

## Tribunal meeting number 298

Case reference: 193951

Case: Prohibition of an associated individual

This case was brought against an 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 Adrian Smith pursuant to paragraph 5.8.5(g) of the Code.

### Background

1. The case related to a previous adjudication against Moblix Media Limited (the “Merchant provider”) (case reference: 189274). The case involved a subscription alert service and was adjudicated on 24 November 2021. The Tribunal that considered the case on 24 November 2021 recommended the prohibition of Mr Smith, a director of the Merchant provider and contact on the Phone-paid Services Authority’s (“PSA”) Registration Scheme for the Merchant provider.
2. The Merchant provider operated a text alert subscription service called “f(b) Friday” that operated on shortcode 84222 (the “Service”). The PSA received a total of 311 complaints concerning the Service from May 2018. Of the 311 complaints, 220 complaints were linked to a technical issue which resulted in 25,770 consumers being overcharged on 25 September 2020 and 91 complaints were received prior to the technical issue, alleging that they had not signed up to the Service or not agreed to be charged for the Service.
3. The Service operated on all mobile network operators.
4. The Intermediary provider, Tap2Bill Limited, indicated that the Service had been in operation for nearly eight years and the Merchant provider confirmed that the Service was suspended on 25 September 2020.
5. On 24 November 2021, the Tribunal considered whether the Service operated by the Merchant provider breached the Code. The Tribunal upheld the following breaches:
  - Breach 1 Rule 2.3.3 – Consent to charge
  - Breach 2 Rule 2.3.3 – Consent to charge (in relation to a technical issue occurring on 25 September 2020)
  - Paragraph 4.2.3 – Failure to disclose in response to a direction
  - Paragraph 4.2.2 – Provision of false or misleading information
6. The Tribunal considered the case to be very serious overall and imposed the following sanctions:
  - a formal reprimand
  - a prohibition on the Provider from providing, or having any involvement in, any premium rate service for a period of five 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 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 £900,000.
7. The Tribunal also proposed payment of 100% of the administrative costs by the Provider and the prohibition of Mr Smith.

### Code provisions

8. The relevant provisions of the Code relating to Mr Smith's potential prohibition include:

Paragraph 5.8.5 of the Code 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 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."*

9. As the relevant edition of the Code in force at the time of the recommendation of Mr Smith's prohibition was Code 14, the relevant Code 14 provisions include:

Paragraph 4.8.3 of Code 14 provides:

*"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 Code 14 provides:

*“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**

10. The Tribunal considered whether the PSA had made all reasonable attempts to notify Mr Smith and the Provider, 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 the consideration of the matter on the papers. The Tribunal was satisfied, on the evidence presented to it, that Mr Smith had been notified.
11. The PSA had attempted to contact Mr Smith using all the contact details Mr Smith had previously provided to the PSA, held on the PSA system. The PSA had also used the contact details of the liquidator involved in the Provider’s affairs.
12. On the 8 and 21 February 2023 the liquidator confirmed that the relevant documentation pertaining to the prohibition, sent by the PSA, had been passed to Mr Smith. The notification of the Tribunal Hearing was sent to the liquidators on 11 April 2023, and they confirmed that they would pass the documentation on to Mr Smith.
13. The Tribunal noted that the Provider was in liquidation and the PSA had provided copies of the relevant documentation to the liquidators, which they felt was over and above what was required. Confirmation was subsequently received from the liquidators that they had passed this information on. The Tribunal were satisfied that paragraph 5.8.12 of the Code had been complied with.

### **Proceeding in absence**

14. In light of the evidence provided, the Tribunal was satisfied that, in all the circumstances, it was fair to proceed with the hearing in the absence of Mr Smith.

## **Submissions**

15. The PSA considered the available evidence and applying the relevant provisions of the Code, submitted that Mr Smith was an associated individual who was knowingly involved in a series of breaches and should be prohibited.

## Associated individual

16. The PSA submitted that Mr Smith was an associated individual as he was a director of the company and had day to day responsibility for the conduct of the Merchant provider. This was evidenced by the following:

- Mr Smith was a director of the Merchant provider from 6 August 2013 to present – as evidenced on Companies House and CreditSafe records relating to the Merchant provider. The PSA notes that the Intermediary provider advised the PSA in October 2020 that the Service had commenced nearly eight years previously and that the first complaint considered by the Merchant provider dated from May 2018.
- Mr Smith is one of two shareholders of the Merchant provider, holding 50% of the shares. This is evidenced by the CreditSafe report for the Merchant provider.
- Mr Smith is listed at Companies House as an Individual Person with Significant Control at the Merchant provider. This is evidenced by the Companies House Notice of Individual Person of Significant Control form.
- Mr Smith is listed as one of two contacts for the Merchant provider on the PSA's registration database
- in the contract dated 30 August 2011 between the Merchant and the Intermediary provider, Mr Smith is listed as the sole contact under contact details for account manager and the sole contact for the Merchant provider under contact details in appendix D of the contract.
- on 16 October 2020, Mr Smith personally responded to the PSA's initial direction for information, providing key information about the Service and the Merchant provider
- on 6 January 2021, Mr Smith personally responded to the PSA's second direction for information, providing further information about the Service and details of the technical incident which had prompted the PSA to open the investigation into the Merchant provider
- on 18 February 2021, Mr Smith personally responded to the PSA's third direction for information, providing further information about the Service and details of the technical incident
- on 2 August 2021, Mr Smith personally responded to the Enforcement Notice, containing details of the apparent breaches as identified by the PSA in its investigation into the Merchant provider
- on 2 August 2021, Mr Smith submitted a PSA Request for Informal Representation form with the response to the Enforcement Notice. Mr Smith attended the Tribunal on 24 November 2021 and made representations on behalf of the Merchant provider.

