

## **MATTERS DECIDED BY THE TRIBUNAL**

Tribunal Meeting Number, Case Number and Date	Case Ref	Network Operator	Level 1 Provider	Level 2 Provider	Service Title and Type	Case Type	Procedure
124 Case 1 18/04/13	15770	Relax Telecom PLC	N/A	Horizon Housing	N/A	Network Operator	Track 2

On 30 August 2012, the Tribunal adjudicated against the Level 2 provider Horizon Housing (a registered charity), which operated the Housing Support Agency premium rate service (case reference 07922). The Tribunal upheld nine breaches of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**") including seeking to take advantage of a vulnerable group (those in receipt of benefits who required accommodation). The Network operator was Relax Telecom Plc. During the course of the investigation against the Level 2 provider, the Executive had concerns regarding the Network operator's due diligence.

The Executive raised the following potential breaches of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**")

- Paragraph 3.3.1 – Due diligence
- Paragraph 4.2.4 – Provision of false or misleading information

The Tribunal upheld a breach of paragraph 3.3.1 of the Code. The Tribunal considered the case to be **significant** and imposed a formal reprimand and a fine of £10,000.

Administrative Charge Awarded 100%

## Tribunal Sitting Number 124 / Case 1

Case Reference: 15770

Level 2 Provider	Horizon Housing
Type of Service	Information
Level 1 Provider	N/A
Network Operator	Relax Telecom PLC

### THIS CASE WAS BROUGHT AGAINST THE NETWORK OPERATOR UNDER PARAGRAPH 4.4 OF THE CODE

#### BACKGROUND

On 30 August 2012, the Tribunal adjudicated against the Level 2 provider Horizon Housing (a registered charity), which operated the Housing Support Agency premium rate service (the "**Service**") (case reference 07922). The Tribunal upheld nine breaches of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**") including seeking to take advantage of a vulnerable group (those in receipt of benefits who required accommodation). The Network operator was Relax Telecom Plc. During the course of the investigation against the Level 2 provider, the Executive had concerns regarding the Network operator's due diligence.

#### The Investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**").

The Executive sent a breach letter to the Network operator on 26 March 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Paragraph 3.3.1 - Due diligence
- Paragraph 4.2.4 - Provide false or misleading information

The Network operator responded on 8 April 2013. On 18 April 2013, the Tribunal reached a

decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH 1**

#### **Rule 3.3.1**

*“All Network operators and Level 1 providers must perform thorough due diligence on any party with which they contract in connection with the provision of premium rate services and must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances.”*

1. The Executive submitted that the Network operator had acted in breach of paragraph 3.3.1 of the Code as it had failed to perform thorough due diligence on the Level 2 provider, prior to allowing the Service to operate.

The Executive asserted that the Network operator breached paragraph 3.3.1 for the following five reasons. Before a binding commercial contract was formed:

1. The Network operator failed to carry out a basic due diligence check on the PhonepayPlus Registration Database;
2. The Network operator failed to make any enquiries regarding its client's charitable purpose, as the individuals it was seeking to benefit would incur charges for obtaining help to find accommodation. This model contrasts vividly with more common charitable funding models, whereby members of the public (who are not the beneficiaries of the charity) make charitable donations. This fact alone should have alerted the Network operator to make further enquiries as to the purpose of the service;
3. The Network operator made no enquiries as to the nature of the Service itself, or how it was to be promoted;
4. The Network operator provided 700 087 numbers to the Level 2 provider but failed to carry out adequate due diligence for the use of the numbers; and
5. The Network operator failed to retain all documentation obtained during due diligence for a period that was reasonable in the circumstances.

The Executive relied on the content of PhonepayPlus Guidance on Due diligence, “Know your Client”. The Guidance states:

### Paragraph 1.1

"Due diligence constitutes the process of checks and safeguards that should be undertaken before any binding legal contract or commercial agreement is entered into."

### Paragraph 2.2

"There is no single or prescribed standard as to what constitutes effective due diligence, but we expect to see a proactive stance being taken by all registered parties to know who they are contracting with."

