

## Tribunal meeting number 294

Case reference: 192920

Case: Prohibition of an associated individual

This case was brought against the associated individual under paragraph 5.8.12 of the 15<sup>th</sup> edition of the Code of Practice (“the Code”).

The Tribunal was asked to consider imposing a prohibition against Mr Darren Hodes pursuant to paragraph 5.8.5(g) of the Code.

### Background

1. The tribunal (“the Tribunal”) has been asked to consider imposing a prohibition against Mr Darren Hodes, pursuant to paragraph 5.8.5(g) of the Code.
2. The case related to a previous adjudication against TCS Combined Solutions Limited (the “Merchant”) (case reference 150301). The previous adjudication involved an alert subscription service and was considered on the 9 and 10 December 2020. A review adjudication took place on 14 June 2021. The Tribunal that considered the case on 9 and 10 December 2020 recommended the prohibition of Mr Hodes, the primary contact on the Phone-paid Services Authority Registration Scheme and sole director of the Merchant.
3. The Merchant operated a text alert subscription service that operated on the shortcodes 80250, 87121 and 78484 (the ‘Service’). The Service operated on all mobile network operators and commenced operation in March 2018. The Service ceased operating in the final quarter of 2020 (exact date unknown). The Phone-paid Services Authority (‘PSA’) received a total of 100 complaints concerning the Service from 1 April 2018.
4. On 10 December 2020, the Tribunal found that the Service operated by the Merchant breached the Code. The Tribunal upheld the following breaches:
  - Rule 2.3.3 – Consent to charge
  - Rule 2.2.7 – Pricing information
  - Paragraph 3.12.5 – Provision of spend reminders
  - Paragraph 4.2.2 – Provision of false or misleading information (omission of information)
  - Paragraph 4.2.2 – Provision of false or misleading information (false information)
  - Paragraph 4.2.3 – Failure to disclose information
  - Paragraph 3.4.8 – Registration renewal
  - Paragraph 3.4.14(a) – Number registration.

5. The Tribunal considered the case to be very serious and imposed the following sanctions:
  - a formal reprimand
  - a prohibition on the Merchant from providing, or having any involvement in, any premium rate service for a period of three years, starting from the date of the publication of the Tribunal decision, or until payment of the fine and the administrative charges, whichever is the later
  - a requirement that the Merchant 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 £885,000.
6. The Tribunal also proposed payment of 100% of the administrative costs by the Merchant and the prohibition of Mr Darren Hodes.
7. On 21 January 2021, the Merchant applied for a Review of the Tribunal's decision. The Chair of the CAP rejected all but one of the grounds detailed in the review application. As such, the Review Tribunal only considered whether the original Tribunal had erred in their approach to personal mitigation and insight shown by Mr Hodes when determining the overall sanctions imposed.
8. On 14 June 2021, the Review Tribunal considered the limited ground for review relating to the personal mitigation and insight shown by Mr Hodes which led to the revision of the sanctions in the following way:
  - formal reprimand
  - a requirement that the Applicant seek compliance advice regarding the Service and its promotion, and that compliance advice is implemented to the satisfaction of the PSA
  - a prohibition on the Applicant from providing, or having any involvement in, any premium rate service for a period of three years, starting from the date of the publication of the original Tribunal decision, or until payment of the fine and administrative charges and the implementation of the compliance advice to the satisfaction of the PSA whichever is the earlier
  - a requirement that the Respondent 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 £750,000.
9. The Tribunal also recommended that the Merchant pay 100% of the administrative fee, but capped the fee at £150,000.

