



Tribunal meeting number 159 / Case 1

Case reference: 47837  
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 Alain Mathieu

The Tribunal was asked to consider imposing a prohibition against Mr Alain Mathieu pursuant to paragraph 4.8.2(g) of the 12<sup>th</sup> edition of the PhonepayPlus Code of Practice (the “**Code**”).

The case related to an adjudication against the Level 2 provider (the “**Level 2 provider**”) A&M Lead Factory B.V. (26 June 2014, case reference: 42025), which concerned a breach of the sanctions imposed by an earlier Tribunal (31 October 2013, case reference 10568) and non-payment of the associated administrative charge. The case on 31 October 2013 concerned a subscription competition and mobile content service (the “**Service**”).

On 26 June 2014, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Alain Mathieu, (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 31 October 2013;
- The Tribunal decision against the Level 2 provider dated 26 June 2014;
- An extract from the Netherlands Chamber of Commerce Commercial Register dated 14 August 2014;
- Information regarding ownership of the Level 2 provider;
- A extract from the PhonepayPlus registration database for the Level 2 provider;
- A contract between the Level 1 provider and the Level 2 provider for the provision of the premium rate shortcodes (undated);
- The informal representation form completed by the Level 2 provider for the Tribunal of 31 October 2013;
- The Level 2 provider's breach letter response of 8 October 2013;
- The formal notification sent to the Level 2 provider following the Tribunal adjudication of 31 October 2013;
- Email correspondence between the Executive and the Level 2 provider between 12 November 2013 and 10 December 2013 and 15 January 2014 and 23 January 2014;
- The breach of sanctions letter sent to the Level 2 provider on 2 June 2014;
- The covering letter and email to the notification of potential prohibition dated 2 October 2014;
- The notification of potential prohibition dated 2 October 2014; and
- Documents confirming the Executive's attempts to deliver the potential prohibition notification to Mr Mathieu and the Level 2 provider dated 3 October 2014.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent notification of a potential prohibition to Mr Mathieu and the Level 2 provider on 2 October 2014 to the Level 2 provider's registered address. In addition, the notification was sent to Mr Mathieu at an address of a company where he was a director. Further, the notification of a potential prohibition was sent to all



known email addresses for Mr Mathieu. The Tribunal noted that the email attachments had not been downloaded but it had not received an email non-delivery receipt. In relation to the notifications that had been sent to the postal addresses, the Tribunal noted that one had been refused and the other had initially been accepted, before being returned to the Executive.

Taking all the circumstances into account, the Tribunal was satisfied that the Executive had made all reasonable attempts to inform Mr Mathieu and the Level 2 provider, in writing, of the prohibition proceedings and had given an opportunity for a response to be provided. On 30 October 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Mathieu.

### 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 Mathieu was an associated individual knowingly involved in a serious and/or series of breaches of the Code, in respect of the adjudications of 31 October 2013 and 26 June 2014.

#### **Adjudication on 31 October 2013, case reference: 10568**

On 31 October 2013, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a subscription competition and mobile content service that operated under the brand name “Pikaboo”. The Service operated on the premium rate shortcodes 61827 and 65013 and was operational between 21 March 2012 and June 2013, when it was voluntarily suspended by the Level 1 provider and the Level 2 provider following correspondence with PhonepayPlus. Consumers were charged £4.50 per week (via three chargeable SMS messages costing £1.50 each) for the subscription Service.



The majority of complainants stated that they had not understood they would be charged and did not recall entering the Service. In addition, some complainants experienced bill shock. The maximum cost incurred by a complainant was £270.00 over approximately one year. In addition, PhonepayPlus' monitoring of affiliate marketing promotions for the Service gave rise to concerns in relation to consumers being misled into interacting with the Service.

The Executive conducted the matter as a Track 2 investigation against the Level 2 provider. On 31 October 2013, the Tribunal upheld the following breach of the Code against the Level 2 provider:

- Rule 2.3.2 – Misleading

The Tribunal concluded that the breach of rule 2.3.2 of the Code was very serious. The Tribunal determined that the seriousness of the case overall, after taking into consideration several mitigating factors, was serious and imposed the following sanctions:

- a formal reprimand;
- a fine of £10,000; 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 75% of the administrative costs incurred by PhonepayPlus.

### **Adjudication on 26 June 2014, case reference: 42025**

On 26 June 2014, the Tribunal adjudicated against the Level 2 provider for the non-compliance with the sanctions imposed by the Tribunal on 31 October 2013 and non-payment of the associated administrative charge.