## **Reason 1**

The Executive submitted that the Network operator failed to carry out a basic due diligence check, on the PhonepayPlus Registration Database before a binding commercial contract was formed. The Executive noted that the availability of the industry-wide Registration Scheme now makes it easier for providers and Network operators to carry out basic due diligence searches on their partner providers.

The Network operator failed to conduct a due diligence report on the PhonepayPlus Registration Database until 13:09:53 on 4 May 2012. The Executive noted that this was 14 days after the Network operator had contracted with the Level 2 provider, and nine minutes after receipt of an email from the Executive on 4 May 2012, in which it raised serious concerns about the Level 2 provider and the Service.

The Executive asserted that the Network operator's due diligence check on the Level 2 provider appeared to have been triggered by the Executive's email of 4 May 2012, and therefore, it had not conducted this check as part of its due diligence.

In light of the Guidance outlined above, the Executive asserted that the Network operator failed to carry out a basic due diligence check on the Level 2 provider before a binding commercial contract was formed.

## **Reason 2**

The Executive submitted that the Network operator failed to make any enquiries regarding its client's charitable purpose, as the individuals it was seeking to benefit would incur charges for obtaining help to find accommodation. This model contrasts vividly with more common charitable funding models, whereby members of the public (who are not the beneficiaries of the charity) make charitable donations. The Executive asserted that this fact alone should have alerted the Network operator to make further enquiries as to the purpose of the Service before a binding commercial contract was formed.

The Executive relied on the content of PhonepayPlus Guidance on Due diligence, "Undertaking effective due diligence". The Guidance states:

"The level and standard of diligence should be consistently applied to all new clients. The PhonepayPlus Code of Practice requires that effective due diligence processes are in place."

The Executive stated that the Network operator's client, the Level 2 provider, was not only a new client, but also a registered charity, who claimed to aid people in receipt of housing benefits who were in need of accommodation. The Level 2 provider's brief description of the Service on the Network operator's Provision of Information Due Diligence ("**POIDD**") form stated, "As a charity we aid vulnerable people in finding supported accommodation". Furthermore, on the Charities Commission website the Level 2 provider described its activities and charitable objects as, "To relieve the needs of vulnerable people and those suffering from additions of any kind, by offering supported accommodation until such time as they are ready to move on to permanent accommodation," and described its charitable purposes in the following ways:

- the advancement of saving lives;
- economic/community and development/employment;
- provides buildings/facilities/open space; and
- provides advocacy/advice/information.

The Executive asserted that it would not ordinarily expect a charity to levy a charge against those it is trying to protect, especially premium rate charges. However, the Network operator has failed to (i) demonstrate that it properly ascertained how the registered charity would operate the Service on a not-for-profit basis, (ii) how the Service would benefit vulnerable people, or (ii) make any other reasonable enquires about the legitimacy of the Service.

In addition, the POIDD form requested details of any premium rate service operated previously. The Executive submitted this should have been another prompt for the Network operator to raise legitimate queries about the Service.

The Level 2 provider's response to this question stated:

- "£1.50p per minute support line. Service has operated since January 2012. We want to cease this service in favour of a Directory Enquiries service, which is more appropriate to the service we offer".

The above statement appeared to suggest that a potential client was still operating a "support line". The Executive asserted that if the Network operator, had obtained details of the premium rate number of the "support line", it could have run a check on the PhonepayPlus Registration Database. This would have highlighted that London and Southern Housing Limited was the provider and that Jonjo Andrews (the charity trustee) was the director.

Secondly, the Executive asserted that the Level 2 provider's reason for switching to a 118 number should have also raised questions/concerns as to how a charitable "support line" (also for vulnerable people), costing £1.50 per minute, would be more "appropriate" being operated on a 118 number, costing £1.50 per minute for the first minute and 75p per minute thereafter.

