

Tribunal meeting number:	240
Case reference:	161127
Level 2 provider:	Xplosion Limited, Douglas, Isle of Man
Service title:	Games Unlimited Moby Apps
Type of service:	Games portal
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 alleged breaches of sanctions imposed by an earlier Tribunal (21 September 2018, case reference 118842) following an investigation into games portal services operating under the brands 'Games Unlimited' and 'MobyApps' on PayForIt ("PFI") and shortcode 65065 (the "Services").

The Level 2 provider for the Service was Xplosion Limited (the "Level 2 provider"). The Level 2 provider registered with the Phone-paid Services Authority (the "PSA") on 27 January 2015 and its registration lapsed on 26 January 2018. The Level 2 provider currently remains de-registered on the PSA Registration Scheme.

The Level 1 providers in respect of the Service were Dynamic Mobile Billing Limited ("DMB").

The Executive received 102 complaints concerning the Services between 31 August 2016 and 20 April 2017.

On 21 September 2018, the Tribunal upheld breaches of rule 2.3.3 (consent to charge), rule 2.2.1 (transparency and pricing), rule 2.3.1 (fair and equitable treatment), and paragraph 3.4.14 (a) (service registration). The overall assessment was that the case was very serious and imposed the following sanctions against the Level2 provider:

- a fine of £440,000
- 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 5 years from the date of the Tribunal decision or until payment of the fine and administrative charges, whichever is the later
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PSA that such refunds have been made.

The Tribunal also recommended payment of 100% of the administrative charge of £5,434.50.

The Level 2 provider was notified informally of the Tribunal's decision on 1 October 2018. On 4 October 2018 the Level 2 provider was issued with the full Tribunal written decision and fine and administrative charge invoices.

At the date of this Tribunal hearing in relation to the alleged breaches of sanctions, the fine and administrative charge remained outstanding.

Interim measures

There were no interim measures in place in respect of the Service.

Apparent breaches of the Code

The Executive raised the following potential breaches of the PSA Code of Practice (14th Edition) ("the Code"):

- Paragraph 4.8.6(b) – Failure to comply with a sanction
- Paragraph 4.11.2 – non-payment of an administrative charge

On 28 January 2019, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full, including:

- the Tribunal adjudication for case ref. 118842
- the notification of the Tribunal decision (case ref. 118842) to the Level 2 provider
- the exchange of correspondence between the Executive and the Level 2 provider's instructed solicitors
- payment reminders issued to the Level 2 provider
- correspondence sent by the Executive to the Level 2 provider serving the Warning Notice

Preliminary issue

The Tribunal noted the proof of service documents contained in the bundle and the correspondence sent by the Executive, to the Level 2 provider, dated 24 January 2019, notifying it of the date of this hearing. The Tribunal was satisfied, on the balance of probabilities, that there had been good service of both the Warning Notice, and notification of the hearing time and date.

Submissions and conclusions

Alleged breach 1

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 breached paragraph 4.8.6 (b) of the Code as it failed to comply with a fine sanction imposed by the Tribunal.

The Executive relied on the Tribunal decision of 21 September 2018, the correspondence exchanged between the Executive and the Level 2 provider's instructed solicitors between 2 October and 19 October 2018 and the proof of service documentation for hard and electronic copies of correspondence issued by the Executive following the Tribunal decision made on 21 September 2018.

On 1 October 2018 the Executive sent the Level 2 provider informal notification of the earlier Tribunal's decision, which stated:

*"Service name: **Games Unlimited, MobyApps (games services)***

The Tribunal upheld the following breaches of the Code and applied the relevant severity level to the breaches:

- a. Breach Rule 2.3.3 – Consent to Charge- Very Serious*
- b. Breach Rule 2.2.1 - Transparency and Pricing – Very Serious*
- c. Breach Rule 2.3.1- Fair and equitable Treatment – Very Serious*
- d. Breach Rule 3.4.14(a) – Service Registration – Serious*

*Taking into consideration the aggravating and mitigating factors, the Tribunal's overall assessment was that the case was **very serious** in its severity.*

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

- *Fine - **£440,000***
- *Formal reprimand*
- *Prohibition on the Level 2 provider from providing or having any involvement in any PRS for a period of 5 years from the date of the Tribunal decision or until payment of the fine and administrative charges, whichever is the later*
- *General refunds"*

On 4 October 2018 the Executive sent the Level 2 provider formal notification of the Tribunal's decision, which included the 'Adjudication cover letter' that stated the following:

"Invoices

*You will find invoices in respect of the fine sanction and administrative charge imposed attached, both of which must be settled within seven working days by **Monday 15 October 2018**.*

<i>The amounts due are: Invoice</i>	Amount
<i>Administration Charge invoice, 14267</i>	<i>£5,434.50</i>
<i>Fine Sanction invoice, 14265</i>	<i>£440,000.00</i>

Between 2 October and 19 October 2018, the Executive and the Level 2 provider's instructed solicitors exchanged various correspondence concerning the Tribunal decision. In addition to the above referenced correspondence, payment reminders were issued to the Level 2 provider on 9 October, 17 October and 24 October 2018.

The Executive submitted that despite the length of time and opportunities provided to the Level 2 provider to make payment of the outstanding fine, it had failed to do so. As such, the fine sanction of £440,000 remains outstanding.

In light of the above, the Executive submitted that a breach of paragraph 4.8.6 (b) of the Code had occurred.

2. The Level 2 provider did not make any response to the Warning Notice and as such neither admitted nor denied the breach.

