

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS (FORMERLY ICSTIS)

TRIBUNAL DECISION

**Thursday 29 October 2008 TRIBUNAL SITTING No. 12 / CASE 2
CASE REFERENCE: 772771/MS**

Service provider & area:	Premium Lines Limited, Birmingham
Information provider & area:	Elite Networks Limited, Leicester
Network operator:	TeIXL Limited, Birmingham
Type of service:	Promotion of 070 numbers via www.yell.com
Service title:	N/A
Service number:	070408 59760 – 070408 59769 number range
Cost:	50 pence per call (drop-charge) plus 1 penny per minute thereafter
Number of complainants:	3

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 3 complaints from members of the public relating to the number 070408 59769, which was part of a range of ten numbers allocated to the service provider.

The Executive received complaints during June and July 2008, from companies who promoted their businesses via the directory enquiries website www.yell.com. Two complainants ran bed and breakfast (B&B) accommodation services, and the other a property business.

The website www.yell.com provides a facility which enables users searching its directory to email the listed organisations directly. The complainants advised the Executive that they had received an email (or emails) from persons who claimed to have contacted their business for genuine business enquiry reasons, and who requested a call-back to an 070 number.

An example of one of the emails received by complainants is as follows:

*“Please contact [NAME REDACTED] by telephone on 070***** regarding:
General enquiry*

The best time to contact [NAME REDACTED] would be any time.

Please do NOT use your reply function to respond to this enquiry. This will send your response to Yell.com and NOT the user.

Please respond using the user’s Email address or telephone number as provided above.

Message reads:

*Hi there, I called last week regarding a booking for the 21st July 08 for 5 nights. I was told that someone would call me back. I would appreciate if someone could assist me. Many Thanks [NAME REDACTED] 070***** / 07040859769*

Kind regards,

Yell.com”

The Executive’s Monitoring of the Service

The Executive monitored and recorded the service operating on the number 070408 59769, on 3 September 2008 at 14:47. After 20 seconds of listening to a recorded ringtone, the following recorded message was heard, which was presented in the style of a typical answer phone message:

“The person that you are trying to reach is not available. Please leave a message after the beep”

Calls to the 070 numbers were charged at 50p per call (“drop-charge”), and 1 penny per minute thereafter. The Executive received information from an independent source that 4,530 calls to the number range in question had been registered, of which 559 calls were to the number 070408 59769. Most calls were 60 seconds or less in duration and so incurred no more than the fixed charge of £50.10p. Twelve calls exceeded 60 seconds and were charged per minute, in addition to the initial drop charge.

The Executive also received confirmation from the network operator, which stated that all 10 of the numbers in the 070 number range under investigation were routed to one mobile telephone number. The network operator chose to close down the number range involved in the investigation upon first contact from the Executive, on 3 September 2008.

The Executive conducted this matter as a standard procedure investigation and instructed the network to withhold revenue in accordance with paragraph 8.5f of the PhonepayPlus Code of Practice (“the Code”) 11th Edition (amended April 2008).

The Executive raised potential breaches of paragraph 5.4.1a, 5.4.1b, 5.7.1 and 5.8 of the Code, in a letter to the service provider dated 23 September 2008. The service provider responded on 30 September 2008 and requested that the investigation be dealt with as an information provider case. Upon receipt of the relevant signed undertaking forms from both the service provider and the information provider, the Executive checked the information provider’s details at Companies House. The Executive found that the information provider company was dissolved as of 27 August 2008, and for this reason the request was refused and the service provider deemed the party responsible for the services.

The Tribunal made a decision on the breaches raised by the Executive on 29 October 2008.

Preliminary Matter

The Tribunal considered the preliminary issue as to:

- a. whether the ringtone recording and/or recorded message heard by complainants, constituted a service for the purposes of section 120(7)(a) of the Communications Act 2003 (“Act”) and within the meaning of section 120(8)(a) of the Act), being contents of communication;
- b. whether the ‘service’ was a legitimate use of the 070 number range;
- c. whether the service involves the use of 070 numbers which are charged at a cost exceeding 10 pence per minute, which satisfies the requirements of the Controlled Premium Rate Services Condition (“CPRS”) as set and published by Ofcom from time to time.

The Tribunal concluded that the service satisfied all the elements of sections 120(7)(a) and 120(8)(a) of the Act. The Tribunal also concluded that the 070 facility had been improperly used for the following reasons: i) there was evidence of intended revenue share between the service provider and the information provider and ii) the fact that there was no evidence of any legitimate use of the 070 numbers. The Tribunal noted that the service involved the use of 070 numbers charged in excess of ten pence per minute (namely a 50 pence drop charge, plus 1 penny per minute thereafter), which thereby satisfied the requirements of the CPRS Condition.

