

## Tribunal meeting number 297

Case reference: 193709

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 Matthew Penny pursuant to paragraph 5.8.5(g) of the Code.

### Background

1. The Tribunal has been asked to consider imposing a prohibition against Mr Matthew Penny, pursuant to paragraph 5.8.5(g) of the Code.
2. The case related to a previous adjudication against Embill Services Limited (case reference: 187522) (“the Provider”). The previous adjudication involved a sexual entertainment service and was adjudicated on 18 January 2022. The Tribunal that considered the case on 18 January 2022 recommended the prohibition of Mr Penny, the primary contact on the PSA’s Registration Scheme and sole director of the Provider.
3. The Provider operated a pre-recorded sexual entertainment service under the brand name “Girls Next Door” (the “Service”). The Service operated on fixed line 09 number ranges across two separate value chains. The PSA received a total of 25 complaints concerning the Service from June 2020 to December 2020.
4. The Service first commenced operation on 11 June 2020. The Provider contracted with Telecom 2 Limited (“Value chain 1”) using two number ranges. The Provider also ran the same Service on two number ranges provided by Square 1 Communications Limited (“Value chain 2”). Both number ranges were disconnected by December 2020. Both Network operators disconnected the Service due to issues of non-compliance.
5. On 18 January 2022, the Tribunal considered whether the Service operated by the Provider breached the 14<sup>th</sup> edition of the Code of Practice (“Code 14”). The Tribunal upheld the following breaches:
  - Code 14 - 2.3.2 - Fairness
  - Code 14 - 2.3.7 - Fairness
  - Code 14 - 2.4.2 - Privacy
  - Code 14 - 4.2.2 - Obligations of Providers of premium rate services
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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 £500,000.
7. The Tribunal also proposed payment of 100% of the administrative costs by the Provider and the prohibition of Mr Penny.
8. On 16 February 2022, the Provider applied for a Review of the Tribunal's decision. The Chair of the Code Adjudication Panel rejected all grounds detailed in the Review application and refused the application.

### Code provisions

9. The relevant provisions of the Code relating to Mr Penny'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.”*

10. As the relevant edition of the Code in force at the time of the recommendation of Mr Penny'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

11. The Tribunal considered whether the PSA had made all reasonable attempts to notify Mr Penny 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 consideration of the matter on the papers. The Tribunal was satisfied, on the evidence presented to it, that Mr Penny had been notified.
12. On 14 December 2022, the PSA emailed the formal notification to Mr Penny detailing the Tribunal's decision that it was minded to prohibit him as an associated individual under the Code. Mr Penny confirmed receipt. On 10 January 2023, the PSA emailed Mr Penny the relevant document pertaining to the prohibition. Mr Penny was given until 24 January 2023 to respond.
13. On 26 January 2023, having received no response, the PSA sent another copy of the relevant documentation to Mr Penny. This was sent by courier and the PSA received confirmation of delivery. On 27 February 2023, the PSA contacted Mr Penny via telephone, using the number on the PSA's database, and Mr Penny confirmed that he did not wish to engage any further in the proceedings.
14. The Tribunal concluded that Mr Penny knew of the proceedings and the hearing and had been provided with an opportunity to make representations.
15. The Tribunal noted that the Provider was in liquidation and the PSA had provided copies of the relevant documentation to the liquidators, as well as to Mr Penny. Moreover, the liquidator had confirmed that it had also passed on the PSA material to Mr Penny.

16. The Tribunal was satisfied that paragraph 5.8.12 of the Code had been complied with.

### **Proceeding in absence**

17. 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 Penny.

### **Submissions**

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

### **Associated individual**

19. The PSA submitted that Mr Penny was an associated individual as he was the sole director and had day-to-day responsibility for the conduct of the Provider. The PSA stated that this was evidenced by the following:

- Mr Penny had been the sole director of the Provider from 17 March 2020 to present – as evidenced on both Companies House records and Creditsafe information relating to the Provider
- Mr Penny was the sole shareholder (100%) and the person with significant control for the Provider
- in Mr Penny's statement dated 18 January 2022 (read to the Tribunal during the hearing on the same date) he stated: *'I started the Company in early 2020'*
- on 7 May 2020, Mr Penny registered the Provider on the PSA's registration database with himself as the primary contact. Mr Penny declared his role within the company as Director.
- on 24 April 2020, Mr Penny in his capacity as Director of the Provider signed a contract to operate premium rate services with the Network operator, Telecom 2
- on 14 April 2020, Mr Penny in his capacity as Director of the Provider signed a contract to operate premium rate services with the Network operator, Square1 Communications Limited
- on 12 January 2018, Mr Penny in his capacity as Director of the Provider, signed a contract with the affiliate marketer Mobile Ads Prvt Ltd (Adzmedia)
- on 8 July 2020, Mr Penny personally responded to the PSA's Informal Enquiry document, providing key information about the Service and the Provider
- on 10 August 2020, Mr Penny personally wrote to the PSA asking for compliance advice regarding the Service

