



Tribunal Sitting Number 140 / Case 3

Case Reference: 29098
Level 2 provider: N/A
Type of Service: N/A
Level 1 Provider: N/A
Network Operator: Premium O Limited

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

BACKGROUND

On 16 May 2013, the Tribunal adjudicated against a telephone driving test booking service (the “**Service**”) operated by the Level 2 provider Waqar Ashraf trading as book-theory-test-online (case reference 17843). The Tribunal upheld five breaches of the Code relating to misleading promotions, the lack of clarity regarding pricing, concerns regarding the provision of written information likely to influence a consumer’s decision to purchase, undue delay and registration of the premium rate numbers. On 22 August 2013, the Tribunal adjudicated against the Level 2 provider and upheld two breaches of the Code for failure to comply with a sanction and non-payment of an administrative charge.

The Network operator for the Service was Premium O Limited. During the course of the investigation against the Level 2 provider, the Executive had concerns regarding the due diligence and the assessment and control of risk undertaken by the Network operator.

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 21 November 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Paragraph 3.3.1 – Due diligence
- Paragraph 3.1.3 – Risk assessment

The Network Operator responded on 5 December 2013. On 12 December 2013, and after hearing informal representations made on the Level 2 provider’s behalf, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 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.”

The Executive submitted that the Network operator had breached paragraph 3.3.1 of the Code as it had not performed adequate due diligence on the Level 2 provider for the following reasons:



- i) The Network operator failed to ensure that it had contracted with the correct legal entity and failed to identify and investigate inconsistencies in the due diligence documentation provided by the Level 2 provider.
- ii) The Network operator did not provide adequate evidence to support its assertion that it had conducted the required due diligence.

The Executive relied on the content of the PhonepayPlus Guidance on “Due Diligence and risk assessment and control on clients” (the “**Guidance**”). The Guidance states:

Paragraph 1.2

“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.”

Paragraph 2.1

“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.”

- i) The Network operator failed to ensure that it had contracted with the correct legal entity and failed to identify and investigate inconsistencies in the due diligence documentation provided by the Level 2 provider.**

During the course of the investigation, the Network operator provided the following documents:

- a memorandum of agreement, between the Network operator and “Book Your Theory Test Ltd”;
- a due diligence form;
- an agreement for services, between the Network operator and “Book Your Theory Test Ltd”; and
- an email from the Level 2 provider to the Network operator providing its PhonepayPlus registration details.

The Executive noted that the due diligence form, which was completed by the Level 2 provider, stated that the Level 2 provider was not a limited company. However, the



agreement for the provision of numbers referred to, “Book Your Theory Test Ltd” (a company) and gave a company registration number. A search of Companies House records revealed that there is a company called “Book Your Theory Test Ltd”, however it has no connection to the Level 2 provider. Furthermore, the memorandum of agreement referred to the unconnected company.

The Executive asserted that the Network operator should have conducted cursory checks to ensure that it was contracting with the correct legal entity. Further, had it conducted a Companies House check on “Book Your Theory Test Ltd”, the discrepancy would have been immediately clear.

When the Executive queried the discrepancy regarding the Level 2 provider’s identity, the Network operator stated:

“This was our mistake, they are not a limited company. Most of our customers are limited companies hence the mistake.”

In addition, the Executive asserted that there were a number of discrepancies in the names and addresses provided in documentation, including a bank statement from an organisation called “Book Your Motorbike Test”, by the Level 2 provider. The Executive noted that there was no evidence that the Network operator had detected and/or made any enquiries into the discrepancies.

The Executive asserted that a basic and fundamental starting point of due diligence is to establish and verify the identity of the party with whom you wish to contract. Consequently, the Executive submitted that the Network operator had failed to perform thorough due diligence as required by paragraph 3.3.1.

The Executive asserted that thorough due diligence would have identified the inconsistencies in the documents and revealed that the providers were not related.

ii) The Network operator did not provide adequate evidence to support its assertion that it had conducted the required due diligence.

The Executive noted that while the Network operator had provided a due diligence form completed by Mr Ashraf (and limited underlying documentation), it had not provided any other evidence to demonstrate that it had conducted adequate due diligence on the Level 2 provider or verified the information provided.

