Code Compliance Panel

Tribunal Decision

Tribunal meeting number 176 / Case 1

Case reference: **73957**
Level 2 provider: **N/A**
Type of service: **N/A**
Level 1 provider: **Sensoria Communications Limited (UK)**
Top Level 1 provider: **Fonix Mobile Limited**
Network operator: **Mobile Network operators**

THIS CASE WAS BROUGHT AGAINST THE LEVEL 1 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

On 14 May 2015, the Tribunal adjudicated against a video subscription service (the "**Service**") operated by the Level 2 provider, Infernal Publishing Ltd (the "**Level 2 provider**").

The Tribunal had upheld breaches of the PhonepayPlus Code of Practice (12th edition) ("**the 12th Code**") against the Level 2 provider in relation to the inadequate provision of information likely to influence the decision to purchase, failure to obtain consumers' consent to charge, and a lack of prominent pricing information and the identity of the Level 2 provider on promotional material for the Service.

The Level 1 provider in relation to this case was Sensoria Communications Limited (the "**Level 1 provider"**). During the course of the investigation against the Level 2 provider, the Executive had concerns regarding the adequacy of its due diligence procedures on its client the Level 2 provider, as required by the Code.

The investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (13th Edition) (**"the 13th Code"**). The Executive sent a breach letter to the Level 2 provider on 14 October 2015. Within the breach letter the Executive raised the following breach of the Code:

- Paragraph 3.3.1 – Due diligence

The Level 2 provider responded to the breach raised by the Executive on 2 November 2015. After hearing informal representations from the Level 1 provider on 12 November 2015, the Tribunal reached a decision on the breach raised by the Executive.

The Tribunal noted correspondence from the Level 1 provider's legal representative in which concerns had been raised about the manner in which the Executive had presented its client's response to the breach letter in the Tribunal's case bundle. The Tribunal confirmed that it had read the Level 1 provider's response as set out in full in the annex to the case report, and the Tribunal members had also been re-sent the Level 1 provider's response on 11 November 2015, at the request of the Level 1 provider. At the beginning of the Tribunal, the Level 1 provider confirmed that on that basis it was content for the Tribunal to continue.

The Tribunal considered the following evidence in full:

- The Tribunal decision against the Level 2 provider (case reference: 49874);
- Correspondence between the Executive and the Level 1 provider (including directions for information and the Level 1 provider's responses) between 16 January 2015 and 16 September 2015;
- Correspondence between the Executive and 100 Mile Media Limited ("**100MM**") between 4 June 2015 and 29 June 2015;
- Correspondence between the Executive and mGage Europe Limited ("**mGage**") (also known as MMBU Private Company Limited) (formerly known as Mobile Interactive Group Limited ("**MIG**") and Velti DR Limited (**"Velti")**) between 1 July 2015 and 13 October 2015 and;
- Correspondence between the Level 1 provider's legal representatives and the Executive regarding its clients, the Level 1, provider and 100MM between 27 July 2015 and 8 September 2015;
- Correspondence between the Executive and Fonix Mobile Limited ("**Fonix**") on 1 May 2015;
- PhonepayPlus Guidance on "Due diligence, risk assessment and control (DDRAC)" and "Definitions";
- Companies House report regarding the Level 2 provider;
- Documents relating to the service of the breach letter;
- The breach letter of 14 October 2015 and the associated annexures;
- The Level 1 provider's response of 2 November 2015 and associated annexures including;

    - Letter from its legal representatives dated 30 October 2015;
    - Letter to the Tribunal from the Director of the Level 1 provider of 30 October 2015;
    - Decision of the High Court of Justice in Northern Ireland dated 13 November 2014;
    - A screenshot of the website hornystuff.co.uk and domain information for that website;
    - Email between the Level 1 provider and 100MM dated 2 July 2014;
    - Unsigned contract between the Level 1 provider and the Level 2 provider dated 2 July 2014;
    - Share purchase agreement with Piri Limited (**"Piri"**) dated 31 March 2010;
    - Software licence agreement between the Level 1 provider and Piri dated 28 May 2010;
    - Companies House documentation regarding the appointment of directors for Piri;
    - Agreement between MIG and the Level 2 provider dated 1 November 2011;
    - Email and letter regarding "earn –out" confirmation;
    - Undated Share purchase agreement with MIG;
    - Hosting support maintenance agreement between the Level 1 provider and Velti dated 17 December 2012;
    - Service review form and testing log;
    - Emails relating to a risk assessment conducted by Velti dated 4 June 2013; and
    - Character reference from employees of Fonix dated 30 October 2015.

- The Executive's letter to the Level 1 provider's legal representatives of 11 November 2015;
- The Executive's letter to the Level 1 provider's legal representatives of 23 September 2015; and
- Email correspondence between the Executive and the Level 1 provider's legal representatives between 5 and 9 November 2015.

SUBMISSIONS AND CONCLUSIONS

Preliminary issues

- **The applicability of the 12th or 13th Edition of the PhonepayPlus Code of Practice**

The Level 1 provider stated that it had previously requested that the Executive confirm whether its case was proceeding under the 12th or 13th Code. It stated that the confusion arose as the Executive's breach letter cited rules of the 12th Code yet the covering letter advised it would consider the Level 1 provider's response in light of the 13th Code. The Level 1 provider stated the case should be interpreted in light of all the rules under 12th Code on the basis that was the version of the Code which was in operation at the time of the alleged breaches. It submitted that a case should be governed by either Code not both. It submitted that the suggestion that in a transition period between the two Codes both versions should apply was wrong in law and that this approach was in breach of PhonepayPlus' responsibilities as a regulator in respect of consistency and transparency.

In response, the Executive stated in respect of the alleged breach, the relevant provisions were those of the 12th Code as the relevant conduct took place in the period governed by that Code (i.e. prior to 1 July 2015). However, as the case was to be considered by a Tribunal in the period governed by the 13th Code, the procedural provisions of the 13th Code governing the consideration of a cases by a Tribunal applied. The Executive submitted that this approach was analogous to the approach usually taken by the civil courts when procedural rules were changed. The Executive stated that it was therefore unclear as to why the Level 1 provider believed that this approach was unworkable and unlawful. It also stated that in correspondence it had invited the Level 1 provider to explain how it would be treated unfairly as a result of use of the 13th Code procedural provisions as opposed to the 12th Code, particularly as there was no material difference between them, but it had not done so.

During informal representations, the Level 1 provider confirmed its legal representative's written submissions and stated that it wanted clarification on the issue.

The Tribunal found that in respect of the alleged breaches, the relevant provisions were those of 12th Code as the relevant conduct took place in the period governed by that Code. However, as the case was being considered by the Tribunal in the period governed by the 13th Code, the procedural provisions of the 13th Code governing the consideration of the case by the Tribunal applied. The Tribunal considered that there was no material difference between the relevant provisions of the Codes and therefore it did not impact on the fairness of the hearing.

