



Tribunal meeting number 157 / Case 2

Case reference: 37144
Case: Prohibition of an associated individual

THIS CASE WAS BROUGHT AGAINST THE ASSOCIATED INDIVIDUAL UNDER PARAGRAPH 4.8.6 OF THE CODE

BACKGROUND

i) Summary relating to Mr Morten Due

The Tribunal was asked to consider imposing a prohibition against Mr Morten Due pursuant to paragraph 4.8.2(g) of the 12th edition of the PhonepayPlus Code of Practice (the “Code”).

The case related to an adjudication against the Level 2 provider (the “**Level 2 provider**”) Upright Line S.A. (22 August 2013, case reference: 28205), which concerned a breach of the sanctions imposed by an earlier Tribunal (18 April 2013, case reference 11099) and non-payment of the associated administrative charges. The case on 18 April 2013 concerned a competition subscription service (the “**Service**”).

On 22 August 2013, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Morten Due, (an associated individual) pursuant to paragraph 4.8.2(g) of the Code.

The Tribunal considered the following evidence in full:

- The Tribunal decision against the Level 2 provider dated 18 April 2013;
- The Tribunal decision against the Level 2 provider dated 22 August 2013;
- Documentation provided by the Level 1 provider in relation to its due diligence and risk assessment of the Level 2 provider and the Service;
- A contract between the Level 1 provider and Level 2 provider and an Information Provider Undertaking;
- An extract from the PhonepayPlus registration database screenshots for the Level 2 provider;
- A contract between the Level 2 provider and the affiliate marketer for the Service;
- Preliminary investigation correspondence between Mr Morten Due (on behalf of the Level 2 provider) and the Executive;
- The Level 2 provider’s response to the original breach letter dated 11 April 2013;
- Post 18 April 2013 adjudication correspondence with the Level 2 provider and its Consultant;
- The Level 2 provider’s application for a review; and
- Confirmation of delivery of notification of potential prohibition to Mr Morten Due and the Level 2 provider.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent the notification of a potential prohibition to Mr Due and the Level 2 provider on 13 August 2014 but it did not receive a response. The Tribunal was satisfied that, in accordance with paragraph 4.8.6 of the Code, the Executive had made all reasonable attempts to inform Mr Morten Due of the prohibition proceedings. On 4 September 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Due.

ii) Relevant Code provisions



- Paragraph 4.8.2(g) of the Code states:

“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. 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:

“(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 premium rate service or promotion for a defined period.”

- Paragraph 5.3.9 of the Code 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 PhonepayPlus”.

- Paragraph 4.8.6 of the Code states:

“If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing”.

SUBMISSIONS AND CONCLUSIONS

1. The Executive submitted that the following evidence indicated that Mr Due was an associated individual knowingly involved in serious and very serious breaches of the Code, in respect of the adjudications of 18 April 2013 and 22 August 2013.

Adjudication dated 18 April 2013, case reference: 11099

On 18 April 2013, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a quiz competition service that operated on the premium rate shortcodes 64055 and 79910, and via Payforit at a cost of £10 every three days. The Service was promoted using affiliate marketing.

The Executive received 148 complaints from consumers, some of whom stated that they had been misled into accessing Service landing pages and as a result had inadvertently incurred premium rate charges. The Tribunal upheld the following breach of the Code:

- Rule 2.3.2 - Misleading

The Tribunal concluded that the breach of rule 2.3.2 of the Code was serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:



- a formal reprimand;
- a fine of £200,000; and
- a requirement to 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 PhonepayPlus that such refunds have been made.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Adjudication dated 22 August 2013, case reference: 28205

On 22 August 2013, the Tribunal adjudicated against the Level 2 provider for the non-compliance with the sanctions and non-payment of an administrative charge imposed by the Tribunal on 18 April 2013.

The Tribunal upheld the following breaches of the Code:

- Paragraph 4.8.4(b) – Failure to comply with a sanction
- Paragraph 4.10.2 – Non-payment of an administrative charge

The Tribunal concluded that both breaches of the Code were very serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand;
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of five years (starting from the date of publication of the decision) until the breaches are remedied by payment of the fine and original and instant administrative charges, whichever is the later.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Associated individual knowingly involved in a serious and/or series of breaches of the Code

The Executive submitted that Mr Morten Due was an associated individual at the time breaches of the Code occurred and were upheld by Tribunals on 18 April 2013 and 22 August 2013, as he was a director of the Level 2 provider. The Executive relied on a document entitled “Upright Line Due Diligence Record” dated 14 March 2012 and provided by the Level 1 provider. The document identified Mr Morten Due as the director of the Level 2 provider. Accordingly, the Executive submitted that Mr Due, as a director of the Level 2 provider, was an associated individual.