In light of the above, the Executive asserted that the Network operator had failed to carry out a due diligence check on its client's charitable purpose, and its reason(s) for operating a premium rate service for the vulnerable, before a binding commercial contract was formed.

### **Reason 3**

The Executive submitted that the Network operator made no enquiries as to the nature of the Service itself, or how it was to be promoted.

The Executive noted that there was a question regarding the promotional material on the POIDD form that stated:

"Confirm that you have read and understood the Promotions and Promotional material document attached in relation to your services. If you require further clarification on any aspect of the Code, then please contact PhonepayPlus before completing this form."

The Executive asserted that the above due diligence question allows any new client (legitimate or otherwise) to simply reply "yes", with no other requirement to submit any details of promotions or promotional material. Furthermore, if the client requires further clarification of the Code, they must contact PhonepayPlus. The Executive asserted that, with no evidence to suggest otherwise, it appears that a simple "yes" to this question appeared to have been enough for the Network operator to allow a registered charity to promote their premium rate number to vulnerable people. The Executive noted that the Level 2 provider's response to this question was, "Yes".

The Executive asserted that the Network operator made no enquiries as to the nature of the Service itself, or how it was to be promoted before a binding commercial contract was formed.

### **Reason 4**

The Network operator failed to carry out adequate due diligence for the use of the 087 numbers.

The Executive noted that the Network operator contracted with the Level 2 provider on 20 April 2012. This contract was for the provision of one 118 number and 700 087 numbers. The Network operator confirmed that there was no separate contract for the 087 numbers. On 15 August 2012, the Network operator submitted details of the 700 numbers allocated to the Level 2 provider. The list provided included details of names and numbers of "affiliates" that each 087 number was routed to.

The Executive noted that, in its response to the Executive request for evidence of due diligence and risk assessment carried out on the 087 numbers on 14 January 2013, the Network operator stated:

"As we had already very recently conducted due diligence on the customer with regards to the more highly legislated PRS [premium rate service] service, we were

satisfied that this would be sufficient for the provision of 'Lower Cost Service' numbers...We do not agree that we provided the 087 numbers as part of a Directory Enquiries service (as was the 118)...the numbers were provided to Horizon Housing on a reseller basis."

The Executive's monitoring of the Service operating on 118 175 in May 2012, identified that all of the 087 numbers provided to callers during interaction with the Service were numbers which had been routed through to estate agents without their knowledge and without pricing information. The Executive raised a breach of rule 2.2.5 of the Code for the promotion of the 087 numbers without pricing information. The Tribunal of 30 August 2012 upheld the breach stating:

"The Level 2 provider provided its own premium rate numbers, re-routed to estate agents, as a means of inflating revenue."

The Guidance states:

"In the context of lower cost services...it is entirely appropriate that the burden of the due diligence is lower."

However, the Executive noted that this does not absolve Network operators of their duty to undertake any due diligence whatsoever. On the contrary, the Executive asserted that the Network operator's burden was higher as its client was a registered charity, and not a commercial organisation. This ought to have prompted the Network operator to question the Level 2 provider's reasons for seeking 700 087 numbers on a reseller basis. The Executive asserted that, had the Network operator made these enquiries, it might have been in a better position to properly assess whether to grant the numbers, or even take the risk of contracting with the Level 2 provider.

Furthermore, in light of the Tribunal's finding in relation to the use of the 087 numbers, if the Network operator, as it claims, did not agree that it provided the 087 numbers as part of the Service operated on 118 175 then the Executive asserted that:

1. The Network operator failed to demonstrate what service the numbers were provided for; and
2. It demonstrates that the Network operator did not undertake thorough due diligence of the full nature of its client's service.

Therefore in light of the above, the Executive submitted that by failing to carry out any specific due diligence for the provision of the 700 087 numbers prior to contracting with the Level 2 provider, the Network operator failed to carry out its obligations under paragraph 3.3.1 of the Code.

## Reason 5

The Network operator failed to retain all due diligence documentation for a period that was reasonable in the circumstances.

Paragraph 3.3.1 of the Code states that Network operators, "...must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances".