17. Finally, the PSA drew the Tribunal's attention to the following, which demonstrates that Mr Smith had a high level of responsibility within the Merchant provider which gives rise to his knowledge of the breaches:

- on 14 September 2021, Mr Smith in his capacity as director, chaired a general meeting of the Merchant provider which passed resolutions winding up the Merchant provider.

18. The Tribunal considered the evidence and submissions provided by the PSA. The Tribunal considered Mr Smith's position and noted that he was a Director of the Provider and therefore fell within the definition of an associated individual provided for within the Code.

19. The Tribunal was therefore satisfied, on the balance of probabilities, that Mr Smith was an associated individual.

### **Knowing involvement**

20. The PSA relied upon key events which evidenced that Mr Smith was knowingly involved when the Merchant provider was operating non-compliantly and the breaches of the Code arose.

21. The PSA submitted that Mr Smith was, at the time the breaches of Code 14 occurred, responsible for the oversight of company affairs and ensuring that the company was properly managed, including complying with the PSA's Code. This is because he was listed as a contact on the PSA's Registration Scheme for the Merchant provider, as a director and Individual Person with Significant Control of the Merchant at Companies House and was listed as the sole named contact in the contract with the Intermediary provider both as account manager and for technical matters.

22. Below are the early events which demonstrated that Mr Smith was aware that the Service was operating non-compliantly and had knowing involvement in the Service operating in breach of the PSA Code:

- Mr Smith received the Intermediary provider's notification that it had identified an apparent technical issue with the Service, which required urgent investigation on the part of the Merchant provider. The notification was issued on 25 September 2020 and Mr Smith responded to it on 26 September 2020.
- Mr Smith received the first PSA direction for information on 6 October 2020 – the document outlined the concerns the PSA had with the technical issue that occurred on 25 September 2020. The PSA also notes Mr Smith's response of 16 October 2020 in which he responded to the PSA's questions concerning the technical issue.
- The PSA asserts that Mr Smith was aware the Merchant provider may have been operating in non-compliance with the Code.

23. Throughout the investigation conducted between 6 October 2020 and 24 November 2021, Mr Smith corresponded with the PSA in relation to the operation and promotion of the Service. Correspondence received and responded to by Mr Smith include:

- the first direction for information sent to the Merchant provider on 6 October 2020, which was responded to on 16 October 2020
- the second direction for information sent to the Merchant provider on 16 December 2020, which was responded to on 6 January 2021
- the third direction for information sent to the Merchant provider on 9 February 2021, which was responded to on 18 February 2021
- the Enforcement Notice issued to the Merchant provider on 1 July 2021, in which the PSA raised breaches of the Code in relation to the operation of the Service and the conduct of the Merchant provider, which Mr Smith responded to on 2 August 2021
- Mr Smith's attendance at the Tribunal on 24 November 2021
- Mr Smith responded to the Enforcement Notice and addressed the four breaches raised by the PSA in the Enforcement Notice.

24. Within the Enforcement Notice response, Mr Smith provided evidence that demonstrates his knowledge of non-compliant Service that was being operated by the Merchant provider. The Enforcement Notice response is annexed at pages 186-232, but the PSA relies on the following specific points raised by Mr Smith within that evidence to demonstrate knowing involvement:

- with respect to breach 1 (Consent to charge), Mr Smith stated that *"I have no access to the original data source, which I have explained to you in reply to numerous request from yourselves. I have tried to provide the information you require, but unfortunately this is no longer available. If it were, then I would now not consider it reliable."*
- with respect to breach 2 (Consent to charge - in relation to a technical issue occurring on 25 September 2020), Mr Smith stated that *"The Incident of September 2020 was not intentional. Having worked in the industry an incident such as this is not possible to legitimately replicate or benefit from. The error occurred due a technical code change that resulted in corruption of data, this corruption also resulted in data contamination from those legitimately opted in and those on a marketing database. This was made clear to the Executive."*
- with respect to breach 3 (failure to disclose information requested), Mr Smith stated that *"Moblix Media complied with every question the Executive asked. Moblix has not withheld any information. Given the effects of COVID on our web developers we could not replicate the site. With the illegal actions of Mr Holt, no data was recoverable, Microsoft state a 180-day retention policy; from Dec 2019 to September*