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; and
- a prohibition on the Level 2 provider from providing, or having any involvement in any premium rate service for a period of three years, starting from the date of publication of the decision, or 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 Mathieu was an associated individual of the Level 2 provider as he had day to day responsibility for the conduct of the Level 2 provider's business, with another individual, at the time breaches of the Code occurred and were upheld by Tribunals on 31 October 2013 and 26 June 2014. Specifically:

- The Executive had obtained extracts from the Netherlands Chamber of Commerce Commercial Register dated 14 August 2014. The extracts revealed that the Level 2 provider had two directors, which were companies and they had held the positions since 10 September 2010. In addition, the Executive established that the Level 2 provider was owned by both these companies. An extract from the Netherlands Chamber of Commerce Commercial Register for one of the companies revealed that Mr Alain Mathieu had been a director of that company since 22 September 2009.

The Executive submitted that as Mr Mathieu was a director of a company that was a joint director and owner of the Level 2 provider, he held a position of authority and had responsibility for the Level 2 provider's affairs.

- The Executive received a copy of an agreement between the Level 1 provider and the Level 2 provider for the provision of the premium rate shortcodes. This key agreement was marked for the attention of "A. Mathieu" and another individual. The agreement named the individuals as legal representatives for the Level 2 provider, which the Executive submitted demonstrated that Mr Mathieu held a position of authority and was jointly responsible for the Level 2 provider's affairs.
- Mr Mathieu was named as a responsible person for the Level 2 provider on the PhonepayPlus Registration Scheme, along with another individual. Mr Mathieu's job title was recorded as a director of the Level 2 provider. The Executive noted that Mr Mathieu remained a responsible person for the Level 2 provider during the period the breaches of the Code occurred and were upheld by the Tribunals of 31 October 2013 and 26 June 2014.
- Prior to the Tribunal of 31 October 2013, Mr Mathieu completed and returned a "Request for Informal Representation" form, where he stated he held the position of a director of the Level 2 provider. Mr Mathieu attended the Tribunal on 31 October 2013 (accompanied by a representative from the Level 1 provider) and made informal representations on behalf of the Level 2 provider. During the informal representations, Mr Mathieu stated he was a director of the Level 2 provider. The Executive asserted that Mr Mathieu's comments highlighted that he believed that he held a position of authority within the Level 2 provider.

In light of this evidence, the Executive asserted that Mr Mathieu was jointly responsible, with another, for the oversight of the Level 2 provider's affairs at the relevant time and had day to day responsibility for the conduct of the Level 2 provider's business.

In addition and/or in the alternative, the Executive submitted that Mr Mathieu, as a director of a company, which was a director and owner of the Level 2 provider, held a position where he had control of the affairs of the Level 2 provider and was an individual in accordance with whose directions or instructions the directors of the Level 2 provider were accustomed to act. Accordingly, for all the reasons stated, the Executive submitted that Mr Mathieu was an associated individual in accordance with paragraph 5.3.9 of the Code.



The Executive submitted that Mr Mathieu was knowingly involved in a serious breach of the Code, which was upheld by a Tribunal on 31 October 2013, as a result of the evidence in relation to Mr Mathieu's responsibility in the Level 2 provider's company, but particularly as a result of the following:

- As a director of a company which was a joint director and owner of the Level 2 provider, Mr Mathieu was, at the time the breaches of the Code occurred, responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed.
- The Executive sent a breach letter to the Level 2 provider on 25 September 2013. The Executive received a response to the breach letter from the Level 2 provider's primary contact on 8 October 2013. Mr Mathieu was copied in to the correspondence sent to the Executive. Therefore, the Executive asserted that Mr Mathieu would have been aware of the content of the Level 2 provider's response.
- Mr Mathieu attended the Tribunal hearing on 31 October 2013 and made informal representations on behalf of the Level 2 provider. During the informal representations, Mr Mathieu stated that the Level 2 provider was a small company with only two members of staff operating across four countries. In light of Mr Mathieu's involvement in the Tribunal of 31 October 2013, the Executive submitted that Mr Mathieu was likely to be one of the two members of staff. As one of two members of staff, the Executive asserted that Mr Mathieu would have been knowingly involved in the breach of the Code.
- During the Tribunal hearing of 31 October 2014, Mr Mathieu stated that the use of affiliate marketers had presented the Level 2 provider with problems and it had found it hard to source trustworthy affiliates with "good traffic". Further, he accepted that the promotions for the Service had been misleading and represented a "clear violation of the Code". In addition, he acknowledged that, under the Code, the Level 2 provider was responsible for the actions of its affiliate marketers. The Executive submitted that Mr Mathieu's response demonstrated that he had a thorough knowledge of the operation, content and promotion of the Service and the breach of the Code that had occurred.

