

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

## TRIBUNAL DECISION

**Thursday 22 May 2008 TRIBUNAL SITTING No. 2 / CASE 1  
CASE REFERENCE: 726711/JI**

Service provider & area:	Mr Tomasz Adamczyk
Information provider & area:	Mr Arun Khanna t/a Khanna Enterprises
Type of service:	Fixed Line – Promoted to Mobiles
Service title:	Unknown (promoted through missed calls)
Service number:	09000445790 plus various other premium rate numbers
Cost:	£1.00 - £1.50 per minute/per call
Network operator:	Cheers International Telecom Limited
Number of complainants:	6 (including 1 industry complaint)

### BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 6 complaints from consumers regarding the receipt of unsolicited missed calls to their mobile phones, which terminated after one ring. One complaint included a representative of the mobile operator 3G UK Ltd, who reported that approximately 2,000 missed calls per day were being made to 3G customers. All 6 complaints formed the basis of the Executive’s preliminary investigations.

The missed call numbers were identified as either ‘09’ numbers or ‘070’ numbers. Consumers who returned the call were presented with either a recorded message or an unavailable telephone line. The complainants had not been informed of the cost of returning these missed calls, nor had a customer service contact number been made available.

Ofcom designate 070 numbers for use only as personal ‘follow me’ numbers and such numbers are charged at a higher rate (up to 50 pence per minute from a landline). Ofcom does not allow revenue share on 070 numbers. When the Executive attempted to monitor the service on 1 February 2008, it found that the service had already been terminated by the network operator.

The name of the service promoted through missed calls operated by ‘Khanna Enterprises’, was not identified. According to the information provider, the service was an information service, for example providing information relating to holiday destination weather. According to the information provider, the service was promoted on a website which was no longer live. Details of the website were not disclosed by the information provider. The service operated using 3,609 premium rate numbers.

On 13 February 2008 the Executive wrote to the service provider for further information under paragraph 8.1.3 of the 11<sup>th</sup> Edition of the Code of Practice (reprinted October 2007) (“the Code”). It asked a series of questions and requested information relating to the claims made by consumers. No response was supplied by Mr Tomasz Adamczyk (“service provider”). The service provider was subsequently notified on 28 February 2008 that a formal breach of paragraph 8.1.3 had been raised.

Potential breaches of paragraphs 5.4.1a, 5.4.3, 5.7.1, 5.8 and 8.1.3 were raised by the Executive in a letter dated 11 March 2008. Following the service provider’s request for the case to be dealt with by the information provider, the breach letter containing a request for further information was re-issued on 4 April 2008 to Mr Arun Khanna t/a Khanna Enterprises (“information provider”). A formal response was provided on 16 April 2008. The Executive notified Mr Arun Khanna in an email dated 2 May 2008 that a breach of paragraph 8.1.3 had been raised.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

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

*“Services and promotional material must not:*

*(a) mislead, or be likely to mislead in any way...”*

1. The Executive advanced three grounds upon which it argued there had been a breach of paragraph 5.4.1. These were:-

##### Reason 1

The Executive regarded the presentation of the 070 number as an ordinary number, to be an attempt to disguise the premium rate number to which the returned call was directed. It considered the manipulation and exploitation of CLI (Caller Line Identification) in this way to be misleading. The Executive was also of the opinion that the 070 ‘follow-me-number’ might mislead consumers to believe they would be dialling a mobile number. Consequently, the cost of the call might not be apparent to consumers until they received their bills.

##### Reason 2

The Executive considered that as neither a live person nor recorded message was made available upon connection to the service, consumers were misled as no service was offered.

##### Reason 3

The Executive considered it misleading that consumers could incur premium rate charges in excess of £1.00 per call, without being made aware of the cost to call the number. It also considered the manner in which missed calls were made to consumers i.e. terminating the call after one ring to prompt a return call, to be misleading. Consumers were not informed about the nature of the service, and therefore were unable to make an informed decision about whether they wanted to return the missed call. It considered the service to be misleading by omission.

2. The information provider did not respond in terms of the breach raised or reason given. In its response to the further information requested in the breach letter, it

stated that calls were not meant to be terminated after one ring, and that this was a technical error.