On being asked for documentary evidence, the Network operator stated:

“This is an internal form, PhonepayPlus is aware that due diligence is common practice in the industry and has never tried to seek to imposed a rigid formula as to how it should be undertaken. Through the implementation of the new industry-wide Registration Scheme, we as Network operators find it easier to carry out basic due diligence searches on our partner and Book Your theory Test was registered as part of the well published scheme. There is no single or prescribed standard as to what constitutes effective due diligence, but we have proactive stance in knowing exactly who we contract with. All information was provided. As we pay the client and he was PPP registered we felt comfortable that he was able to discharge his obligations under the code”.



The Executive submitted that the Network operator should have performed thorough due diligence and had it done so, the true identity of the Level 2 provider would have been revealed. In addition, it did not provide adequate evidence to show that due diligence had been conducted. In light of this, the Executive submitted that the Network operator had not met the required standard of due diligence and therefore acted in breach of paragraph 3.3.1 of the Code.

2. The Network operator strongly denied the breach. At the outset, the Network operator made several overarching points:
 - i) The Level 2 provider had not complied with the sanctions imposed by the Tribunal and had that happened, it was the view of the Network operator that it would not have been held to account for breaches, which are those of another party in the value-chain. It was aware that the Executive has previously taken action against other Network operators and Level 1 providers for the failings of the Level 2 provider.
 - ii) The Network operator is “purely a carrier”, providing telephone services to third parties, and the actions of the Executive, in holding the Network operator responsible for the content of the Service, is akin to holding a Mobile Network operator liable for telephone fraud, or a credit card company liable for the usage of its payment mechanism for fraudulent transactions.
 - iii) The Network operator stated that it was of great concern that the Network operator received no prior assistance from PhonepayPlus or an opportunity to improve its procedures before the instigation of formal proceedings.
 - iv) The Network operator stated that the issues raised by the Executive, on balance, were of a minor nature. The Network operator made a mistake which it had fully admitted and promised to rectify.

Specifically, the Network operator stated that, a principal purpose of the Registration Scheme is to enable service providers within the value-chain to identify risks posed by the parties with whom they may contract. It noted that the Executive suggested that the Service was provided by, “Waqar Ashraf, trading as book-theory-test-online” yet the Network operator asserted that this was not the case, as the “proof of registration” email listed the organisation as ‘Book-theory-test-online’. It stated that Waqar Ashraf was not listed in the organisation details registered with PhonepayPlus.

The Network operator accepted that the name of the party on its contracts was not the same as the one which was registered with PhonepayPlus. It stated that the error was made by a junior member of staff. The Network operator stated that it had put in place new procedures to ensure that the mistake is not repeated, including, ensuring that more senior members of staff are responsible for due diligence.

However, the Network operator stated that its failure to realise the error in the contracts had no bearing upon the breaches and the level of consumer harm. It stated:

“The suggestion that company checks on Book Your Theory Test Ltd would have revealed that Mr Ashraf was not a director and could not bind the company is misguided. The



Network operator was not trying to bind the company – the intention was to bind the correct party, the sole trader. It was the identity of Mr Ashraf that required verification and the address matched up.”

The Network operator stated that the Level 2 provider was not a company and therefore Companies House would hold no records. It stated that the mistake was in recording the customer as a company in the contracts. It argued that the Tribunal should not sanction the Network operator for failing to conduct Companies House checks, when those checks would not have revealed anything.

Further, the Level 2 provider asked the Tribunal to consider whether had the Network operator fully complied with its due diligence obligations, the situation have been any different. The Network operator submitted that as it was dealing with a new Level 2 provider, no amount of due diligence could have identified the risk and all the Network operator could do was react quickly upon becoming aware that the Service had problems, which it did.

The Network operator stated that the registration of a provider with PhonepayPlus should act as assurance to a Network operator. It stated that it now understood that this may be incorrect as the information on the database is inputted by providers and is not verified by PhonepayPlus. The Network operator submitted that the only breach was stating the incorrect name on the contract. It stated that this could only be regarded as a minor technical breach which would not be repeated.