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 that consumers promoting their business on the website www.yell.com, who received one (or more) emails from a person with an apparently genuine enquiry, might have been misled into calling the 070 number contained in the email. The Executive noted that as the emails had been personalised with an individual’s name, personal telephone number and the specific reasons for their enquiry tailored to the company in question, the recipient might not have had reason to suspect it was not a genuine enquiry.

The Executive noted that many of the same or similar types of businesses were sent emails which were almost identical in nature. The Executive also discovered that all of the 070 numbers routed to one mobile telephone number (which it considered likely to be connected to one answering machine).

2. The service provider did not provide a specific response to the alleged breaches, but requested that the Executive contact the information provider directly. As PhonepayPlus had not granted a request to deal directly with the information provider, the Executive was unable to contact the information provider and made this clear to the service provider. The service provider acknowledged that it had

understood the process, but chose not to respond further in respect of any of the breaches raised.

3. The Tribunal noted that the service provider had declined to supply a detailed response to the breach. The Tribunal considered the evidence and concluded that the emails sent via the www.yell.com were not genuine enquiries, but clear and deliberate attempts to encourage the recipient to call the premium rate 070 number stated within. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

UNFAIR ADVANTAGE (Paragraph 5.4.1b)

“Services and promotional material must not:

b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”

1. The Executive considered that unfair advantage might have been taken of consumers who called the expensive 070 numbers contained in the emails. The emails failed to convey (to the lay consumer) that the numbers were not normal phone numbers. The Executive also considered it likely that some recipients might be unaware of the existence or purpose of 070 numbers. The Executive subsequently raised concerns that although it considered the service misled consumers into calling the 070 numbers, some of the reasons raised either overlapped with those raised in respect of paragraph 5.4.1a, or were not relevant. The Executive recommended that the Tribunal did not uphold a breach of paragraph 5.4.1b of the Code.
2. The service provider stated it had believed that the 070 numbers in question were used as follow-me numbers and that it was unaware of any other “service or promotion” operating upon them. The service provider declined to comment further (as clarified in relation to the breach of paragraph 5.4.1a of the Code).
3. The Tribunal considered the evidence and noted the Executive’s submissions that some of the reasons raised had already been dealt with under 5.4.1a of the Code, or were irrelevant. The Tribunal did not uphold a breach of paragraph 5.4.1b of the Code.

Decision: NOT UPHELD

ALLEGED BREACH THREE

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 emails received by complainants through www.yell.com did not appear to include any pricing information as required by paragraph 5.7.1 of the Code.

2. The service provider reiterated that it had believed the 070 numbers in question were used as follow-me numbers and that it was unaware of any other “service or promotion” operating upon them. The service provider declined to comment further (as clarified in relation to the breach of paragraph 5.4.1a of the Code).
3. The Tribunal considered the evidence and noted that the emails sent via the www.yell.com website failed to include any pricing information in respect of the 50 pence drop charge and 1 penny per minute charge thereafter. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

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 the emails received by complainants through the website www.yell.com did not appear to include the identity of contact details in the UK of either the service provider or information provider, as required by paragraph 5.8 of the Code.
2. The service provider did not respond to the breaches raised (for the reason stated in relation to the breach of paragraph 5.4.1a of the Code).
3. The Tribunal considered the evidence and noted that the emails sent via the www.yell.com website, failed to include any contact information in respect of the service provider or information provider. 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 was reckless in respect of its lack of due diligence regarding the information provider’s illegitimate use of the 070 numbers provided, which had been used in a wilfully deceptive fashion;

- There was material consumer harm, evidence by the high number of calls made to the service (4,523); and
- The misleading and unlawful use of 070 numbers is a concern which has previously been brought to the attention of the industry.

There were no mitigating factors for the Tribunal to consider.

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

The Tribunal therefore decided to impose the following sanctions against the service provider:

- A formal reprimand, making specific reference to the lack of due diligence carried out by the service provider in respect of the information provider.
- A punitive fine of £10,000.
- A bar on the service and the numbers providing access to the service until the service provider seeks and implements compliance advice from PhonepayPlus. The Tribunal doubted whether the service which had been the subject of the present complaints could be made compliant with the Code, but required the service provider to seek compliance advice regarding the future use or allocation of the numbers which provide access to the service in question.
- Claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.