

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

Thursday 14 August 2008 TRIBUNAL SITTING No. 8 / CASE 1
CASE REFERENCE: 760879/JI

Service provider & area:	Jack Barnard Telecom Services Limited, Epping, Essex
Information provider & area:	Roger Simmons t/a Russell Marketing Dagenham, Essex
Type of service:	Fixed Line
Service title:	Unknown
Service number:	070 365 15000-15999 070 365 22000-22999 070 365 47000-47999 070 365 63000-63999 070 365 86000-86999
Cost:	50 pence per minute from a standard BT line
Network operator:	Invomo Limited
Number of complainants:	32

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 32 complaints from consumers regarding the receipt of unsolicited calls allegedly made using Automated Calling Equipment (“ACE”). The calls had been made to residential, business fixed-line and mobile telephones and were identified as “070365” prefixed numbers.

The complainants were consistent in claiming that the call received lasted approximately 5 seconds and that during that time they heard a male voice which sounded like a recording, and stated: “*Hello, hello, can you hear me?*” (or similar), after which point the call was terminated. This prompted consumers to return the call whilst being unaware of high rate charges.

Ofcom have designated 070 numbers for use only as personal “follow me” numbers which are charged at a higher rate (up to 50 pence per minute from a landline). Ofcom do not allow end-user revenue share on 070 numbers.

The Executive was concerned that these 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, which involves a computer using hundreds of phone lines to randomly dial mobile phone numbers. After one ring, the call terminates and leaves the number stored in the receiving party's mobile phone. If the person returns the call they are connected, usually being charged a premium rate by the subscriber at the other end.

As it appeared that breaches of the 11th Edition (amended April 2008) of the PhonepayPlus Code of Practice were taking place which were serious and required urgent remedy, the emergency procedure was used.

The name of the service was not identified but was promoted through calls apparently operated by a company called "IP Ltd", a client of Roger Simmons t/a Russell Marketing ("the information provider"). According to Jack Barnard Telecom Services Limited ("the service provider"), the service was a "Personal Number Service" promoted by the information provider via the website www.4pns.co.uk. The service operated using a total of 5,000 numbers with the 070365 prefix.

How the service is supposed to work (according to the service provider):

Users signed up for a personal number and received instructions on how to promote and use it themselves. An important element of the service was the ability for the end-user to dial their own personal number, a unique PIN and then the number of the person they were calling. The purpose enabled the end-user to disguise their personal number.

How the services work in practice:

The service, which was charged at the rate of 50 pence per minute at all times, was promoted to consumers by ACE calls to both landlines and mobile phones.

The Caller Line Identification ("CLI") was available when the recipient of the call either viewed the incoming CLI display or dialled "1471" to find out the number of the caller. The CLI also remained displayed on mobile phone handsets. The calls made to consumers originated from a single 0207 number, but the CLI presented to them was an 070365 prefixed number.

It appeared that the return call was routed differently depending on whether the consumer called the 070 number back from a line where the CLI was presented. In some cases the call was routed to an apparently genuine end user; in other cases to a voicemail. Charging appeared to occur from commencement of the ringing tone. The Executive conducted the matter as an emergency procedure investigation in accordance with paragraph 8.6 of the Code. In a letter to the service provider dated 1st July 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.4.3, 5.7.1, and 5.8, of the Code, together with a request for further information under paragraph 8.3.3. The letter was later updated on 21 July 2008, in order to acknowledge the service provider's requests for extensions to the deadline, clarification on certain matters, and a further request by the Executive for information.

During the course of the investigation, the following responses were submitted by the service provider's legal representatives: preliminary information in an email dated 8 July 2008, a partial response to the breach letter dated 15 July 2008, and a formal response dated 28 July 2008. All statements and comments will be attributed to the service provider, regardless of whether they were submitted by its lawyers.

The Tribunal made a decision on the breaches raised by the Executive on 14 August 2008.

PRELIMINARY ISSUE

As the service provider disputed that PhonepayPlus had jurisdiction with regard to this matter, on the basis that there was no revenue share between the information provider and its client, the service being a personal numbering, not a premium rate service. The Tribunal therefore considered the preliminary issue as to:

- a. whether the 'service' was a premium rate service within the meaning of section 120(7) of the Communications Act 2003 ("the Act") (as set out in paragraph 11.3.1 of the Code); and
- b. whether the 'service' was a legitimate use of the 070 range.

The Tribunal concluded that the service satisfied all the elements of section 120(7) of the Act. The Tribunal also concluded that the 070 facility had been improperly used for the following reasons: i) there was evidence before it of revenue share between the service provider and the information provider and ii) the fact that there was no evidence of any legitimate end users beyond the information provider. This was supported by the fact that the calls to consumers appeared to come from a single source and all complainants reported the same or similar recorded messages.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

LEGALITY (Paragraph 5.2)

"Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful."

Under Section 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 it is an offence to use automated calling equipment ("ACE") to transmit, or instigate the transmission of, recorded matter for direct marketing purposes unless the subscriber has previously notified the caller that he consents to that particular telephone line being used for such communications and his consent remains valid.