3. Tribunal considered the Code and all of the evidence before it, applying the civil standard of proof. It carefully considered the correspondence sent to the Level 2 provider, notifying it of the fine payable, including the adjudication and the payment reminders. It also considered the exchange of correspondence between the Executive and the Level 2 provider's instructed solicitors. The Tribunal was satisfied that the Executive had served appropriate notice of the fine on the Level 2 provider, but the Level 2 provider had failed to comply with the fine sanction. Accordingly, the Tribunal found that there had been a breach of paragraph 4.8.6(b) of the Code by the Level 2 provider.

Decision: Breach upheld

Alleged breach 2

Paragraph 4.11.2 of the Code states:

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

1. The Executive asserted that the Level 2 provider had breached paragraph 4.11.2 of the Code as it had failed to pay the administrative charge within the time period specified by the PSA.

The Executive relied on the Tribunal decision of 21 September 2018, the correspondence exchanged between the Executive and the Level 2 provider's instructed solicitors between 2 October and 19 October 2018 and the proof of service documentation for hard and electronic copies of correspondence issued by the Executive following the Tribunal decision made on 21 September 2018.

On 21 September 2018 the Tribunal upheld four breaches of the Code against the Level 2 provider. In reaching its decision, the Tribunal *recommended that the Level 2 provider make payment of 100% of the administrative charge of £5,434.50.*

On 1 October 2018 the Executive sent the Level 2 provider informal notification of the Tribunal's decision, which stated:

*"...the Tribunal recommended 100% of the administrative charge for all three cases to be paid by the Level 2 provider – this figure will be supplied to you on **Thursday 4 October 2018** and the invoice will provide a breakdown of costs."*

On 4 October 2018 the Executive sent the Level 2 provider formal notification of the Tribunal's decision, which included the 'Adjudication cover letter' that stated the following:

"Invoices

*You will find invoices in respect of the fine sanction and administrative charge imposed attached, both of which must be settled within seven working days by **Monday 15 October 2018.***

<i>The amounts due are: Invoice</i>	Amount
<i>Administration Charge invoice, 14261</i>	<i>£5,434.50</i>
<i>Fine Sanction invoice, 14265</i>	<i>£440,000.00</i>

Between 2 October and 19 October 2018, the Executive and the Level 2 provider's instructed solicitors exchanged various correspondence concerning the Tribunal decision. In addition to the above referenced correspondence, payment reminders were issued to the Level 2 provider on 9 October, 17 October and 24 October.

The Executive submitted that despite the length of time and opportunities provided to the Level 2 provider to make payment of the outstanding administrative charge, it had failed to do so. As such, the administrative charge of £5,434.50 remained outstanding.

In light of the above, the Executive submitted that a breach of paragraph 4.8.6 (b) of the Code had occurred.

2. The Level 2 provider did not make any response to the Warning Notice and as such neither admitted nor denied the breach.
3. Tribunal considered the Code and all of the evidence before it, applying the civil standard of proof. It carefully considered the correspondence sent to the Level 2

provider, notifying it of the administrative charge, including the adjudication and the payment reminders. It also considered the exchange of correspondence between the Executive and the Level 2 provider's instructed solicitors. The Tribunal was satisfied that the Executive had served appropriate notice of the administrative charge on the Level 2 provider and the Level 2 provider had failed to comply with the direction of the Tribunal to pay the administrative charge. Accordingly, the Tribunal found that there had been a breach of paragraph 4.11.2 of the Code by the Level 2 provider.

Decision: Breach upheld

Sanctions

Initial assessment of sanctions

1. The Executive submitted that the following sanctions were appropriate:
 - a formal reprimand
 - a prohibition on the Level 2 provider for a period of 8 years, starting from the date of publication of the Tribunal decision or until payment of the outstanding fine and administrative charges, whichever is the later.
2. As set out above, the Level 2 did not respond to the Warning Notice and as such, did not make any submissions on sanction.
3. The Tribunal's initial assessment was that the breached of paragraphs 4.8.6(b) and 4.11.2 were both very serious. In making this assessment, the Tribunal found the following:
 - non-compliance with the sanctions imposed by the earlier Tribunal represented a fundamental non-compliance with the Code and undermined the PSA as a regulator.

Overall case and proportionality assessments

1. The Executive submitted that there had been no mitigating factors in this case. It noted that some refunds had been provided, although these were issued by the Network and Level 1 providers, without any involvement by the Level 2 provider. The Executive submitted that it was an aggravating factor that the Level 2 provider had not acknowledged or responded to the payment reminders and that, barring one email from the Level 2 provider's instructed solicitor, querying the date for payment of the fine, no other contact relating to the sanctions had been received. The Executive further submitted that there was a need to deter the Level 2 provider and the wider industry from failing to comply with sanctions.
2. The Level 2 provider did not make any response on this matter.

3. The Tribunal found that there were no mitigating factors and that it was an aggravating factor that the Level 2 provider had not corresponded substantively with the Executive in relation to the fine and administrative charge. The Tribunal was of the view that the Level 2 provider had demonstrated a fundamental disregard for the regulatory process. It was satisfied to the requisite standard that there was a need in this case for deterrence, both to the Level 2 provider and the wider industry.

Sanctions adjustment

1. The Executive recommended that the initial sanctions recommendation was not adjusted as it was at the appropriate level to achieve the sanctioning objective of credible deterrence. The Executive noted that the lengthy prohibition it had recommended would result in an extension of the time period the Level 2 provider would be prohibited from operating in the premium rate industry but argued that this was justified when balancing against the sanctioning objectives.
2. The Level 2 provider did not make any submissions on this issue.
3. The Tribunal considered the likely impact of the recommended prohibition on the Level 2 provider and balanced this against the need for the sanctioning objective of credible deterrence. The Tribunal did not consider that it was necessary to adjust its initial sanction.

Final Sanctions

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 8 years from the date of the Tribunal decision or until payment of the fine and administrative charges, whichever is the later.

Administrative charge recommendation: 100%