

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 18 February 2010
TRIBUNAL SITTING No. 47/ CASE 1
CASE REFERENCE: 807597/MS

Network Operator:	Cheers International Sales Limited
Service title/type:	N/A
Service numbers:	070333, 070344, 070353 number ranges
Cost:	50p per call, plus 3.95p per minute at all times.
Network operator:	All Mobile Network Operators
Number of complainants:	129

THIS CASE WAS BROUGHT AGAINST THE NETWORK OPERATOR UNDER PARAGRAPH 9.1 OF THE CODE

BACKGROUND

In July and August 2008, PhonepayPlus received complaints from members of the public regarding missed calls received from '070333' prefixed numbers which were operating on the Cheers International Sales Limited network (the 'Cheers Network'). The complaints were linked to three service providers which were all found to be in breach of the PhonepayPlus Code of Practice 11th Edition Amended April 2008 ("the Code") and rated as 'very serious' 'wangiri' scams (missed call scam).

The Executive has received a further 129 complaints from members of the public between 1 January 2009 and the present date. Consumers received missed calls to both landlines and / or mobile phones, which were terminated after just one ring. The Caller Line Identification ('CLI') was available when the recipient of the call either viewed the incoming CLI display or called '1471' to find out the number of the caller. Consumers then called one of the numbers (prefixed '070333') back, expecting it to be a genuine missed call, at which point they were charged for the call. There was an initial charge of 50p per call plus 3.95p per minute at all times. Charging appeared to have occurred from the moment a ringing tone was heard.

As a result of the association of all three service providers with the Cheers Network, the Executive commenced an investigation specifically in relation to Cheers Network's due diligence procedures and any steps taken to prevent the evasion or undermining of the regulation of premium rate services (as required by all network operators under the Code).

(i) The Investigation

The Executive conducted this investigation using the Standard Procedure in accordance with paragraph 8.7 of the Code.

Following an investigation, the Executive sent preliminary directions to the Network Operator on the 16 and 22 October 2009. The Network Operator provided information under the directions.

The Tribunal made a decision on the breaches raised by the Executive on 18 February 2010, having heard an Informal Representation from the Network Operator.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

GENERAL RESPONSIBILITIES (Paragraph 2.1.1b)

“Network operators must ensure that PhonepayPlus regulation is satisfactorily maintained by:

- b taking all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services.”*

1. The Executive considered there to be a breach of paragraph 2.1.1b of the Code on the following grounds:

Ground1

Several 070 numbers pointing towards one MSISDN

The Executive submitted that it was of the opinion that the Network Operator should have been suspicious, on several occasions, of missed call services operating on the Cheers network on their client’s completion of their ‘070 Numbers Service Order Forms’ as it showed that several 070 numbers had been requested to point to just one geographic phone number (also known as a MSISDN).

It made reference to the Network Operator’s response to the Executive’s Directions of 22 October 2009, in which the Network Operator stated that to have informed its client (Mr D. Naruna who had requested that 50x 070 numbers to one phone number) that he could not do this. It submitted that the client replied that he would make sure that the numbers did not do this, but there does not appear to be any further correspondence between himself and the Network Operator to show that this did not happen.

The Executive made reference to the number of consumer complaints and submitted that it was of the opinion that this same level of due diligence may have also been applied each time the Network Operator was faced by this situation.

It provided other examples of ‘070 Numbers Service Order Forms’ and submitted that these were examples of three order forms taken from the three formal investigations which were formally adjudicated in December 2008 (case ref 764718, case ref 779455 & case ref 777081). It submitted that it could be seen from the forms that all of these clients of the Network Operator had requested that the 070 numbers in each example be pointed towards a single end user number.

Further, you have also stated in your response to the Executive’s Directions of 22 October 2009 that:

“it should be noted that there is nothing stopping any individual taking out as many 070 numbers as they wish and have them point to just one number. For instance a salesman may advertise different 070 numbers depending on different marketing platforms. Also a number reseller may wish to connect them to a test number to illustrate the numbers are active and the type of service that can be used. None of this is against the guidance set by Ofcom on 070.”

