

Tribunal meeting number 163 / Case 1

Case reference: 58930
Level 2 provider: Circle Marketing Ltd
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 4.4 OF THE CODE

BACKGROUND

A service provided by the Level 2 provider Circle Marketing Ltd (the “**Level 2 provider**”) was the subject of a PhonepayPlus investigation and adjudication (case reference: 29838), which resulted in sanctions being imposed by a Tribunal on 27 November 2014. The sanctions imposed by the Tribunal were a formal reprimand, a fine of £130,000, a warning that if the Level 2 provider fails to demonstrate that it has robust verifiable evidence of consumers’ consent to charge in the future it should expect to receive a significant penalty, a requirement that, within three months of the Level 2 provider re-commencing trading, the Level 2 provider submit to a compliance audit of its procedures for ensuring consumers provide valid consent to be charged and that it had robust verifiable evidence of that consent, the recommendations of the audit must be implemented within a period defined by PhonepayPlus and the costs of such audit must be paid by the Level 2 provider, and a requirement that the Level 2 provider must 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 provide evidence to PhonepayPlus. In addition, an administrative charge of £11,578.13 was imposed.

The Level 2 provider was informed of the sanctions imposed in a formal notification sent by email and post on 10 December 2014. In addition, the Level 2 provider was issued with a request to provide its contact details to PhonepayPlus to assist in the administration of the refund sanction. The deadline for payment of the invoices for both the fine and the administrative charge was seven working days from the date of the invoices (19 December 2014). The deadline passed without payment being received.

On 30 December 2014, the Executive issued the Level 2 provider with a reminder that the payment of the invoices was outstanding and overdue. The Executive received what appeared to be an automated response which requested that further emails were sent to a third party. The reminder was re-issued to the email address provided and sent by post.

The Level 2 provider failed to pay the fine and administrative charge in the time period specified or at all. Consequently, the total amount outstanding to PhonepayPlus is £141,578.13.

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 Level 2 provider on 23 January 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Paragraph 4.8.4 (b) – Failure to comply with a sanction
- Paragraph 4.10.2 – Non-payment of an administrative charge

The Level 2 provider did not provide a response to the breach letter within the specified deadline.

However, on 28 January 2015 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.

The Executive re-issued the breach letter to the liquidator, giving it an opportunity to respond on behalf of the Level 2 provider. On 13 February 2015, the liquidator provided a response to the breach letter.

The Tribunal considered the confirmations of delivery of the breach letter by post and email to the Level 2 provider and the liquidator, and was satisfied that the Executive had made all reasonable attempts to inform the Level 2 provider of the proceedings. On 19 February 2015, the Tribunal reached a decision on the breaches 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 Tribunal decision against the Level 2 provider dated 27 November 2014;
- Correspondence between the Executive and the Level 2 provider between 10 December 2014 and 6 February 2015;
- The breach letter dated 23 January 2015;
- Notification from the liquidator that the Level 2 provider had resolved to enter into liquidation dated 28 January 2015;
- The Level 2 provider's response sent on its behalf by the liquidator dated 13 February 2015;
- The case report; and
- Confirmation of delivery of the breach letter to the Level 2 provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 4.8.4(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 27 November 2014, the Tribunal adjudicated on a service operated by the Level 2 provider that had been the subject of a PhonepayPlus investigation (case reference: 29838). The adjudication resulted in the imposition of sanctions, including a fine of £130,000 and a refund sanction.

On 10 December 2014, the Executive sent the Level 2 provider a formal notification of the outcome of the adjudication, which included an invoice for payment of the £130,000 to be made within seven working days. Payment was not made within the time period specified (or at all).

The Executive also issued a form which the Level 2 provider was required to complete to ensure compliance with the refund sanction. The Level 2 provider was directed to return the completed form within 48 hours by providing its contact details to ensure that complainants could request and receive their refunds. The Executive received no response from the Level 2 provider in relation to the direction for contact details to be provided and the Executive had no evidence to suggest that the Level 2 provider has complied with the refund sanction.

The Executive submitted that the Level 2 provider was in breach of paragraph 4.8.4(b) of the Code as it had failed to pay the fine or comply with the refund sanction within the time period specified.

2. The Executive received notification in a letter dated 28 January 2015 that the Level 2 provider had passed a resolution to enter into voluntary liquidation. On 13 February 2015, the liquidator, acting on behalf of the Level 2 provider, provided a response to the breach letter, in which it admitted that a breach of paragraph 4.8.4(b) of the Code had occurred. It further stated that the Level 2 provider had no assets.
3. The Tribunal considered the evidence. The Tribunal noted that the liquidator had stated that the Level 2 provider had resolved to enter into liquidation and had no assets. The Tribunal noted that the evidence suggested the Level 2 provider had ceased trading from at least 23 October 2014. However, the Level 2 provider had not provided any evidence to demonstrate that it had no assets at the time it was notified of the sanctions. The Tribunal concluded that there had been a further breach of the Code due to non-payment of the fine and failure to comply with the refund sanction. Accordingly, the Tribunal upheld a breach of paragraph 4.8.4(b) of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Paragraph 4.10.2

“Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.”

1. On 27 November 2014, the Tribunal recommended that PhonepayPlus impose 100% of the administrative costs incurred in relation to the Level 2 provider’s case (£11,578.13). On 10 December 2014, the Executive sent the Level 2 provider a formal notification which included an invoice for payment of the administrative charge. The invoice requested that payment be made within seven working days. The deadline passed without PhonepayPlus receiving payment of the administrative charge.

In light of the above, the Executive submitted that a breach of paragraph 4.10.2 of the Code had occurred.

2. The Executive received notification in a letter dated 28 January 2015 that the Level 2 provider had passed a resolution to enter into voluntary liquidation. On 13 February 2015, the liquidator, acting on behalf of the Level 2 provider, provided a response to the breach letter, in which it admitted that a breach of paragraph 4.10.2 of the Code had. It further stated that the Level 2 provider had no assets.
3. The Tribunal considered the evidence. The Tribunal noted that the liquidator had stated that the company had resolved to enter into liquidation and had no assets. The Tribunal noted that the evidence suggested the Level 2 provider had ceased trading from at least 23 October 2014. However, the Level 2 provider had not provided any evidence to demonstrate that it had no assets at the time it was notified of the sanctions. The Tribunal concluded that there had been a further breach of the Code as a result of non-payment of the administrative charge. Accordingly, the Tribunal upheld a breach of paragraph 4.10.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Paragraph 4.8.4 (b) – Failure to comply with a sanction

The initial assessment of paragraph 4.8.4(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 and comply with the refund sanction 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.

Paragraph 4.10.2 – Non-payment of an administrative charge

The initial assessment of paragraph 4.10.2 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 administrative charge 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 breaches were **very serious**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating or mitigating factors. The Tribunal noted that the Level 2 provider had previous breach history, which had been taken into consideration by the Tribunal of 27 November 2014. The Tribunal did not find that it was relevant breach history for the purposes of this adjudication.

In determining the final overall assessment for the case, the Tribunal noted that the liquidator, acting on behalf of the Level 2 provider, had admitted the breaches. The Tribunal also noted that the Level 2 provider had now resolved to be placed into liquidation, following notification of the sanctions imposed on 27 November 2014. The Level 2 provider had not provided any evidence to demonstrate that it had no assets at the time it was notified of the sanctions. Taking into account the circumstances of the case, the Tribunal did not find that these matters amounted to mitigation.

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, the Tribunal decided to impose the following sanctions:

- a formal reprimand; and
- 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 payment of the outstanding fine and original and instant administrative charges, whichever is the later.

Administrative charge recommendation:

100%