- **The identity of Sensoria Communications Limited as a Level 1 provider**

The Executive submitted that Sensoria Communications Limited was the Level 1 provider, as defined by the 12th Code at paragraph 5.3.8, which states:

> "a person who provides a platform which, through arrangements made with a Network operator or another Level 1 provider, enables the relevant premium rate service to be accessed by a consumer or provides any other technical service which facilitates the provision of the relevant premium rate service."

The Executive submitted that a value chain may have more than one Level 1 provider. The Executive stated that throughout the course of the investigation against the Level 2 provider and during its subsequent investigation against the Level 1 provider, it had made numerous requests

for information in order to understand the value chain. The Executive understood that Fonix (as a Level 1 provider) was contracted with the Mobile Network operators for the provision of the Service shortcode. It also understood that Fonix was also contracted with the Level 1 provider, which in turn had contracted with the Level 2 provider. However, a commercial agent called 100MM had acted as an intermediary between the Level 1 provider and Level 2 provider to facilitate its relationship.

The Executive outlined the information that it had obtained from various parties to reach its conclusion.

- During correspondence, the Level 1 provider or its legal representative had stated the following in relation to the Level 1 provider's role:

  "Sensoria is the supplier of the technology, we provide Software as a Solution via the web that allows Infernal Publishing to run their services. We provide access to the platform that is fully manageable from a user interface by the client. We provide all features to make the service compliant to the rules of PP+ and ofcom for the client. The service is run and managed by Infernal Publishing Limited."

  "Our client [Sensoria] is the provider of a self-service technology platform…"

  "Infernal Publishing used Sensoria's technical platform to provide the TV Babes service."

  In response to the Executive's question as to whether the Level 1 provider invoiced 100MM for permitting the Level 2 provider to use its technical platform, the Level 1 provider stated:

  "Correct (although no invoices were raised by Sensoria to 100 Mile Media as the costs incurred were taken off the revenue 100 Mile Media collected for the service and then 100 Mile Media invoiced Sensoria for the remaining total as per statements provided by Sensoria)."

- The contract between the Level 1 provider and 100MM stated the following:

  "…Under the Services, Sensoria will receive SMS and MMS from users on behalf of the Customer and process the messages and send to users via SMS or WAP-push. Where Services are chargeable to users Sensoria will collect and forward funds to the Customer in accordance with the terms of this Agreement."

  "On each Calculation Date Sensoria will calculate the number of Short Messages conveyed to Service Users by means of the SMS Service and the Network during the relevant period and will calculate the payment due to the Customer in respect thereof ("Service Revenue") in accordance with Sensoria's current Message Fee tariff, unless an alternative Message Fee tariff has been agreed between Sensoria and the Customer. If the Customer is provided with use of the shared shortcode, then Service Revenue for the shared shortcode shall be divided among the Sensoria customers that use the shared shortcode based on Sensoria's statistics and at the sole discretion of Sensoria."

- During correspondence 100MM or its legal representative stated the following in relation to its role:

  "Our client's [100 Mile Media] role in the value chain is that of a sales agent: as such our client falls neither into the category of an L1, nor an L2."

> "100 Mile Media acted at all times as a commercial agent on behalf of Infernal publishing."
>
> "100 Mile Media was invoiced by UK printer on behalf of Infernal."
>
> "100 Mile Media referred Infernal publishing to Sensoria."

- During correspondence Fonix stated the following in relation to its role in the value chain:

> "Service from mid 2014 was paid by Fonix."

- In relation to Fonix's role in the value chain, the legal representative of the Level 1 provider and 100mm stated:

> "Sensoria … started receiving revenues from Fonix in July 2014 (Full first month was August 2014) Sensoria had no connection with the service before that date and no monies were received from mGage -just Fonix."

- During the investigation, 100MM stated that mGage (formerly known as MIG and Velti) had involvement in the value chain. Accordingly, the Executive corresponded with mGage to ascertain its role. It stated:

> "Neither Infernal Publishing Limited or 100 Mile Media Ltd have ever been a client of GSO MMBU Private Company Limited (t/a mGage)."
>
> "The following is mGage's understanding in this matter:
> No contact between MIG or Infernal was ever signed.
> Sensoria Communications Limited &/or 11 [sic] Mile Media Limited may have made an initial introduction of Infernal Publishing Limited (Infernal) to Mobile Interactive Group Limited (MIG) (hence why 100 Mile Media appears to have a draft document) but this was not concluded - as you've indicated, Sensoria Communications Limited entered into a direct contract with Infernal."

In addition, the Executive stated that it had initially been informed that a separate company had had some involvement in the Service, but the Executive had been informed that the company did not pay any revenues to the Level 2 provider nor any other party in this value chain. Accordingly, the Executive was satisfied that this company played no part in the value chain.

The Executive noted that the Level 1 provider had stated that it had received revenue from Fonix for the Service from July 2014 onwards. Further, the Level 2 provider was paid revenue from the Level 1 provider via 100MM. The Level 1 provider made the following statement in relation to the flow of revenue:

> "When 100 Mile Media's clients use [Sensoria's] technology platform, 100 Mile Media invoices their clients for using it and then Sensoria charges 100 Mile Media for providing the service to them. Sensoria also charges 100 Mile Media for PRS revenues that are collected for Sensoria's clients by 100 Mile Media. Once the total charges to 100 Mile Media have been deducted from the revenues Sensoria has collected on behalf of 100 Mile Media, 100 Mile Media invoices for the total."

The Executive also noted that in relation to the contract for the Service, the Level 1 provider had stated that it did not hold a copy, as its standard SMS contract had been supplied to 100MM for the

purposes of forwarding to the Level 2 provider. The Level 1 provider's platform had been provided on the basis of its standard terms and conditions. The Level 1 provider had informed the Executive that the Service was promoted from July 2014 but the contract did not show the exact date on which the contract between the Level 1 provider and the Level 2 provider commenced.

Consequently as a result of all the above information, the Executive submitted that Sensoria Communications Limited was the Level 1 provider as it had contracted with the Level 2 provider to provide the technical platform which facilitated the provision of the Service. The Level 1 provider received Service revenue from Fonix which it then paid out. The Executive understood that 100MM was an agent who referred the Level 2 provider to the Level 1 provider, and therefore did not fall within the definition of a Level 1 or Level 2 provider. Fonix was the top Level 1 provider (an aggregator) that contracted with the Mobile Network operators and the Level 1 provider. mGage (formerly MIG and Velti) had no part in the value chain as it did not have a contract with the Level 1 or Level 2 provider.