The Executive made reference to the Network Operator's response that stated the following:

"it should be noted that there is nothing stopping any individual taking out as many 070 numbers as they wish and have them point to just one number. For instance a salesman may advertise different 070 numbers depending on different marketing platforms. Also a number reseller may wish to connect them to a test number to illustrate the numbers are active and the type of service that can be used. None of this is against the guidance set by Ofcom on 070."

The Executive submitted that whilst it may not be against the Ofcom guidance to point more than one / multiple 070 numbers towards one end user number, it had never been made aware of the examples that you have given in practice. The Executive submitted that it was of the opinion that clients requesting to set up their numbers in the manner referenced by the Network Operator, should have been treated with the utmost care due to the type of request.

The Executive submitted that in light of the above it appeared that full due diligence procedures had not been carried out in these instances and that the Network Operator had not taken all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services.

Ground 2

Checks (testing) of services

The Executive made reference to the Network Operator's response to the Executive's Directions of 22 October 2009. It submitted that the Network Operator had responded to the request for evidence with regard to internal 070 number checks by stating that the numbers had been dialled by the technical support team and e-mail evidence had been supplied to support this assertion.

It submitted that the first e-mail trail, of 27 and 28 November 2008, demonstrated that of the 31 '070333' numbers passed to the technical support team for checking, 25 of the '070333' numbers were connected with ten of them going to voice mail. The second e-mail trail, of 14 and 16 April 2009, demonstrated that nine of the '070333' numbers which were checked by the technical support team went to voice mail.

The Executive submitted that a key trait of missed call services is that the number dialled is connected to a voice mail. The Executive submitted that the Network Operator's technical team tested the numbers and then reported back that many of them went to voice mail and made no further checks. The Executive submitted that this showed a distinct lack of care and due diligence on the part of the Network Operator and as such it appeared not to have taken all reasonable steps prevent the undermining of the regulations of premium rate services. And furthermore, the e-mails referenced above (sent from the technical team) do not appear to indicate that all of the numbers asked to be tested, actually were tested.

The Executive submitted that the Network Operator should have been aware that numbers diverting to voice mail was a key trait of missed call services, as was the case with the three previously adjudicated services that were operating on the its network.

Ground 3

The use of marketing databases

The Executive made reference to the Network Operator's responses to the Executive's Directions of 22 October 2009. It submitted that the Network Operator supplied details of complaints that it had received directly from members of the public. Furthermore, the Network Operator also supplied e-mail evidence of its contact with its clients in advising them there had been a complaint(s) made against them.

The Executive submitted that from viewing this information that it appeared that a) marketing databases had been used to call consumers' telephone numbers (either their mobile phone numbers or their landline telephone numbers), and b) that the numbers had been used by 'a salesman' or 'a businessman' (as noted in the respective e-mail chains).

The Executive submitted that the use of a Marketing list or database to call consumers was not a legitimate use of 070 numbers and it was of the opinion that the Network Operator should have been aware of this fact. It submitted that in its email correspondence, in which the Network Operator advised that the end user's numbers should be removed from the list / database, the Network Operator had not stated that such lists are not actually permitted to be used in relation to 070 services. In light of this, it was the opinion of the Executive that the Network Operator had not fully undertaken its duties in taking all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services.

Ground 4

The monitoring of short call patterns

The Executive made reference to the Network Operator's response to the Executive's Directions of 22 October 2009. It submitted that the Network Operator had stated that it did not monitor short call patterns on 070 numbers, partly due to the fact that it had too many numbers – over 10 million – to make this possible in a practical sense.