The Network operator confirmed on 21 January 2013 that:

- i. "Horizon Housing ceased to be a customer in early August 2012, Due to this fact, coupled with correspondence we received from PhonepayPlus on 12 September 2012 (stating that investigations into the service in question had been completed, with no reference to the requirement for further information, as is normally the case) the information we do have relating to the service may not be complete as it once was....",
- ii. "[N]ot all communications between Relax Telecom and Horizon Housing took place in the form of emails or hard copy written documents. Face to Face meetings and numerous telephone conversations also took place that contributed to the due diligence process."
- iii. "We do not have copies of the full minutes etc on file" [of the meeting between the Network operator and the Level 2 provider on 12 April 2012].

In light of the above statements, the Executive accordingly asserted that relevant documentation had not been retained for a period of time that was reasonable in the circumstances.

In relation to the first point above, the Executive noted that the Level 2 provider ceased all communication with the Executive after its 4.2.3 response on 30 July 2012. On 30 August 2012, the Executive emailed the Network operator to ask if it had heard from the Level 2 provider. The Network operator responded:

"No we haven't heard a thing from them at all! They seem to have disappeared from the face of the earth!!"

On 12 September 2012, the Executive informed the Network operator of the Tribunal's findings against the Level 2 provider and issued a formal direction for retention of the withheld revenue. The Network operator responded the same day. The Executive's email stated:

"The Executive wrote to you... to notify you that an investigation was being conducted into a service operating on your network. That investigation has now been completed, the outcome of which is set out in the 'Code Compliance Tribunal Decision' attached. You will see that breaches were upheld in this case. However, also attached is a formal direction to retain the outstanding revenues for the 0872 numbers, which have currently been withheld."

The Executive noted that the wording, "the investigation has now been completed,"



referred only to the investigation leading up to the Tribunal hearing on 30 August 2012. Given that the Executive had, on the same date, directed the Network operator to retain revenue, it ought to have known that the case was far from being concluded as there were outstanding invoices. It was also clear from the Level 2 provider's lack of contact with the Network operator that there was a risk that the Level 2 provider might not respond to the invoices and could potentially not comply with the sanctions imposed.

The Executive accordingly asserted that the Network operator had failed to retain all relevant documentation obtained during the due diligence process for a period that was reasonable in the circumstances.

In light of the above five reasons, the Executive asserted that thorough due diligence had not been carried out and/or the relevant documentation had not been retained for a reasonable time period; as a result a breach of paragraph 3.3.1 of the Code had occurred.

2. The Network operator denied that it had acted in breach of paragraph 3.3.1. Generally, the provider submitted that it had no history of compliance issues or breaches of the Code and that it takes its responsibilities as a Network operator seriously and endeavours to follow the regulations of the Code to its best understanding and ability. In addition to this, it asserted that it takes a pro-active stance to alerting PhonepayPlus to any suspicious activity it encounters. For example, it recently identified and reported to PhonepayPlus a prohibited provider who had registered under a false name and was attempting to procure PRS numbers. The Network operator stated that it was not infallible to deception from third parties. It said that it is extremely difficult to pre-empt the deceptive activity and be 100% prepared for all scenarios and that what may seem obvious to a regulatory body, who has witnessed similar activities before, would not necessarily be obvious to a Network operator without prior experience. It asserted that it would learn from its experiences and adjust its procedures to detect future repeats.

The Network operator stated that when it contracted with the Level 2 provider, information in relation to the investigation was not yet available. In addition to this, the Compliance Update surrounding due diligence was issued after it had contracted with the Level 2 provider. The Network operator asserted that a strong contributing factor to the potential breaches in this case has been "unfortunate timing" which had been beyond its control.

The Network operator submitted that it had co-operated and provided assistance to the Executive, despite instances where it felt unfairly treated by PhonepayPlus. These instances included, at times, a lack of communication, where several attempts at contact over long periods of time were made before it received a response.