In addition, the Executive submitted that the Level 1 provider appeared to be aware of its obligations as a Level 1 provider, having stated in correspondence that it had conducted due diligence on the Level 2 provider.

Following questioning from the Tribunal, the Executive confirmed that there could be more than one Level 1 provider in any given value chain. The Executive submitted that this was made clear in the wording of the 12th Code itself at paragraph 5.3.8 and also in the PhonepayPlus Guidance on "Definitions" at paragraph 2.3 and 2.7.

The Executive submitted that a technology platform provider could meet the definition of a Level 1 provider at paragraph 5.3.8 of the Code, where the evidence showed that it met that definition. The Executive accepted that the value chain for a service may change from time to time and it may also discover in the course of its investigations that a provider is acting as a Level 1 provider, when this would not be otherwise apparent from (for instance) the PhonepayPlus register. Accordingly, the Executive submitted that whether it had previously named other parties as Level 1 providers for this Service was not relevant to the alleged breach against the Level 1 provider. Whilst the Executive did not rule out the possibility of investigating other parties, the Executive's view (noting that the Level 1 provider had the most recent and most direct contractual relationship with the Level 2 provider in the value chain) was that it was appropriate to proceed against the Level 1 provider.

The Level 1 provider made written submissions via its legal representatives regarding the issue as to whether it met the definition of a Level 1 provider. The Level 1 provider submitted that it did not accept the Executive's view that it was a Level 1 provider for the purposes of the Code. It stated that it had repeatedly requested in correspondence with the Executive that it substantiates its view but the Executive had refused to do so until it had sent the Level 1 provider the breach letter. Even then, the Level 1 provider submitted that it considered the reasons put forward in the breach letter as deficient. It made the following points:

- A provider of a technology platform is not a provider of premium rate services. The Level 1 provider stated that it was no more a Level 1 provider than a third party software developer, producing some coding under engagement to a Level 2 provider, would be.
- Since the Level 1 provider's inception in 2004, in the history of dealings with the Executive, it had never been treated as a Level 1 provider before. It suggested that the only reason it was being treated as a Level 1 provider in this instance was because it suited the Executive's primary agenda, being the recovery of its funds.

- As to the suggestion that the Level 1 provider knew it was the Level 1 provider based on the fact that it conducted some due diligence, it asserted that this was nothing to the point: as undertaking due diligence was in line with common practice in a business context, and common sense. By way of an analogy, it stated lawyers may undertake some cursory due diligence on their clients in assessing whether to undertake work, independently of their money laundering obligations.

The Level 1 provider further added that it was not made clear in the Code that there may be more than one Level 1 provider and the Executive had made this assertion without any reference to the Code or Guidance.

The Level 1 provider maintained that it had assisted the Executive at every stage to understand the value chain and it was not responsible for requests made of and the adequacy of the responses received from other parties contacted. The Level 1 provider questioned why the Executive had included correspondence concerning 100MM in its case, when this was not relevant to its obligations or the case.

In relation to the Executive's submission regarding the revenue for the Service, the Level 1 provider clarified that it collected revenue from Fonix and forwarded the balance to 100MM. The Level 1 provider took issue with the Executive's presentation of various provider's roles in its breach letter and questioned why its status and 100MM were under consideration but not Fonix. Further, it questioned why the Executive had not referred to Fonix as a Level 1 provider when it was clear that Fonix was a Mobile Network aggregator, platform provider and ordinarily considered the Level 1 provider.

The Level 1 provider did not accept that because it had conducted due diligence it had been attempting to comply with the Level 1 provider Code obligations. It stated that due diligence was good business practice, common sense and commonplace, and was often a requirement for many other rules and regulations. It believed that due diligence was essential for a technology platform considering what its end users will experience. It submitted that this in no way proved that it thought it was a Level 1 provider.

In summary, the Level 1 provider stated that it did not accept that it met the definition of a Level 1 provider and it sought to rely on precedent and the requirements of fairness and consistency in support of its position.

During informal representations, the Level 1 provider reiterated its written submissions in relation to this issue and stated that it was of the view that if it had been in the value chain and deemed a Level 1 provider by the Executive it would have been stated in all earlier correspondence, when that was not the case. It stated that it was only aware that the Executive were treating it as a Level 1 provider in its letter of 23 September 2015, which was after it had made the last payment of Service revenue withheld from the Level 2 provider. The Tribunal referred the Level 1 provider to the Tribunal adjudication against the Level 2 provider and highlighted that it had been named in the adjudication as the Level 1 provider. The Level 1 provider stated that it had not noticed this.

The Tribunal found that Sensoria Communications Limited met the definition of a Level 1 provider in the 12th Code. It was satisfied that Sensoria Communications Limited provided a technical platform that facilitated the provision of the Service and enabled the Service to be accessed by consumers. It also considered that there could be more than one Level 1 provider in a value chain, as was the case with the Service.

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."

1. The Executive asserted that the Level 1 provider had breached paragraph 3.3.1 of the 12th Code as the Level 1 provider had not performed thorough due diligence on the Level 2 provider but it had instead largely relied on its existing relationship with a third party, 100MM. Accordingly, the Executive submitted that the Level 1 provider had not adequately satisfied itself that it knew who it was contracting with.

   The Executive relied on the content of the PhonepayPlus Guidance on "Due Diligence and risk assessment and control (DDRAC)" (the "**Guidance**"). 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 arrangement is entered into. PhonepayPlus is aware that due diligence is common practice in the industry and does not seek to impose a rigid formula as to how it should be undertaken. Through the implementation of the new industry-wide Registration Scheme, Network operators and providers should find it easier to carry out basic due diligence searches on their partner providers."

   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."

On 23 January 2015 the Executive issued a direction for information to the Level 1 provider regarding the Service. In response to this direction for information the Level 1 provider stated:

> "When Sensoria starts working with a new client we make sure they are registered with Phone Pay Plus – (ORG827-99600-70615 is the registration number of Infernal Publishing Limited trading as Firstlight) and that they have no regulatory cases against them. Sensoria also carries out due diligence of the service(s) that the client intends to run we request a service review of clients services that use our Self Service SMS platform every 12 months or when a new service is started. With that in mind the last service review we did for Infernal Publishing Limited (Firstlight) was supplied by them in July 2014 once they changed the way the service was run after taking advice from Phone Pay Plus. We also then test the service with our test phone to make sure it is compliant…"

On 4 June 2015, the Executive issued a further direction for information to the Level 1 provider in order to ascertain whether it had carried out effective due diligence of its client the Level 2 provider, in which the Level 1 provider was asked:

> "What information did you obtain as part of your due diligence on this client? Please provide evidence. The Executive already holds a copy of the due diligence record, please provide any additional relevant documentation"

On this occasion, the Level 1 provider's legal representative responded on behalf of the Level 1 provider and in response to the question above it stated that it had no further information.

