

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 14 October 2010 TRIBUNAL SITTING No. 64 / CASE 2  
CASE REFERENCE: 841420

Service provider:	MX Telecom Limited
Information provider:	In Touch Games Limited
Type of service:	Remote gambling service
Service title:	'mFortune Mobile Phone Casino'
Service number:	78555, 79555, 85080, 82772 and all other shortcodes in relation to this service
Cost:	£10 / £5 / £3 cost each to receive, depending on the shortcode
Network operator:	All Mobile Network Operators
Number of complainants:	6

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

### BACKGROUND

By 7 September 2010, the Executive had received six complaints in relation to the remote gambling service 'mFortune Mobile Phone Casino' ('mFortune'). Three of the six complainants stated to have received unsolicited, chargeable text messages and three expressed confusion as to how the premium rate charges had arisen.

The Executive was concerned about the high charges incurred by complainants, and upon further investigation, it appeared that the service had operated for a considerable time period without the required PhonepayPlus prior permission. Furthermore, after prior permission had been granted, it appeared that specific conditions in the Prior Permission Certificate had not been followed.

### The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Service Provider, dated 10 September 2010. The Service Provider provided signed Information Provider pass-through forms. The Executive also received a response from the Service Provider, dated 24 September 2010. On reading the response, the Executive informed the Service Provider that it did not accept the pass-through and considered that it should remain a Service Provider case, as the responsibility for applying for prior permission rests with the Service Provider, not the Information Provider. The Service Provider provided further responses, dated 4 October 2010.

The Tribunal initially considered the alleged breaches raised by the Executive on 14 October 2010. The case was adjourned for further information to be obtained and a final decision was made by the Tribunal on 9 November 2010.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

### **PRIOR PERMISSION (Paragraph 5.1.1)**

*“PhonepayPlus may require that particular categories of services must not be provided without its prior written permission for any service within that category. PhonepayPlus will give reasonable notice of such a requirement and the category of service to which it applies, and will publish a full list of such service categories from time to time. Prior permission may be granted subject to the imposition of additional conditions. Such permission may be withdrawn or varied upon reasonable grounds and with notice in writing.”*

1. The Executive submitted that PhonepayPlus requires certain categories of premium rate service obtain prior permission before commencing operation. PhonepayPlus publishes a list of services that require prior permission, available in the form of a Help Note, which is available on the PhonepayPlus website.

It submitted that, on 20 October 2009, the Information Provider contacted the Industry Affairs Team regarding applying for prior permission for a remote gambling service. Prior permission was granted for the ‘mFortune’ service and the Prior Permission Certificate was issued to the Service Provider on 23 July 2010.

During the course of the investigation into the ‘mFortune’ service, logs were obtained by PhonepayPlus that demonstrated that the service had commenced operation before prior permission had been obtained. The Executive provided a summary of the relevant message logs.

The Executive submitted that it had noted that, in the period between 6 June 2008 (when the service was in operation) and 20 October 2009 (when first contact to the Executive was made regarding prior permission for the ‘mFortune’ service), the Service Provider had applied to PhonepayPlus for prior permission for a variety of other, unrelated services on ten separate occasions.

The Executive submitted that, since the service had commenced operation before obtaining prior permission from PhonepayPlus, a breach of paragraph 5.1.1 of the Code had occurred.

2. The Service Provider stated that, further to In Touch Games’ applications, the Service Provider had applied for the licence on the Information Provider’s behalf and it was approved by a Tribunal on 14 May 2010, although the licence was not issued until July 2010. It stated that it subsequently became apparent some time after this that the service had already been operating when the Service Provider had applied for the licence. It stated that, in retrospect, it was clear that its in-house due diligence procedures in 2008 had not been sufficient to pick up that this service had been running without permission. This was also, in part, because, for a period of time, the Information Provider had been using the Service Provider for other services that did not require a licence.

It stated that, unfortunately, at the time the Information Provider signed up with the Service Provider, gambling services were not commonly requested and, as such, the commercial sales staff dealing with Information Provider did not pick up on the need for a licence. This had played a large part in this issue, rather than an intention to circumvent the requirements of PhonepayPlus.