### Code provisions

10. The relevant provisions of the Code for the present matter relating to Mr Hodes' potential prohibition include:

Paragraph 5.8.5 of the provides:

*“Having taken all relevant circumstances into account, the Tribunal or single legally qualified CAP member may impose one or more of the following sanctions in relation to each breach as they consider appropriate and proportionate:*

*(g) a prohibition on a Relevant Party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code, and/or failed to take reasonable steps to prevent such breaches, from providing or having any involvement in any PRS or promotion for a defined period”.*

Paragraph 5.8.12 of the Code which provides:

*“If a Tribunal considers that it may wish to impose a prohibition under sub-paragraphs 5.8.5(f) or 5.8.5(g) in respect of any associated individual, the PSA will first make all reasonable attempts to notify the individual concerned and the Relevant Party in writing. In providing any such notification, the PSA will inform the Relevant Party and the associated individual that either of them may request an opportunity to make representations in writing, or in person, to the Tribunal and of their right to require an oral hearing under paragraph 5.7.9(b) above rather than consideration of the matter relating to the associated individual on the papers.”*

11. As the relevant Code in force at the time of the recommendation of Mr Hode’s prohibition was the 14<sup>th</sup> Edition of the Code (“Code 14”) the relevant Code Provisions include:

Paragraph 4.8.3(g) of the 14th Edition of the Code which provides states:

*“Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach as it deems to be appropriate and proportionate: (g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any PRS or promotion for a defined period.”*

Paragraph 5.3.9 of the 14th Edition of the Code which provides states:

*“Associated individual’ is any sole trader, partner or director or manager of a Premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by the PSA.”*

## **Preliminary issues**

### **Service**

12. The Tribunal considered whether the PSA had made reasonable attempts to notify the Mr Hodes and the Merchant, in writing. The PSA was required to inform both parties of their opportunity to make representations in writing, or in person, to the Tribunal and

of their right to require an oral hearing, rather than consideration of the matter on the papers. The Tribunal found that Mr Hodes had been notified.

13. The Tribunal also found that the PSA had made reasonable attempts to notify Mr Hodes and the Merchant of the time and date of the hearing, evidenced by the email dated 31 October 2022. The Tribunal considered that Mr Hodes knew of the Hearing and had been provided with an opportunity to make representations in writing. The Tribunal were content that paragraph 5.8.12 of the Code had been complied with.
14. The Tribunal noted that the Merchant was in liquidation and its registered address was that of the liquidators. The Executive had issued the Notice on the liquidators as well as on Mr Hodes, as required by the Code. The Tribunal noted email notifications sent by the Executive to Mr Hodes dated 20 December 2021 and 24 August 2022 of his potential prohibition, proof of service received by the Executive dated 25 August 2022, and Mr Hodes email response dated 8 September 2022.

### **Proceeding in absence**

15. In light of the evidence provided, the Tribunal was satisfied that it was fair to proceed in the absence of Mr Hodes.

### **Submissions**

16. The PSA considered the available evidence and applying the relevant provisions of submitted that the Mr Hodes was an associated individual who was knowingly involved series of breaches and should be prohibited.

### **Associated individual**

17. The PSA submitted that Mr Hodes was an associated individual as he had day to day responsibility for the conduct of the Merchant. The PSA stated that this was evidenced by the following:
  - Mr Hodes had been the sole director of the Merchant from 25 August 2017 to the point of liquidation, as evidenced on Companies House records. The PSA noted that the Service commenced on 2 March 2018 and the first complaint was received 3 April 2018.
  - Mr Hodes was the sole shareholder of the Merchant. This was evidenced by the CreditSafe report for the Merchant.
  - Ms Hodes had been listed as the primary contact for the Merchant on the PSA's registration database since the Merchant first registered on 6 October 2017
  - on 2 March 2018, Mr Hodes in his capacity as Director of the Merchant signed a contract to operate premium rate services with the Level 1 provider, Veoo
  - on 12 March 2018, Mr Hodes in his capacity as Director of the Merchant signed a contract to operate premium rate services with the Level 1 provider, Mobivate
  - on 29 June 2018, Mr Hodes in his capacity as Director of the Merchant signed a contract to operate premium rate services with the Level 1 provider, mGage

