

Tribunal meeting number 269
Case reference 184879
Case Prohibition of an associated individual

This case was brought against the associated individual under paragraph 4.8.8 of the Code.

Background

The Tribunal was asked to consider imposing a prohibition against Mr Ofir Sarusy pursuant to paragraph 4.8.3(g) of the 14th edition of the Phone-paid Services Authority (“PSA”) Code of Practice (the “Code”).

The case related to two previous adjudications against the Level 2 provider, Tobaji Ltd. The first adjudication which was dated 13 September 2018 (case reference: 130464) involved a call-connection service. The second adjudication that was dated 12 December 2019 (case reference: 178293) related to a failure to comply with the financial sanctions imposed by the Tribunal on 13 September 2018.

On 12 December 2019, the Tribunal recommended that the Executive consider a prohibition in accordance with paragraph 4.8.3(g) of the Code against Mr Sarusy, the primary contact for the Level 2 provider on the PSA Registration Scheme and the registered director of the company.

Relevant Code Provisions

- Paragraph 4.8.8 of the Code states:

“(a) If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.3(f), 4.8.3(g) or 4.8.3(h) in respect of any associated individual, the PSA shall first make all reasonable attempts to notify the individual concerned and the relevant party in writing.

(b) It shall inform each of them that any of them may request an opportunity to make representations in writing, or in person, to the Tribunal and of the right of any of them (or the PSA itself) to instead require an oral hearing.”

- Paragraph 4.8.3(g) of the Code states:

“Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in 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 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 the PSA.”

Preliminary issue – service

The Tribunal noted that the Executive had conducted this matter in accordance with paragraph 4.8.8 of the Code. The Executive sent notification of a potential prohibition to Mr Sarusy on 22 May 2020. Although the Executive did not receive a response from Mr Sarusy, the Executive was able to provide evidence to the Tribunal that the Warning Notice had been downloaded on 22 May 2020.

The Executive sent an email to Mr Sarusy on 17 June 2020 advising that the deadline for responding to the Warning Notice had passed on 8 June 2020 and that in the absence of a response, the PSA would proceed with the case on the assumption that he did not wish to respond. The Executive produced the Tribunal with a copy of the delivery receipt for this email.

The Executive sent a further email to Mr Sarusy on 3 July 2020 confirming the date and time of the Tribunal hearing and providing him with a copy of the Tribunal Case Report and Annexes. Mr Sarusy did not respond but the Executive was again able to provide evidence to the Tribunal that the documents had been downloaded by Mr Sarusy.

The Tribunal was satisfied that the Executive had made all reasonable attempts to notify Mr Sarusy and the Level 2 provider of the prohibition proceedings and their rights, in accordance with paragraph 4.8.8 of the Code.

Submissions and conclusions

The evidence submitted by the Executive indicated that Mr Sarusy was an associated individual knowingly involved in a serious and/or series of breaches of the Code in respect of the adjudications of 13 September 2018 and 12 December 2019.

Adjudication of 13 September 2018 (case reference: 130464)

The Tribunal upheld the following breaches of the PSA’s Code:

- Rule 2.2.1 - Transparency and pricing
- Rule 2.2.2 - Organisation’s identity

- Rule 2.3.2 - Misleading
- Paragraph 3.11.3 - Special Conditions ICSS 3
- Paragraph 3.11.3 - Special Conditions ICSS 11
- Paragraph 3.11.3 - Special Conditions ICSS 13

The Tribunal determined that the breaches of rule 2.2.1 and rule 2.2.2 were serious. The Tribunal concluded that the breaches of rule 2.3.2, paragraph 3.11.3/ Special condition ICSS 3, paragraph 3.11.3/ Special condition ICSS 11, paragraph 3.11.3/ Special condition ICSS 13 were very serious. The Tribunal considered the case overall to be very serious and imposed the following sanctions:

- a formal reprimand
- a fine of £700,000
- a requirement that the Level 2 provider remedy the breaches by addressing the issues around transparency and pricing, number registration and the ICSS Special conditions
- a requirement that the Level 2 provider seek compliance advice on its Service promotions, such compliance advice to be implemented to the satisfaction of the PSA
- a direction that access to any current or future ICSS service operated on a number or number range within the PSA's regulatory remit is barred until compliance advice has been sought and implemented to the satisfaction of PSA
- a requirement that the Level 2 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 PSA that such refunds have been made.

