Tribunal meeting number 266

Case reference:	178537
Level 2 provider:	Inter Inventory Company Limited
Type of service:	Game portal – subscription service
Level 1 provider:	mGage
Network operator:	All network operators

This case was brought against the Level 2 provider under Paragraph 4.5 of the 14th edition of the PSA Code of Practice ("the **Code**").

Background

The case concerned the non-payment of financial sanctions and administrative charges and the failure to refund consumers as directed by an earlier Tribunal (case reference 135923). The previous case, which was heard on 6 March 2019, concerned a game portal subscription service named BestVIPGames ("the **Service**") which was operated by Inter Inventory Company Limited ("the **Level 2 provider**"). The Level 1 provider was mGage Europe Limited ("the **Level 1 provider**").

Since the Tribunal adjudication on 6 March 2019 the Executive has received seven complaints regarding the Service. Prior to the above Tribunal, the Executive received a total of 161 complaints in relation to the Service.

The Service commenced operation on the 31 May 2017 and operated on a PayForIt ("**PFI**") platform. PFI was a payment method which enabled consumers to buy digital content and services via their phone bill. The Service used short codes 64055 (short code 1) for the STOP function and 85450 (short code 2) for free reminder messages and receipts. The Service was charged at £4.50 per week and provided access to a games portal which consumers were sent a link to once they had subscribed. The Service was promoted using banner adverts between June 2017 and January 2018.

The Service is no longer in operation and no longer charging consumers.

On 6 March 2019, the Tribunal upheld breaches of rules 2.3.1 (fair and equitable treatment), 2.3.2 (misleading), 2.6.1 (complaint handling) and paragraph 3.4.14(a) (registration).

The overall assessment of the case was '**very serious'**, and the following sanctions were imposed as a result:

- a formal reprimand
- a requirement that the Level 2 provider remedy the breaches by ensuring that:

    - all consumers affected by the content locking are removed from the Level 2 provider's database;
    - all subscribers to the Service be provided with an appropriate link to the Service to be re-sent on each occasion that the subscriber is billed;
    - all relevant service information to be registered on the PSA's registration database as required by paragraph 3.4.14(a) of the Code.
- a bar on access to the Service for 2 years and following this period access to the Service remain barred until the breaches have been remedied to the satisfaction of the PSA (where this has not yet occurred)
- 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 the PSA that such refunds have been made
- a fine of £375,000 compromised as follows:
    - Rule 2.3.1 - £75,000
    - Rule 2.3.2 - £150,000
    - Rule 2.6.1 - £100,000
    - Paragraph 3.4.14(a) - £50,000.

The Tribunal also recommended the payment of 100% of the administration charges which amounted to £6,886.00.

The Level 2 provider was formally notified of the Tribunal's decision on 20 March 2019.

The Executive submitted that the Level 2 provider had made no attempt to comply with the financial sanctions or to pay the administrative charges. In addition to this the Level 2 provider had failed to respond to the Executive and five PSA complainants in relation to the general refunds sanction.

Apparent breaches of the Code

The Executive sent a Warning Notice to the Level2 provider in which the following breaches of the Code were raised:

- Paragraph 4.8.6(b) - Failure to comply with any sanction
- Paragraph 4.11.2 – Non-payment of the administrative charge

Preliminary issues – service (2 April 2020)

The case against the Level 2 provider was considered by the Tribunal on 2 April 2020. The Tribunal was informed that a copy of the Warning Notice had been sent to the Level 2 provider via post and email on 24 February 2020. The Tribunal noted that no response had been received by Level 2 provider to the Warning Notice despite confirmation of the postal delivery and the receipt of an automatic email acknowledgement from one of the Level 2 provider's email addresses.

The Tribunal acknowledged that the Executive had sent further correspondence to the Level 2 provider on 11 March 2020 asking for a response to the Warning Notice. The Tribunal was however informed that the Level 2 provider had not been informed of the time and date of the Tribunal hearing until approximately 12pm earlier that day. The Tribunal was also informed that the Level 2 provider had not been made aware that the Tribunal was now taking place remotely using video conferencing for all participants.