Finally, the Network operator stated that it wished to emphasise that a large proportion of the reasons that the Executive provided in support of the potential breaches, were assumed due to a lack of physical documented evidence to the contrary. The opinion seemed to be that because the Network operator no longer had in their possession certain documents that it is then the case that they never existed and/or certain procedures did not take place. The Network operator maintained that this was not the case and if it had believed that it would be required to provide further information at a very late stage, it would have made sure that copies had been retained. It stated that it believed the investigations were completed (as stated in the email sent to it on 12 September 2012) and as it had terminated the contract with the Level 2 provider, it did not feel it was appropriate to continue to retain this information.

## **Reason 1**

Neither the Code nor the due diligence Guidance states that Network operators are obliged to run the "Due diligence checker", rather that it makes, "...it easier to carry out basic due diligence searches on their providers". The Guidance also states that the checker, "...is not enough to demonstrate effective due diligence, nor does it prove that a thorough or robust analysis has been made to ascertain the risk posed by a particular client".

The Network operator stated that, although it does actively run the "Due diligence checker" (which a check against our activity will support), beyond checking that a provider is registered, as required; it had actually found the "Due diligence checker" unreliable with regards to providing information expected to assist in due diligence checks. It therefore cannot and does not rely on the checker alone for its due diligence. The example of the Level 2 provider illustrates this. The Network operator noted that the Executive stated that it has only obtained a due diligence report for the Level 2 provider on 4 May 2012. This is not correct, it had obtained numerous due diligence reports (4 May 2012, 15 May 2012, 25 May 2012 and 18 Jan 2012). Up to and including the 25 May 2012 report, the report for the Level 2 provider stated that there were no prohibitions, no barred services, no current investigations or no existing adjudications against the Level 2 provider. This lack of information would not assist any provider when running checks. The Network operator submitted that it found it more reliable to monitor adjudication decisions and actively subscribed to the Compliance Updates and Alerts.

The Network operator noted that the Executive stated that it, "...failed to provide

evidence of the due diligence check on the PhonepayPlus Registration Scheme". The Network operator stated that it did not feel it necessary to provide copies of these documents, as it was PhonepayPlus themselves that had sent them to it and could easily validate the existence of them.

The Network operator stated that the Guidance states that the following is considered to be effective due diligence. The Network operator submitted that it believe that at the time the due diligence took place, the information from the POIDD form used in conjunction with checks with "RISKDISK", Charities Commission, face to face conversations and telephone conversations with senior staff were sufficient to cover the following examples:

"The level and standard of due diligence should be consistently applied to all new clients. The PhonepayPlus Code of Practice requires that effective due diligence processes are in place. It does not prescribe the process, or the information to be gathered, so the examples set out below are to illustrate the kinds of information gathering and other actions both Network operators and providers could take, before a binding commercial agreement is formed:

- Contact details for a client's place of business;  
Copies of each client's current entry (and first entry, if different) in the Companies House register;
- Names and addresses of all owners and directors;
- Names and addresses of all individuals who receive any share from the revenue generated by the client;
- Undertakings from the client that no other party is operating in the capacity of a shadow director under the Companies Act, if appropriate;
- The names and details of any parent or ultimate holding company which the client is a part of, if appropriate; and
- To make clients aware of PhonepayPlus and requiring adherence to the PhonepayPlus Code of Practice."

The Network operator also highlighted that the Compliance Update with regards to Due diligence and risk assessment was published on the 26 April 2012. This was after the due diligence for the Level 2 provider was completed and the 118 number had been allocated.

## Reason 2

The Network operator noted that the Executive asserted that the:

“Network operator failed to carry out a due diligence check on its client’s charitable purpose, and it reason(s) for operating a premium rate service for the vulnerable before a binding commercial contract was formed.”

The Network operator stated that, as mentioned in previous conversations with the Executive, not all elements of its due diligence on the Level 2 provider were retained in writing. This was due to a combination of the fact that the Level 2 provider ceased to be a customer in August 2012, so not all information was retained and at that time it did not document all conversations. The Network operator stated that this did not mean that due diligence into the charitable purpose of the Level 2 provider did not take place but rather that unfortunately, due to the circumstances mentioned, it could not provide a physical document as evidence.