The Tribunal also recommended that the Level 2 provider pay 95% of the administrative costs which totalled £12,151.75.

Adjudication of 12 December 2019 (case reference: 178293)

On 12 December 2019, the Tribunal adjudicated against the Level 2 provider for non-compliance with the financial sanction imposed by the Tribunal on 13 September 2018. The Tribunal upheld the following breach of the Code raised against the Level 2 provider:

- Paragraph 4.8.6(b) - Failure to comply with a sanction

The Tribunal considered the overall case to be **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, from the date of the publication of the decision, or until all sanctions imposed by the Tribunal of 13 September 2018 have been complied with, whichever is the later.

The Tribunal of 12 December 2019, in accordance with paragraph 4.8.8(a) of the Code, considered that it may wish to make a prohibition under paragraph 4.8.3(g) of the Code against Mr Sarusy, the registered director of the company and the primary contact for the Level 2 provider on the PSA Registration Scheme.

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

1. The Executive submitted that Mr Sarusy was an associated individual for the purpose of paragraph 5.3.9 of the Code as he had day-to-day responsibility for the conduct of the Level 2 provider. The Executive submitted that this was evidenced by the following:
 - Mr Sarusy had been a director of the Level 2 provider since its incorporation on 30 August 2016 and the sole director since 21 June 2017
 - Mr Sarusy has been listed as the sole primary contact on the PSA registration database since the Level 2 provider first registered on 26 January 2017
 - Mr Sarusy registered himself as a 'responsible party' by the title of 'Director' on the PSA Registration Scheme
 - on 14 November 2016, Mr Sarusy in his capacity as Director of the Level 2 provider signed a contract to operate premium rate services with the Level 1 provider
 - on 30 September 2018, Mr Sarusy, in his capacity as Director of the Level 2 provider, filed micro-company accounts with Companies House.

The Executive asserted that the above demonstrated that Mr Sarusy had day-to-day responsibility for the conduct of the Level 2 provider's business and was an associated individual under paragraph 5.3.9 of the Code when breaches of rules 2.2.1, 2.2.2 and 2.3.2 of the Code were being carried out. In addition, breaches of paragraphs 3.11.3/ICSS 3, 3.11.3/ICSS 11 and 3.11.3/ICSS 13 of the Code were upheld and considered to be very serious by the Tribunal of 13 September 2018.

The Executive also noted that key events occurred which alerted Mr Sarusy to potential breaches and the fact that the Level 2 provider was not operating compliantly.

As the primary contact and holding the position of company director, the Executive submitted that Mr Sarusy was, at the time the very serious breaches of the Code occurred, responsible for the oversight of the company affairs and ensuring the company was properly managed, including complying with the Code and sanctions.

The Executive asserted that the following key events would have alerted Mr Sarusy to the fact that the Service may have been operating non-compliantly:

- Mr Sarusy corresponded with the Executive in relation to the operation and promotion of the Service. Mr Sarusy responded to the Executive's directions for information in relation to the Service

- Mr Sarusy provided comments on each of the apparent breaches of the Code raised against the Level 2 provider in the Interim Measures application issued on 1 December 2017
- Mr Sarusy provided comments on each of the apparent breaches of the Code raised against the Level 2 provider in the Warning Notice issued on 26 June 2018.