During informal representations, the Network operator robustly denied the breach and made a number of assertions in relation to PhonepayPlus’ motivation for bringing the case. It stated that it felt the outcome of the adjudication had been pre-determined. It accepted that the wrong provider name was included in the contracts. It added that the majority of Level 2 providers it had contracted with were limited companies. As such it was an unusual situation and it did not have any processes in place to deal with sole traders, as it did not think it had not previously contracted with any. It stated that it would not normally agree to provide numbers to sole traders.

The Network operator explained that due diligence procedures are conducted by its finance team, who are required to do a Companies House search, check the registration with PhonepayPlus and review any breach history. It stated that it had a due diligence and risk assessment policy, which it could send to the Tribunal but stated that it did not know all the details.

The Network operator described the breach as a technical breach caused by an oversight by a junior member of staff. It also stated that it believed the breach was minor, as it had conducted adequate checks in accordance with its procedures.

1. The Tribunal considered the evidence including the representations made by the Network operator. The Tribunal noted that the Network operator admitted that there had been an error in identifying the correct legal identity of the Level 2 provider. It also noted that the Network operator had asserted that it had an effective due diligence system in place. However, the Tribunal found this had not been substantiated as no evidence had been provided to demonstrate that thorough due diligence had been performed. The Tribunal found that the due diligence process appeared to be limited to the collection of documents.



There was no evidence of any verification procedures and/or consideration of the content of the documents supplied. The Tribunal found that there were obvious inconsistencies in the documentation provided, which had not been detected. Consequently and for the reasons outlined by the Executive, the Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Paragraph 3.1.3

“All Network operators, Level 1 and Level 2 providers must assess the potential risks posed by any party with which they contract in respect of: the provision of premium rate services, and the promotion, marketing and content of the premium rate services which they take and maintain reasonable continuing steps to control those risks.”

1. The Executive submitted that the Network operator had breached paragraph 3.1.3 for the following reasons:
 - i) the Network operator did not adequately assess the potential risks posed by the Service; and
 - ii) the Network operator did not take and maintain reasonable steps to control the risks posed by the Service.

The Executive relied on the content of the PhonepayPlus Guidance on “Due Diligence and risk assessment and control on clients”. The Guidance states:

Paragraph 4.7

“We would also expect there to be consideration given to the length of time a provider had been active in the UK PRS market, particularly as this relates to knowledge of their responsibilities under the PhonepayPlus Code of Practice and how to operate their services in a way that pre-empts and prevents consumer harm. We would expect providers who are new to the market to be alerted to the requirement to register with PhonepayPlus.”

Paragraph 4.2

“Risk assessment and control is the business process that puts in place systems to assess and manage the level of risk that a particular client and/or their service(s) may pose. Unlike due diligence, PhonepayPlus considers that the extent of any risk assessment needs to be proportionate to where the contracting party sits in the value-chain. The essence of undertaking a robust analysis of risk assessment is to encourage providers to make a commercial judgment as to the regulatory risk posed by a contracting party throughout the lifetime of a contractual arrangement. Where a commercial judgment has been taken, and an assessment of ‘risk’ made, our expectation is that reasonable steps and/or ‘controls’ should be implemented to help pre-empt, where possible, the likelihood of consumer harm.”

i) The Network operator did not adequately assess the potential risks posed by the Service

The Executive asserted that the Network operator did not adequately assess the risks posed by the Service as it did not provide evidence of it conducting a risk assessment and/or providing a risk rating in relation to the Service.



The Executive requested evidence of a risk assessment and the provision of a specific risk rating that the Network operator had assigned to the Level 2 provider. However, the Network operator merely outlined the general due diligence and risk assessment processes that it stated it had in place. The Executive therefore inferred that the Level 2 provider had either not assigned a risk rating or it had informally classed it as low risk. During correspondence, the Network operator submitted that the following risk assessment steps had been carried out:

- “1. We researched the clients [sic] breach history and found no previous breaches
2. We researched the clients previous trading history and it was satisfactory
3. No previous adjudications were ever related to this clients type of service
4. No spikes in traffic were seen and volumes were commensurate with other service providers of the type.
5. All partners had no previous rulings with PPP or any other regulatory body
6. Draft promotional material was seen and changes recommended
7. It was suggested as always that the client seeks PPP compliance advice
8. As soon as Premium O were made aware of any issues with the service it was immediately disconnected”

The Executive noted that researching the Level 2 provider’s directors’ breach and trading history would not have revealed any concerns, as the Level 2 provider was new to the premium rate market. The Executive asserted that, the fact the Level 2 provider was new to the premium rate industry would indicate that it posed an inherent risk through lack of experience and the Network operator should have considered this when assessing the risk assessment.

ii) The Network operator did not take and maintain reasonable steps to control the risks posed by the Service.

