

Tribunal meeting number: 215

Case reference: 130687

Level 2 provider: Golden Brand Inc. Seychelles

Type of service: Adult video subscription service

Level 1 provider: Veoo Limited, England, UK

Network operator: All Mobile network operators

This case was brought against the Level 2 provider under Paragraph 4.8.6(b) of the Code of Practice

Background

This case concerned a potential breach of sanction imposed by an earlier Tribunal (26 May 2016, case reference: 85964), namely a failure to make universal refunds.

The case of 26 May 2016 concerned an adult video subscription service ‘Hot Selfie babes’ (the “**Service**”) operated and promoted by the Level 2 provider Golden Brand Inc. (the ‘**Level 2 provider**’). The Level 1 provider for Service shortcode 89945 was Veoo Ltd (“**Veoo**”).

Between 24 August 2015 and 9 March 2016, the Executive received 27 complaints concerning the Service. Complainants variously alleged that the Service charges were unsolicited.

The Service was stated by the Level 2 provider to be an adult content subscription service which offered an initial free trial period before charging on a monthly basis. All complainants were subscribed to the service for 9 months free, followed by a £4.50 per month tariff.

The Level 2 provider confirmed that the Service commenced operation on 1 November 2014. Veoo confirmed that Service charging commenced on shortcode 89945 on 14 August 2015.

The Level 2 provider advised the Executive that the method of Service entry was via a mobile originating (“MO”) opt-in. The Executive noted that the message logs supplied by the Level 2 provider showed that the users opted in to the Service in November 2014, but were only charged in August 2015 through Veoo shortcode 89945 following a migration and after the initial free trial period.

The Tribunal of 26 May 2016 upheld breaches of rule 2.3.3 (consent to charge), paragraph 4.2.4 (provision of false information), paragraph 3.12.5 (spend reminders) and paragraph 3.4.1 (failure to register with the Phone-paid Services Authority). It considered the case to be **very serious** and imposed the following sanctions against the Level 2 provider:

- a formal reprimand;
- a fine of £50,000; and
- a requirement that the Level 2 provider make refunds, within three months, to all consumers who have used the Service for the full amount spent, regardless of whether or not they have claimed a refund. Refunds should be directly credited to the users' mobile accounts and the Level 2 provider must provide evidence to PSA (then known as PhonepayPlus) that the refunds have been made ("universal refunds").

The Tribunal also recommended payment of the administrative charge totaling £9,770.71.

The Level 2 provider was said to have failed to comply with the universal refunds sanction.

The Executive raised the following potential breaches of the Phone-paid Services Authority ("PSA") Code of Practice (14th Edition) ("the Code")

- Paragraph 4.8.6(b) – Failure to comply with a sanction

On 20 September 2017, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full:

- Correspondence between the Executive and the Level 2 provider;
- Correspondence between the Executive and the Level 1 provider;
- Correspondence between the Executive and Mobile Commerce and Other Media Ltd ("MCOM")
- The minutes of the 26 May 2016 Tribunal for the original adjudication against the Level 2 provider;
- The Level 2 provider's response to the Warning Notice;
- PSA Guidance on "Consent to Charge" (Code 14);

Submissions and Conclusions

Alleged Breach

Paragraph 4.8.6(b) of the Code states:

"The failure of any relevant party to comply with any sanction within a reasonable time will result in:

(b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed".

1. The Executive asserted that the Level 2 provider had acted in breach of paragraph 4.8.6(b) of the Code as it had failed to comply with the universal refunds sanction imposed by the Tribunal.

On 26 May 2016, the Tribunal had upheld four breaches against the Level 2 provider. One of the sanctions imposed was a universal refund sanction.

The Level 2 provider was formally notified of the Tribunal's decision on 8 June 2016. The formal notification comprised of:

- a cover letter dated 8 June 2016;
- the Tribunal's decision of 26 May 2016;
- an invoice for payment of the fine of £50,000;
- a further separate invoice for payment of the administrative charge of £9,770.71.

The total sum, representing both the fine and the administrative charge, owed to the PSA was £59,770.71.

The Level 2 provider sought a review of the Tribunal's decision. The application for review was considered and refused by a legally qualified member of the Code Compliance Panel on 11 July 2016.

The PSA Investigations Enforcement Consultant informed the Level 2 provider on 26 July 2016 that she had taken over the matter post-adjudication in order to ensure compliance with the universal refund sanction and payment of the fine and administrative charge.