However, the Executive noted that throughout the course of the investigation, Mr Due had asserted that he had held other positions within or for the Level 2 provider. Specifically:

- Mr Due was registered on the PhonepayPlus Registration database as a responsible person for the Level 2 provider from 29 July 2011 and additionally as a consultant for the Level 2 provider from 26 August 2011. The Executive confirmed that the entries remained in place at the time the breaches of the Code occurred,



throughout the course of the investigation against the Level 2 provider and beyond the dates of the Tribunal hearings on 18 April 2013 and 22 August 2013. The Executive asserted that the position of “responsible person” is ordinarily attributed to an individual that holds a managerial post. Further, the Executive submitted that the role of a Consultant could meet the definition of an associated individual as directors, managers and those having day to day responsibility may be accustomed to act under a Consultant’s instructions.

- The Executive noted that Mr Due had signed an “Information Provider Undertaking” dated 27 January 2011 and a contract entitled “Mobile Telephony Services Agreement” between the Level 1 provider and the Level 2 provider on 27 January 2011. Mr Morten Due had signed the documents on behalf of the Level 2 provider as “POA”, which the Executive submitted was likely to mean “Power of Attorney”. The Executive asserted that an individual operating under a “POA” is an associated individual as the signing of important documents for and on behalf of the Level 2 provider demonstrated that the individual was clearly attributed with responsibility for the day to day conduct of the Level 2 provider’s affairs.

The Executive noted the different roles that Mr Due had stated that he had held, but submitted that notwithstanding this, Mr Due was still an associated individual within the definition of paragraph 5.3.9 of the Code, as he had held positions that indicated that he had day to day responsibility and/or he was an individual in accordance with whose directions or instructions directors or managers of premium rate services providers are accustomed to act.

The Executive submitted that Mr Morten Due was knowingly involved in a serious breach of the Code that was upheld by a Tribunal on 18 April 2013, as a result of the following:

- As a director of the Level 2 provider, Mr Due was responsible for the oversight of the Level 2 provider’s affairs and ensuring that it was properly managed.
- As a director, Mr Due had a fiduciary duty to ensure that all the commercial activities, including the operation of the Service were conducted in accordance with the law and the regulatory obligations.
- Mr Morten Due personally actioned changes to Service promotional material required by the Level 1 provider, which was evidence by correspondence between 11 October 2012 and 16 October 2012. Given that the Level 1 provider raised issues of non-compliance with the Service promotions directly with Mr Due, it was clear that he had a thorough knowledge of the methods in which the Service was promoted. Examples of issues identified by the Level 1 provider included terms and conditions not being displayed in promotional material and links to terms and conditions provided in the promotional material that were not working. Whilst the Executive acknowledged that these issues were different to the issues identified in the breach of rule 2.3.2 of the Code and upheld on 18 April 2013, the Executive asserted that the correspondence demonstrated that Mr Morten Due was an individual within the Level 2 provider with the requisite knowledge and authority to action the required changes to the promotional material and that this knowledge and authority would have extended to the issues identified in the breach of rule 2.3.2 of the Code.
- In addition to the above responsibilities within the Level 2 provider, Mr Due was also president of the affiliate marketer which promoted the Service in breach of rule 2.3.2 of the Code. This was evidenced by the contract between the Level 2 provider and the affiliate marketer dated 1 March 2011. Further, within Mr Due’s response to the



breach letter on 11 April 2013, he stated that he had imposed rules on the affiliate marketer to ensure that it did not promote the Service in a misleading manner. Given that Mr Due was the president of the only affiliate marketer known to have had a commercial relationship with the Level 2 provider, it was evident that Mr Due was required to follow the instructions that he had specified. However as demonstrated by the breach of rule 2.3.2 of the Code upheld on 18 April 2013, these rules were not followed by the Level 2 provider.

- Mr. Morten Due attended the Tribunal on 18 April 2013 and provided informal representations alongside a Consultant representing the Level 2 provider. During informal representations, Mr Due confirmed that an affiliate marketer promoted the Service and he was the president of the affiliate marketer. He submitted that PhonepayPlus should regulate affiliate marketers directly. Following the Tribunal, the Executive emailed the Consultant to the Level 2 provider to request clarification regarding the capacity in which Mr Due attended the Tribunal on 18 April 2013. The Consultant responded with an explanation from Mr Due which stated that he was not the responsible person for the Level 2 provider and he had not provided informal representations at the Tribunal as an employee of the Level 2 provider but, he had done so, because he had provided consultation and technical guidance on the implementation of Payforit and had involvement as an affiliate marketer for the Service.