The Executive submitted that the Network operator did not take and maintain reasonable processes to control the risks associated with the Service in respect of the promotional material and the call records.

Promotional material

The Executive requested that the Network operator supply a copy of the draft promotional material provided by the Level 2 provider. The Network operator stated that the promotional material it had received was <https://www.book-theory-test-online.co.uk> and to its knowledge this was the only advertising material.

The Executive noted that the Service was promoted through Google Adwords. The Executive asserted that both the Google Adwords promotion and the Service webpage contained clear indicators that the Service presented a high risk of consumer harm and that there were easily identifiable issues surrounding the clarity of pricing information and the misleading nature of the Service.

The Executive submitted that, had the Network operator reviewed the promotional material as part of a risk assessment, it would have been aware of a number of compliance issues and been able to identify the risks associated with the Service.

Call records



The Executive noted that the Service website stated that calls, “should last between 5 to 7 minutes or may be more”, yet it also noted that a considerable number of calls exceeded this prescribed period.

The Executive asserted that the call data provided by the Network operator, indicated that between January and February 2013 there was a total of 126 calls that exceeded 30 minutes and 11 calls that exceeded 60 minutes. Given the nature of the Service and the cost of the calls per minute, the Executive submitted that the number of lengthy calls should have alerted the Network operator and triggered the monitoring of the Service. The Executive asserted that if the Network operator had monitored the Service, it is more likely than not, that issues with the Service would have been identified and consumer harm would have been reduced.

In light of the above, the Executive submitted that the Network had not assigned a risk rating and met the required standard of risk assessment and control. Consequently, it acted in breach of paragraph 3.1.3 of the Code.

2. The Network operator strongly denied the breach.

The Network operator’s primary submission was that the breach had been misframed. It stated that the Executive’s logic was flawed, as the wording of the Code and the Guidance does not impose an obligation to assess the potential risks posed by a Service. In particular, it asserted that the Guidance only imposes an obligation to assess the risks posed by the types of services being offered and having consideration for previous adjudications. The Network operator asserted that there was no evidence that the Level 2 provider was providing the type of services that were “high risk”.

In addition, the Network operator asserted that ongoing monitoring obligations do not extend to “keeping a constant eye” on a service. The Network operator alleged that the Executive was seeking to expand the remit of paragraph 3.1.3 of the Code. It added that this could have the effect of making Network operators and Level 1 providers responsible every time breaches were found against a Level 2 provider. It stated that if this was the obligation, there should be a period of consultation. It warned the Executive of the dangers of imposing stringent obligations for the following reasons:

- i) It would have the likely effect of forcing Network operators and Level 1 providers out of the industry, as the rewards are small and do not justify the increased risk, in respect of matters which are largely outside of its control.
- ii) Network operators do not have the time and resources to constantly monitor all services which pass over its networks.
- iii) Any attempt to hold Level 1 providers and Network operators responsible for the content and promotion of services would appear to entirely disregard the ‘polluter pays’ principle and the practice in other Ofcom-regulated areas.

The Network operator urged the Executive to be consistent in its approach and stated that it should not attempt to impose a breach of paragraph 3.1.3 for failing to monitor services in certain cases and not in others. Further, a breach of this nature could probably be levelled at any Level 1 provider or Network operator, where a breach is found against its Level 2 provider client.



The Network operator distinguished itself from other providers and Network operators who had previously been adjudicated against. The Network operator commented that there were only a small number of complaints in relation to the Service and that it was difficult to see how it could have been expected to be aware of the problems posed by the Service.

