

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 4 December 2008 TRIBUNAL SITTING No. 16 / CASE 3

CASE REFERENCE: 748452/JI

Service provider & area:	Starwire Limited, Romford, Essex
Information provider & area:	N/A
Type of service:	Fixed Line
Service title:	Unknown (promoted through missed calls)
Service number:	Various number ranges within the following prefixes: 070145, 070425, 070427, 070428, 070617, 070817, 070817 and 070896
Cost:	50 pence per minute (070145, 070427, 070428, and 070817 prefixed numbers). 50 pence per call plus 3.95 pence per minute (070425, 070617, and 070896 prefixed numbers).
Network operator:	Hotchilli Communications Limited, London
Number of complainants:	27

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 27 consumer complaints regarding the receipt of unsolicited calls to personal landlines or mobiles from one or more 070 prefixed numbers. The complainants were consistent in claiming that the call they received terminated after one ring. This prompted consumers to return the call whilst being unaware that the number was not a mobile number and would incur higher rate charges. The vast majority of complainants who returned the call claimed that they were connected to either a recording of a ringing tone, or a voicemail messaging service.

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. This service charged users either 50 pence per minute or 50 pence per call plus 3.95 pence per minute from a standard BT landline, and appeared to charge consumers from the commencement of the ringing tone.

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.

The Executive’s understanding of how the service should have operated

The name of the service was not identified but had been promoted through calls operated by the service provider. According to the service provider, a range of 070 prefixed numbers were allocated for a particular international VOIP (“Voice over Internet Protocol”)/SMS/MMS (“Multimedia Messaging Service”) plus other mobile and fixed data solutions. This enabled end users or communication providers to receive both fixed and mobile voice and data calls, and to also receive similar services, such as standard mobile call features i.e. SMS/MMS when they were in different locations, hence a ‘follow me’ service.

The service provider claimed that the system also allowed users to make outbound (“egress”) calls when they were on the move via VOIP and to send SMS and MMS via the service. Where the call terminated, that end user would be given the originator’s CLI (“caller line identification”) wherever possible and appropriate. The CLI in this case corresponded to the end user’s designated personal number and was available either when viewing the incoming call display on mobile phone handsets or upon calling ‘1471’. The specific CLI numbers varied but originated from a 070 prefixed number range.

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5f of the Code.

In a letter to the service provider dated 26 September 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 information under paragraph 8.3.3. A formal response to the breach letter was provided by the service provider on 10 October 2008.

As several of the questions within the request for information contained in the breach letter were not answered sufficiently, the Executive raised a further breach of paragraph 8.3.3 on 24 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 4 December 2008.

Preliminary Matter

As a preliminary issue the Tribunal considered the following matters:

1. 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;
2. whether there had been for the purposes of sections 120(7)(b), (c) and (d) of the Act; a charge for the provision of the service such charge paid to a person providing an electronic communication service by means of which the service in question was provided; and, such charge imposed in the form of a charge made by that person for the use of the electronic communications service.
3. whether the service involved the use of 070 numbers which were charged at a cost exceeding 10 pence per minute, thereby satisfying the requirements of the Controlled Premium Rate Services Condition (“CPRS”) as set and published by Ofcom from time to time.

The Tribunal concluded that:

1. The ringtone recording and/or recorded message heard by complainants, constituted a service within the meaning of section 120(8)(a) of the Act being contents of communication, and was thereby a service for the purposes of s120(7)(a) of the Act.
2. The service also satisfied subsections 120(7)(b), (c) and (d) of the Act on the basis that the callers to the numbers were charged on connection to the service and some of the monies paid by callers to their respective billing networks, having first been paid to the network operator, were received by the service provider, who also appeared to be the end user. Furthermore, the Tribunal noted the lack of any evidence suggesting that there were any other valid end-users to which the 070 numbers were assigned, other than the service provider.
3. The Tribunal noted that the service involved the use of 070 numbers charged in excess of ten pence per minute (50 pence per minute or 50 pence per call plus 3.95 pence per minute from a standard BT landline), which thereby satisfied the requirements of the CPRS Condition.