However in the same response the legal representative provided the following information in relation to the Level 1 provider's due diligence on the Level 2 provider:

> "…we can confirm that our client does have formal Due Diligence Procedures in place. Every customer has to complete a Service Review; once the service is set up it is checked to ensure it is running as per the Service; our client performs MO and MT loop tests; and once the service is running it is monitored so as to see how many Requests for Information it generates from yourselves….Infernal Publishing (known to our client as Firstlight) was referred to our client by 100 Mile Media Limited, with whom our client has worked with for over 11 years and with whom our client had never had a compliance issue before. Our client completed due diligence on 100 Mile Media and found them to be registered with PhonepayPlus and with an exemplary regulatory record.
>
> We understand that our client's relationship with 100 Mile Media is such that they refer clients to use the Sensoria platform…Our client has worked with 100 Mile Media for a number of years (before the more strenuous due diligence requirements came into force): we would suggest that their history of working together, together with their reputation within the industry and the lack of any previous issues with their clients using the Sensoria platform, constitute further evidence of compliance (i.e assessment or risk) in respect of any perceived due diligence obligations on the part of our client. We enclose a copy of the contract as between our client and 100 Mile Media which dates from 2011.100 Mile Media had contracts/ & working relationships with ALL known fixed line and mobile operators and had worked for various renown publishers which is where he advertised and generated his business."

Based on the responses and the service review provided by the Level 1 provider, the Executive noted that the Level 1 provider had not obtained any of the following documents:

- Contact details for a client's place of business;
- Copies of the 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;

The Executive noted that the service review form obtained from Sensoria appeared to have been completed by the Level 2 provider as it has stated:

"Every customer has to complete a service review."

The Executive also noted from the Service review form that the Level 1 provider had not obtained any evidence of the mobile originating and mobile terminating message loop tests that had been referred to.

In the same direction to the Level 1 provider, the Executive also requested the following information:

"Please provide a signed copy of your most recent contract with Infernal Publishing Ltd for the provision of this service. The Executive notes that you previously provided only a template SMS services contact."

The legal representative responded on behalf of the Level 1 provider and stated:

"We do not hold a signed copy. Our client's standard SMS services contract was supplied to 100 Mile Media, as intermediary, for the purposes of forwarding to Infernal. Accordingly, our client's platform was provided on the basis of our client's standard terms."

The Executive contacted 100MM to question whether they had conducted any due diligence on the Level 2 provider. The Executive received the following response from the legal representative on behalf of 100MM, which stated:

"Companies House Registration Number 605139
VAT Registered
Org Number with PPP
Checked all artwork to be compliant
Checked all services to be compliant
Home Address
Full legal compliance measures were taken by Mobile Interactive Group [MIG] at the time and our client had full approval from their in-house counsel."

The Executive did not receive any documentary evidence of the due diligence that was stated to have been conducted (and listed above) from 100MM.

The Executive noted that the legal representative on behalf of 100MM had also stated that as a sales agent it had not believed that it was required to undertake any due diligence, risk assessment and control measures as it was neither a Level 1 or Level 2 provider.

The Executive noted that the legal representative on behalf of 100MM had submitted an unsigned copy of an order form between MIG and 100MM and an order form between the Level 2 provider and MIG. When the Executive contacted mGage regarding its involvement

with the Level 2 provider, it stated that no contract had been signed between it and the Level 2 provider. It acknowledged that the Level 1 provider and/or 100MM may have made an initial introduction of the Level 2 provider. Following a further request for clarification from the Executive to mGage, it confirmed that its in-house Counsel had not provided 100MM with approval to take on the Level 2 provider as a client, because neither 100MM or the Level 2 provider had ever been clients of mGage.

The Executive highlighted paragraph 1.2 of the Guidance as stated above, which makes it clear that there is no single or prescribed standard as to what constitutes effective due diligence but PhonepayPlus expects all parties to know who they are contracting with.

The Executive noted that the Level 1 provider had referred to their long standing relationship with 100MM as its reason for not performing thorough due diligence on the Level 2 provider as required. When questioned, 100MM stated that full compliance measures in relation to the Level 2 provider were undertaken by mGage, however mGage stated that they have never contracted with the Level 2 provider.

The Executive asserted that the Level 1 provider appeared to have relied on a presumed existing relationship between 100MM and the Level 2 provider to not perform its own thorough due diligence on the Level 2 provider.

In relation to the Service, the Level 1 provider stated that it had not obtained and did not hold any proof of identity documents for any individual contracting on behalf of the Level 2 provider, and no documentation relating to the proof of address of the Level 2 provider. The Executive asserted that where a provider is not satisfied it knows its client, it is required to take extra steps, such as obtaining a passport and a recent utility bill for directors of the business. Further, the Executive stated that it was aware that various Level 1 providers include this step as part of their standard due diligence procedure. Similarly, the Executive submitted that where there is any concern as to the identity of its client, a Level 1 provider should ensure it has a record of the bank account details of its client.

Although PhonepayPlus does not impose a rigid formula for due diligence, the Executive stated that it is a requirement that due diligence is done thoroughly. In this case, the Executive submitted that the Level 1 provider should have recognised there were additional risks, which increased the need for thorough due diligence in order to ensure it knew its client, which were as follows:

- The Level 1 provider was dealing with its client via a commercial agent;
- Payments were not being made directly to the Level 2 provider's account (the Executive noted that 100MM had refused to identify the name of the party to whom it had made payments out in respect of the Service, other than using the pseudonym "UK printer.")
- The Level 2 provider operated under the trading name "Firstlight";
- The Level 1 provider did not hold a contract signed by a director of the Level 2 provider, the primary contact for the Level 2 provider was not a director of the business, and the Level 1 provider did not hold authorisation for that contact from the registered director of the business.

The Executive noted that even basic measures concerning Companies House searches had not been adhered to by the Level 1 provider, and that save for the service review form, documentation which stated that checks had been conducted (for instance, on the PhonepayPlus register) had not been retained as was required by the 12th Code. Had the

Level 1 provider checked Companies House at the relevant time, it would have realised that it was not dealing with the listed director of the Level 2 provider. The Executive had no evidence that the Level 1 provider had ever dealt with the director of the Level 2 provider and it had received communication from the primary contact and director of the Level 2 provider stating that he had no knowledge of the Service or the matters that were detailed in the Tribunal adjudication of 28 May 2015.