The Executive submitted that the Network Operator had supplied call statistics on the number range 070333 00000 – 070333 79999 (79,999 numbers) for the period 1 January 2009 – 2 September 2009 which show that hundreds of thousands of calls (626,714 calls) were made to numbers in this range within this period. And that each call made by a consumer was incredibly short in length i.e. less than 20 seconds.

The Executive submitted that it was of the opinion that each of the calls to the numbers in this range had been made as a result of a missed call received by the consumer and that there would not seem to be any other explanation whatsoever for the short call lengths. It also submitted that it was of the opinion that the Network Operator should have had systems in place to alert it to this kind of abuse at an early stage. It also noted that practically every single consumer call was to a number owned by one of the

Network Operator's clients and that the vast majority of consumer calls had been made from their mobile phones.

Ground 5

Complaints received by Cheers directly

The Executive submitted that with regard to the complaints that the Network Operator had received directly from consumers (details of which were supplied in its response to the Direction of 22 October 2009), it appeared that, from what consumers had written, it was clear that the numbers they were questioning had been used in connection with missed call services.

The Executive submitted that in spite of this, it appeared that the Network Operator's standard response was to refund the consumer, and contact its client to ask the use of the number and ensure that the complainant's mobile phone number or geographic number was removed from any marketing database. It also reminded its client of the Ofcom guidance notes in relation to the acceptable uses of 070 numbers by way of referencing a web link within the e-mail.

The Executive submitted that this was a standard response – i.e. the response used by the Network Operator in several e-mail trails in relation to complaints of this nature and it did not suggest to the Executive that any further action was being taken against the client or that the purpose of the number was actually provided by its client.

2. The Network Operator responded to the Executive's allegations as follows:

Ground 1

Several 070 numbers pointing towards one MSISDN

The Network Operator made reference to one of the Executive's examples in relation to its '070 Service Order Forms' and stated that in that particular example it had specifically told its client that he could not point to just one geographic number, of which he acknowledged. It stated that in relation to the other '070 Service Order Forms' taken from the three formal investigations adjudicated on in December 2008 - case ref 764718, case ref 779455 and case ref 777081, these should bear no relevance, as these forms were issued to these clients before the industry tightened its standards on 070.

The Network Operator made reference to Ofcom's 'Personal Numbering - Guidance on the acceptable use of 070 numbers' Revised 27 February 2009 and quoted as follows:

"The End-user must be in charge of the destination number" and goes further to say "all Personal Numbering Services have in common is that it must be the called party who decides which destination the 070 number is routed to. Additionally, if the service that is being offered is the facility to be reached at any chosen destination then the End-User must be in charge of changing as well as allocating the destination number."

It stated that following this guidance it had set up an online administration area on its number reseller website (uknumbers4u.com), whereby a user could log in and administer their own number. It stated that as such the Ofcom guidance itself made the service

order forms irrelevant, as the user administered their own number and could change it as they please.

It stated that the service order forms provided by the Executive were originally set up internally for 09 premium rate services during the time that it had been dealing specifically with service providers. It stated that it had helped it administer internally and had provided it with another way to check due diligence as these forms were sent to a service provider's UK address, therefore verifying the address and another signature confirmation. It stated that in the case of 070 numbers, it had found itself dealing specifically with number resellers, and as such were receiving requests for a batch(s) of numbers without any destination numbers attached in the first instance. It stated that it was only when the numbers were resold to clients that numbers were attached. It stated that as these forms had not really bourn any significance.

The Network Operator stated that in hindsight it was easy to suggest that a client asking for a batch of numbers to be pointed to one destination number should have been dealt with suspicion, but if the presence of a number reseller and the fact the numbers can be administered beyond the control of Network Operator as stated by Ofcom (point 3 above), this kind of thinking was redundant in its opinion.

The Network Operator stated that to counter balance this, it had under its own initiative introduced due diligence procedures, as follows:

- i. Request for proof of identity (copy of ID).
- ii. Request for contact details (address, email & tel no (non premium), and if not based in UK, UK details requested as well.
- iii. Request for UK Bank details, preferably a recent statement showing balance.
- iv. Check the PhonepayPlus website for any prior adjudications made against the service provider/information provider or individuals. Checking whether the directors have been associated with other companies against which rulings have been made by PhonepayPlus/Ofcom/ASA or other regulators.
- v. Service checks of the service.

