

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 1 September 2011
TRIBUNAL SITTING No. 84 / CASE 1
CASE REFERENCE: 859338**

Network operator: Cheers International Sales Limited, London, UK
Service Provider: Cheers International Sales Limited, London, UK

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

BACKGROUND

By 1 February 2011, the Executive had received four complaints from the public regarding high charges on their phone bills, which were related to a non-adult entertainment service called 'Gossip Box'. The service was operated by Cheers International Sales Limited which acted as both a Network Operator and a Service Provider.

Of these complaints, three related to attempts by consumers to vote for 'Strictly Come Dancing' contestants, and one related to an attempt to vote for an 'X Factor' contestant.

For each complainant, the number dialled and charged on connection was a different 'Gossip Box' number operated by the Service Provider. The complainants admitted to misdialling the number presented on the television broadcast.

During the Executive's investigation of the service, it transpired that the service had been allocated 3,406 numbers.

The Executive had concerns regarding the allocation of 3,406 numbers to one service, given that this seemed to create a circumstance which made consumers potentially vulnerable to accessing the 'Gossip Box' service unintentionally when misdialling other widely-advertised voting lines linked to popular live broadcast services. The Executive believed that consumers in this position would not have had knowledge of the pricing of the service prior to incurring the charges.

The Service

The service website was at URL address, 'gossipbox.co.uk' and described the service in the following terms:

"Hello and welcome to the all-new Gossip Box. Where you can have your say on all the up to the minute action and gossip on [Website lists television shows]. Whether you want to show your support to a contestant, tell the world that you think they are drop dead gorgeous or basically have a good ol' gossip, this service lets you create your very own Gossip Box with the option to listen to what others have to say about it, or alternatively you can just browse and add your comments to other Gossip Boxes."

The terms and conditions in small print at the foot of the webpage stated: *"The Gossip Box service is in no way associated with [the named television shows] or any of their associated companies. Service provided by CIS, PO Box..."*

The service was described by the Service Provider as an open forum for users who would like to post a comment or listen to comments left by other users regarding popular television talent/competition programmes.

When a user called the service, they were prompted to select from one of the following service options:

- Create their own 'Gossip Box' (create their own message post);
- Listen to comments made by other users in relation to their own 'Gossip Box';
- Browse and listen to other users' 'Gossip Boxes'; or
- Go straight to a specific user's 'Gossip Box'.

The service was advertised online and was promoted through the use of the website (gossipbox.co.uk), with additional online marketing via posts on online chat forums (particular to a TV show), Google adwords and search engine submissions.

When a potential user accessed the website, they were prompted to press a link marked "*click here to join the fun*". When the link was selected, the user was then given a number which they could call to use the service with the cost of the call clearly stated next to the number. A different user could press the link and obtain details of a completely different number at a completely different rate. The same applied if the same user returned to the page and pressed the link again, as they would be given a different number. The Service Provider claimed that this added an element of chance and fun for the user. The call rate for this particular point of entry ranged from £1.02 per call through to £1.53 per call + £1.53 per minute (from a BT landline).

When a user used the service, at several points during the voice prompts in the menu system, they were given a £0.31 per minute number (0905 933 9335) which they were directed to note down if they wished to return to the service (the "Dedicated Number").

The Investigation

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

On 22 February 2011, the Executive sent Formal Directions under paragraph 2.5.1 of the Code (the "Formal Directions") by email to the Service Provider and requested that it:

"Please supply a list of all the numbers allocated to this Service Provider."

On 23 February 2011, the Service Provider issued a response to the Formal Directions, although it did not answer the above question.

The Executive considered that the case warranted further investigation, given the nature of the breaches and potential consumer harm. The case was formally allocated to the Investigations Executive on 4 April 2011.

On 5 April 2011, the Executive sent an email to the Service Provider, repeating its request for a list of all numbers allocated to the Service Provider. In the same email, the Executive sent a request for information in furtherance of an investigation under paragraph 8.3.3 of the Code (the "First Paragraph 8.3.3 RFI").

On 12 April 2011, the Service Provider sent a response to the First Paragraph 8.3.3 RFI, although this response did not include a list of all the numbers allocated to the Service Provider (the "12 April 2011 Response").

During a telephone conversation on 12 April 2011, the Service Provider explained that the failure to provide the requested information was due to a misunderstanding, as there was no Service Provider in this case other than the Network Operator themselves. The Executive acknowledged that the question had been phrased in such a way that a full list of numbers dedicated to the specific service operated by Cheers International Sales Limited was not provided. However, during this telephone conversation, the Executive clarified the need for

the Service Provider to provide a list of all numbers held by Cheers International Sales Limited which were used for the 'Gossip Box' service.