Post the Compliance Update with regards to due diligence, the Network operator stated that it had now updated its procedures to make sure it documents every element of due diligence. It also asserted that it now makes sure that all checks are made by one department.

The Network operator stated that it would seem that the Executive asserted that it had failed in its due diligence of the Level 2 provider because a charity wanting to utilise PRS should immediately have raised alarm bells. The Network operator stated that it disagreed with the position as it is not obvious that this indicates intent to cause harm. It may raise suspicions with the Executive who are a regulatory body and very experienced in this area. However, it would seem unfair to expect a Network operator to have this wealth of knowledge innately.

The fact that the Level 2 provider was a charity induced more trust from the Network operator. In hindsight, the Network operator stated it would now apply more strict checks on charities wanting to use PRS, as suggested by the Executive. However, it did not agree that it should have realised this at the time of contracting, as it still maintains that it is not unusual to witness Charities using PRS numbers. In fact, in the, “NOTICE TO INDUSTRY – LAUNCH OF THE REGISTRATION SCHEME IN SUPPORT OF THE 12TH EDITION OF THE PHONEPAYPLUS CODE OF PRACTICE - Issued on 27 April 2011”, it states under the exemptions:

“Charities engaged in PRS activity, which are registered as charities in England, Wales, Northern Ireland or Scotland. Charities registered as being such only in foreign jurisdictions will not be exempt from a requirement to pay the registration

fee.”

This appears to contradict the Executive’s opinion that Charities using PRS:

“[C]ontrasts vividly with more common charitable funding models, whereby members of the public (who are not the beneficiaries of the charity) make charitable donations. This fact alone should have alerted the Network operator to make further enquiries as to the purpose of the service before a binding commercial contract was formed.”

The Network operator stated that it did not understand why an exemption for registration fees for charities would be referred to, if it is not the case that charities would or should use premium rate services.

Finally, the Network operator asserted that it had taken on board the suggestion by the Executive to try to obtain actual previous PRS numbers allocated to potential customers when running due diligence and will actively do this, in conjunction with searching the provider’s name, going forward.

### **Reason 3**

The Network operator noted that the Executive used the POIDD form to support that it had not made any enquiry as to how the Service would be promoted, as the form asks providers to confirm that they have read and understood the PhonepayPlus Guidance on Promotions and promotional material. The Network operator asserted that the reason for this question is purely to draw the provider’s attention to the Guidance (that is attached to the form) which it is required to do.

The Network operator added that it requests information about promotional material and actively check this for new customers. As it did not have written documentation of this, for the same reason previously mentioned, it was unable to provide evidence with regards to the Level 2 provider. However, it has sent copy over to PhonepayPlus in relation to other providers on occasion to double check.

#### **Reason 4**

The Network operator stated that the agreement between itself and the Level 2 provider is a standard agreement covering all aspects of telephony. It would not normally issue a new 23+ page agreement for every different number range or service that it provides to an individual customer or reseller. It asserted that it did not know of any further due diligence it should have processed for the 087 lower cost service in addition to the checks previously mentioned and drawing the attention of the provider to the service specific Guidance notes and their responsibilities in the delivery chain.

As previously stated, it was informed that the 087 numbers were to be provided to a database of affiliates as business numbers. In using the 087 numbers the affiliates were generating revenues for the Level 2 provider during their day to day business. At the time it did not see anything unusual in businesses agreeing to use 087 numbers to generate funds for a charity they are affiliated with.

It is not common practice for a Network operator to check personally every individual customer that a reseller provides lower cost 087 numbers to. In fact it would not be commercially viable and would surely result in Network operators no longer contracting with resellers.

#### **Reason 5**

The Network operator agreed that it had not retained all documentation obtained during the due diligence. However, it did not agree that, in the circumstances, it had breached the Code because of this.