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:

The Executive noted that 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. The Executive considered that receiving a missed call in this manner, prompted consumers to return the 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.

The Executive considered the consumer expectation of responding to a ‘missed call’ was usually to find out more information about who had called and their reason for calling. That expectation was defeated in this instance, as responding to the 070 number directly engaged the consumer with the service, which was a commercial enterprise. Consequently, the cost of the call might not be apparent to the consumer until they received their bill and were thereby misled.

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 two 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 did not respond to the breach raised. However, in its response to the further information requested by the Executive, it stated that it had no records of the complainants in question receiving calls from its system. The service provider also commented that the caller would or should have heard a ringtone when the call was routed through to the end user. Due to the fact the end-user could route the call via VOIP etc, several different styles of call routing had initially been tested. It was found that especially in the case of VOIP, the majority of the calls would route with silence, resulting in the caller terminating the call before being connected. The service provider stated that all callers should have heard a generic UK ringtone, although the end user was able to specify different ringtones including international and fun ringtones.
 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 in the belief that they had missed a call from someone who wanted to speak to them. The Tribunal 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 at all times for 070145, 070427, 070428, and 070817 prefixed numbers, and 50 pence per call plus 3.95 pence per minute for 070425, 070617, and 070896 prefixed numbers. The service 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 27 complainants reported to 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 did not respond to the breach raised. However, in its response to the further information requested by the Executive, it stated that as the service was a personal number service and ran on 070 as per Ofcom regulations, and did not play a message informing consumers of the call cost as it was not a requirement. The service provider stated that there was a message previously played by all operators for a time, which informed the end users that the call costs were 50p or more, depending on the caller's network. This was implemented for 070 numbers in the UK in September 2007 as part of an Ofcom directive, and subsequently removed by the operators around December 2007, for reasons unknown.
3. The Tribunal considered the evidence and concluded that consumers had not been supplied with any 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 27 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 did not respond to the breach raised. However, in its response to the further information requested by the Executive, it commented that since the service was not run on premium rate numbers, no customer services number was operated, although there was an online help facility available to customers.
3. The Tribunal considered the evidence and concluded that the display of CLI on consumer's mobiles or land lines constituted promotional material for the purposes of paragraph 11.3.27. It also concluded that this promotional material had failed to provide consumers with any contact information. The Tribunal therefore 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 27 complainants reported to have consented to receive missed calls from the 070 prefixed numbers, which related to the service. Several complainants 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 did not respond to the breach. However, in its response to the further information requested by the Executive, it commented that end users were free to make and receive calls through the system as they pleased; in exactly the same way that a user could make and receive calls from both fixed lines and mobile phones. If complaints had been received with respect to nuisance calls sent through the system, then those users would have had their numbers blocked. The service provider also stated that no calls were made by the service provider through the system, apart from test calls.
3. The Tribunal considered the evidence and concluded that the service had been inappropriately promoted due to the lack of consent of the recipients, the frequency of the calls (in some cases) and the worry or annoyance caused by the apparent missed calls. 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 made various requests for information under paragraph 8.3.3 of the Code. The service provider failed to answer certain questions sufficiently. In some instances, the service provider referred the Executive to missing attachments, however these were eventually supplied.
2. The service provider disputed the Executive’s allegations. It disputed its alleged use of certain number ranges, also disputed the categorisation of 070 numbers

as premium rate and requested that the Executive obtain the missing attachments, directly from the network operator.

3. The Tribunal considered the evidence and noted that although the service provider had subsequently provided the missing attachments and had attempted to answer the Executive's questions, the answers received were insufficient. 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 service provider's operation of the improper use of 070 numbers was wilful;
- There was material consumer harm; there were 27 consumer complaints but the revenue from the service showed that thousands of calls had been made to the service;
- The cost paid by individual consumers was high; 50 pence plus per minute; and
- The misleading and improper 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 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 fine of £250,000; and
- The Tribunal ordered that 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.