The Tribunal noted that there was no specific requirement within the Code and/or the accompanying Supporting Procedures for the Executive to provide the time and date of the Tribunal hearing to a provider who had not previously indicated that they wish to attend the Tribunal. However, the Tribunal noted that there was a general requirement for Level 2 providers to be given an opportunity to attend any Tribunal hearing to make representation. The Tribunal was also mindful of its overarching obligation to act fairly and in accordance with the relevant law at all times.

Taking all these factors into account, the Tribunal concluded that the Level 2 provider had been given insufficient notice of the Tribunal hearing particularly in the context of the Level 2 provider being based in Hong Kong. The Tribunal accordingly concluded that it would be unfair to consider proceeding in the absence of the Level 2 provider where the Level 2 provider had not been provided with sufficient details of the Tribunal hearing. The Tribunal hearing was therefore adjourned to 22 April 2020.

Adjournment

Following the adjournment of the Tribunal hearing on 2 April 2020, the Executive received new information in relation to the Level 2 provider which indicated that the Sole Director of the Level 2 provider had changed and was not the individual whom the Executive had previously served the Warning Notice on in February 2020.

As a result of this information, the Executive made a written application to the Chair of the Tribunal to adjourn the re-listed hearing in accordance with supporting procedures. The Executive made this application on the grounds that the hearing should be adjourned to allow for the Warning Notice to be re-served on the Sole Director of the Level 2 provider and to ensure that the individual concerned was given enough time to properly respond to the Warning Notice prior to any hearing taking place.

After consideration, the Chair of the Tribunal granted the adjournment on 7 April 2020 on the grounds that while there was a public interest in the case being considered in a timely manner, it was in the interests of justice for the Sole Director of the Level 2 provider to be provided with an opportunity to make representations.

Service of notice and proceeding in absence (22 June 2020)

Following the adjournment from 7 April 2020, the Tribunal reconvened on 22 June 2020 to consider the case.

In considering whether service had been properly made out, and whether to proceed in the provider's absence, the Tribunal considered the bundle and specifically the annexes relating to the service of the documents on the Level 2 provider. The Tribunal was further assisted by the Executive who attended to answer the Tribunal's queries around service.

The Tribunal considered the email that was sent to the Level 2 provider's Sole Director who had been identified following the adjournment of the Tribunal hearing on 2 April 2020. The email was sent on 29 April 2020 and attached a copy of the reissued Warning Notice. The email attaching the reissued Warning Notice was also sent to the Level 2 provider's customer service email address. Although the email was not delivered to the Sole Director, the Tribunal noted that the email had been delivered to the Level 2 provider's customer service email address, which the investigator clarified was the registered email address on the PSA's Registration database.

In response to questioning by the Tribunal, the Executive confirmed that the Warning Notice had been delivered to the Level 2 provider's registered email address. Additionally, the Executive advised that it had attempted to telephone the Level 2 provider using the primary contact number the PSA had to check that the Level 2 provider had received the Warning Notice and to find out whether it would be attending the hearing. The Executive further advised that it had also attempted to telephone the Level 2 provider using the number provided by the Level 1 provider in its Due Diligence record. The Executive explained that the primary number for the Level 2 provider was engaged on repeated attempts and there was no opportunity to leave a recorded voice message, and the other number was not recognised.

The Tribunal considered that reasonable endeavours had been made to serve the Warning Notice on the Level 2 provider. It was satisfied that the automatic response from the customer service email address was the equivalent of a delivery receipt and the Tribunal was therefore satisfied that the email had been delivered to the Level 2 provider's email server. The Tribunal commented that the Executive had sent repeated and frequent emails to the Level 2 provider's registered address. It found that the Level 2 provider had not engaged with the Executive despite the Executive's attempts to secure its participation.

In light of this and considering its responsibility to ensure that Tribunal hearings are conducted properly, fairly and in accordance with good practice and the relevant law, the Tribunal was satisfied that service had been properly made out and that it was fair to proceed in the absence of the Level 2 provider and that adjourning the case would not secure the participation of the Level 2 provider.