3. The Tribunal considered the evidence, including the Service Provider’s admission, and concluded that prior permission to operate a remote gambling service, as required by PhonepayPlus, had not been sought or obtained by the Service Provider or the Information Provider before the operation of the service. The Tribunal upheld a breach of paragraph 5.1.1 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH TWO**

**BREACH OF CONDITION ON PRIOR PERMISSION CERTIFICATE (Paragraph 5.1.3)**

*“A breach of any condition imposed in connection with a permission granted by PhonepayPlus in accordance with this Code shall be a breach of the Code.”*

1. The Executive submitted that, on 23 July 2010, a Prior Permission Certificate was issued to the Service Provider in relation to the Information Provider’s ‘mFortune’ service. It stated that specific condition (b) (v) on the certificate was as follows:

*‘Consumers are not permitted to spend more than £30 in any 24 hour period.’*

It submitted that, on 29 July 2010, the Executive wrote to the Service Provider and highlighted that several message logs appeared to show that consumers were able to spend more than £30 in any 24-hour period. It submitted several examples of this occurrence and highlighted some of the consumer spend, for example:

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10 September 2009 – total daily spend = £70  
11 September 2009 – total daily spend = £93  
16 September 2009 – total daily spend = £80  
22 September 2009 – total daily spend = £99  
23 September 2009 – total daily spend = £99

The Executive made reference to correspondence issued to the Service Provider on 29 July 2010. It stated that the fact that consumers appeared to be allowed to exceed £30 spend in any 24-hour period, in contravention of the specific condition (b) (v), had been highlighted to the Service Provider.

The Executive submitted that it had received a response from the Service Provider on 5 August 2010, which stated as follows in regard to the £30 spend-limit:

*‘Prior permission - £30 per user per day limit: Given the oversight in acquiring prior permission (detailed above) Intouch Games weren’t aware of the daily £30 consumer spend limit required by PP+. Since PP+ permission was granted on 23<sup>rd</sup> July 2010, Intouch Games have confirmed they have performed the necessary technical work to fulfill this requirement.’*

It submitted that, following the Service Provider’s confirmation that the £30 spend-limit had been put in place, the Executive tested the service on 24 August 2010 and was charged £40 to top up the gambling account.

The Executive submitted that it was of the view that, by allowing consumers to top up their gambling accounts in excess of £30 in any 24-hour period, this contravened specific condition (b) (v) of the Prior Permission Certificate covering the service, and, therefore, it followed that there had been a breach of the Code.

2. The Service Provider stated that, although it had the facility to cap spending on a per shortcode basis, it had not done so here, due to the fact that, at the time the Information Provider signed up, the Service Provider had been running various

services across several shortcodes on different tariff points and, as such, it could not enforce this user spend-limit. It stated that it had provided a copy of the licence to the Information Provider in order for the Information Provider to implement daily spend caps.

3. The Tribunal considered the evidence and concluded that the Information Provider had failed to comply with a condition of its Prior Permission Certificate and failed to implement a £30 spend-limit (designed to stop consumers spending more than £30 in any 24-hour period). The Tribunal upheld a breach of paragraph 5.1.3 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

The Tribunal's initial assessment was that, overall, the breaches taken together were **significant**.

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- The Service Provider's behaviour was reckless in its failure to apply for prior permission for the operation of a remote gambling service.
- The cost paid by individual consumers was high and the Tribunal noted that the charges had been substantially higher than would have been possible had a £30 spend-limit been in place.
- The Service Provider failed to co-operate sufficiently with the Executive, having failed to remedy the breach, despite assuring the Executive that it had done so.

There were no mitigating factors for the Tribunal to consider.

The revenue in relation to this service fell within the range of Band 1 (£500,000+).

Having taken into account the aggravating factors and the mitigating factors, and the revenue generated by the service (particularly the revenue generated as a direct result of the failure to have a £30 spending cap in place), 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;
- A fine of £100,000;
- The Tribunal imposed a bar on the Service Provider from operating remote gambling services or a period of three months, starting from the date of publication of this decision;
- The Tribunal ordered that refunds be paid by the Service Provider for the full amount spent by all complainants, where the complaint relates to underage use and/or charges incurred by someone other than the bill-payer, except where there is good cause to believe that such claims are not valid.