- on 1 March 2018, Mr Hodes in his capacity as Director of the Merchant signed a contract with the third-party verifier, Tropo-com
  - on 12 January 2018, Mr Hodes in his capacity as Director of the Merchant signed a contract with the third-party verifier, Square 1 Communications (Pintegrity)
  - on 3 October 2018, Mr Hodes personally responded to the PSA's informal enquiry document, providing key information about the Service and the Merchant
  - on 23 November 2018, Mr Hodes personally responded to the PSA's allocation notification email, addressing the initial concerns raised about the Service and seeking clarification on matters related to a potential withhold of Service revenue
  - on 29 March 2021, Mr Hodes in his capacity as a person with an interest, officially signed a registration of charge, thereby providing security to a lender
  - on 20 December 2021, Mr Hodes in his capacity as director, officially served notice that the Merchant be wound up through a Creditors Voluntary Liquidation.
18. Mr Hodes did not attend the paper-based hearing, however, the Tribunal noted Mr Hodes' response email dated 8 September 2022. Within the response email, Mr Hodes made no representations as to whether he was an associated individual or not.
19. The liquidators for the Merchant informed the PSA that: *"...a response will not be provided by this office with regards to the Enforcement Notification (re: Potential Prohibition of an Associated Individual), which has been issued with regards to the director, Mr Darren Hodes."*
20. The Tribunal considered the evidence submitted by the PSA and in particular considered the documents from Companies House. The Tribunal noted that Mr Hodes was listed as the Company Secretary and the Company Director. The Tribunal also had regard of the Oral Hearing that had taken place 9 – 10 December 2020 and noted the submission made by the Merchant that Mr Hodes had been solely responsible for the Service and referred to the operation of the Service as a 'one man band'.
21. Overall, the Tribunal was satisfied, on the balance on probabilities, that Mr Hodes was an associated individual.

### Knowing involvement

22. The PSA relied upon key events to evidence the submission that Mr Hodes was knowingly involved when the Merchant was operating non-compliantly and the breaches of Code 14 arose.
23. As the primary contact, the PSA submitted that Mr Hodes was, at the time the breaches of Code 14 occurred, responsible for the oversight of the company affairs and ensuring that the company was properly managed, including complying with Code 14.

24. The Executive relied upon the following early events to demonstrate that Mr Hodes was aware that the Service was operating non-compliantly and had knowing involvement in the Service operating in breach of Code 14:
- Mr Hodes received the Executive's informal enquiry document on 20 August 2018 and responded to it on 3 October 2018
  - Mr Hodes received the allocation notification email and first direction for information (financial information) on 15 November 2018 the former document outlined the initial concerns the PSA had with the service. The PSA also noted Mr Hodes response of 23 November 2018 in which he commented on each of the initial concerns raised by the Executive.
25. The PSA submitted that throughout the investigation conducted between 20 August 2018 and 28 February 2020, Mr Hodes and/or his appointed solicitors corresponded with the PSA in relation to the operation and promotion of the Service.
26. Correspondence received and responded to by Mr Hodes and/or his solicitors included:
- informal enquiry sent to the Merchant on 20 August 2018 which was responded to on 3 October 2018
  - the first formal direction for information sent with the allocation notification email to the Merchant on 15 November 2018. This was partially responded to on 7 December 2018.
  - the interim warning notice sent to the Merchant on 12 December 2018 which was responded to on 14 December 2018
  - the interim measures review application submitted by the Merchant on 21 December 2018
  - the second formal direction for information sent on 14 February 2019 which was responded to on 25 February 2019
  - the third formal direction for information sent on 21 March 2019 which was responded to on 15 April 2019
  - the interim measures review application submitted by the Merchant on 31 May 2019
  - the fourth formal direction for information sent on 16 July 2019 which was responded to on 1 August 2019 and 6 August 2019
  - the fifth formal direction for information sent on 23 August 2019 which was responded to on 11 September 2019
  - the sixth formal direction for information sent on 30 September 2019 which was responded to on 7 October 2019
  - correspondence submitted by the Merchant on 5 November 2019 and 6 December 2019
  - the Warning Notice issued to Mr Hodes which raised breaches against the Merchant, dated 28 February 2021
  - the Merchant's application for the case to be heard as an oral hearing.
27. The PSA also relied on the witness statement of Mr Hode, which was included in the documentation prepared by the Merchant, in readiness for the oral hearing. The statement was signed by Mr Hodes in his capacity as the Company Director and addressed the eight breaches raised by the PSA in the warning notice.