The Network operator gave a number of reasons for this, including its obligations under the Data Protection Act (which it later reported that it had clarified) and the belief that the investigation was completed as a result of correspondence with the Executive. Although the Executive stated that the Network operator did not accept that it, "ought to have known," that the wording, "the investigation has now been completed," did not actually mean that, as there were, "outstanding invoices," from the Level 2 provider.

In addition, the Executive stated that, "it is clear from the lack of contact with the Network operator that there was a risk that the Level 2 provider might not respond to

the invoices". The Executive support this by referencing an email dated 30 August 2012, where the Network operator stated that it had not heard from the Level 2 provider. However, the Network operator had actually terminated the contract with the Level 2 provider on the 13 August 2012, so would not have expected to hear from them again after that date.

The Network operator added that it was not fully conversant with the processes surrounding a PhonepayPlus formal investigation; its assumption was that the collection of any fines, admin charges, retained revenue, etc. would just be a post investigation administration process and not indicative of the actual investigation still being active.

3. The Tribunal considered the detailed written submissions of both the Executive and the Network operator. The Tribunal commented that due diligence is a fundamental obligation under the Code, but is particularly important when a Network operator or provider contracts with a party targeting a service at a vulnerable group. It also stated paragraph 3.3.1 of the Code required that due diligence should occur *before* contracting with a third party. The Tribunal noted that the Network operator had not made any pre-contractual checks on the PhonepayPlus Registration Database in relation to the Level 2 provider; however, the conduct of this check, although recommended, is not a requirement of the Code. The Tribunal also noted that any checks conducted on the PhonepayPlus Registration Database prior to the date of contracting with the Level 2 provider would not have highlighted any issues. In considering the due diligence checks that had been carried out by the Network operator, the Tribunal noted that some steps had been taken, for example checking the Level 2 provider's registration with the Charity Commission, and arranging a meeting with it. The Tribunal concluded, however, that although the Network operator had conducted some due diligence on the Level 2 provider, the due diligence was either not "thorough" (based on the evidence it had seen) or, if it had been "thorough" then the Network operator had failed in its obligation to, "retain all relevant documentation obtained during the process for a period that is reasonable in the circumstances". In particular, the Tribunal found that:
  - i. The Network operator had either failed to make sufficient enquiries regarding the promotion and operation of the Service by a charity to a vulnerable group of consumers, or made the necessary enquiries and failed to, "retain all relevant documentation obtained during the process for a period that is reasonable in the circumstances".
  - ii. The Network operator had either failed to make sufficient enquiries regarding the provision of 700 087 numbers or made the necessary enquiries and failed to, "retain all relevant documentation obtained during the process for a period that is reasonable in the circumstances".

The Tribunal also commented that the Network operator's POIDD form was too basic to amount to "thorough" due diligence and considered that the Network operator would

need to have gone considerably further in its enquiries to meet the requirement of “thorough” due diligence under paragraph 3.3.1 of the Code.

The Tribunal noted the explanation given by the Network operator for the lack of documentation provided to the Tribunal. However, the Tribunal did not accept that the Network operator had good grounds for not retaining the relevant documentation for a period that was reasonable in the circumstances. Accordingly, the Tribunal concluded that the Network operator had acted in breach of paragraph 3.3.1 of the Code.

## **Decision: UPHELD**

### **ALLEGED BREACH 2**

#### **Paragraph 4.2.4**

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

1. The Executive submitted that the Network operator had breached paragraph 4.2.4 of the Code as it had knowingly or recklessly provided false or misleading information. This was on the grounds that the Network operator had indicated that it had conducted a check on the Level 2 provider on the PhonepayPlus Registration Database as part of its due diligence when this was not the case.

The Executive noted due diligence should be conducted prior to contracting with a third party.

The Executive noted that on 20 April 2012, the Network operator contracted with the Level 2 provider for the provision of the directory enquiries number 118 175 and 700 087 numbers. In response to questioning from the Executive on 4 May 2012, the Network operator stated that it had as part of its due diligence on the Level 2 provider:

“...[C]onducted the PhonepayPlus due diligence report which states that there are no prohibitions, no barred services, no current investigations and no existing adjudications against Horizon Housing.”