- Mr Penny personally responded to all three of the PSA Directions requested during the investigation for the underlying case
- Mr Penny also responded to all requests for further information regarding 24 individual complainants
- on 2 February 2021, in response to the PSA's allocation notification, Mr Penny personally requested the case be downgraded to a Track 1 procedure. Throughout the correspondence Mr Penny often refers to himself in a manner that suggests he has sole control over the day-to-day operation of the business, for example: *"In the very early stages of promotion I was new to this industry and I signed to work with some professional marketing businesses to work with me and help grow my business. I sought advice from people who understood this industry far more than me and I received some fantastic support and help from our network operator partners as well."* and *"In summary then, I would ask that as a young person, who has entered this industry for the first time and keen to learn further, that my investigation can be downgraded to a track 1 which I understand is possible, and so we can work to an action plan that allows me to work with you and ensure I continue operating in a compliant manner. No consumers have been financially disadvantaged at all. We stopped the promotion very early on and terminated the agreement with the marketing partner (after following a thorough due diligence process) and proceeding to a track 2 enforcement would ultimately be fruitless, as financially there are no monies to pay any fines or administration charges and I have no assets."*
- finally, the PSA drew the Tribunal's attention to the following, which demonstrated that Mr Penny had a high level of responsibility within the Provider company which gave rise to his knowledge of the breaches:
  - on 24 June 2022, Mr Penny signed in his capacity as Director the statement of affairs
  - on 30 June 2022, Mr Penny in his capacity as Director, officially served notice that the Provider be wound up through a Creditors Voluntary Liquidation.

20. The PSA submitted that there was no evidence any other individual was involved in the day-to-day operation of the Provider. Further, the PSA submitted that Mr Penny had full control over all parts of the business throughout its lifetime and there was no evidence the Provider had any other employees.

21. The Tribunal considered the evidence and submissions provided by the PSA, and in particular the evidence that Mr Penny was the primary contact and person responsible for all company affairs. The Tribunal noted that Mr Penny was the sole director and shareholder. He had duties as the sole Director, which included the Provider's compliance regulatory requirements.

22. The Tribunal also noted that Mr Penny had responded to the PSA's enquiries and that he had contacted the PSA for compliance advice. The Tribunal also had regard to the

hearing that had taken place on 18 January 2022 and noted the submissions made by Mr Penny on behalf of the Provider.

23. Overall, the Tribunal was satisfied, on the balance of probabilities, that Mr Penny was an associated individual. They found that Mr Penny clearly satisfied the test as he had full control over the Service, notwithstanding his previous assertions regarding the role of affiliate marketers.

### Knowing involvement

24. The PSA relied upon key events to evidence that Mr Penny was knowingly involved when the Provider was operating non-compliantly and the breaches of Code 14 arose.
25. As the primary contact, the PSA submitted that Mr Penny 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.
26. The PSA relied upon the following events to demonstrate that Mr Penny was aware the Service was operating non-compliantly and had knowing involvement in the Service operating in breach of Code 14:
- the Service commenced on 19 June 2020 and the first complaint from a member of the public was received 28 June 2020. This was sent to the Provider and Mr Penny personally responded. The complaint highlighted that the complainant had received an unsolicited promotional SMS message that stated they had received a Zoom voicemail and that it would cost £6 to retrieve it.
  - the PSA continued to receive complaints regarding unsolicited promotional text messages from complainants telling them that they had received a “Zoom voicemail” or “voicemail”. Mr Penny responded to all the further requests for information.
  - on 1 July 2020, Mr Penny received the PSA’s informal enquiry document and monitoring evidence (demonstrating the PSA’s concerns that the Service was operating non-compliantly). Mr Penny responded to it directly on 8 July 2020, providing key information about the how the Service (and Provider) operated.
  - Mr Penny received the allocation notification on 1 February 2021 - this outlined the initial concerns the PSA had with the service. Mr Penny responded on 2 February 2021. The PSA asserted that it was clear from this correspondence that Mr Penny was knowingly involved because he addressed at length each of the concerns raised by the PSA and his opinions on why these should be mitigated to a Track 1 procedure.
  - on 10 August 2020, Mr Penny contacted the PSA requesting compliance advice - he provided detailed information about the Service, including that stating the word “voicemail” was used in promotional SMS messages. The PSA responded with a standard approach and requested further promotional information from

