

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

Thursday 20 November 2008 TRIBUNAL SITTING No. 15 / CASE 2  
CASE REFERENCE: 763989/JI

Service provider & area:	7Tel Limited, Dyfed, Wales
Information provider & area:	Tony Lines t/a Net Lines, Slough, Berkshire
Type of service:	Fixed Line
Service title:	Unknown (promoted through missed calls)
Service number:	070535 prefixed numbers (range not supplied)
Cost:	50 pence per minute from a standard BT line
Network operator:	7Tel Limited, Dyfed, Wales
Number of complainants:	32

### BACKGROUND

The PhonepayPlus Executive ("the Executive) received 32 consumer complaints regarding the receipt of calls to mobile telephones which terminated after one ring. The missed call numbers were identified as '070535' prefixed numbers. The complainants were consistent in claiming that the calls received terminated after one ring. This prompted consumers to return the call, whilst being unaware of higher rate charges. The majority of complainants who returned the call, claimed that once connected, they were played a ringing tone, which some recognised to be a recording of a ringing tone.

Ofcom has designated 070 numbers for use only as personal 'follow me' numbers, which are charged at a higher rate. Ofcom does not allow end user revenue share on 070 numbers.

The Executive was concerned that the complainants were experiencing a modified version of what is commonly known as 'wangiri', a well known trend for misuse of premium rate and personal numbers, involving a computer using hundreds of phone lines to randomly dial mobile phone numbers. After one ring, the call disconnects, which leaves the number stored in the receiving parties' mobile phone. If the call is returned, the caller is usually charged at premium rate for connection; in this instance, 50 pence per minute (from a landline).

### **The Executive's understanding of how the service operated**

The service provider also traded as 'Firefly Telecom'. The name of the service itself was not identified to the Executive but it was operated by the information provider Tony Lines t/a Net Lines. FireFly Telecom operated web based services involving the use of 070 personal numbers. The 070 range of numbers was designed for end-users who wished to use the service as an 'ad safety/follow me' service.

The service was charged at a rate of 50 pence per minute, with charging commencing upon the ringing tone being heard. The service was promoted to consumers via missed calls to mobile numbers, which terminated after one ring. The caller line identification (“CLI”) was available to recipients of the call, via the display on their mobile phone handset. The specific CLI numbers varied, but each originated from a 070535 prefixed number range.

The Executive conducted the matter as a standard procedure and directed the network operator to withhold revenue (the network provider and service provider being one and the same in this instance), in accordance with paragraph 8.5f of the 11<sup>th</sup> Edition (amended April 2008) PhonepayPlus Code of Practice (“the Code”). Of the 32 complaints received, 29 formed the basis of the Executive’s preliminary investigation.

In a letter to the service provider dated 6 October 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 5.7.1, 5.8 and 5.12 of the Code, together with a request for further information. The service provider supplied a formal response on 17 October 2008. The service provider supplied an amended response to the breach letter on 22 October 2008. The Executive made an additional request for further information on 3 November 2008, to which the service provider responded on 5 November 2008. On the basis that the service provider failed to supply sufficient responses, the Executive raised a breach of paragraph 8.3.3 of the Code in an email to the service provider dated 5 November 2008.

The Tribunal made a decision on the breaches raised by the Executive on 20 November 2008.

### **Preliminary Matter**

The Tribunal considered the preliminary issue as to whether this service was a Premium Rate Service. It concluded that the service satisfied all the elements of sections 120(7)(a) and 120(8)(a) of the Communications Act 2003 and the requirements of the Controlled Premium Rate Services Condition as set and published by Ofcom from time to time.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **MISLEADING (Paragraph 5.4.1a)**

*“Services and promotional material must not:  
a mislead, or be likely to mislead in any way...”*

1. The Executive considered the service to be misleading for the following reasons:

#### Reason 1:

All complainants reported to have received unsolicited missed calls from numbers they did not recognise. The calls lasted for the duration of one ring and terminated before it was possible for complainants to answer, which the Executive considered likely to prompt a return call. The Executive commented that the 070 ‘personal number’ was a relatively unknown technology to the average consumer, which could result in the number being confused for a mobile

number and the call being returned. Consumers would therefore be unaware that they were responding to a commercial enterprise, for which they would incur charges that might not be apparent until receipt of their bill.

Reason 2:

The Executive noted that some of the complainants who returned the missed call, indicated that had been charged for listening to a recording of a ringing tone without realising they were connected to the number and, in any event, did not at the time realise they were being charged.

The Executive monitored the service and found that, on playback of the recordings of 18 of the 070 numbers, after connection to the service, a ringing tone was heard. The Executive considered that the recorded ringing tone had been presented to consumers in a manner which implied that a connection had not been made and consequently no charge incurred. The Executive considered that that the service had intentionally sought to mislead consumers by creating a fake scenario in order to delay consumers' termination of the call, thereby prolonging the period in which revenue was generated.