*2020 this is approx. 280 days. Since I gained full control of the IT Company in May 2021 it is apparent that Mr Holt and his team deleted all data relating to the Moblix Service on December 15th 2019. Servers holding data were deleted and any potential back ups were deleted on the same day. As a result of the Whistle Blowers illegal actions Moblix Media and the IT COMPANY holds NO data.”*

- with respect to breach 4 (provision of false information), Mr Smith stated that *“From reviewing the information provided by the Executive, I Adrian Smith have been fully compliant with providing the information where possible. From the dates mentioned and the information received it is clear that Ali M responded. As in my supplementary evidence it is apparent that Ali M and Mr Holt saw to benefit financially from their collaboration. Since the removal of Ali M, Moblix Media has complied with every question the Executive has asked. Adrian Smith has not withheld any information. Given Moblix Media has no data to investigate after the deletion by Mr Holt and the removal of employment for Ali M, I cannot review any message logs. Mr Holt also removed email access together with the deletion of all historical email data.”*

25. Mr Smith also attended the Tribunal on behalf of the Merchant provider to make oral representations on the content of the Enforcement Notice response he made on behalf of the Merchant provider.

26. During Mr Smith’s oral representations at the Tribunal, he addressed the four breaches raised by the PSA in the Enforcement Notice.

- with respect to breach 1, the PSA noted Mr Smith stated that the discrepancies between the Intermediary providers message logs and the logs supplied by the Merchant provider were attributable to the use by the Merchant provider of another aggregator in order to send the MO keyword messages. The Merchant provider indicated that for this reason, the Intermediary provider’s logs would not show copies of the MO keyword messages that had been sent in by consumers.
- with respect to breach 2, the PSA noted Mr Smith explained that Moblix did not deny that the technical issue had occurred but explained that this had not been done deliberately
- with respect to breach 3, the PSA noted that Mr Smith stated in his response to the Enforcement Notice that he had provided all the information that he could and that the whistleblower had deleted all data of the Service and that data held after the deletion was subject to a Microsoft retention policy which only kept data for 180 days
- with respect to breach 4, the PSA noted that Mr Smith added that the MO messages were missing from the intermediary provider’s logs as a third aggregator had been used. The merchant provider explained that it was for this reason that the message logs appeared to be different. The merchant provider concluded by submitting that it had done its best to provide full and accurate information to the PSA and that any issues were as a result of the actions of the Whistleblower as

opposed to any deliberate attempt on the merchant provider's part to mislead the PSA.

27. The Tribunal considered the merits of the points raised by Mr Smith and dismissed them. In particular the Tribunal stated:

- in relation to breach 1, the Tribunal was of the view that even if some of the data had been destroyed or corrupted as described by Mr Smith, this did not explain why the Intermediary provider's message logs demonstrated that consumers had been overcharged for the service and that there was sufficient evidence to find the breach proved on the balance of probabilities.
- in relation to breach 2, the Tribunal was of the view that there was clear undisputed evidence that consumers had been overcharged as a result of the technical error and that these affected consumers had not consented to be charged for the Service
- in relation to breach 3, the Tribunal was of the view that even if some of the evidence that had been requested by the PSA was no longer available, the Level 2 provider should have been able to provide some of the other evidence such as correspondence, invoices and more details, but that it had failed to do so
- in relation to breach 4, the Tribunal noted that even if inaccurate information had been provided by another individual to the Merchant provider, it remained a responsibility on the Merchant provider, of whom Mr Smith was an associated individual, to provide accurate information. In addition, the Tribunal noted that at no stage did Mr Smith inform the PSA that the information supplied may not be accurate.
- notwithstanding the merit of any points raised by Mr Smith, both in writing and orally, the evidence set out above clearly demonstrated his direct knowledge of the behaviour that gave rise to the breaches of the Code i.e., the way in which the Merchant provider was operating, the circumstances surrounding the technical incident that occurred and the nature of information provided to the PSA throughout the investigation into Moblix Media Limited.

28. The Tribunal considered the evidence and submissions provided by the PSA. The Tribunal acknowledged the fundamental flaws that existed in the Provider's business model that led to the non-compliance. In the absence of any argument from Mr Smith, the Tribunal found it difficult to consider how Mr Smith was not knowingly involved in the non-compliance.

29. The Tribunal noted the nature of the breaches that had been proven on 24 November 2021 and found that the findings of intention demonstrated that Mr Smith had the level of knowledge and involvement required to satisfy the test.

30. The Tribunal was satisfied, on the balance of probabilities, that Mr Smith was knowingly involved in a series of breaches of Code 14.

## Sanction

31. The PSA recommended that Mr Smith 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 proportionate taking into consideration the severity of the breaches that had been upheld.
32. The Tribunal considered whether, in all the circumstances, the recommendation from the PSA was appropriate and proportionate. The Tribunal found that the length of time that the Provider had operated non-compliantly, coupled with the findings of intention led it to be appropriate to impose the prohibition.
33. The Tribunal decided (unanimously) to prohibit Mr Smith from providing, or having any involvement in, any premium rate service in the UK, and to do so for a period of five years, taking into consideration the severity of the breaches upheld against the Provider and the need to protect the public from harm in the future.

Administrative charge recommendation: 100%.