Mr Penny. However, the PSA did highlight a recommendation to review the “promoting premium rate services” and “privacy” guidance and specifically stipulated the following: *“Whilst we are unable to give compliance advice at this stage we have noted that the promotional method and marketing will need to make clear to the consumer that they are opting-in to a paid premium rate service – based on the information you have provided so far there may be a risk of consumers being misled if they are not made fully aware that the ‘voicemail’ they have a link to is a premium rate adult service, particularly as retrieving a ‘voicemail’ is not ordinarily associated with any charge. It is also not immediately clear from the information you have provided as to when the consumer is provided with information on pricing.”* Despite the PSA asking for further information, Mr Penny did not respond. The Provider chose not to listen to the advice and continued to use the word “voicemail” in promotional material despite the advice provided.

- Mr Penny personally responded to the Warning Notice and in response to breach 1, Mr Penny admitted in part the apparent breach and specifically stated *“I accept we retained the use of the word voicemail...”*. The Tribunal’s decision states: *“The Tribunal considered that the breach was committed intentionally or recklessly taking account of the continued use of the word voicemail despite the compliance advice received from the Executive”*. Mr Penny was made aware through the compliance advice provided that the continued use of the word “voicemail” created a risk that consumers could have been misled but continued with its use. The PSA asserted that this demonstrated Mr Penny’s knowing involvement of the breach.
- In relation to breach 2, the PSA highlighted that Mr Penny was aware of the content of the pre-recorded audio files as he personally supplied them to both Telecom 2 and Square 1 Communications. The PSA asserted that this demonstrated Mr Penny would have been aware that the audio messages stated that users had to be over 16 years of age rather than 18.
- Mr Penny responded to breach 2 and agreed to the breach in part he stated: *“I agree that this was incorrect and was an error, but this was administrative and not deliberate. There is nothing to be gained by offering Adult services to people who may be underage...”*
- In relation to breach 3, this was denied by the Provider who tried to put the responsibility on affiliate marketers. In his statement to the Tribunal, however, Mr Penny also stated that consumers had likely forgotten that they had consented to marketing. The Tribunal found that the Provider was responsible for ensuring that robust evidence of consent to market was made available and retained, but none had been provided. The PSA asserted that the statements made by Mr Penny demonstrated that he was aware that consumers needed to consent to receive marketing, but that he failed to follow the requirements under Code 14 to ensure that evidence of that consent was retained. The PSA therefore further asserted that Mr Penny was knowingly involved in the breach.

27. Breaches 4 and 5 related to paragraph 4.2.2 of the Code which states: “A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to the PSA (either by inclusion or omission).” Both of these breaches were considered by the Tribunal to be very serious. The evidence provided in the Warning Notice was based entirely on the PSA’s correspondence with Mr Penny. The PSA asserted that Mr Penny was alone in acting on the responses and that this demonstrated knowing involvement in the breaches that were found.
28. Mr Penny attended the Tribunal Hearing of the underlying case. He read out a statement dated 18 January 2022. The statement was signed by Mr Penny in his capacity as the company director and addressed the five breaches raised by the PSA in the Warning Notice. The PSA noted the following comments:
29. With respect to breach 1, Mr Penny stated: “On every occasion it was the Affiliate partner that sent the messages – Not the Company. We were the service supplier not the marketing partner. We acted swiftly when notified of the PSA concerns which is exactly what the PSA Executive would expect us to do. We saw they misled consumers and terminated the agreement with them and withheld revenue from them.” However, Mr Penny was also aware that any activity by his affiliates should be controlled via adequate DDRAC (due diligence, risk assessment and control) procedures.
30. With respect to breach 3, Mr Penny stated “On the issue of consent, is it possible for any one of us here, to remember every single company we have supplied consent to marketing to, the date it was done and the method of consent provided? I doubt it. My view is most, if not all of the 24 complainants had forgotten that consent was provided at some point in the previous 12 months. It is also possible that out of the original consent provided, ownership of the MSISDN had changed to someone new. This is not impossible, is totally feasible and also outside of my control.” However, the PSA's case was that the Provider retained responsibility for ensuring that there was robust consent to market regardless of the use of market affiliates. This was accepted by the Tribunal who considered that the Provider had not produced any evidence to support its assertions and found the breach to be very serious. The PSA asserted that the evidence provided by Mr Penny, in writing, demonstrated his direct knowledge of the way in which the Provider was operating that gave rise to the breaches of the Code.
31. The PSA also pointed out that, throughout the Warning Notice response, Mr Penny often referred to himself as acting solely for the Provider and referred to the Provider and himself interchangeably, for example;
- “This is my very first breach and I have not been trading long. This sanction is excessive and it fails to meet any burden of proof.”*
- “I gave a perfectly reasonable analogy why the PSA argument is flawed, however after researching other breaches, it is clear the Tribunal will always side with the PSA”*
- “I could not even afford to pay the administration costs let alone the fine, however as I have mentioned, the PSA has misled the Tribunal, not established an evidential burden of proof and did not investigate professionally or diligently.”*