On 26 July 2016, the Level 2 provider contacted the PSA regarding payment of the fine and administration charge. It also proposed informing and administering the universal refund sanction to consumers via a text message, using a Post Office service mechanism.

On 2 August 2016, the PSA Investigations Enforcement Consultant set out what was required to comply with the universal refund sanction and payment of the fine and administration charge:

"In response to your email of 26 July below, PhonepayPlus has considered your proposal for compliance with the universal refund sanction and considers that the issuance of refunds to consumers by text message and collection via the Post Office, may facilitate Golden Brand's compliance with the sanction in accordance with 4.8.4(b) of the Code. It has also considered your request for the fine and administration charge to be released from withheld revenues, as well as the remaining withhold. All these matters are dealt with in detail below:

To ensure implementation in accordance with 4.8.4(b) PhonepayPlus would need to be satisfied of the process implemented and have regular oversight of any refund claims made. In particular, PhonepayPlus would require the following:

- *Some initial detail of proposed implementation of the process; for example the provider of the service and the proposed start and end date of the refund process;*
- *The wording of the text message to consumers;*

- Regular reports of the take-up of the refund process (to be determined and agreed)

Please note that PhonepayPlus reserves the right, pursuant to paragraph 4.8.4 of the Code to issue a breach of sanctions case if it becomes clear that the sanction is not been properly implemented at any stage.

The outstanding fine and administration charges are:

£50,000.00

£9,770.71

£59,770.71

Veoo confirmed that the withheld revenues on 14 July 2016, were **£60,590.96**, leaving an excess of £820.25 of withheld revenues (this may be subject to change).

PhonepayPlus has considered your request for the fine and administration charge to be paid from withheld revenues, and in the circumstances, is willing to direct your Level 1 provider Veoo to release £59,770.71 to PhonepayPlus.

PhonepayPlus directed a withhold of revenues of up to £183,000 in order to ensure that the fine, administrative charges, and any refunds were paid. Accordingly, the remainder of the withhold directed (being for revenue up to £123,229.29) will remain in place until the satisfactory conclusion of the refund process. However, upon receipt of regular adequate confirmation that refunds have been paid, PhonepayPlus is content to release a proportionate amount of withhold in respect of such refunds. If you have any queries regarding the above, then please do not hesitate to contact me." **(Annex 1, page 22-23)**

In response to the above email, on 9 August 2016 the Level 2 provider proposed using a third-party provider, MCOM to process the universal refunds on its behalf. The Level 2 provider stated:

" I have looked at the refund options extensively and propose we use the following company: <http://mcomltd.com/>

MCom is a recognised refund provider and is engaged closely with industry.

MCom will send a message to the user base, along following lines: Message content: Free Msg: You are entitled to a full refund of mobile charges from HotSelfieBabes. Show this code at a Post Office for a refund: 13543683. help/stop 02071172790

We propose to leave a refund window of one month.

When the user attends the post office they will be given the exact refund amount allocated to their individual file.

The file will be shared with PhonePayPlus and MCOM prior to the fulfillment of the above exercise. [sic]

After 30 days, the refund code will be set to expire.

The file of refunds claimed will be updated and shared with PPP again at that point.

We would anticipate at this stage that the amount of refunds cashed by claimants is released to Golden Brand by PhonePayPlus for cash flow purposes.

We would then suggest the balance of the withhold is released after a further 30 days.

Golden Brand will keep open it's customer care line for any late claimants.

Will await hearing from you on moving ahead with this solution. [sic]"

On 28 September 2016, the PSA Executive suggested amendments to the Level 2 provider's proposal in order to ensure maximum consumer uptake of refund:

"the text message content should ensure optimal uptake and that keeping within the character limit should not be at the expense of clarity and would suggest the inclusion of an embedded link to the PhonepayPlus adjudication site. For instance, below is an example how this could be achieved within the character limit. We have removed STOP as this is not applicable and removed the service name as we believe that this may impact uptake:

FreeMsg: To claim your full refund of mobile charges from 89945, show this code at a Post Office: 13543683. See goo.gl/pOn23g for details. Help 02071172790

You proposed to leave a refund window of one month and for the refund code to expiry after 30 days. PhonepayPlus suggests a three month claim period and code expiry date to ensure optimal uptake and allow consumers adequate time to claim their refund.

PhonepayPlus would suggest monthly file update, to allow us to assess uptake levels.