Alleged breach 1

Paragraph 4.8.6(b) of the 14th Edition of the Code of Practice 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 submitted that a breach of paragraph 4.8.6(b) had occurred because the Level 2 provider had made no attempts to comply with the financial sanction that had been imposed by the Tribunal of 6 March 2019. As set out in the 'Background' section above, on 6 March 2019, the Tribunal had upheld four breaches of the Code against the Level 2 provider.

   The Executive stated that its basis for raising a breach of paragraph 4.8.6(b) was that the Level 2 provider had made no attempts to make payment of the £375,000 fine and had failed to comply with the general refund sanction imposed on the Level 2 provider.

   The overall assessment of the case was '**very serious**' and the following sanctions were imposed as a result:

- formal reprimand
- a requirement that the Level 2 provider remedy the breaches by ensuring that:
  - all consumers affected by the content locking are removed from the Level 2 provider's database
  - all subscribers to the Service be provided with an appropriate link to the Service to be re-sent on each occasion that the subscriber is billed
  - all relevant service information to be registered on the PSA's registration database as required by paragraph 3.4.14(a) of the Code.
- a bar on access to the Service for two years and following this period access to the Service remain barred until the breaches have been remedied to the satisfaction of the PSA (where this has not yet occurred)
- 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 the PSA that such refunds have been made
- a fine of £375,000.

   On 15 March 2019, an informal notification was sent to the Level 2 provider via email.

   On 20 March 2019 a formal notification was sent to the Level 2 provider also via email which included the adjudication report and the fine invoice. In addition, a form requesting contact details for refund requests was sent to the Level 2 provider. The Executive attached tracking options to the email which sent a delivery receipt to them once the email had successfully been delivered. The delivery receipt was received by the Executive at 10:49 on 15 March 2019.

   In response to the formal notification sent on the 20 March 2019, the Executive received an automated message from the copied in Customer Service email address but did not receive a response from the main email address for the Level 2 provider.

On 29 March 2019, the Executive sent an email reminder regarding a refund request it had sent to the Level 2 provider. The Level 2 provider had failed to respond to this email reminder, even though a receipt came back confirming that the email had been successfully delivered.

On 10 April 2020 and 16 April 2019, payment reminders regarding the fine sanction were sent to the Level 2 provider. The Level 2 provider did not respond.

The Executive had noted that the Level 2 provider engaged and responded appropriately to correspondence from the Executive during the investigation of the substantial case. The Level 2 provider stopped responding to the Executive when the substantial case had been adjudicated.

The Executive attempted to contact the Level 2 provider through other contact information that the Executive obtained for the Service. However, these emails came back undelivered.

Additionally, regarding the general refunds sanction imposed on the Level 2 provider, the Executive received three complaints from new complainants stating that the Level 2 provider had failed to issue them refunds after they had requested them following the adjudication.

The Executive forwarded these complaints to the Level 2 provider and received automated responses from the Customer Service email address stating that the message had been received and it would respond in 1-2 working days but nothing further was received.

On 22 August 2019, the Executive advised the Level 2 provider that a breach of sanctions case had been raised against it.

The Executive asserted that the Level 2 provider has intentionally breached paragraph 4.8.6(b) of the Code due to its deliberate refusal to engage with the Executive in relation to its non-payment of the fine and non-compliance with the general refund sanctions imposed on it by the Tribunal of 6 March 2019.

2. The Level 2 provider did not make representations or respond to the Warning Notice.

3. The Tribunal considered the Code and all the evidence before it. The Tribunal was satisfied that the Level 2 provider had not responded to payment reminders or made any attempt to pay the fine or issue refunds to consumers. The Tribunal was satisfied that the Level 2 provider had not complied with the financial sanction within a reasonable time period. Accordingly, the Tribunal upheld a breach of paragraph 4.8.6(b) of the Code.

   Decision: UPHELD.

Alleged breach 2

Paragraph 4.11.2 of the 14th Edition of the Code of Practice 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."

The Executive asserts that a breach of Paragraph 4.11.2 has occurred because of the Level 2 provider's failure to pay the Executive's administration costs within the time period specified by the PSA.