The Executive submitted that the Network operator’s response indicated that it had obtained the PhonepayPlus due diligence report prior to signing the contract with the



Level 2 provider. However, when the Executive internally extracted the report from the PhonepayPlus Registration Database, it noted that the check was not conducted until 13:09:53 on 4 May 2012. The Executive noted that this was 14 days after Network operator contracted with the Level 2 provider, and nine minutes after receipt of an email from the Executive on 4 May 2012, in which it raised serious concerns about the Level 2 provider and the Service.

Accordingly, the Executive asserted that the Network operator knowingly or recklessly concealed or falsified information, and/or provided false or misleading information to PhonepayPlus in breach of paragraph 4.2.4 of the Code.

2. The Network operator strongly denied that it had acted in breach of paragraph 4.2.4.

The Network operator noted that the Executive stated that the question, "What information did you obtain as part of your due diligence on this client? Please provide evidence," clearly relates to pre-contractual due diligence. The Network operator did not agree that the question "clearly" related to pre-contractual due diligence. It stated that it was not its intention to "indicate" that the due diligence report was conducted prior to signing a contract. To support its assertion the Network operator noted that it had also referred to the same due diligence report in response to the question:

"Please provide evidence of your risk assessment on this client and your rationale explaining your stance with this client."

The Network operator asserted that as much as "due diligence" could refer to pre-contractual activity, "risk assessment" could refer to post contractual activity. It maintained that this was simply a misunderstanding of the intended question. The Network operator commented that at no point did it state that the due diligence report was conducted before the 4 May 2012. The documentation was sent to the Executive on the 9 May 2012 stating that the "Due Diligence Check" report had been conducted - this is an accurate statement.

In addition, the Network operator stated that it would not make any logical sense for it to try to "falsify" the date that the due diligence report was conducted on, as the report is provided by PhonepayPlus and the date of provision can be easily validated.

The Network operator strongly refuted any accusation that it had knowingly or recklessly concealed or falsified information, and/or provided false or misleading information to PhonepayPlus. It stated that the fact it had been completely transparent with the Executive with regards to no longer having evidential documentation should support this. It asserted that if it was attempting to falsify information or mislead PhonepayPlus, there would not be any missing documentation.

3. The Tribunal considered the submissions made by the Executive and the Network operator and concluded that, although due diligence should be conducted pre-contract, and the Network operator had given an ambiguous account of when it carried out specific checks, on balance, there was insufficient evidence for it to conclude that the Network operator had knowingly or recklessly provided false or misleading information. Accordingly, the Tribunal did not uphold a breach of paragraph 4.2.4 of the Code.

**Decision: NOT UPHELD**

## **SANCTIONS**

### **Initial Overall Assessment**

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

#### **Rule 3.3.1- Due diligence**

The initial assessment of paragraph 3.3.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The case had a clear detrimental impact indirectly on consumers and the breach had a clear and damaging impact or potential impact on consumers.
- The Network operator had failed to develop and/ or consistently use thorough due diligence processes for its clients.

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

### **Final Overall Assessment**

The Tribunal did not find any aggravating factors.

In determining the final overall assessment for the case, the Tribunal took into account the following two mitigating factors:

- The Network operator co-operated beyond the level generally expected in relation to

- the underlying case against the Level 2 provider.
- The Network operator stated that it had made the following changes:
    - “Re-addressed” its due diligence procedures. It stated that all due diligence now takes place in a single department, all due diligence is documented and all correspondence is conducted via an email ticketing system.
    - It would ask all future charity clients to contact PhonepayPlus in writing and gain clarification in writing that the proposed use is acceptable.

Having taken into account the mitigating factors, and all the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded, overall, as **significant**.

### **Sanctions Imposed**

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

- A formal reprimand; and
- A fine of £10,000.