32. The PSA also asserted that throughout the lifetime of both the Service and the investigation, Mr Penny was the only individual to corresponded with the PSA in relation to the operation and promotion of the Service and issues of potential non-compliance. Correspondence received and responded to by Mr Penny included:
- all responses to requests for information for individual complainants
  - Informal Enquiry sent to the Provider on 1 July 2020 which was responded to on 8 July 2020
  - Mr Penny received the allocation notification on 1 February 2020, this outlined the initial concerns the PSA had with the service. The PSA noted Mr Penny's response of 2 February 2020.
  - the first formal direction for information sent to the Provider on 17 February 2021. This was responded to on 24 February 2021.
  - the second formal direction for information sent on 19 March 2021 which was responded to on 1 April 2021
  - the third formal direction for information sent on 1 July 2021 which was responded to on 7 July 2021
  - Mr Penny also responded to the Warning Notice issued to the Provider and individually addressed the breaches and sanctions, dated 28 February 2021
  - the PSA confirmed that it had not received any correspondence from any other individual on behalf of the Provider.
33. Mr Penny attended the underlying Tribunal hearing on behalf of the Provider. The PSA asserted that Mr Penny was made directly aware of the non-compliance issues and breaches identified by the PSA. The PSA further asserted that Mr Penny had direct responsibility for overseeing the business and the way in which the Service was operated as demonstrated by his responses, actions and his statement - all of which demonstrated that he had direct knowledge of the breaches and was, therefore, knowingly involved within the meaning of the Code.
34. The PSA further asserted that by virtue of holding the position of Director as well as having day-to-day responsibility for the conduct of the Service, Mr Penny was acting as an associated individual when the breaches occurred, in line with the definition provided in paragraph 5.3.9 of Code 14.
35. The Tribunal considered the evidence submitted by the PSA and found that it demonstrated that Mr Penny had knowing involvement in at least one serious breach and, in fact, in a series of breaches of Code 14, found to be proven during the hearing on 18 January 2022. The Tribunal noted that those breaches were all found to be very serious and found that the evidence presented by the PSA, coupled with the Tribunal's findings of 18 January 2022, demonstrated that Mr Penny had the level of knowledge and involvement required to satisfy the test. Among other things, the findings of

“concealment” and the associated level of intent, led to this Tribunal concluding that it would have been improbable for Mr Penny to not have been knowingly involved.

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

### Sanction

37. The PSA recommended that Mr Penny 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 to the severity of the breaches that had been upheld by the Tribunal of 18 January 2022.
38. The Tribunal considered whether, in all the circumstances, the recommendation from the PSA was appropriate and proportionate. The Tribunal found that there was a lack of evidence of any insight and remediation, on the part of Mr Penny, and that that was a relevant factor to take into consideration. The Tribunal took into account that there was a need to provide deterrence and noted that Mr Penny had left the PRS market.
39. The Tribunal decided (unanimously) to prohibit Mr Penny 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 importance of the legitimate aims of the regulatory scheme. The Tribunal concluded that, in all the circumstances, such a prohibition was both appropriate and proportionate, and therefore fair and justified due to the proven conduct of the Provider and the Tribunal’s finding that Mr Penny was knowingly involved in conduct that went to the heart of why the industry falls to be regulated. The Tribunal also considered the need to protect the public and ensure that such non-compliant conduct would not be repeated.

Administrative charge recommendation: 100%.