Finally, we have no objections to keeping open a customer care line open for late claimants, but subject to our suggestions above this would have to be after the three month period - an additional month would be reasonable. We also have no objections to releasing withheld revenues for refund cashed by claimants at each file sharing stage. Please note that as with any case, the remaining withheld revenues can only be released upon compliance with all sanctions imposed by the Tribunal."

On 11 October 2016, the Level 2 provider confirmed that it accepted the Executive's amendments and that the refund messages would be issued to complainants on 24 October 2016.

The Level 2 provider also alluded to the need for 'some' of the withhold to be released to either it or MCOM:

"I am OK with your suggested wording. I will check this is OK with MCOM and come back to confirm it.

The refund window is 30 days. This is a feature of the MCOM / Post Office system that we cannot alter.

If any user calls us after 30 days and requests a repeat refund due to time-lapse, then we can issue it no problem, provided the first refund remains unclaimed. A file of refunds due can be prepared now. We can aim to send the refund message in the week of October 24th.

We will need some of the withhold to be released, either to ourselves or directly to MCOM to cover the costs of the refund.

I will advise you of the total refund amount that needs to be loaded onto the MCOM system in the coming days."

On 14 October 2016, the Executive provided granular detail regarding the refund window and the file sharing reports. It also confirmed that withheld revenues could be released upon the receipt of the file sharing reports and it requested further clarification about what appeared to be a request for a lump sum payment:

"I can confirm that the 30 day period is acceptable as long as the refund window for late claimants remains available for three months. Before commencement of the Universal refund process, please confirm if the following is correct:

- *Golden Brand to send the text message to all consumers on 24 October 2016;*
- *The code to claim a refund remains valid until 23 November 2016;*
- *The customer care line remains open until 24 January 2017 for any late claimants.*

Based on the date of issuance of the text message -24 October 2016, PhonepayPlus would require a monthly file sharing report from MCOM on:

- *23 November 2016,*
- *24 December 2016; and*
- *24 January 2017*

The reports of 24 December 2016 and 24 January 2017 should also include a separate report of any late claimants from Golden Brand.

The withhold can be released to MCOM/Golden Brand (please specify) upon receipt of the MCOM file sharing reports and/or the late claimant data from Golden Brand on, or after the above dates.

Finally, please confirm what you mean by the 'total refund amount that needs to be loaded onto the MCOM system in the coming days' as this appears to suggest an upfront payment."

On 2 November 2016, the Executive requested an update from the Level 2 provider to confirm if MCOM had commenced the issue of the prescribed text messages to all consumers on 24 October 2016.

The Level 2 provider responded to the Executive's email on 8 November 2016. Contrary to the agreed refund process (as above), the Level 2 provider had failed to inform the PSA that it had not commenced the universal refund process, instead the Level 2 provider requested that the PSA authorise the release of £92,000 what it claimed was the "refund value". In its email of 8 November 2016, the Level 2 provider stated MCOM will not process any refund without funds on account unless it received £92,000 upfront to fund the refund process:

"Sorry there has been some delay however I am happy to confirm that MCOM can meet your reporting requirements in full.

MCOM are ready to send the refund message as follows:

FreeMsg: To claim your full refund of mobile charges from 89945, show this code at a Post Office: 13543683. See goo.gl/pOn23g for details. Help 02071172790"

MCOM will not process a refund without funds on account. The total value of refunds we are submitting is £92,000.

Can you please arrange for the withhold to be temporarily lifted and an amount of funds released to Golden Brand so we can fund the refund process."

In light of the Level 2 provider request for the release of £92,000 from withheld revenues, on 16 November 2016, the Executive as per Code paragraph 4.9.1, requested that the Level 2 provider supply information to satisfy the PSA that it could not pay refunds to consumers, as directed under Code paragraph 4.8.3(j), without recourse to money, which has been retained by Veoo in response to a PSA direction ('a retention').

The Executive requested that the Level 2 provider provide full documentary evidence supporting this request, including all relevant financial information, company accounts and bank statements:

"Before we can make a decision about how to proceed, I require further information from you. I note your comment that "MCOM will not process a refund without funds on account". However, Golden Brand has not satisfied the PSA that it is unable to make the payment on account without access to the withheld funds. Please confirm whether or not Golden Brand is able to make the payment on account without access to the withhold. If your response is that

Golden Brand is unable to do so, please ensure that you provide full documentary evidence supporting this response, including all relevant financial information, company accounts and bank statements.