The Executive submitted that Mr Due was knowingly involved in very serious breaches of the Code that were upheld by a Tribunal on 22 August 2013, as a result of the following:

- As a director of the Level 2 provider, Mr Due was responsible for ensuring that the Level 2 provider adhered to the sanctions imposed by the Tribunal of 18 April 2013 and made payment of the associated administrative charges.
- Mr Due was made aware of the outcome of the adjudication on 18 April 2013 and the consequences of the failure to comply with the sanctions imposed and make payment of the administrative charge in a letter sent to the Level 2 provider on 1 May 2013.
- The Level 2 provider made an application for a review of the Tribunal decision on 15 May 2013. The application was refused on 27 May 2013 and the Level 2 provider was notified of this outcome on 28 May 2013. Following the refusal of the application for a review and the failure of the Level 2 provider to adhere to the Tribunal's sanction of 18 April 2013 and pay the associated administrative charge, a reminder email was issued to the Level 2 provider and the Consultant representing the Level 2 provider on 12 June 2013. The Consultant advised the Executive that the Level 2 provider was virtually out of business and therefore it authorised the Level 1 provider to release withheld revenue to PhonepayPlus in part payment of the amount outstanding. It stated that it had no other means of making payment of the remaining balance and accordingly this was its best and final offer.
- On 31 July 2013, the Executive issued a breach letter to the Level 2 provider raising breaches of paragraph 4.8.4(b) and paragraph 4.10.2 of the Code. The Executive acknowledged that Mr Morten Due did not personally correspond with the Executive following the adjudication of 18 April 2013 but it asserted that in light of Mr Due's involvement at the Tribunal it was highly likely that Mr Due was instructing the Consultant to correspond on behalf of the Level 2 provider. In addition, it asserted that Mr Due was aware of the outcome of the adjudication of 18 April 2013 and the requirement to comply with the sanctions imposed and the associated administrative charges.



Consequently, the Executive submitted that Mr Due was an associated individual who was knowingly involved in serious and very serious breaches of the Code.

2. Mr Morten Due did not provide a response to the notification of potential prohibition.
3. The Tribunal considered all the evidence presented to it. The Tribunal noted that the Executive had submitted that Mr Due was a director of the Level 2 provider and therefore, in accordance with paragraph 5.3.9 of the Code, was an associated individual. The Tribunal found that, although it was clear that Mr Due had held himself out as a director to the Level 1 provider, there was insufficient evidence to conclude that Mr Due was the director of the Level 2 provider. However, the Tribunal found that the other evidence presented by the Executive indicated that Mr Due had day to day responsibility for the conduct of the Level 2 provider's business at the time the breaches of the Code occurred and were upheld by the Tribunal on 18 April 2013. Accordingly, it found Mr Due was an associated individual.

The Tribunal considered whether Mr Due was knowingly involved in a serious and/or series of breaches of the Code at the relevant time. The Tribunal found that Mr Due was knowingly involved in a serious breach of the Code upheld against the Level 2 provider on 18 April 2013, as a result of the email exchange between Mr Due and the Level 1 provider between 11 October 2012 and 16 October 2012, which demonstrated that Mr Due, on behalf of the Level 2 provider, had a thorough knowledge of the Service and had the requisite authority to action amendments to the promotional material. In addition, Mr Due's position within the affiliate marketer meant he was in a unique position within the Level 2 provider and would have had a closer involvement in the promotions for the Service, which were found to be in breach of the Code. In particular, the Tribunal noted that Mr Due was authorised to sign a contract with the Level 1 provider and therefore clearly had knowing involvement in the activities of the Level 2 provider.

In relation to the very serious breaches of the Code upheld on 22 August 2013, the Tribunal noted that the Executive had received no further correspondence from Mr Due and, as it had found that there was insufficient evidence to conclude that Mr Due was a director of the Level 2 provider, there was also insufficient evidence to conclude that Mr Due was knowingly involved in the breaches of the Code that were upheld by the Tribunal on 22 August 2013.

Consequently, having regard for all the circumstances of the case, the Tribunal concluded that the evidence presented by the Executive did not support the imposition of a prohibition. Accordingly, the Tribunal did not impose a prohibition on Mr Morten Due.