2. The service provider responded to the Executive's allegations by requesting transcripts of the individual complaints and the original voice recordings which underpinned the Executive's 'Evidence in Support', in order to examine the veracity of the evidence.
3. The Tribunal considered the evidence and concluded that the missed calls made to consumers' handsets were likely to mislead recipients into returning the calls, especially those unfamiliar with 070 technology. The Executive also noted that the service had presented a recording of a ringing tone, which was a clear and deliberate attempt to mislead consumers into staying on the line, in the mistaken belief that connection had not been made, thus increasing the revenue generated by the service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH TWO**

**PRICING INFORMATION (Paragraph 5.7.1)**

*"Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge."*

1. The Executive noted that the service was charged at 50 pence per minute and therefore had the potential to cost more than 50 pence overall, which was confirmed by the individual complaints and the Executive's monitoring of the service. As such, the Executive considered that the service did not fall under the exemption from the requirement to provide pricing information, granted by paragraph 5.7.5 of the Code. None of the 29 complainants reported having been informed of the cost of returning a call to a 070 number at any point prior to incurring a charge. Only upon receiving their phone bill, did complainants realise that the service was in fact premium rate.

2. The service provider reiterated its request for transcripts of both individual complainant reports and the original voice recordings, which underpinned the Executive's 'Evidence in Support', in order to examine the veracity of the evidence.
3. The Tribunal considered the evidence and concluded that due to the misleading nature of the service, consumers had deliberately not been supplied with pricing information prior to incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **CONTACT INFORMATION (Paragraph 5.8)**

*"For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user."*

1. The Executive considered that the number displayed on the consumers' handset fell within the definition of promotional material under paragraph 11.3.27 of the Code. None of the 29 complainants were provided with contact information at any point during the service; either at the point of promotion when the missed call was initially made to them or after calling the premium rate service. Therefore complainants had no way of contacting the service provider other than returning the missed call and hence calling the premium rate number.
2. The service provider stated that the generic service was not 'promoted' by displaying the CLI on the consumers' mobile phone, nor was it designed to do so. The service provider explained that it was an 'ad safety' service, which could be expanded to a 'follow me' service. The generic service was designed to be non-premium rate, providing benefit to the end user, and was provided by the information provider, which it deemed to be the 'service provider'.
3. The Tribunal considered the evidence and concluded that due to the misleading nature of the service, the promotional material had deliberately failed to provide consumers with any contact information. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH FOUR**

#### **INAPPROPRIATE PROMOTION (Paragraph 5.12)**

*"Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all*

*reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”*

1. The Executive noted that none of the 29 complainants reported to have consented to receive missed calls from 070535 prefixed numbers, which related to the service. Several complainants, some of whom received multiple missed calls, explicitly stated that the calls were unsolicited. Furthermore, the calls lasted for the duration of one ring before terminating, prompting a call back from consumers. The Executive considered that the calls made to consumers who had not consented to receive them and the manner in which those calls were made, constituted inappropriate promotion. As such, it was the opinion of the Executive that the service provider had not used all reasonable endeavours to ensure that the services were not promoted in an inappropriate manner.
2. The service provider commented that the generic service operated in the way it had been designed and was neither offensive nor harmful. Accordingly, the generic service was not promoted in an inappropriate way. The service provider reiterated that the ‘service’ was not operated by itself, but by the information provider. In its response to the Executive’s request for further information within the breach letter, the service provider stated that it had no idea why these numbers were called, whether the users had or had not consented to receive calls, or whether the caller(s) personally knew the called parties.
3. The Tribunal considered the evidence and concluded that the service had been inappropriately promoted, namely by unsolicited missed calls. The Tribunal commented that this inappropriate promotion had been possible, as a result of the service provider’s lack of due diligence in respect of the service conducted by its information provider client. The Tribunal upheld a breach of paragraph 5.12 of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH FIVE**

### **FURTHER INFORMATION (Paragraph 8.3.3)**

*“During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents.”*

1. The Executive considered that the service provider had failed in its duty to supply further information as requested. The service provider had i) failed to supply a complete list of all 070 premium rate numbers on which the service operated (supplying a list of call logs instead), ii) supplied incomplete call volume statistics, iii) supplied incomplete revenue statistics, iv) failed to answer the question asked about where the premium rate numbers are promoted. It responded by disputing that the generic service was in fact premium rate, and v) totally failed to supply documentation relating to instructions to and from the service provider regarding service matters, invoicing or statistical information.

2. The service provider commented that it had supplied the requisite information and furthermore, disputed that the generic service was in fact premium rate.
3. The Tribunal considered the requests made by the Executive, together with the service provider's responses. The Tribunal noted that the service provider had failed to supply the information requested by the Executive in respect of points (i) and (v), and had supplied incomplete information in respect of requests (ii), (iii) and (iv). The Tribunal upheld a breach of paragraph 8.3.3 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

The Tribunal's initial assessment was that, overall, the breaches taken together were **very serious**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The service was valueless to consumers.
- The information provider's operation of the improper use of 070 numbers was deliberate. The service provider was reckless in respect of its lack of due diligence regarding the information provider's improper use.
- There was material consumer harm; a total of 32 consumer complaints and clear evidence that the service caused consumers annoyance and frustration;
- The cost to consumers was high; complainants who returned the calls were charged 50 pence per minute;
- The misleading and improper use of 070 numbers is a concern which has previously been brought to the attention of the industry; and
- The service provider failed to cooperate with the Executive when asked to supply full information under paragraph 8.3.3 of the Code.

There were no mitigating factors for the Tribunal to consider:

Taking into account the aggravating and lack of mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A confiscatory and punitive fine of £20,000;
- The Tribunal imposed a bar on the service and the numbers providing access to the service, for 12 months or until the service provider seeks and implements compliance advice from PhonepayPlus so as to make the service compliant, whichever is the longer. The Tribunal doubted whether the service which had been the subject of the complaints could be made compliant with the Code.