The telephone conversation on 12 April 2011 was followed up by an email on the same date which further clarified the need for: "*all numbers held by Cheers International Sales which are used for the 'Gossip Box' service*". These clarifications were also made as a request for information in accordance with Paragraph 8.3.3 of the Code (the "Second Paragraph 8.3.3 RFI").

On 19 April 2011, the Service Provider responded by sending an email, together with attached documents containing a list of 2,264 premium rate numbers, as well as other additionally requested information (the "19 April 2011 Response"). The 19 April 2011 Response also contained information concerning the Service Provider's reasons for allocating 2,264 numbers to a single service.

The Executive responded to the above email on 19 April 2011 and suggested that a meeting be arranged to '*discuss the operation of the service and cover some of the comments made in correspondence.*' Following further correspondence by email, a meeting was arranged to take place on 28 April 2011.

Prior to the meeting, on 21 April 2011, the Service Provider agreed to disconnect the majority of numbers associated with the service and retain only five numbers dedicated to the 'Gossip Box' service. This was considered by the Executive to be helpful in reducing any potential user harm that might have occurred should any user inadvertently dial the 'Gossip Box' service by misdialling a similar premium rate number.

At the meeting on 28 April 2011, the Executive explained and presented the complaints from the public, and indicated that data from Originating Communication Provider (OCP) Network Operators had been considered and showed a pattern in terms of calls made to the 'Gossip Box' service.

During this meeting, the Executive further questioned the Service Provider regarding its decision to allocate 2,264 numbers to a single service. The Service Provider reiterated the explanation contained in the 19 April 2011 Response:

"Using a selection of appropriate numbers, across various ranges was set up as a marketing tool, as it gives us an insight into the trends of usage by users, ie what are they happy to pay, do they feel comfortable with pence per call, pence per min, or a combination etc."

The Executive reviewed the case, following the meeting on 28 April 2011, and as part of that review it assessed the monitoring of the service website with the full list of numbers supplied. Two numbers did not appear on the list: 09012162218 and 09046163763.

In light of the above findings, the Executive sent an email (the "Third Paragraph 8.3.3 RFI") to the Service Provider on 31 May 2011. This set out a request for (i) an explanation as to how the data records in the 19 April 2011 Response could have been compiled without the missing numbers and, if any, how many other numbers were missing from the list given in the 19 April 2011 Response; and, (ii) evidence of the success of the marketing tool as described in the 19 April 2011 Response.

On 16 June 2011, the Service Provider's legal adviser sent an email to the Executive containing its response to the above requests (the "16 June 2011 Response"). With respect to (i) above, the Service Provider (via its legal adviser) acknowledged that the original information supplied in the 19 April 2011 Response was defective and incomplete. With respect to (ii) above, the Service Provider indicated that no evidence existed in relation to any marketing analysis done on the data gathered from calls made to the service having allocated 2,264 numbers to it.

The data supplied with the 16 June 2011 Response further showed that, according to the Service Provider, 3,406 numbers were in fact allocated to the service. This included the 2,264 numbers given in the 19 April 2011 Response, and a further 1,142 numbers that had been allocated to the service but had never been dialled by consumers.

Analysis of numbers supplied in relation to the Dedicated Number and the 0901161* range

The Executive noted that the numbers allocated to the service were randomly selected by consumers clicking on the link on the website labelled *"Click here to join the fun"*. This system of random selection suggested that there ought to have been a relatively even distribution of calls to each of the numbers allocated to the service. The analysis of the calls made to the 0901161* number range did not, however, reflect the random selection process designed by the Service Provider on the 'Gossip Box' website. For example, the Executive noted that the 'Gossip Box' number 09011616110 had been dialled 16,883 times between 6 April 2010 and 7 April 2011. This number was very similar to the numbers used by the 'X Factor', which were 09016161101 to 09016161116. The Executive also noted that there had been a significant spike in calls to this number in December 2010, which coincided with the broadcast of the 'X Factor' live final. One of the complainants who had contacted the Executive had been attempting to call the 'X Factor' and instead hit the similar 'Gossip Box' number 09011616110. Where an extra '1' was added in the first five digits, consumers could have been attempting to vote for any one of the first nine 'X Factor' numbers, but were connected to the 'Gossip Box' service before selecting the last digit, which could explain the high level of calls to that particular 'Gossip Box' service number.

The Executive also made the following observations from the data supplied in the 12 April 2011 Response:

- 37,527 calls were made overall between 6 April 2010 and 7 April 2011;
- 34,948 calls lasted less than one minute, with 13,760 of these calls lasting less than 15 seconds;
- 2,521 calls lasted between one minute and three minutes;
- 55 calls lasted between three minutes and 30 minutes; and
- Five calls lasted over 30 minutes.