1. The Executive noted that none of the 32 complainants reported to have consented to receive calls from a service using ACE. Several complainants explicitly stated that the calls received were unsolicited, including two complainants who had received calls to numbers registered with the Telephone Preference Service. The Executive considered that ACE had been used to transmit recorded matter for the purposes of direct marketing, in order to promote a premium rate service, operated using 070 prefixed numbers.
2. The service provider did not respond specifically to this breach. However, it stated that there was no evidence that ACE had been used in relation to the numbers supplied. The comments provided by consumers described scenarios in which calls were either answered personally or went through to personal voicemails. It considered that if ACE had been in place, this would not have been the case.

It also commented that none of the reported calls were either in respect of sales or marketing, and were therefore not in contravention of the TPS rules.

In view of the fact that many of the numbers affected were not publicly available or readily given out by the complainants, it logically followed that calls to these numbers were unlikely to have resulted from the use of a marketing list; and were likely to be misdialled numbers. The service provider also commented that the information provider felt unable to prevent its customers from making unsolicited calls but in any event, this was not a requirement for personal number services. The service provider reiterated that neither it, nor the information provider used ACE equipment, and that the information provider was not aware of its own customers using ACE.

3. The Tribunal considered the evidence and concluded that the information provided by the complainants was so strikingly similar about the content and duration of the call that on a balance of probabilities they were satisfied that there was use of ACE. The Tribunal noted the service provider's response, but concluded on the balance of probabilities that there was a lack of consumer consent, on the basis that the service provider had not offered any evidence to the contrary. The Tribunal considered that the purpose of the "service" was to elicit a response, namely that the recipient return the call. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

FAIRNESS - MISLEADING (Paragraph 5.4.1a)

*"Services and promotional material must not:
(a) mislead, or be likely to mislead in any way..."*

1. The Executive believed the service to be misleading because the overall nature of the recorded message suggested that the caller might know the consumer personally and that the caller was urgently trying to contact them, exacerbated by the fact that the call was terminated at the service end after approximately 5 seconds, which prompted a return call. The Executive also considered that the whole operation intentionally sought to mislead consumers by creating a fictitious scenario.
2. The service provider did not respond to specifically to this breach. However, within its response to the breach letter, it stated that it was not involved in the provision of such a service. It also stated that the information provider had advised that the set up of voicemail was a choice of each personal numbering customer.
3. The Tribunal considered the evidence and concluded that the urgent tone of the call, combined with its 5 second duration and the fact that the scenario was fictitious, was likely to mislead callers into calling the number. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

UNAUTHORISED USE (Paragraph 5.4.3)

“Services must not be of a nature which encourages unauthorised use.”

1. The Executive noted that of the 32 complainants, 7 reported receiving unsolicited calls on their business mobile or landline phones, one of whom returned the call. The Executive considered that most UK businesses would have a policy preventing or discouraging employees from using or accessing premium rate services, without seeking prior authorisation. By presenting the number as an ordinary mobile number, employees would be unlikely to seek the necessary authorisation.
2. The service provider did not specifically respond to this breach. However, in its response to the breach letter, the service provider stated that it had been advised by the information provider that whilst it sought to impose terms and conditions of use on its customers, the information provider felt unable to control the activities of its customers and prevent them from making unsolicited calls. However, it commented that this requirement was specific to premium rate services and not a requirement for personal number services.
3. The Tribunal found insufficient evidence to show that unauthorised use was *encouraged* and therefore, did not uphold a breach of this paragraph.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

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 only one complainant reported to have been informed of the cost, but only after returning the call, and therefore was not fully informed of the cost prior to incurring a charge. The Executive also noted that none of the remaining complainants were informed of the cost to return the call to a 070 number. It was only upon receiving their phone bills, that complainants discovered that they had been charged a high call charge rate.
2. The service provider did not respond specifically to this breach. However, it stated that calls cost 50p per minute from a BT landline and that calls from other networks and mobiles might vary, and that call costs were displayed on the website referred to above. It accepted that anyone calling the number would probably not have been aware of the cost of the call. It understood that for a period of time during the running of the service, originating networks provided a caller announcement quoting the cost of calls to 070 numbers and as such, call costs were available to the caller.
3. The Tribunal considered the evidence and noted that only one complainant had received information in respect of the cost of the service, when returning the call. However, the Tribunal concluded that there was no evidence to show that the service to users cost more than 50 pence, and thus fell under the pricing

exemption in Code paragraph 5.7.5. The Tribunal did not uphold a breach of paragraph 5.7.1 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FIVE

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 none of the 32 complainants were provided with contact information at any point during the service, either at the point of promotion, when the call was initially made to them, or upon calling the premium rate service. As the number displayed on the consumers’ handset and the recording message initially conveyed to consumers’ is considered promotional material, the absence of contact information would constitute a breach of paragraph 5.8.
2. The service provider did not respond to this specific breach. However, it stated that the information provider did not offer a helpline service. According to the information provider, there was no demand for such, although it did offer an email contact from its website. It commented that this condition related to premium rate services and was not required in respect of personal number services.
3. The Tribunal noted the evidence and the service provider’s admission that contact information was not provided. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal’s initial assessment was that, overall, the breaches taken together were **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 service provider’s behaviour was deliberate as regards the promotion and operation of the misleading service;
- The service caused material harm, resulting in 32 complaints received from members of the public;
- The misleading and unlawful use of ACE to promote premium rate services is a concern which has previously been brought to the attention of the industry; and

- The service provider's flagrant and deliberate disregard for PECR, Ofcom and PhonepayPlus compliance.

There were no mitigating factors for the Tribunal to consider.

Taking into account the aggravating factors and the 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; and
- A £200,000 fine.