You have stated that “The total value of refunds we are submitting is £92,000.” Please clarify what this figure relates to and explain the precise basis upon which it has been calculated.

If you can satisfactorily answer my questions above, the PSA will consider issuing a direction to the Level 1 provider under paragraph 4.9.2 of the Code to release a portion of the withheld funds directly to MCOM for the purpose of making refunds to consumers.”

On 24 November 2016, the Level 2 provider stated that its “bank account is empty”, and provided the front page of a redacted bank statement showing a bank balance of £120.75 but no further information. It also stated that it was satisfied for the £92,000 to be released directly to MCOM.

On 25 November 2016, the PSA requested the Level 2 provider to confirm whether it had access to any other bank account and/or financial resources and to clarify whether the £92,000 refund value figure was “the difference between its revenue and refunds made to date”.

On 2 December 2016 the Level 2 provider confirmed that it only had one bank account and that the £92,000 figure was “..the difference between the pay-out received and the amount already refunded..”.

On 14 December 2016, the PSA informed the Level 2 provider that the one page, redacted bank statement it had provided was insufficient evidence to consider the release of withheld revenues and requested the following information:

- 1) satisfactory evidence of the refunds the Level 2 provider has paid to consumers to date.
- 2) a copy of the contractual agreement between the Level 2 provider and MCOM.
- 3) confirmation of the fees charged for use of the MCOM service and how you propose for these to be paid (clarifying that the withheld revenue cannot be used for this).
- 4) confirmation of the anticipated consumer uptake levels in relation to the refund process.
- 5) confirmation of how it proposed to pay the fine and administration charge which remains outstanding, including its plans for the payment of any surplus funds in the MCOM account to be paid to PSA following the conclusion of the refund process.

In addition, the Level 2 provider was requested to provide the current status of the Service (noting that the Service had been found to be operating following the receipt of further complaints from consumers).

On 20 December 2016 the Level 2 provider stated:

- *"We don't hold a signed contract. MCOM will be able to independently confirm our status as a client".*
- *"Golden Brand is private company based in the Seychelles. GB is under no legal or other obligation to provide you with private information on our accounts. If the bank statement provided is not satisfactory and your Authority is not willing to release any of the withheld revenue to enable the refund process, then this only leaves one solution, for GB to borrow the funds and make them available to MCOM as a matter of urgency, since this matter has been dragging on for months."*
- *"The attached sheet contains a list of all users who have received refund from GB. You are welcome to contact any of them at random to confirm they received a refund message from MCOM although some may have ignored it or forgotten about it as issued many months ago. MCOM themselves may be willing to confirm refunds have been sent to the list. This is all the evidence of refunds that we can provide, since we won't be providing, and are under no obligation to provide, unredacted bank statements."*
- *"GB pays a monthly fee of £25 and a refund fee of £0,80p per transaction, reducing to £0,75p after 5000 transactions in a month."*
- *"We would expect a low uptake level since the vast majority of our customers are happy with the service and do not wish to be stopped or refunded".*
- *"The last information I received was that PSA had debited the fine and costs from the withheld revenue and that this amount was fully paid up months ago. The withheld revenue is sufficient to cover these costs in full"*

The Level 2 provider also stated:

- *"GB has sought to implement the universal refund within the 3 month period allowed by the Tribunal but has been consistently blocked and delayed by your Authority, sometimes by many weeks on end. Now GB is ready to issue the universal refund but still your Authority is obstructing this with red tape by refusing to allow the withhold money to be used to pay the withholds!!"*
- *"GB is prepared to borrow funding to allow the £92,000 refund to start. It is really now the Authority's choice whether to allow the refund to move ahead or not. GB is ready to go. "*
- *"Once the refund is completed using these borrowed funds which GB needs to return to the lender, GB seeks confirmation that the withhold will be released promptly and no further objections will be raised by the Authority."*
- *"The tribunal made no recommendation for the service to be switched off or users re-opted in."*

"Since GB was not instructed to re-opt-in its customer base by the Tribunal, it has not done so. If you require GB to stop its service and re-opt-in its customer base then please appeal the verdict of the Tribunal in June, since this was a lawful judgment by which we and your Authority are currently bound."