It made reference the above due diligence process and quoted Ofcom's 'Personal Numbering - Guidance on the acceptable use of 070 numbers' Revised 27 February 2009, as follows, *"To allow a reasonable time for 070 allocatees to carry out their due diligence process, communications providers have 18 months before the above guidance applies to existing customers, i.e. until 28 August 2010."* The Network Operator stated that it had shown to have applied this guidance well within the Ofcom deadline.

Ground 2

Checks (testing) of services

The Network Operator stated that it disagreed that the emails supplied from its technical team *"do not seem to indicate that all the numbers asked to be tested where tested"*, it stated that these emails specifically indicated all the numbers requested where tested.

The Network Operator stated that the internal call checks had never given the impression that a premium rate service was being applied. It stated that testing these numbers resulted in connection to a user, connection to a voicemail or the number was shown as not active. It stated that this was typical of what you would expect a 'follow me

number' to act like in accordance to the Ofcom guidance and typically a number assigned to a number reseller. It stated that not once had calling the number led to a recorded service, chatline, internet dialler or sexual entertainment service, and therefore it had not been given the impression that the numbers had a premium service attached to them.

The Network Operator stated that in hindsight, it could be argued that voicemail was a key trait, but so could a recording of a ringing tone (recent adjudication case ref 806717), however call testing would not have shown any initial misuse.

It stated that call checking for the type of service would not always show 070 misuse, as a missed call service could hide behind a genuine service, i.e. a correctly used 070 follow me number can go to a voicemail. There was nothing questionable about voicemail on a 070 number.

The Network Operator made reference to the guidance set out by Ofcom a 070, a user can set up their 070 number to divert to their contact number (i.e. mobile, landline, international number etc) and stated that a call made by an end user could be answered or go to the standard voicemail for that number.

Ground 3

The use of marketing databases

The Network Operator acknowledged the Executive's reference to the possible use of marketing databases, however, this terminology had been in reference to what the end user had requested i.e.: if an end user requested for their number to be removed from a database so that they are not called again, this message would be relayed as well a reminder to the number reseller / service provider of their responsibilities. It stated that this was standard procedure across all its number ranges.

The Network Operator stated that in email correspondence the number resellers in question had not referred to any marketing lists or databases and that it had referred to them as a result of the request from the end users. Also, it stated that the correspondence referred to numbers being forwarded to a 'businessman' and 'salesman', which was a legitimate use for 070 numbers.

It stated that it should be noted that the recorded complaints had helped it ascertain a full investigation into one of the resellers, whereby upon further investigation the Network Operator had suspected misuse of the reseller and had concluded by terminating his numbers.

Ground 4

The monitoring of short call patterns

The Network Operator stated that it should be noted, that with over 10 million numbers, the foremost way it policed these numbers was by end user enquiries and feedback from other operators, PhonepayPlus and Ofcom. It stated that the co-operation of all, or part of these contributors' means it could act swiftly to any misuse. However, without the co-operation of these parties, it was very difficult to monitor all of its numbers effectively. It stated that to spot check a number to see if it has the correct service was one thing, but

to check short call duration was another, as this would mean call reporting on all its numbers to see if there were short call duration patterns. It stated that this would create a very large strain on its switch and was likely to cause major disruption to its service as it was only a small-medium sized Network Operator.

It stated that only once it had received a third party enquiries would it find itself in a position to challenge the service provider/reseller. It stated that in some instances there had been a suspension of a number reseller and their numbers due to them not satisfying one of its internal investigations.