While no system of due diligence is prescribed, PhonepayPlus is clear in its Guidance that Level 1 providers must know their clients. The Executive submitted that reliance on an existing relationship between a Level 1 provider and a commercial agent who referred clients to it, did not constitute thorough due diligence on a Level 2 provider. As a result, such due diligence as may have been performed on the Level 2 provider by the Level 1 provider was substantially inadequate. The Executive submitted that reliance on a third party outside the value chain in this way clearly increases the potential for fraud, for instance.

In light of the above, the Executive submitted that the Level 1 provider had not met the required standard of due diligence and therefore acted in breach of paragraph 3.3.1 of the 12th Code.

The Executive stated that following the adjudication against the Level 2 provider, it had been contacted by the primary contact and the director of the Level 2 provider and they stated that it had no knowledge of the Service or the matters detailed in the adjudication. The Executive submitted that the breach was aggravated; had the Level 1 provider performed adequate due diligence on the Level 2 provider, the Executive may have been able to assist the police with enquiries regarding a potential fraud. Following questioning from the Tribunal, the Executive clarified that it did not rely on this evidence to establish whether the Level 1 provider had taken all necessary steps to comply with its due diligence requirements, and the Executive had not assumed that the primary contact was telling the truth. There may be more than one contact who operated under the same name. The Executive was in fact concerned that, at least partly due to the Level 1 provider's failure to conduct adequate due diligence, the Executive had not been placed in a position to make a robust determination on whether the primary contact was telling the truth.

Following questioning from the Tribunal, the Executive clarified that it was incorrect that its case assumed that the Level 1 provider was involved in the Service before July 2014. The Executive's case against the Level 1 provider only related to the period after July 2014, at which time it had contracted with the Level 2 provider. The Executive stated that whether any other Level 1 providers (either for a period earlier than July 2014, or higher in the contractual chain than the Level 1 provider) were present in the value chain was not relevant to the alleged breach, nor was the question of whether those parties conducted their own due diligence. Each Level 1 provider has to satisfy its due diligence requirements when it entered the value chain.

The Executive submitted that the interpretation that the Level 1 provider was not contracting in respect of the provision of a technology platform was not correct. If it was correct, that would imply that most upstream providers in the value chain would not be subject to a due diligence requirement, because only the Level 2 provider directly provides a premium rate service to the public. The Executive highlighted that the wording of paragraph 3.3.1 of the Code was not contracting "to supply a premium rate service"; it was contracting "in connection with the provision of premium rate service."

The Executive noted that the Level 1 provider's legal representatives had stated in correspondence that the Level 1 provider would not transfer withheld Service revenue to PhonepayPlus "…unless it has comfort that it [Sensoria] nor 100 Mile [100MM] will face an investigation…". The Executive submitted that this conduct aggravated the breach as it represented an attempt to avoid investigation by inappropriate means. During informal representations at the Tribunal, the Executive submitted that it was manifestly inappropriate for a regulated party to seek to avoid a proper investigation by threatening to withhold sums it was otherwise obliged to pay to PhonepayPlus. If the Level 1 provider had wished to challenge whether those sums were due, it could have followed the proper channels at the time.

Following questioning from the Tribunal regarding the Executive's decision to deal with this case under the formal Track 2 procedure, the Executive confirmed that a number of factors are taken into consideration when deciding how a case should be allocated, including the seriousness of the alleged breach, and that these factors had been taken into account in this case.

2. The Level 1 provider denied that a breach of paragraph 3.3.1 of the Code had occurred, as it submitted that it was not a Level 1 provider for the purposes of the Code (its submissions regarding this issue are contained in the "Background" section above under the heading "Preliminary issues") and in any event it had conducted adequate due diligence.

The Level 1 provider made several overarching points in relation to the case against it:

- The Level 1 provider highlighted the wording of paragraph 3.3.1 which states:

  "All Network operators and Level 1 providers must perform thorough due diligence on any party with whom they contract in connection with the provision of premium rate services…" [Emphasis added by the Level 1 provider]

  It stated that it was not – as a matter of fact – contracting "in connection with the provision of premium rate services". It was contracting in respect of the provision of a technology platform. On such a basis it did not believe that liability under paragraph 3.3.1 was engaged. It was not involved in the launch or operation of the Service. Whilst it did undertake some due diligence, this was of its own volition and not because it considered itself under an obligation to do so.

- It asserted that the Executive's case assumed that the Level 1 provider was involved in the Service before July 2014 but that was not the case. The Level 1 provider stated that the reason this was important was because:

  - There was a question mark as to whether it was liable under paragraph 3.3.1 (even assuming it was the Level 1 provider) if due diligence had already been conducted, or at least ought to have been conducted by a third party; and
  - If it had been involved with the Service since July 2014, then necessarily it could not in any way have prevented consumer harm which arose prior to that date, which it asserted was key in assessing the level of any sanction.

- The Executive had assumed that the primary contact for the Level 2 provider had been telling the truth and this appeared to have been assumed without any evidence. That the Executive should rely upon the word of an individual without any evidence as an

aggravating factor was of deep concern to the Level 1 provider as it implied an assumption of culpability without any verification of evidence.

- The conduct of the investigation by the Executive was of deep concern as:

  - This case (and often other cases against Level 1 providers for due diligence breaches) had been brought presumably because there was a shortfall from the withheld sums for the full amount which the Executive was due. It believed it was the target of the investigation purely because no other target had presented itself.
  - The Executive had been evasive throughout the investigation in relation to why it considered the Level 1 provider to meet the definition of a Level 1 provider and latterly as to why it considered both versions of the Code applied to the case.
  - The Executive suggested that the breach had been aggravated by the fact that in correspondence the Level 1 provider's legal representatives had suggested that it would withhold the sums due unless it had confirmation from the Executive that the investigation would not go any further and astoundingly it was characterised as an attempt to avoid investigation by inappropriate manner. The Level 1 provider submitted that it did not need to transfer the funds as the direction was not binding on it (not being a Level 1 provider), its offer was a gesture of goodwill to seek some transparency from the Executive and that to seize upon the actions of its legal representatives – in seeking to protect its clients best interests – and to punish the Level 1 provider was entirely inappropriate. The inclusion of this information was purely prejudicial rather than the conduct of a supposedly impartial and fair regulator.
  - The Executive had proceeded in its investigation from a starting point of assumed guilt on the part of the Level 1 provider.

Background:

The Level 1 provider noted that the Executive had included significant background information in its case that appeared to allege that the Level 1 provider was involved in the Service before July 2014 and that the alleged absence of due diligence was the cause of 47 complaints in a seven month period, even though the Service ran from November 2011. The Level 1 provider believed that there had been a misunderstanding concerning the history and stated that it wished to explain this in more detail.

The Level 1 provider submitted that before July 2014, the Level 1 provider was merely a software provider to MIG. In all other respects, the Level 1 provider had no prior dealings and no relationship with the Level 2 provider.