On 22 December 2016, the Executive responded to the Level 2 provider in the following terms:

- *"We note that you have declined to provide the financial information requested and your comments in this regard. To be clear, the financial information was required in order for the PSA to consider Golden Brand's request that £92,000 of withheld revenue be transferred to MCOM for the purpose of issuing refunds to consumers."*
- *"PSA would have expected the option of obtaining a loan to have been explored by Golden Brand before it made its request for the release of the withhold."*
- *"In respect of the fine and administration costs, these have not been debited from the withheld monies as the refunds element of the sanctions is given priority by PSA."*
- *"The Tribunal did not impose a "remedy the breach" sanction in respect of the service. However, all providers who operate a service are obliged to operate it in compliance with the Code of Practice. This obligation does not cease following a Tribunal hearing and where a service continues to operate in a manner which is not compliant with the Code of Practice, PSA are not barred from taking further regulatory action where necessary."*
- *"Golden Brand has been sent several letters by the PSA Contact Assessment Team outlining the complaints received from consumers since the Tribunal date, to which Golden Brand has failed to respond."*
- *"It has also come to our attention that Golden Brand has not been registered with the PSA as a provider since 26 July 2016 and that the service is not registered."*

On 29 December 2016 the Level 2 provider stated:

- *"What you are now saying is that you want to fine Golden Brand again for all the same issues we got fined for before, even though nothing has changed, we haven't marketed to new customers and you have received 3 complaints in six months. Is this not referred to as "double jeopardy", here is a link on it: https://en.wikipedia.org/wiki/Double_jeopardy"*

"We are currently free to continue billing out our base there is nothing I read in the tribunal decision to prevent this. You are free to do whatever you please, however GB will seek to use the defense [sic] above to block you repeating the same proceedings and getting a double conviction. We can re-register the company on your database, I wasn't aware our subscription had lapsed, but then again we were fined for not being registered already, so my argument above still apply".

- *"In order to resolve this impasse, what is required in my view is as follows:*
- 1. GB agrees to take out the loan and process the £92,000 of refunds. These can be processed w/c 2nd January 2017. This in the best interest of the consumers and upholds the instruction of the tribunal.*
 - 2. GB agrees to permanently suspend it's service in January in return for a complete stay. This offer is made without prejudice and only because it is quite clear PSA will never release the withhold, now in place for 8 months and counting. [sic]*
 - 3. PSA agree to release the withheld revenue 30 days from the expiry of the refund schedule and provided the expectations on GB and MCOM highlighted in bold in your email below are met (expiry expected first week in February), subject to your fines and charges being netted off at source.*

If we cannot get any clarity on the future release of the withhold then GB cannot be expected to borrow money to finance a refund. I would be put in the position of acting negligently as a Director taking a loan that can never be repaid. GB is acting entirely reasonably in this request and it is the PSA that will be shown to be acting unreasonably if you are unable"

The Executive asserted that the Level 2 provider had failed to explain or substantiate the "refund value" of £92,000 that it had requested to be released and had failed to provide adequate evidence of its financial position. In addition, post the original Tribunal and during the period of time that clarification of these matters was sought by the Executive, the Service remained in operation. This was despite the Level 2 provider having confirmed in its breach letter response dated 5 May 2016 that *"We confirm our service is no longer operating in the UK market and we have no intention of providing services moving forwards in such a difficult commercial and regulatory environment."*

The Executive wrote to MCOM to clarify the position in respect of the processing of refunds via the MCOM service. MCOM stated on 9 January 2017:

"We process MCOM Payouts for Golden Brand and have done since September 2015. The amount of payouts to date we have processed at their request is 448."

"The total amount issued in MCOM Payouts is £11,690 over the period September 2015 to date."

The Executive submitted that it had, at this stage in the process, duly considered the responses from the Level 2 provider and MCOM, together with the revenue information supplied by Veoo during the original Track 2 investigation.

The Executive asserted that there was a discrepancy between the figures provided and the £92,000 requested by the Level 2 provider which it stated it required to pay outstanding refunds. The Level 2 provider had confirmed that *"the £92,000 of refunds is the difference between the pay-out received and amounts previously refunded."* A

spreadsheet provided by the Level 2 provider showed that £41,230.25 of refunds had been paid. However, MCOM stated that only £11,690 of refunds had been paid. The revenue information supplied by the Level 1 provider for August 2015 – January 2015 showed a gross revenue of £291,384 and £168,169.29 paid to the Level 2 provider. The Executive noted that the universal refund sanction imposed by Tribunal of 26 May 2016 required that all consumers charged by the Service must be refunded in full. From the above figures, and the explanation provided by the Level 2 provider, it was unclear how releasing £92,000 from the withhold would have enabled the Level 2 provider to fully comply with the universal refund sanction.