Separate data was provided in the 19 April 2011 Response regarding calls made to the Dedicated Number. This number was not advertised on the website, but was given out at the end of the introductory message which explained how the service worked, the cost of the service and the options available in the Interactive Voice Recording (IVR) system.

The length of the introductory message was approximately three minutes in duration. This suggested to the Executive that any call that was shorter in duration than three minutes was more likely to have been a misdial. The Executive's analysis of the call data provided by the Service Provider confirmed that only 60 of the 37,527 calls made were greater than three minutes in duration.

The Executive observed that only six calls had been made to the Dedicated Number, and these were made from four separate Caller Line Identification (CLI) numbers.

From its observations, the Executive formed the view that very few people were, in fact, connecting to the service following a visit to the website and the vast majority of calls to the service were the result of misdials.

In light of the above observations, the Executive sent a breach letter to the Service Provider on 22 June 2011 and raised the following potential breaches under the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) (the "Code"):

- Paragraph 3.2.2(a) – Provision of information (Number ranges) (in relation to Paragraph 8.3.3); and/or
- Paragraph 5.4.1(b) – Fairness (Vulnerability).

The Service Provider replied to the breach letter on 29 June 2011 and requested an opportunity to make an informal representation.

Following an informal representation made by the Service Provider, the Tribunal reached a decision on the breaches raised by the Executive on 1 September 2011.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

PROVISION OF INFORMATION (Paragraph 3.2.2a)

*“Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code which may include but is not limited to:
a any number ranges (including dialling codes) or other connection arrangements allocated to it by Ofcom or any Network operator...”*

1. The Executive submitted that the key aspect of this service and the associated investigation into potential consumer harm centred round the number of points of access to the service.

The Executive monitored the ‘Gossip Box’ website (Appendix A) and discovered that not all access numbers were advertised all of the time. This meant that, following monitoring of the service website, the Executive knew there were multiple points of access to the service, but did not know whether there were hundreds of numbers or, indeed, whether tens of thousands were allocated.

The Service Provider had a very broad portfolio of allocated number ranges from Ofcom as it acted as a Terminating Communications Provider (TCP) Network Operator. In this case, Cheers International Sales Limited confirmed that it was also the Service Provider. The Executive was reliant on the Service Provider to fully and accurately disclose how it managed its portfolio of allocated numbers. The Executive was concerned to discover inaccurate information had been shared when verifying data supplied during the investigation.

The Executive requested, as standard, information relating to, *“all numbers allocated to the Service Provider”*. This request was made within two separate formal directions issued to Service Provider. The first was on 22 February 2011 in the Formal Directions and the second was on 5 April 2011 in the First Paragraph 8.3.3 RFI.

Paragraph 2.5.1 of the Code (Directions for information) states:

“When directed to do so by PhonepayPlus, network operators shall provide to PhonepayPlus within such time as it shall specify such information (including copy documents) as it requires in relation to any complaint received or investigation being carried out by it.

The Executive noted that the Service Provider was confused by the wording of this request, and concluded that there was no Service Provider (as Cheers International Sales Limited was the only party in the value-chain). The Service Provider said it did not consider that the question was seeking all numbers allocated to the ‘Gossip Box’ service.

The Executive accepted this reason on face value, but clarified the request on 12 April 2011 in the Second Paragraph 8.3.3 RFI.

Paragraph 8.3.3 of the Code states:

“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.”

The Executive received a list of 2,264 access numbers in the 19 April 2011 Response from the Service Provider. It was this data that was checked to verify the information given by complainants and was observed during monitoring of the ‘Gossip Box’ service.

The Executive had observed several numbers advertised on the internet, but had not called all of them. Some had been called to listen to the service introductory message on the lines and understand the operation of the service.

Two of the numbers did not appear on the full list of access numbers. On 31 May 2011, this observation was put to the Service Provider in the Third Paragraph 8.3.3 RFI. The two numbers identified were 09012162218 and 09046163763 (Appendix B).

In its 16 June 2011 Response, the Service Provider accepted that these two numbers, and 1,140 other numbers giving access to the service, had not been supplied at the earlier date. In total, 1,142 additional numbers were supplied by the Service Provider in the 16 June 2011 Response.

The Executive considered the new information supplied alongside the original list of 2,264 numbers and there remained some unexplained gaps in the number sequences allocated to the ‘Gossip Box’ service. There appeared to be no clear reason or pattern to the Service Provider’s numbers that were allocated to this service out of the large portfolio of numbers allocated by Ofcom to the Service Provider in its capacity as a Network Operator.