3. The Tribunal considered the evidence before it and rejected the information provider's argument that the missed calls were due to a technical error. No evidence of technical error was advanced. It considered the missed calls to be a promotion under paragraph 11.3.27 of the Code. It concluded that the missed calls had been made deliberately and deceitfully, that they were intended to mislead the recipient into thinking someone wished to speak to them and would mislead many recipients into thinking that the 070 number originated from a mobile phone. The Tribunal concluded that overall the service was misleading and upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

## **ALLEDGED BREACH TWO**

### **PROMOTIONS - UNAUTHORISED USE (Paragraph 5.4.3)**

*"Services must not be of a nature which encourages unauthorised use."*

1. The Executive noted that two of the complainants had received unsolicited missed calls on their business mobile phones. Both complainants returned the missed call believing it to be a genuine non-premium rate number. One complainant stated that calling premium rate numbers was an abuse of his company's telephone policy. The Executive considered that by presenting the number as an ordinary number, employees would be unlikely to seek authorisation to call it. It considered that most UK businesses had policies preventing or discouraging employees from engaging in the use of premium rate services, without seeking appropriate authorisation.
2. The information provider did not respond to this breach.
3. The Tribunal considered the evidence and concluded that at least one consumer had been encouraged to return the missed calls on a business mobile phone in breach of his company's telephone policy. Having regard to the number of consumers affected, both business and non-business consumers, the Tribunal concluded that the service was of a nature which encouraged unauthorised use. The Tribunal upheld a breach of paragraph 5.4.3 of the Code.

**Decision: UPHELD**

## **ALLEDGED BREACH THREE**

### **PROMOTIONS - 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 all complainants reported that they were not informed of the cost to return missed calls. It was only after the complainants returned the missed calls that they discovered that the numbers were premium rate either

through being informed by a recorded message service or upon receiving their phone bill.

2. The information provider did not respond to the breach.
3. The Tribunal considered the evidence and noted that there had been a total failure to provide pricing information and upheld a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FOUR**

##### **PROMOTIONS - 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 noted that all complainants received a missed call on their handset. The only information provided was a CLI or ‘Caller Line Identification’ which was a premium rate number or a 070 number. No other information was sent to the consumer and they had no way of contacting the service provider (other than by incurring a premium rate charge). The recorded message heard upon connection by some complainants also failed to include contact information.
2. The information provider did not respond to the breach raised. In its response to the further information requested in the breach letter, it stated that: *“Along with the voice prompt information about the price there was website url given.”* No further evidence was supplied to support the statement. In particular, the information provider did not verify that a contact number was available on the website.
3. The Tribunal considered the evidence and noted that no contact information had been provided by the information provider at the time of the initial promotion and, in many cases, none was provided at all. The Tribunal upheld a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FIVE**

##### **FURTHER INFORMATION (Paragraph 8.1.3)**

*“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 noted that the information provider had responded to 11 of the 17 questions posed by the Executive. Only 4 of the questions were answered sufficiently. The remaining responses failed to provide the relevant information

requested. The answers provided were presented in no particular order, with no reference made to the original question, which made it difficult for the Executive to ascertain which answers corresponded to which questions.

2. The information provider provided a limited response in a letter dated 16 April 2008. The Executive responded in an email dated 2 May 2008, stating that the information provided was inadequate. The information provider did not respond further.
3. The Tribunal considered the information provider's response to be wholly inadequate. The responses which were made were either partial responses or failed to answer the question as asked. The Tribunal concluded that there had been a failure to comply with a direction from the Executive to disclose relevant information. The Tribunal also noted that the information provider had been given a further opportunity to respond and had failed to do so. The Tribunal upheld a breach of paragraph 8.1.3 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:

- Consumers received nothing in return for responding to the missed calls. In essence, the service was devoid of value.
- In all the circumstances, the cost to individual consumers was high as they received nothing and were given no information.
- The behaviour of the information provider, in particular the manipulation of CLI, was wilful.
- The service caused material consumer harm, namely 6 complaints including a representative of 3G who reported approximately 2,000 missed calls made to 3G customers per day.

There were no mitigating factors for the Tribunal to consider.

Taking into account the aggravating 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 £25,000 fine;
- The information provider is to pay all claims made by users for refunds of the full amount spent by them, save where there is good cause to believe that such claims are not valid.

## **Tribunal Comment**

The Tribunal noted that other similar promotions have been known by the Japanese name “Wangiri” (“one call”) and that such promotions will almost inevitably not be compliant with the Code.

The Tribunal also commented adversely on the conduct of the network operator, Cheers International Telecom Limited. It considered that there was a strong case that it had failed in its due diligence requirements by taking on such a service and had performed unsatisfactorily in failing to disconnect the service.