On 12 January 2017 the PSA Investigations Enforcement Consultant began being contacted directly by complainants seeking a refund from the PSA in respect of their spend on the Service. The complainants stated that they had been referred to the PSA by the Level 2 provider and provided the Executive with a copy of the email they had received from the Level 2 provider, which stated the following:

“Our revenues have been frozen by Phone Paid Services Authority (psauthority.org.uk) since June 2016 and unfortunately we are not able to access them to issue any more refunds. You should approach them to ask for your refund directly.”

We have notified the authority that we are unable to process any more refunds until they release some revenues to us.

The contact at the authority is [name redacted] please feel free to contact her direct and copy us in.

I am sorry about this but the situation is totally out of our hands now.”

The Executive continued to receive further consumer complaints from January 2017 to the date of the Warning Notice. Recent complainants had shown that the Level 2 provider, who had ceased all correspondence with the Investigations Executive during this investigation, was continuing to respond to consumer’s refund queries and providing them with inaccurate information. The most recent email that the Level 2 provider sent to a consumer stated:

“PhonpayPlus have issued a revenue withhold against our company since May 2016. This means our revenues have been frozen since then.

This withhold was published in their case against us which you can find listed on their website.

We are unable to issue refunds without access to these funds.

Sadly PhonpayPlus refuse to use these funds to enable refunds to take place. They are responsible for just sitting on the funds and using them to pay their inflated overheads and salaries, rather than taking care of genuine customer refund requests.

Sorry we cannot be of more assistance but our hands are tied by PhonepayPlus. We direct you back to them. Ask them why they cannot process a refund to you directly out of the funds they are sitting on?"

The Executive submitted that the Level 2 provider had failed to administer the universal refund sanction following its failure to comply with the agreed start date to issue refunds, which was 24 October 2016. The Executive noted that the inadequate and inconsistent financial information it received from the Level 2 provider, and MCOM, prevented it from giving access to the withheld revenues for the purposes of administering refunds to consumers, as per Code paragraph 4.9.1. Furthermore, having indicated that it would obtain a loan in order to fund the refunds process, the Level 2 provider had failed to do so, without explanation. The Level 2 provider subsequently failed to correspond with the Executive or provide further information.

The Executive submitted that, despite the length of time and opportunities provided to the Level 2 provider to comply with the universal refund sanction, it had failed to submit any sufficient proposal that ensured compliance with the outstanding sanction, and had since ceased all communication with the PSA. By the date of the Tribunal, the universal refund sanction remained outstanding. Consequently, the Executive asserted that the Level 2 provider has not complied with the universal refund sanction imposed by the Tribunal.

In light of the above, the Executive asserted that a breach of 4.8.6(b) of the Code has occurred.

In response to questioning by the Tribunal, the Executive confirmed that, even if the PSA had released all of the funds that had been withheld, this would not have been a sufficient amount to satisfy all of the consumer refunds owed under the universal refund sanction.

2. The Level 2 provider denied the breach. It stated that it had no access to funds to refund consumers as the funds had been withheld under the direction of PSA, which had complete control over them, and the power to direct them to be used for refunds. It stated that the PSA therefore had sufficient funds available for all consumers to be refunded. The Level 2 provider noted that this was the only sanction from the original Tribunal – apart from the formal reprimand and fine, which had been paid in full.

The Level 2 provider submitted that it had suggested to the PSA that the funds necessary to effect refunds, namely £92,000, be released directly by PSA to the 3rd party refund provider "MCOM", who would have ensured the funds were used correctly to provide consumers with the redress ordered by the May 2016 Tribunal. This would have kept the funds out of its own control, something which it assumed would have been welcomed by the PSA Executive. However, it submitted that this suggestion had been rebuffed by the PSA Executive, who instead chose to pursue

further costly cases against the Level 2 provider, resulting in no consumer redress and ultimately the inflation of PSA's penalty fine and administrative income.

The Level 2 provider stated that this was a depressing outcome that flew in the face of the previous Tribunals' findings. The key point it wished to make was that PSA were both in control of the funds required and which were directed by the May 2016 Tribunal to pay refunds.

The Level 2 provider stated that it was unclear as to how the PSA ever intended to address the £183,000 withhold entitlement, and whether they indeed wanted to prioritise refunds or prioritise fine revenues. It noted that there seemed to be no clear strategy at the Executive level either.