The Level 1 provider explained that it was incorporated in August 2004 and had since worked successfully in the premium rate industry supplying a text platform that allowed its customers to set up virtual text chat services and subscription services. The Level 1 provider had an 11 year history of working in the industry (during that time it had had many large clients, had processed over 400,000 premium SMS each month with minimal complaints by end users) with no history of non-compliance or breaches of the Code. The Level 1 provider stated that during those eleven years it had not been deemed a Level 1 provider by the Executive, which had contributed to its confusion with this case. The Level 1 provider gave details of another case where it had paid revenues to the Level 2 provider directly but it stated that it had not

been deemed the Level 1 provider by the Executive. It explained that it contracts directly with aggregators so that the aggregator's clients can use its text platform technology without its clients having to enter into a contract directly with the Level 1 provider. In other cases it also contracts directly with Level 2 providers to enable them to use its text platform to run services.

The Level 1 provider stated that although the Service was in operation from 2011, it had only commenced service provision from July 2014. There were effectively two stages to the Service; i) operation under MIG (later known as Velti and mGage) between November 2011 and June 2014; and ii) operation under Fonix and the Level 1 provider from July 2014 until termination. Therefore, it submitted that the email from mGage stating otherwise was inaccurate.

The Level 1 provider explained that another company called Piri was incorporated in 2006 and the Level 1 provider's director was also a director of Piri. Piri had very similar software to the Level 1 provider, however instead of facilitating virtual text chat services, it provided mobile marketing services for corporate clients.

In May 2010, MIG (later known as Velti and mGage) bought Piri to own its software and the profitable clients that were contracted to Piri. The Level 1 provider provided evidence of this purchase. The Level 1 provider's director was made Technical Director of MIG (which it evidenced with an email from the Chief Operations Officer of MIG). To clarify, the Level 1 provider stated the Level 1 provider's director's role was purely to manage a team of software developers and it was not involved in any commercial deals or due diligence of clients. In addition, MIG also signed a software license agreement with the Level 1 provider so that it could use the Level 1 provider's virtual text chat and subscription platform for free and continue to service existing Piri customers. Part of the deal was the Level 1 provider's director was an employee of MIG but the Level 1 provider was prevented from competing with Piri (now owned by MIG), which meant that the Level 1 provider could not take on any clients whilst the Level 1 provider's director worked for MIG.

The Level 1 provider's director's role at MIG concluded in December 2012. If during that time the Level 1 provider had entered a contract with any other party it would have nullified the agreement. The Service commenced in November 2011, nearly a year before the Level 1 provider's director finished working for MIG which the Level 1 provider stated proved that it could not have contracted with the Level 2 provider. The Level 1 provider highlighted key terms from its contract with Piri to demonstrate its point.

After the contract concluded in December 2012, MIG (by that stage known as Velti) contracted directly with the Level 1 provider to licence the virtual text chat platform to allow its customers to carry on using the platform without requiring them to contract directly with the Level 1 provider (a copy of the agreement was supplied by the Level 1 provider). However, there was now a charge for the Service but this was the only revenue the Level 1 provider received from MIG. Therefore, the Level 1 provider submitted that the information the Executive had received from mGage was not accurate and the evidence it had supplied to the Executive demonstrated that those that had provided this information to the Executive did not understand the contract in place. It was disappointed that the Executive had misquoted the correspondence from mGage and that its content had been taken as fact. Had this been presented to the Level 1 provider earlier, it believed that it would not be in its current predicament; facing significant financial and reputational loss.

The Level 1 provider referred to mGage's comment that revenue in relation to the Service was paid to another company and the Level 1 provider. The Level 1 provider reiterated that it was

only paid by mGage under the software licence agreement and it provided a copy of that agreement.

The Level 1 provider stated that further proof that it was not involved with the Service prior to July 2014 could be seen from the Track 1 cases that the Executive had instigated against the Level 2 provider. Before July 2014, all Track 1 cases involving the Level 1 provider had stated that MIG or Velti was the Level 1 provider and there was no mention of the Level 1 provider being in the value chain nor did it receive any correspondence regarding the procedures. The Level 1 provider provided correspondence on the Track 1 procedures to evidence its point.

In summary, the Level 1 provider stated that its role before July 2014 was only as a software provider directly licensed to Piri and owned by MIG.

Due Diligence:

The Level 1 provider stated, as it was not involved in the Service before July 2014, an important question for the Executive was who conducted due diligence at that time. It stated that MIG had conducted due diligence on the Service even though it had stated that it (or certain "MIG entities") had no contract with the Level 2 provider. It asserted that this proved that MIG felt that due diligence fell under its remit before July 2014.

The Level 1 provider stated that due diligence was clearly being carried out by MIG in the earlier stages of the Service which it evidenced by an email from MIG in 2013 whereby the author of the email had directly contacted the director of the Level 2 provider to carry out due diligence on the Service. The email also referred to a previous review that had been conducted by MIG on the same Service. The Level 1 provider asserted that had MIG performed adequate due diligence then it did not believe that it would be corresponding with the Executive on this issue and there would be no need to assist the police. It asserted that MIG had also tried to obtain a signed contract from the Level 2 provider but it had had the same problem as the Level 1 provider.

Contract with the Level 2 provider:

To explain how the Level 1 provider ended up contracting with the Level 2 provider in July 2014, it stated that Velti ceased to operate and many good staff moved to Fonix, along with a number of large clients. One of those clients was the Level 2 provider and since the platform was the same as it was using MIG, the Level 1 provider was an obvious choice to run the Service via Fonix's platform. 100MM facilitated the move so that there was a relationship between Fonix, the Level 1 provider and the Level 2 provider.

The Level 1 provider conducted due diligence into the Level 2 provider as a matter of good business practice. However, its view from reading the Guidance was that it had complied with the due diligence requirements in all material respects even though it did not consider itself to be a Level 1 provider. The Level 1 provider noted the wording in the Guidance that makes it clear that PhonepayPlus does not seek to impose a rigid formula concerning due diligence, yet it submitted that the Executive appeared to be doing exactly that in this case. The Level 1 provider took issue with the Executive's approach, especially since it had co-operated at every stage, answered all questions, followed all directions, shut down the Service and paid to the Executive more than the £100,000 of the fine.

It also stated that it should be remembered that there was now no risk of ongoing consumer harm and that there had been only 47 complaints in a seven month period (from 4000 users

that equated to less than 0.5%) and under those circumstances the case seemed disproportionate and unreasonable.