The Executive submitted that Mr Mathieu was knowingly involved in very serious breaches of the Code that were upheld by the Tribunal on 26 June 2014, as a result of the evidence in relation to Mr Mathieu's responsibility in the Level 2 provider's company, but particularly as a result of the following:

- On 12 November 2013, the Executive sent a notification of the Tribunal adjudication to the Level 2 provider confirming the Tribunal adjudication decision of 31 October 2013. The primary contact for the Level 2 provider corresponded with the Executive and stated that it was experiencing financial difficulties and requested clemency in relation to the fine imposed. In the email exchanges that followed, the Executive made the Level 2 provider aware of the option of requesting a review of the Tribunal decision and/or a payment plan but these options were not pursued by the Level 2 provider. The primary contact stated in an email that he had been hospitalised and was unable to deal with the matter but would be in touch soon. The primary contact copied Mr Mathieu into this email. The Executive enquired whether there was another individual within the organisation who could assist and a further email was received from the primary contact, which stated that the Level 2 provider was not in a position to commit to a payment plan and reiterated his previous requests for clemency. Mr Mathieu was also copied in to these emails. The Executive issued a breach letter to the Level 2 provider alleging breaches of the Code for non-payment of the fine and administrative charge. No response was received from the Level 2 provider. The Tribunal reached a decision on the breaches raised by the Executive on 26 June 2014.



- The Executive acknowledged that Mr Alain Mathieu did not personally respond following the adjudication of 31 October 2013. However, in light of the active role taken by Mr Mathieu during the informal representations at the Tribunal hearing on 31 October 2013, his position of responsibility within the Level 2 provider and as he was copied into some post adjudication correspondence between the Executive and the Level 2 provider regarding the sanctions imposed, the Executive submitted that Mr Mathieu would have been aware of the outcome of the Tribunal of 31 October 2013 and that the Level 2 provider was required to comply with sanctions imposed and make payment of the associated administrative charge.
- The Executive asserted that Mr Mathieu, as an individual with joint day to day responsibility for the Level 2 provider was also responsible for ensuring that the Level 2 provider adhered to sanctions imposed against it by the Tribunal of 31 October 2013 and paid the associated administrative charge. If the Level 2 provider was experiencing financial hardship and had difficulties complying with the sanctions, Mr Mathieu could have contacted the Executive rather than cease all correspondence.

The Executive submitted that, as demonstrated by the evidence above, Mr Alain Mathieu was knowingly involved in the non-payment of the fine and administrative charge, which ultimately resulted in two further very serious breaches of the Code occurring and being upheld by a Tribunal on 26 June 2014.

Consequently, the Executive submitted that Mr Mathieu was an associated individual who was knowingly involved in a serious and/or a series of breaches of the Code.

2. Mr Mathieu did not provide a response to the notification of potential prohibition.
3. The Tribunal considered all the evidence presented to it. The Tribunal found that, in accordance with paragraph 5.3.9 of the Code, Mr Mathieu was an associated individual as he had significant responsibility for the management of the Level 2 provider's business and this had been demonstrated by his role at the Tribunal on 31 October 2013, his status as an individual with responsibility for the Level 2 provider contained within a key contract for the provision of the Service shortcodes and as he was a responsible party for the Level 2 provider. In particular, the Tribunal noted that Mr Mathieu was director of a company, which was a director and owner of the Level 2 provider and accordingly, taking this into account with the other evidence presented, the Tribunal found that Mr Mathieu had joint day to day responsibility for the Level 2 provider and was an associated individual.

In addition, the Tribunal found that Mr Mathieu was knowingly involved in a series of breaches of the Code, which were serious and very serious, upheld against the Level 2 provider on 31 October 2013 and 26 June 2014. The Tribunal noted that Mr Mathieu had stated at the Tribunal of 31 October 2013 that the Level 2 provider was a small company with only two members of staff. Accordingly, it concluded that as Mr Mathieu was part of a small team, he was knowingly involved in the breaches of the Code. Further, the Tribunal found that as Mr Mathieu had attended the Tribunal on 31 October 2013 and was copied into post adjudication correspondence he had knowledge of the adjudication of 31 October 2013 and the sanctions imposed. The Tribunal commented that as Mr Mathieu had taken an active role in the Level 2 provider's business he was knowingly involved in the further breaches of the Code upheld by the Tribunal on 26 June 2014.

Consequently, the Tribunal concluded that Mr Mathieu was knowingly involved in a serious and/or series of breaches of the Code, as an associated individual.



### Sanction

The Tribunal decided to prohibit Mr Mathieu from providing, or having any involvement in, any premium rate service for a period of three years from the date of publication of this decision.

In making this decision, the Tribunal noted that Mr Mathieu had failed to co-operate with, or acknowledge, the prohibition proceedings. The Tribunal further noted that there had been non-compliance with sanctions imposed by a Tribunal, which was a very serious matter and indicated a general disregard for the regulatory process. Accordingly, the Tribunal was satisfied that three years was an appropriate period, taking into consideration all the relevant circumstances.