

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 2 April 2009 TRIBUNAL SITTING No. 24 / CASE 5**

**CASE REFERENCE: 767427/JI**

Service provider & area:	Enbel Limited, London
Type of service:	Fixed Line
Service title:	Unknown (promoted through missed calls)
Service number:	07042100000-07042199999 07089632000-07089633999
Cost:	50 pence per call plus 3.95 pence per minute from a standard BT landline
Network operator:	Hotchilli Communications Limited
Number of complainants:	7

### **THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE**

#### **BACKGROUND**

The PhonepayPlus Executive (“the Executive”) received 7 consumer complaints regarding the receipt of unsolicited calls to personal 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 a recording of a ringing tone.

The service charged users 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 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 8 January 2009, 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 disputing allocation of the 070 numbers was provided by the service provider on 13 January 2009.

As none of the questions within the request for information contained in the breach letter were answered, the Executive raised a further breach of paragraph 8.3.3 on 19 January 2009.

The Tribunal made a decision on the breaches raised by the Executive on 2 April 2009.

### **Preliminary Matter**

As a preliminary issue the Tribunal considered whether the service was a regulated premium rate service and considered the following matters:

1. whether the recording of a ringing tone 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 service provided by Enbel, 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 making the service a Controlled Premium Rate Service (“CPRS”) as defined within paragraph 2(e) of the Premium Rate Services Condition (“the PRS Condition”) as published by Ofcom in December 2003 (as amended in April 2007).

The service provider disputed that it was the service provider for the following reasons:

1. The service provider stated that it used to have its own number ranges which were hosted on another company’s switch, but these were transferred to a different company. The service provider assured the Executive that although it appeared that the numbers belonged to it, it had never received any payment in relation to calls to the numbers.
2. The service provider stated that it was very clear that it was not in breach at any time and that the contract issued by the network operator was not valid. The service provider re-emphasised that it never invoiced the network operator for these calls and never received any payment from the network operator into its bank account.

The Tribunal concluded that the service was a regulated premium rate service and that Enbel was the service provider for the following reasons:

1. The recording of a ringing tone 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 appeared to have been received by the service provider (in the absence of any evidence to the contrary) who also

appeared to be the end user. The Tribunal noted the lack of any evidence to support the service provider's assertion that the relevant numbers had been transferred to another company or that the contract it had with the network was invalid and that no revenues were received. The Tribunal also noted the lack of evidence to suggest 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 call plus 3.95 pence per minute from a standard BT landline) and was thereby a CPRS for the purposes of the PRS Condition.

The Tribunal commented that it would not consider number ranges where no complaints had been received i.e. 07089632000-07089633999. The Tribunal therefore restricted its consideration to the 100,000 numbers, being 070 numbers, within the range 07042100000 to 07042199999.

## **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 on the following grounds:

##### Ground 1

The Executive stated 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 that 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 may not have been apparent to the consumer until they received their bill and were thereby misled.

##### Ground 2

The Executive submitted 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 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 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.
3. The Tribunal considered the evidence and concluded that, in relation to ground one, 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 and that the number they were calling from was a personal mobile number. In relation to ground two, the Tribunal concluded that the service had presented a recording of a ringing tone as a clear and deliberate attempt to mislead consumers into staying on the line in the mistaken belief that connection had not been made, thereby increasing the revenue generated by the service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code in relation to both grounds.

**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 submitted that the service was charged at 50 pence per call plus 3.95 pence per minute. 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, given by paragraph 5.7.5 of the Code. None of the 7 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.
3. The Tribunal considered the evidence and concluded that consumers had not been provided with any pricing information prior to returning the call and consequently 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 caller line identification (“the CLI”) number displayed on the consumers’ handset fell within the definition of promotional material under paragraph 11.3.27 of the Code. None of the 7 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.
3. The Tribunal considered the evidence and concluded that the display of CLI on consumers’ 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 identity or 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 submitted that none of the 7 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 raised.
3. The Tribunal considered the evidence and concluded that the manner in which the service was promoted was inappropriate (i.e. the use of one ring to solicit a

call back, the failure to obtain the consent of the recipients prior to calling them, the frequency of the calls (in some cases), and the worry or annoyance caused to complainants by the 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 supply any response to the questions raised.
2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the service provider had completely failed to provide responses to any of the Executive’s requests for information under paragraph 8.3.3 of the Code. The Tribunal therefore 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 provider’s improper use of 070 numbers was wilful;
- There was material consumer harm; there were 7 consumer complaints and almost 200,000 calls made from consumers to the range of 070 numbers under consideration;
- The cost paid by individual consumers was high; 50 pence per call plus 3.95 pence per minute from a standard BT landline, and considerably higher from a mobile phone;
- 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 did not co-operate with PhonepayPlus when notified of the breaches.

There were no mitigating factors for the Tribunal to consider.

Taking into account the aggravating factors 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 £110,000; and
- The Tribunal also 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.