond to the Interim Warning Notice.
4. The Tribunal has considered paragraphs 4.5.1(b), 4.6.1 – 4.6.5 of the Code and the factors set out at paragraphs 80 to paragraph 92 of the Supporting Procedures.
5. The Tribunal notes that the burden of proof remains on the Executive throughout and that it for the Executive to satisfy the Tribunal that the grounds for the application are made out, and in particular that the Level 2 provider cannot and/or will not comply with any financial sanction that may be imposed by a future Tribunal. The Tribunal applied the civil standard of proof.

6. Having considered the evidence before it, the Tribunal has made the following determinations:

### **The apparent breaches**

7. It appears, at this stage (and subject to evidence, arguments, or information being later supplied and/ or tested), that there have been apparent breaches of rule 2.3.3 and paragraph 4.2.3 of the Code by the Level 2 provider.
8. In reaching this decision, the Tribunal has considered the Executive's representations in the Interim Warning notice and the Withhold Assessment.
9. The Level 2 provider did not respond to the Interim Warning notice. However, the Tribunal has read and taken into account earlier correspondence from the Level 2 provider to the Executive, including a response that the Level 2 provider had provided to the Cypriot Authority, in which the Level 2 provider denied that breaches of the PSA's Code of Practice have occurred.
10. The Tribunal considers that on the balance of probabilities there is a good arguable case that there has been an apparent breach of rule 2.3.3 of the Code. It notes, in particular, that 292 consumer complaints about the Service as well as the failure of the Level 2 provider to supply evidence of consent to charge which is sufficiently robust to meet the requirements set out in the PSA's Guidance on Privacy and Consent to Charge. In the absence of robust evidence of consent to charge, the Tribunal prefers to rely on the evidence of the consumers that the charges were unsolicited. The Tribunal considers that there is sufficient evidence of an apparent breach of rule 2.3.3 of the Code.
11. The Tribunal finds that on the balance of probabilities there is a good arguable case that there has been an apparent breach of paragraph 4.2.3 of the Code. The Tribunal has reviewed the 4.2.1 direction issued to the Level 2 provider on 16 August 2019 and notes the initial deadline for responding was 23 August 2019. This was extended to 3 October 2019 and further extended to 11 October 2019. The Tribunal noted that nothing was received by 11 October 2019. The Tribunal considers that the Executive's direction was reasonable and finds that there is evidence that the Level 2 provider failed to comply with it. The Tribunal therefore finds that there is a good arguable case the Level 2 provider has breached paragraph 4.2.3 of the Code.

### **Inability/unwillingness to comply with a sanction**

12. The Executive's application for a withhold is made on the basis that there is a risk that the Level 2 provider would be unwilling to pay a financial sanction if one is imposed following a final adjudication.
13. The Tribunal has taken into account the information and representations contained within the Interim Warning Notice and the Withhold Assessment.

14. Although the Level 2 provider did not make representations and did not respond to the Interim Warning Notice, the Tribunal has noted the Level 2 provider's earlier representations and its denial that breaches of the PSA's Code of Practice have occurred.
15. The Tribunal is satisfied, on the balance of probabilities, that there is evidence demonstrating that the Level 2 provider would be unwilling to comply with any likely financial sanction on the grounds that:
  - a. The Level 2 provider has failed to comply with Directions to provide any of the information requested by the Executive in two sets of Directions dated 16 August 2019 and 26 September 2019. The Tribunal notes that the Level 2 provider queried the PSA's legal basis for conducting its investigation and requested sight of correspondence from the Cypriot Regulator relating to the derogation of this matter. The Executive responded on 26 September 2019 confirming that 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 given with the Executive's response to the Level 2 provider, on the same date, reiterating the request for financial information and information relating to the operation of the Service. The Level 2 provider was given until 3 October 2019 to respond. No response was received, and the Executive extended the deadline to 11 October 2019, but no response was again received and no explanation for this failure was given by the Level 2 provider. Having considered the entirety of the Level 2 provider's conduct in the course of the investigation, the Tribunal determines, on the balance of probabilities, that the provider would be unwilling to comply with any sanctions or administrative charge that may be imposed.
  - b. The Level 2 provider failed to co-operate with the Executive by failing to supply relevant financial information. The Tribunal agrees with the Executive that failing to supply the information demonstrates a wilful disregard for its obligations under the Code. The Tribunal has noted that the Level 1 provider has supplied a figure of total consumer spend and outpayment to the Level 2 provider's supplier Kalastia Consulting Limited of £461,368,89 between December 2018 and October 2019. As the Level 2 provider has not provided the information that the Executive has requested, the Tribunal considers that it is not possible for the Executive to ascertain how much revenue was actually received by the Level 2 provider for this Service.
16. The Tribunal's overall assessment is that the evidence in the round, is sufficient to satisfy the Tribunal on the balance of probabilities that the Level 2 provider will be unwilling to pay any financial sanctions which may be imposed in due course.
17. The Tribunal has considered the Executive's assessment of the likely future final sanctions, together with the 292 complaints generated by the Service to date, and the high level of service revenue generated during which a very serious breach relating to consent to charge appears to have occurred.

18. In relation to the withhold amount, the Level 2 provider did not make any representations.
19. The Tribunal has considered the breaches on which it has considered that there was a good arguable case. It has determined that the apparent breaches of rule 2.3.3 and paragraph 4.2.3 are very serious.
20. The Tribunal considers that a future Tribunal would be likely to impose the following initial fines:
  1. Rule 2.3.3: £250,000
  2. Paragraph 4.2.3: £250,000
21. The Tribunal is satisfied that the measures set out below are necessary and proportionate to take in the circumstances of this case. The Tribunal is satisfied that the potential impact on the Level 2 provider of the measures set out below is proportionate and justified when balanced against the very serious nature of the apparent breaches and the need to achieve the sanctioning aim of appropriate deterrence.
22. The Tribunal is of the view that there would also likely be an administrative charge of £10,000 is reasonable.
23. The Tribunal is of the view that the risk of non-compliance cannot be remedied without the imposition of this level of withhold, particularly given its findings as to whether the Level 2 provider would comply with any future financial sanction.
24. Accordingly, in respect of the Service the Tribunal hereby directs that:
  - a. The PSA is authorised to direct a withhold of up to £510,000;
  - b. The sums directed to be withheld may be allocated and re-allocated between any Network operators or Level 1 providers for the Service as the Executive sees fit from time to time, provided that the total sum withheld by all providers does not exceed the maximum sum authorised in this decision;
  - c. The Executive is given discretion to vary the total directed to be withheld downwards in the event that it is provided with alternative security, which is, in its view, sufficient to ensure that such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course are paid;
  - d. Such interim measures are to be revoked upon the case being re-allocated to a Track 1 or otherwise discontinued without sanction.

Mohammed Khamisa QC  
13 December 2019