During informal representations, the Network operator stated that steps were taken to control the risks as it utilised algorithms, which identified peaks in total average call duration. On this occasion, as a significant number of consumers had terminated calls immediately upon connection, therefore the average call length had been reduced and the algorithm had not shown the excessive call lengths. The algorithm only had the capability to show an average call length. It believed that this method was used by many Network operators.

The Network operator stated that when it became aware of the compliance issues, it took immediate action to suspend the Service before PhonepayPlus made a request. It stated that it had previously worked with and assisted PhonepayPlus, including attending PhonepayPlus forums.

The Network operator highlighted that the first complaint to PhonepayPlus was on 5 November 2012 but it was not alerted to the issues until 19 February 2013. It believed that consumer harm could have been prevented, as the complainants would have been one instead of 17, if PhonepayPlus had contacted it earlier. It stated that lessons should be learnt on both sides as, "PhonepayPlus had made mistakes too. We are not fully to blame".

The Network operator stated that the steps it takes to control risks included an assessment of the Service not just the party it was contracting with. It acknowledged that this may have been contrary to its written response but stated that this was a response provided by its advisors. A review of the Service promotions had led the Network operator to believe that the Service promotions, operation and content operated in a compliant manner.

In summary, it stated that it was a professional company who had operated premium rate services for some time and it had never previously been before the Tribunal for a breach of the Code. It asserted that this was a minor matter that had "caught us out" but it urged the Tribunal to look upon it favorably.

3. The Tribunal considered the evidence and the submissions made by the Executive and the Network operator. The Tribunal commented that a Network operator's and/or Level 1 provider's risk assessment obligations require consideration of the risks posed in relation to the provision of a service and the promotion, marketing and content of the Service. Contrary to the written submission made by the Level 2 provider, it is not sufficient to merely consider the risk associated with contracting with a party and not consider the provision, operation, promotion and/or content of the service. The Tribunal noted the Network operator's comment in informal representations that it had assessed the risks associated with the Service. However, the Tribunal found that the evidence of any risk assessment in relation to promotions was limited. The Tribunal found that the Network operator had not carried out an adequate risk assessment on the Level 2 provider in relation to the provision of the Service and therefore had failed to properly assess the risks posed by the Level 2 provider. In addition, the Tribunal commented that the Network operator had failed to take reasonable steps to monitor the risks posed by the Service. In particular it had not noticed that a significant number of calls were unduly lengthy. Consequently, the Tribunal found that the risk assessment was inadequate and had the Network operator taken reasonable steps to identify the risks, the problems with the Service

were likely to have been identified. Accordingly, the Tribunal upheld a breach of paragraph 3.1.3 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 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:

- Due diligence processes had been operated in such a way that demonstrated a degree of negligence and/or reckless non-compliance with the Code.
- The Network operator failed to develop and/or consistently use due diligence processes for its clients, which had a detrimental impact on the investigation and enforcement of the Code.

Paragraph 3.1.3 – Risk assessment

The initial assessment of paragraph 3.1.3 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Risk assessment processes had been operated in such a way that demonstrated a degree of negligence and / or reckless non-compliance with the Code.
- The Network operator failed to develop and/or consistently use due diligence processes for its clients, which had a detrimental impact on the investigation and enforcement of the Code.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal found no aggravating or mitigating factors. The Tribunal noted that there had been a number of adjudications and guidance regarding due diligence and risk assessment control. The Tribunal commented that it was helpful that the Network operator attended the Tribunal to provide informal representations but noted that its oral submissions did not always reflect the written response. Further, the written response showed a misunderstanding of the Network operator's obligations under the Code, in respect of due diligence and risk assessment control. The Tribunal noted the Network operator's stated that it should have been notified of the complaints to PhonepayPlus earlier and the Tribunal commented that it hoped that in the future, PhonepayPlus would ensure that once it received a complaint it was brought to the attention of all those in the value chain promptly to reduce consumer harm.

The Network operator's revenue in relation to the underlying Service was in the range of Band 5 (£5,000 - £50,000). The Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions Imposed



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

- a formal reprimand;
- a fine of £40,000; and
- a requirement that the Network operator remedy the breach by designing and implementing adequate due diligence and risk assessment procedures and produce evidence to the satisfaction of PhonepayPlus, within four weeks from the date of publication of this decision.