The Executive submitted that throughout the first investigation conducted between 17 July 2017 and December 2018, Mr Sarusy corresponded with the Executive in relation to the operation and promotion of the Service. The correspondence received and responded to by Mr Sarusy included:

- the response to the informal enquiry dated 20 June 2017
- the response to the first direction for information dated 11 September 2017
- the response to the second direction for information dated 11 October 2017
- the email stating that the Service was being suspended, dated 7 November 2017
- the response to the apparent breaches of the Code raised against the Level 2 provider in the Interim Measures application issued on 1 December 2017
- the response to the apparent breaches of the Code raised against the Level 2 provider in the Warning Notice issued on 26 June 2018.

The Executive submitted that Mr Sarusy was also sent correspondence which he received but did not respond to, in relation to the second investigation against the Level 2 provider for non-compliance with the financial sanction imposed by the Tribunal on 13 September 2018. The correspondence sent to Mr Sarusy included:

- the email notifying Mr Sarusy that a second investigation had been allocated against the Level 2 provider for non-compliance with the financial sanction imposed, dated 6 August 2019
- the Warning Notice issued to Mr Sarusy which raised a breach against the Level 2 provider for non-compliance with the financial sanction imposed, dated 28 October 2019
- the reminder email notifying Mr Sarusy that no response had been received in relation to the Warning Notice, dated 12 October 2019
- the email notifying Mr Sarusy of the date the Tribunal hearing was due to take place to consider the case, dated 3 December 2019.

The Executive further relied on the fact that Mr Sarusy had made a formal complaint against the PSA on behalf of the Level 2 provider on the grounds that the procedures followed by the Executive and financial sanctions imposed by the Tribunal were unfair. The correspondence received from Mr Sarusy in relation to his complaint were:

- Mr Sarusy's initial complaint email to the Independent Complaints Assessor, dated 12 August 2019
- stage one complaint email to the PSA Head of Contact Management, dated 22 August 2019

- stage two complaint email to the PSA Chief Executive, dated 6 September 2019.

The Executive submitted that Mr Sarusy had a high level of responsibility within the Level 2 provider company and accordingly Mr Sarusy would have had knowledge of the PSA's investigation and the financial sanction that was imposed and was not paid by the Level 2 provider. The Executive relied on the following:

- on 30 September 2018, Mr Sarusy in his capacity as director, officially filed company annual accounts with Companies House
- Mr Sarusy's request to the Level 1 provider for premium rate numbers to be used to operate the Service.

The Executive asserted that the evidence above and contained within the Tribunal report demonstrated that Mr Sarusy received and responded to crucial correspondence on behalf of the Level 2 provider during the Executive's first investigation. Although Mr Sarusy did not respond to correspondence during the second investigation, apart from requesting that correspondence was only sent to the company address, the Executive received confirmation of delivery for the correspondence sent to him.

The Executive asserted that Mr Sarusy was alive to potential breaches of the Code, fully aware of the Executive's investigations, and had been notified by the Executive about the sanctions requiring compliance but had failed to comply with them.

The Executive submitted that the evidence showed that Mr Sarusy was an associated individual with knowledge of a series of breaches of the Code that were upheld and considered overall to be 'very serious' by two earlier Tribunals and therefore he was knowingly involved in the non-compliant conduct at the relevant times.

2. Mr Sarusy 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 Sarusy was an associated individual. The Tribunal noted that Mr Sarusy was a director and became the sole director of the company. Further, the Tribunal found, for the reasons set out by the Executive that Mr Sarusy was knowingly involved in a series of breaches of the Code that were upheld and considered overall to be 'very serious' by two earlier Tribunals. Accordingly, the Tribunal was satisfied that, on a balance of probabilities, Mr Sarusy had knowledge of the series of breaches and was knowingly involved in the non-compliant conduct at the relevant times.

Sanction

The Tribunal decided to prohibit Mr Sarusy 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 Tribunal considered that this was a proportionate sanction, having considered all the facts of the case and the nature of the series of seven breaches of the Code, including breaches of Special conditions, that had been upheld by the earlier Tribunals.

Administrative charge recommendation: 100%