In relation to the Guidance relied on by the Executive, the Level 1 provider submitted that when considering it point by point, the Executive had failed to establish that the Level 1 provider had fallen short on any material point. The Level 1 provider noted that, "There is no single or prescribed standard as to what constitutes effective due diligence" and on that basis it submitted that, any reasonable standard it had chosen to adopt was the correct approach. In addition, it noted that the Executive, "…does not prescribe the process, or the information to be gathered" and therefore it queried how it was supposed to know what was acceptable and more precisely that its due diligence practices were not adequate. Despite this, the Guidance states what is expected and the Level 1 provider listed each requirement which it submitted contradicted the above advice.

The Level 1 provider did not agree that it had failed to conduct due diligence or that it had solely relied on its existing relationship with 100MM. It stated that its existing relationship with 100MM was a factor but it undertook significantly more due diligence than just speaking to 100MM. In summary, the Level 1 provider stated that it had conducted the following due diligence:

- It had obtained contact details for the Level 2 provider's place of business. It provided the contract with the Level 2 provider and a covering email which referred to the Level 2 provider's place of business. It also referred to the Level 2 provider's website and the footer of the Level 2 provider's emails to the Level 1 provider which also stated the Level 2 provider's place of business.
- It had obtained the Level 2 provider's company name and number from Companies House when it created the contract with the Level 2 provider.
- Regarding the suggestion that it should have obtained copies of any client's current entry (and first entry, if different) in the Companies House register, the Level 1 provider stated that this information was in the public domain so accessible at any time and it had viewed but not recorded the information when it had searched for the company on Companies House.
- Regarding the suggestion that it should have obtained the names and addresses of all owners and directors, it stated that to its knowledge one individual ran the Service but it acknowledged that it had now turned out that another individual was the director. It submitted that although the director had another name it was the same person. It referred to a Court decision from the High Court of Justice in Northern Ireland which it stated made it clear they were the same individuals. Notwthstanding this, it submitted that these checks would not identify willful, criminal and fraudulent activity.
- Regarding the suggestion that it should have obtained details of all individuals who received any share from the revenue generated by the client, it stated that Fonix, the Level 1 provider and 100MM received a share of the revenue and it held the details of each party.
- Regarding the suggestion that it should have obtained undertakings from clients that no other party was operating in the capacity of a shadow director under the Companies Act, it stated this was not applicable to this Level 2 provider.
- Regarding the suggestion that it should have obtained the names and details of any parent or ultimate holding company which the client is a part of, it stated this was not applicable to this Level 2 provider.
- Regarding the suggestion that it should have made its clients aware of PhonepayPlus and the requirement to adhere to the Code, the Level 1 provider stated that the Service had recently been reviewed by the Executive and changes had been made.

In addition to the above, the Level 1 provider stated that it had conducted the following:

- A pre-launch Service review which included compliance obligations as contractual requirements. The Level 2 provider was required to provide the information and it was then reviewed by the Level 1 provider who tested it.
- Enquired about the Service: how many years it had been running / how many consumers per month / monthly complaints and PhonepayPlus' requests for information. The Level 1 provider stated that it was aware that the Service had been running since November 2011 on other platforms and it had been told that those providers had conducted due diligence since November 2011. Further, it was told that there were minimal complaints (as low as 0.5%) and the Service had been subject to one minor PhonepayPlus Track 1 procedure regarding the way the Service was being promoted.
- During the Service review (a copy of which was provided), the Service was tested on a handset.

In relation to the Executive's submissions regarding a signed contract with the Level 2 provider, the Level 1 provider referred to an email wherein it had asked 100MM to obtain a signed contract from the Level 2 provider. It stated that it was not unusual for providers to operate on the basis of its standard contract supplied in advance of the commencement date. It acknowledged that it was unfortunate that it had not been signed in this instance and this had only not been followed up due to extenuating circumstances related to its director. Further, the Level 1 provider acknowledged that the contract did not state the start date of the Service but it stated that this had no real bearing in validating the commencement date of the Service as the commencement date was evidenced by the launch of the Service on its platforms, by payment and the flow of traffic. It stated that it had supplied the contract and if the Executive had reviewed the document it had submitted, it would have seen the date the document was created and modified was 2 July 2014.

In addition, the Level 1 provider stated that obtaining a signed contract was not a due diligence requirement and in this case, would not have had any bearing on the case as the individual at the Level 2 provider demonstrated that he was prepared to commit fraud. The Level 1 provider stated that it was confident that it was dealing with the primary contact for the Level 2 provider, not least because of his involvement in the Service since its inception, long before July 2014. All communication was with this individual who it understood was running the Service. The Level 1 provider referred to a website, the domain of which was registered to this individual and it was still promoting the Service shortcode. The Level 1 provider's contact at the Level 2 provider must have been aware of the Service, the investigation and the sanctions imposed by the Tribunal, as it asserted that he had a criminal record, had lied to the Executive and therefore any comments made by him were unsafe and should be omitted from the Executive's breach letter. It stated that the Tribunal should not attribute any weight to the evidence from this individual and certainly not above the evidence of the Level 1 provider which was a reputable company with a clean record in all respects.

The Level 1 provider also submitted that it had reasonably relied on the fact that MIG had carried out multiple due diligence reviews on the Level 2 provider's Service before it had contracted with the Level 2 provider. It also took into account that it had not had any problems with any of the clients that 100MM had previously introduced.

The Level 1 provider submitted that it dealt with both 100MM and the Level 2 provider. The fact that 100MM did not disclose to the Executive the identity of the party to whom it made

payments was not the fault of the Level 1 provider. Regarding the Executive's submission that the Level 2 provider had operated under a trading name and that this should have alerted the Level 1 provider to the need to conduct more thorough due diligence, the Level 1 provider submitted that trading under different names was not unusual and there may be practical and sensible reasons for this. For example, in the case of the Level 2 provider, it was easier to include the trading name in a text message and was an established and familiar brand name.

In summary, the Level 1 provider submitted that the process it had followed was in line and above the expectations of the Code, at no time did the Executive state that what had been collected was insufficient to meet the requirements of paragraph 3.3.1 of the Code, and if a review of the Level 1 provider's due diligence was required, this could easily have been dealt with fairly and reasonable by means of the Track 1 procedure. The Level 1 provider asserted that the Executive had deliberately decided to pursue the formal Track 2 procedure when it was not required or warranted.

Conclusion:

The Level 1 provider stated that it believed, like PhonepayPlus, that there should be good regulation in the premium rate industry that is proportionate to the circumstances. With this in mind, it submitted that it had always helped resolve concerns or questions put to it by the Executive, which up until this Service had been minimal.