28. The PSA asserted that within the body of the statement, Mr Hodes provided evidence that demonstrated his knowledge of the non-compliant Service that was being operated by the Merchant. The PSA relied on the following specific points raised by Mr Hodes within that evidence to demonstrate knowing involvement:

- with respect to Breach 1, Mr Hodes stated that *“I have provided all data that I have been asked for relating to consent to charge. I have provided logs from my own system which have been ignored. I have provided contacts for both PIN providers (external opt-in verification companies) who have both provided reports and access to their systems...”*
- with respect to Breach 2, Mr Hodes stated that *“After this allegation was made, screenshots of the web pages visitors saw were provided...”* and that *“There is zero evidence that this breach has occurred. All evidence provided supports the fact that sufficient information was displayed to all customers prior to their opt-in.”*
- with respect to Breach 3, Mr Hodes stated that *“As soon as the PSA brought their concerns to my attention, I immediately played on the side of caution and activated reminders for all customers.”* and that *“the code of conduct I was following was unclear at the time, but no customer harm has been caused by the lack of clarity.”*
- with respect to Breach 4, Mr Hodes stated that *“I have provided that information, then the PSA has argued that I didn’t provide further detail, beyond what was actually asked for.”* and that *“I am required to provide only what was specifically asked for in the requests, and I have done that in every case.”*
- with respect to Breach 5, Mr Hodes stated that *“The matter of message logs being unclear left me between a rock and a hard place.”* and that *“I made the decision to take the first path and send the data exactly as it appeared in the database.”*
- with respect to Breach 6, Mr Hodes stated that *“I maintain that the detailed finances of my company are private information and the partially redacted documents I provided were perfectly sufficient for the PSA’s purposes.”*
- with respect to Breach 7, Mr Hodes stated that *“This was nothing more than a minor administrative oversight.”* and that *“As soon as I was made aware of the problem, I made the renewal payment and offered to backdate the amount.”*
- with respect to Breach 8, Mr Hodes stated that *“This is a technical breach for which the PSA has not demonstrated any consumer harm.”*

29. The PSA outlined that Mr Hodes had attended both the oral hearing and the review hearing on behalf of the Merchant to provide evidence in line with the contents of his witness statement and was cross examined during the oral hearing, Mr Hodes also addressed the eight breaches raised by the PSA in the warning notice.

- with respect to Breach 1, the PSA noted Mr Hodes’ submissions that the discrepancies with the subscriber figures and verified PIN figures *“were largely explained by the migration of subscribers from one shortcode to another”* and that he

was unable to explain a further discrepancy in his written witness evidence or under cross-examination.

- with respect to Breach 2, the PSA noted that Mr Hodes argued that the examples were sufficiently prominent and proximate and did comply with the guidance.
- with respect to Breach 3, the PSA noted that Mr Hodes said that he had read the Sector Specific Guidance Note on Subscription Services in force at the time. The PSA further noted that Mr Hodes suggested that paragraph 4.4 of the Guidance had led him to believe that alert services were not 'subscription services'.
- with respect to Breach 4 and the Direction answers provided on 25 February 2019, the PSA noted that Mr Hodes accepted that read in this context the answers appeared misleading.
- with respect to Breach 5 and the text message logs supplied, the PSA noted that Mr Hodes "*knew they were misleading, because they contained the send reminders which appeared to have been marked as sent*". The PSA further noted that Mr Hodes was forced to accept in cross-examination that there was an obvious third way on the scenario he presented. He could have sent the unedited message logs with an accompanying explanation that would help the PSA understand what they showed. He accepted that he probably should have done that.

30. The PSA submitted that the evidence provided by Mr Hodes, both in writing and orally, demonstrates his direct knowledge of the way in which the Merchant was operating that gave rise to the breaches of Code 14 and that it was clear that Mr Hodes was made directly aware of the potential non-compliance issues and breaches identified by the PSA.

31. The PSA concluded its submissions by stating that Mr Hodes had direct responsibility for overseeing the business and the way in which the Service was operated, as demonstrated by his responses, witness statement and oral evidence at the Oral Hearing. Taken together, the PSA asserted that this evidenced that Mr Hodes was knowingly involved.