The Level 2 provider stated that it had provided a bank statement to the PSA with a few expenditure items crossed out, but queried why that should matter when it still showed a net zero balance. The Level 2 provider questioned what other proof it could furnish to show that it had no funds on account, other than a bank statement. It questioned why withheld funds were not allocated by the PSA for the purpose of providing refunds the moment it had provided evidence of its bank balance given that this was what the funds were withheld for in the first place - to prioritise refunds.

The Level 2 provider submitted that at virtually every turn, the PSA Investigations Enforcement Consultant seemed to inadvertently delay and complicate proceedings.

The Level 2 provider further submitted that the £92,000 figure suggested as being needed to front-load the MCOM refund system represented its estimate of the maximum total claim that might be made by users on receipt of the refund offer. It noted that the calculations based upon the previous experience of MCOM were actually significantly lower as not all users who were offered a refund, would either wish to accept it, or would want to go to the effort of responding and claiming it.

The Level 2 provider stated that there was no available mechanism to simply add the refund to the users mobile phone account that existed on all networks. Therefore MCOM's SMS refund facility, operated in conjunction with the Post Office, was the best solution it could find. The Level 2 provider submitted that it had brought a satisfactory, credible and independent refund processor MCOM, already well known to PSA and the Mobile Network Operators to the table early on with a view to handling the refund processing. Therefore, the universal refund could have taken place by sending a claim message to the whole database had the PSA Case Handler shown the willingness to engage with the suggestion of releasing funds to MCOM.

The Level 2 provider stated that in December 2016 it had tried to find a commercial loan to fund the £92,000 worth of refunds, but with no trading and an empty balance sheet, a loan offer was not provided by any lender. This was a testament to the lengths the company was willing to go to in order to find a resolution that could fund MCOM and the refund process.

In respect of the Executive's assertion that it had failed to explain or substantiate the refund value of £92,000 that it had requested to be released, and that it had failed to provide adequate evidence of its financial position, the Level 2 provider stated that the £92,000, had it been paid into MCOM's refund system, would have been sufficient to cover all universal refund claims forthcoming from users, based on statistical analysis of previous data looked at by MCOM prior to assessing the cash sum needed to front-load MCOM's refund system. In the very unlikely event of MCOM refunds exceeding the £92,000 figure, by December 2016 the PSA had further withheld funds to fall back on in any event, which could have been credited to MCOM. In light of this, it had not seen a situation arising where not all users who accepted the refund would get the refund. Although the Service had a few dissatisfied users, including the 27 who originally complained as part of the original Tribunal, and the 16 who complained to PSA since then, it also had thousands of satisfied users, who had no intention of taking a refund for the service.

The Level 2 provider stated that, whether the final "agreed" refund figure ended up being £40,000 or £340,000, the important thing was how many refunds would be claimed, and therefore how many consumers would be satisfied with the outcome. It laid out its case from the beginning that £92,000 was the right figure to cover the cost of offering the universal refund, and PSA accepted that figure right up until the end when they started wrangling over the prospect of having to release a withhold so that consumers could actually get redress. That the Executive now sought to bring a Prohibition action against it (not to mention a further £75,000 fine in the joined case), was testament to the fact that the Executive continue to place the levy of administrative expenses and fines at the top of its agenda. The Level 2 provider stated that the very poor end outcome for consumers was influenced and affected by a lack of strategy on the Executive's part in dealing with the universal refund sanction.

The Level 2 provider submitted that, whilst it was plainly evident that the universal refund sanction was not initiated, and that therefore it followed there must have been a "breach" of the sanction, this breach was caused by circumstances outside of its direct control. Therefore that it was not guilty of directly causing the breach to take effect.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal carefully considered the correspondence exchanged between the Executive and the Level 2 provider.

The Tribunal was satisfied that the Level 2 provider had failed to take all reasonable steps to comply with the direction of the Tribunal of 26 May 2016 to issue a universal refund. The Tribunal noted that, whilst the Level 2 provider had been in contact with the PSA to request £92,000 from withheld funds for the purposes of paying universal refunds, when further information was reasonably requested by the Executive in order to establish precisely why these funds were required, the Level 2 provider had not supplied a satisfactory response.