It stated that it had kept abreast of changes to the Code and updated its technology promptly and in line with best industry practices. It asserted that it had previously assisted the Executive with its case against the Level 2 provider, as it had abided by a direction to withhold revenue issued by the Executive and terminated the Service. Despite this, the Level 1 provider had requested several times (via its legal representatives) an explanation from the Executive as to the basis for deciding to treat it as a Level 1 provider and whether it was under investigation. It submitted that no adequate answer was ever received on either question and it felt that it had been kept in the dark. It was reasonable for it to conclude that the Executive was tactical, underhand and not acting in a manner befitting of an impartial regulator. Although its legal representative advised it not to release funds to PhonepayPlus due to concerns about its legal exposure, it had done so in full co-operation.

The Level 1 provider explained that funds were requested by the Executive in a direction to it as the Level 1 provider and (to its knowledge) this was the first communication it had received from the Executive addressing it as a Level 1 provider. The funds were due to third parties, who may also have had legitimate claims and/or losses arising from the Service and by handing over those funds without receiving any response from the Executive on the issue concerning its status it was at risk of handing over monies in response to an invalid direction, and thereby to claims from third parties. It was disappointed that the Executive had failed to provide any reasoning or explain why the direction was not imposed on Fonix, in the usual way.

The Level 1 provider asserted that it had suffered loss as a result of the investigation and by virtue of the way the Executive had handled the matter. It had in essence acted as a preferred creditor in this case. The Executive was aware the Level 2 provider had been dissolved and the Level 1 provider and 100MM had no way of recovering its losses because the Executive had first claim on the revenue. The Level 1 provider believed that the Executive was "pointing the finger" at the Level 1 provider and alleging it to have played a bigger part in the Service than it did, due to the Level 2 provider's director who was a fraudster and a criminal calling up

the Executive claiming that it had never had anything to do with the Service and then not paying the fine.

The Level 1 provider submitted that it was an honest, established, respectable business with the highest integrity and track record in the industry and until now, had an unblemished record. It stated that the Executive's case had done its best to tarnish its reputation and therefore it provided a copy of a character reference from two individuals from Fonix that it stated had a good working relationship with PhonepayPlus. The reference stated, amongst other things, that the Level 1 provider had been a responsible and proactive partner supplying software as a service technology platform to a number of different clients whom it had contracted with directly and it had always been responsive to changes in regulation and had updated its platform accordingly to ensure that services were compliant. It stated that when looking at the claims against the individuals behind the Level 2 provider it was reasonable to conclude that it had also been lied to and it was a victim.

The Level 1 provider noted that the Executive had referred to it instructing the same solicitors as the Level 2 provider and it questioned why this had been raised as an issue. It stated that it should not be prejudiced by this and further its legal representative are well-known in the sector and one of only a small number of specialists in this area of regulation. It stated that they were bound by professional rules and any concerns should be referred to them directly.

During informal representations, the Level 1 provider reiterated its written submissions but also stated that it believed this matter should have been dealt with under the informal Track 1 procedure rather than unnecessarily taking this matter to a Tribunal. The Level 1 provider believed that the whole process could have been avoided had the Executive instigated a conversation with it and acted as a transparent regulator.

The Level 1 provider stated that it believed it had conducted sufficient due diligence and had it done everything that the Executive required, it submitted that it would not have made any difference to the underlying case against the Level 2 provider, as the same consumer harm would have occurred.

The Level 1 provider stated that due diligence was conducted by MIG before the Level 1 provider's involvement in the Service. During informal representations it was asked by the Tribunal why it had relied on what a former Level 1 provider had done. It stated that this was only part of its assessment and the process involved speaking to 100MM and then conducting its own checks. The Level 1 provider accepted that it had not documented its conversations or obtained MIG's records at the time of contracting with the Level 2 provider.

Regarding the flow of revenue, the Level 1 provider clarified that it paid 100MM and it was unaware that 100MM may be paying another company called "UK Printer", it believed it had been making payment to the Level 2 provider.

3. The Tribunal considered the Code, the Guidance and all the evidence before it, including the parties' written and oral submissions.

In light of the Tribunal's preliminary finding that Sensoria Communications Limited was a Level 1 provider for the purposes of the 12th Code, the Tribunal was satisfied that the Level 1 provider had due diligence obligations under paragraph 3.3.1 of the Code. Although the Level 1 provider seemed unaware that it would be deemed a Level 1 provider and therefore that it was required to undertake due diligence checks, the Tribunal noted that the Level 1 provider

had taken some steps to perform due diligence. In particular, the Tribunal noted that the Level 1 provider had stated that it had conducted checks on the Level 2 provider's place of business and viewed entries on Companies House. The Tribunal also noted that the Level 1 provider stated that it had made enquiries about the Level 2 provider of 100MM, with whom it had a long standing relationship and checked the PhonepayPlus register. However, the Tribunal noted that the Level 1 provider had not provided documentation evidencing those checks and although it had provided some evidence of its checks on the Level 2 provider' place of business, it had not retained any documentation from an official source.

Notwithstanding that the Level 1 provider stated it had conducted some checks, the Tribunal determined that the checks that had been undertaken were not adequate. For example, the Tribunal noted that the Level 1 provider had not obtained a signed contract with the Level 2 provider, a record of all the directors' names and addresses or satisfied itself of the individuals at the Level 2 provider that received a share of the revenue. It was the view of the Tribunal that, while not explicitly stated in the Code of the Guidance, Level 1 providers should ordinarily be obtaining identity documents for any individual contracting on behalf of a provider.

The Tribunal concluded that the Level 1 provider had relied too much on its long standing relationship with 100MM and the fact that a former Level 1 provider had been involved with the Level 2 provider and the Service.

The Tribunal found that there had been a breach of the Code due to the Level 1 provider's failure to perform thorough due diligence on the Level 2 provider, and retain relevant documentation. Accordingly, the Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Paragraph 3.3.1 – Due diligence

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

- The Level 1 provider had taken some steps to seek to comply with its due diligence obligations, but had failed to complete the due diligence process to a thorough standard, including retaining all documentation.

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

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 Level 1 provider engaged and co-operated with the Executive throughout the investigation including complying with directions to retain and pay to PhonepayPlus

revenue in relation to the Service, despite it not being clear that it was a Level 1 provider for the purposes of the Code; and
- The breach had been contributed to by the circumstances of the Level 1 provider's director at the relevant time.

The Level 1 provider's evidenced revenue in relation to the Service was in Band 6 (£5,000 – £49,999).

The Tribunal concluded that the seriousness of the case should be regarded overall as **moderate.**

Sanctions imposed

Having regard to all the circumstances of the case, and taking into account the principles of totality and proportionality, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £3,000; and
- a requirement that the Level 1 provider seek compliance advice on its due diligence processes and procedures within two weeks of the date of publication of this decision and thereafter implement that advice within two weeks (subject to any extension of time agreed with PhonepayPlus) to the satisfaction of PhonepayPlus.

Administrative charge recommendation: **100%**