32. The PSA submitted that Mr Hodes was an associated individual with knowledge of the series of breaches of Code 14, that were upheld and considered overall to be 'very serious' by a Tribunal, and therefore was knowingly involved in the non-compliant conduct from 2 March 2018 to when the service ceased in the final quarter of 2020.

33. Mr Hodes did not attend the paper-based hearing, however, the Tribunal noted Mr Hodes' response email dated 8 September 2022. Within the response email, Mr Hodes made no representations as to whether he was knowingly involved.

34. The liquidators for the Merchant informed the PSA that: "*...a response will not be provided by this office with regards to the Enforcement Notification (re: Potential Prohibition*

of an Associated Individual), which has been issued with regards to the director, Mr Darren Hodes.”

35. The Tribunal considered the evidence submitted by the PSA and found that it demonstrated Mr Hodes’ knowing involvement the series of breaches of Code 14 found to be proven during the hearing that took place on 9 and 10 December 2020. The Tribunal found that the evidence presented by the PSA’s demonstrated that Mr Hodes had the requisite knowledge, and furthermore, had intimate knowledge of the wrongdoing. The Tribunal found that it would have been impossible for Mr Hodes to not have been knowingly involved, taking into consideration the way in which he operated the Service. In addition, the Tribunal noted that Mr Hodes’ response email dated 8 September 2022, did not deny knowing involvement.
36. The Tribunal was satisfied on the balance of probabilities that Mr Hodes was knowingly involved in a series of breaches of Code 14.

### Sanction

37. The PSA recommended that Mr Hodes should be prohibited from providing, or having any involvement in, any premium rate service in the UK for a period of five years from the date of publication of this decision. The PSA asserted that this was a proportionate outcome due to the severity of the breaches that had been upheld in the previous adjudication.
38. Mr Hodes requested for the commencement date of any prohibition to be the date he stated the premium rate services ceased. However, the Tribunal noted that there was no provision for this within Code 15 and the accompanying Procedures.
39. The Tribunal also considered the revision of the sanctions that had taken place during the Review adjudication and considered in their initial assessment, whether this led to a reduction in recommended period of five years.
40. The Tribunal initially questioned whether the recommendation from the PSA was fair and proportionate. However, the Tribunal also considered Mr Hodes’ action post the review adjudication and in particular noted Mr Hodes’ response dated 8 September 2022, in which Mr Hodes stated “*Although maintaining that all breaches brought against TCS Combined Solutions Limited were incorrect and the sanctions imposed were unproportionate in their severity...*”. The Tribunal considered, at length, whether the remorse and insight referred to in the review adjudication was genuine and had particular regard for the new information before them.
41. The Tribunal concluded that the remorse and insight was somewhat self-serving and disingenuous, taking into consideration the email response of 8 September 2022. The Tribunal also reflected on the upheld breach of paragraph 4.2.2 of Code 14 which involved deliberate concealment by Mr Hodes. the Tribunal found that this breach in particular was very serious as the concealment of the shortcodes inhibited the regulator’s ability to regulate and demonstrates a fundamental disregard for the Code. The suggestion on the part of Mr Hodes, that this breach was somehow incorrect, was

of concern to the Tribunal and demonstrated the need for a deterrent effect on Mr Hodes individually.

42. The Tribunal also noted that Mr Hodes played a substantial role in the operation of the Services and was a significant figure in the corporate entity that was the Merchant. This was balanced against the submission of Mr Hodes that he had left the PRS market.
43. The Tribunal decided (unanimously) to prohibit Ms Hodes from providing, or having any involvement in, any premium rate service in the UK for a period of five years. The Tribunal considered that such a prohibition was appropriate, proportionate and justified due to the proven conduct of the Merchant and the Tribunal's finding that Mr Hodes was knowingly involved in the same. The Tribunal took into account the deterrent effect of the sanction and the need to ensure that such non-compliant conduct would not be repeated by Mr Hodes.

Administrative charge recommendation: 100%