The Tribunal considered it to be particularly significant that the funds withheld by the PSA would not have been sufficient to cover the cost of the universal refunds in any event and especially in light of the Level 2 provider's confirmation to the Executive that its only bank account was empty. The Tribunal was of the clear view that the universal refund sanction required all subscribers of the service to be refunded, not just those who claimed a refund. In light of this fact, the Tribunal was particularly concerned that consumers who had recently contacted the Level 2 provider for a refund had not been refunded, but had instead been re-directed by the Level 2 provider to the PSA in breach of the sanction imposed by the earlier Tribunal.

For the reasons set out above, the Tribunal was satisfied that the Level 2 provider had failed to comply with a sanction, in breach of paragraph 4.8.6 of the Code.

SANCTIONS

Representations on sanctions made by the Executive

The Executive submitted that the following sanctions were appropriate:

- a formal reprimand; and
- a prohibition from providing any premium rate service for a period of five years from the date of publication of the Tribunal's decision or date upon which the universal refund ordered by the Tribunal of 26 May 2016 is complied with, whichever is the later.

based on a preliminary assessment of breaches 1 and 2 as "very serious" and breach 3 as "serious".

Level 2 provider representations on sanctions

With regard to the Executive's recommendation of a prohibition, the Level 2 provider made the following representations:

- A prohibition order against the Company in the circumstances is too harsh. Such a draconian sanction should only be reserved for the worst offenders, those who encountered significant levels of consumer complaints and harm and that plainly made no attempt to comply with the sanctions imposed (by payment of fine or otherwise).
- It had clearly outlined that the only sanctions to which it was committed by the May 2016 Tribunal was to issue a universal refund, accept a reprimand and pay a fine. It had documented clearly why its reasonable efforts in facilitating the refund were frustrated by the PSA Executive and particularly the PSA Investigations Enforcement Consultant dealing with the case.
- The Level 2 provider had attempted to engage, requesting the fine and administrative charge be paid out of withheld revenues. It also wished for it to be noted that the concept of a universal refund was relatively unheard of before the Golden Brand May

2016 Tribunal, and it could find no record of it being repeated by a Tribunal since that time.

- It was technically very difficult to achieve the sanction, perhaps this was the reason the sanction has not been repeated in cases since. In all other cases, the sanction required the provider to pay refunds only if claimed by users.
- In many ways the May 2016 Tribunal decision was a “one-off”, and perhaps a policy experiment that had since been corrected internally at PSA. It could only speculate by reviewing other similar decisions.
- Taking these factors into account, a prohibition order was not appropriate or fair in the circumstances.

Initial overall assessment

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

Rule 4.8.6(b) – Failure to comply with a sanction

The initial assessment of the breach of rule 4.8.6(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The case had a clear and highly detrimental impact on consumers who had not received the refund they were due.
- The nature of the breach and the scale of harm caused to consumers was likely to severely damage consumer confidence in premium rate services.
- The breach was deliberate and/or reckless and was a repeated act of non-compliance with the Code.

Final overall assessment

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

- That the Level 2 provider knew that the amount required to be repaid to consumers was greater than the funds withheld by the PSA.
- That the Level 2 provider incorrectly informed complainants that it could not make refunds due to the actions of the PSA and directed them to the PSA for payment.

In determining the final overall assessment for the case, the Tribunal found the following mitigating factors:

- There was some engagement by the Level 2 provider and it took some initial steps to ensure partial compliance with the universal refund sanction.
- Some refunds were paid to consumers.

The Level 2 provider made the following comments in relation to the aggravating features identified by the Executive:

- The actions or inactions of the Executive were a major contributing factor to the breach occurring.
- It had provided a strong level of cooperation and willingness to ensure the sanction was met.
- Only 16 complaints had been received by the PSA since the conclusion of the May 2016 Tribunal, which was indicative of the relatively low impact nature of the service.

The Level 2 provider's evidenced revenue in relation to the Service in the period post the Tribunal of 26 May 2016 was in the range of Band 4 (£100,000-249,999).

Having taken into account the circumstances of the case, 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;
- A prohibition on the Level 2 provider from providing, or having any involvement in any premium rate service for a period of five years from the date of publication of this decision or compliance with the order of the previous Tribunal in full, whichever is the later.

In imposing the above sanctions the Tribunal took into account that the provider had failed to take all reasonable steps to comply with a sanction previously imposed by a Tribunal, which it considered to be of the utmost seriousness. In these circumstances, the Tribunal was satisfied that the above sanctions were proportionate and justified.

Administrative charge recommendation 100%