1. The Executive stated that the Level 2 provider had acted in breach of paragraph 4.11.2 of the Code as the full administrative charge of £6,886.00 remained outstanding.

   The Executive stated that it had sent a formal notification of the Tribunal outcome to the Level 2 provider on 20 March 2019. This included a separate invoice in respect of the administrative charge of £6,886.00.

   On 10 April 2019 and 16 April 2019 two payment reminders were sent to the Level 2 provider regarding the outstanding administrative charge payment.

   On 22 August 2019, the Executive advised the Level 2 provider that a breach of sanctions case had been raised against it.

   The Executive submitted that the Level 2 provider was in breach of paragraph 4.11.2 as it was fully aware of its requirement to pay the administrative charge and had been given adequate opportunity to do so but the full administrative charge remained outstanding.

2. The Level 2 provider did not make representations or respond to the Warning Notice.

3. Having considered the Code and the evidence before it, the Tribunal was satisfied on the balance of probabilities that the Level 2 provider had not paid the administrative charge within the specified period of time. Accordingly, the Tribunal upheld a breach of paragraph 4.11.2 of the Code.

Decision: UPHELD.

Breach severity – initial assessment

The Executive considered the breach of paragraph 4.8.6(b), failure to comply with a sanction, to be '**very serious**' as the breach was committed intentionally and demonstrated a fundamental disregard for the Code.

The Executive considered the breach of paragraph 4.11.2, non-payment of administrative charge, to be '**very serious**' as the breach was committed intentionally and demonstrated a fundamental disregard for the Code.

The Tribunal agreed that the breach of paragraph 4.8.6(b) was '**very serious'**, for the reasons advanced by the Executive. The Tribunal was satisfied that the breach was intentional and demonstrated a disregard for the finding of the earlier Tribunal.

The Tribunal further considered that the breach of 4.11.2 was '**very serious'**, for the reasons advanced by the Executive. The Tribunal considered that the breach was deliberate and noted that the Level 2 provider had not demonstrated any intention to pay the charges. The Tribunal concluded that the Level 2 provider had demonstrated a disregard for the finding of the earlier Tribunal as well as a fundamental disregard for the requirements of the Code of Practice.

The Tribunal considered that the overall severity of this case was '**very serious**'.

Recommended sanctions – initial assessment

The Executive recommended the following initial sanctions:

- a formal reprimand
- that the Level 2 provider be prohibited from having any involvement in any current or future PRS operated on a number or number range within the PSA's regulatory remit for five years or until all sanctions imposed by the Tribunal of 6 March 2019 have been complied with and both administrative charges have been paid in full, whichever is the later.

The Level 2 provider did not make representations in respect of the recommended sanctions.

The Tribunal was in agreement with the Executive's recommended initial sanctions.

The Tribunal considered that credible deterrence in this case would be achieved by prohibiting the Level 2 provider from re-entering the premium rate service market. This would restrict the business operations of the Level 2 provider ensuring that future non-compliant activity is deterred thus protecting consumers from future harm.

Mitigating factors applying as a whole

The Executive submitted that there were no mitigating factors.

The Tribunal did not find any mitigating factors.

Aggravating factors applying as a whole

The Executive submitted that there were no aggravating factors.

The Tribunal did not find any aggravating factors.

Proportionality considerations

The Executive stated that the recommended sanctions of a formal reprimand and five-year prohibition on the Level 2 provider were proportionate and justified.

Given the intentional and very serious nature of the breaches, the Executive was of the view that recommended sanctions are the minimum necessary to achieve the sanctioning objective of credible deterrence.

The Tribunal considered that the prohibition was a proportionate sanction. It was satisfied that there was a clear need to deter the Level 2 provider and the wider industry from the commission of similar breaches. The Tribunal regarded the breaches to be '**very serious**' and noted that industry's compliance with sanctions was essential to the effectiveness of the regulator and the broader protection of consumers. The Tribunal therefore did not consider that there was a need to make any adjustment to the initially assessed sanctions.

Final sanctions

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

- 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 the publication of this decision, or until all sanctions imposed by the Tribunal of 6 March 2019 have been complied with, whichever is the later.

Administrative charge recommendation: 100%