The Network Operator stated that, currently, there was no requirement for a Network Operator to check numbers continuously for short call durations, therefore if PhonepayPlus were suggesting it was in breach of this, then the majority of Network Operators were too. It stated that if PhonepayPlus made it a requirement for it to check for short call duration, then it would expect this to be applied across the whole industry.

Ground 5

Complaints received by Cheers directly

The Network Operator stated that it was of the opinion that receiving five complaints in ten months had not warranted the same attention that 129 complaints (as set out by the Executive) would have given it. It stated that some complaints had led to the termination of one of its client's numbers.

Network Operator concluding points:

- It applied due diligence where necessary and had provided proof to show this (even though it argued that the requirement to do so was unclear).
 - If the due diligence checks are clean, then it had to partly take what the service provider / number reseller said as true e.g. what type of service it was.
 - It included fail-safe procedures in the contract with regards to payment, i.e. payment was only made 40 days after the first month, and payments would not be issued until the amount reached £200.
 - If information of end user complaints/enquiries were not withheld from us, then the elimination of misuse would have been swiftly eradicated.
 - It only directly received five customer complaints this year on this range.
 - It actively gave a low revenue rate to service provider / number reseller on this range to discourage its use.
 - Its initial testing of these numbers did not show anything that resembled misuse. Having a call connect to a voicemail or a user, gives the impression the number is being used as per the Ofcom guidance for use of 070 follow me numbers. Therefore it was not deemed as a premium service at that time.
 - It invoked its own Emergency Procedure on the biggest reseller on this range.
 - The majority of numbers on this range have now been suspended.
 - It had co-operated fully with this investigation.
3. The Tribunal considered the evidence and concluded that in relation to Ground 1, there had been a reasonable cause to carry out further enquiries with regard to one of the Network Operator's clients who had ordered fifty '070' numbers from the Network and who had provided two separate addresses; one in India and one in the United Kingdom. The request for all of the numbers to point to one MSISDN coupled with the Notice to

Industry should have alerted the Network Operator to the possibility that these numbers were potentially going to be misused. In addition, the Tribunal found that the high volume of '070' numbers requested and the inconsistency in the identity information should have led the Network Operator to carry out further enquiries and accordingly had failed to carry out reasonable due diligence in relation to this client and it followed that, in the circumstances, the Network Operator had failed to take all reasonable steps to prevent the evasion of the regulation of premium rate services.

In relation to Ground 4, the Tribunal was not persuaded by the Network Operator's argument that it had no cause for suspicion. The Tribunal noted the Notice to Industry in relation to '070' numbers, the three previous service provider cases associated with the Network Operator and the complaints received directly by the Network Operator and considered these as indicators of the need to carry out internal monitoring. The Tribunal considered that it would have been reasonable to perform some kind of shortcall monitoring in order to establish any potential pattern in relation to the '070' numbers in question.

In relation to Ground 5, the Tribunal acknowledged the Network Operator had received five direct complaints in a year, however it noted the high profile nature of the Notice to Industry and the Network Operator's previous knowledge that one ring scams were operating (due to the three previous service provider cases) and considered that the nature of the complaints received would have been reasonable to instigate further action and investigate any irregularities more thoroughly.

The Tribunal did not uphold Grounds 2 or 3 due to a lack of evidence.

The Tribunal therefore upheld a breach of paragraph 2.1.1 of the Code on grounds 1,4 and 5.

Decision: UPHELD on grounds 1,4 and 5

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:

- Consumer detriment was caused by the Network Operator's failure to take reasonable steps following a Notice to Industry and the three service provider cases associated with it.

In mitigation, the Tribunal noted the following factor:

- The Network Operator co-operated with the Executive.

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

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- £15,000 fine;
- The Tribunal ordered that claims for refunds are to be paid by the Network Operator for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

The Tribunal noted and expressed its disappointment that Mr Miles Samaratne had been a director of a company that had been involved in a previous failure of due diligence in relation to premium rate services and expressed the hope and expectation that he would seek compliance advice on due diligence activities in the future.