The Executive was concerned that the data supplied by the Service Provider was inaccurate and had the potential to impact upon effective enforcement action in response to the potential breaches.

The Executive considered that the relevant information requested was not supplied fully and accurately without delay, and that the Service Provider was therefore in breach of paragraph 3.2.2 of the Code.

2. The Service Provider’s response was that every effort had been made to be as open and transparent as possible to the formal directions issued by PhonepayPlus. The Service Provider asserted that the information provided to the Executive was complete and accurate based on its understanding of the request. It said that the Executive had acknowledged that the initial request for information was misleading. The request was for *“all numbers held by Cheers International Sales which are used for the Gossip Box Service”*. The word “used” had been interpreted by the Service Provider’s staff as a request for all numbers that had been physically dialled by users. It was only as a result of the Third Paragraph 8.3.3 RFI with respect to the numbers 0901262218 09046163763 that it was realised that the list of numbers provided by the Service Provider’s IT department in the 19 April 2011 Response was based on the call record data for the ‘Gossip Box’ service. This was a genuine misunderstanding and oversight. The Service Provider’s IT department provided a list of all numbers which had been called (i.e. “used” by users, as opposed to being “used” in the sense of being allocated to the service). The Service Provider said that

this was corrected as soon as it realised that the list provided to the Executive was not a complete list of the numbers allocated to the service. The Service Provider acknowledged the omission and apologised to the Executive.

The Service Provider further clarified that the numbers that were missing from the 19 April 2011 Response did not contain any call data and, as such, were not activated and had not been “used” by any members of the public.

The Service Provider asserted that it never knowingly withheld information and the record of correspondence confirmed its efforts to respond in a timely and efficient manner. The Service Provider additionally asked that the Tribunal take into consideration the fact that the 16 June 2011 Response contained details of over 1,140 'unused' numbers, in addition to the two numbers that had initially been cited in the Executive's Third Paragraph 8.3.3 RFI. The Service Provider submitted that this action was clear evidence that there was never any intention to withhold information.

The Service Provider believed that the concern raised by the Executive, *“that the data supplied was inaccurate and had the potential to impact upon effective enforcement action in response to the potential breaches”*, was without foundation. The Service Provider further stated that, on 21 April 2011, it had acted on the Executive's recommendation that the 'Gossip Box' service be given a dedicated number of no more than five premium line numbers. Following a meeting with members of the Executive on 28 April 2011, one of the five numbers still in use (09011616110) was removed and replaced with an alternative number and this change was notified to the Executive on 28 April 2011.

The Service Provider said that it had welcomed the meeting with the Executive on 28 April 2011. The meeting had been followed up with a letter from the Service Provider, dated 6 May 2011, which included an undertaking to maintain the 'Gossip Box' service using only five dedicated premium rate numbers. The Service Provider stated that the Third Paragraph 8.3.3 RFI from PhonepayPlus was not received by the Service Provider until 31 May 2011 and had initially been prompted by a request by the Service Provider for an update, which had been sent to the Executive in an email dated 27 May 2011.

The Service Provider finally submitted that it had acted in good faith at all times and had promptly provided the Executive with the best information that it could provide. The Service Provider stated that the Executive had requested information in a way which could have been interpreted in one of two ways. The Service Provider stated that the Executive had accepted that its request was misleading. The Service Provider confirmed that, as soon as it realised that the Executive's interpretation of the question was different from that of the Service Provider, further information was immediately provided.

3. The Tribunal considered the evidence and noted the Service Provider's references to its misunderstanding of the Executive's request, but noted that the Executive had clarified its request on at least two subsequent occasions. It also noted that the Service Provider had failed to provide any list of numbers in response to the first request, and had provided an incomplete list of numbers in response to a subsequent request. The Tribunal accordingly concluded that the relevant information requested by the Executive had not been supplied fully and accurately without delay, and that the Service Provider was in breach of Paragraph 3.2.2(a) of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
FAIRNESS (VULNERABILITY) (Paragraph 5.4.1b)**

“Services and promotion material must not...b take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”

1. The Executive focused attention on the service and not on its promotional material in relation to this potential breach. The four complainants to PhonepayPlus reported that they did not see any promotional material or have any knowledge of the service or its branding, ‘Gossip Box’, prior to connecting to one of the 3,406 access numbers allocated by the Service Provider to the ‘Gossip Box’ service.

The Executive sought to define the circumstance which could make consumers vulnerable in this case. It stated that the allocation of 3,406 premium rate numbers to one single service, of which some of the numbers allocated were similar to those used for one or multiple different live broadcast services, created a circumstance in which consumers were capable of misdialling the widely-advertised voting line and being charged high costs for connecting to the ‘Gossip Box’ service without prior knowledge or intent.

The Executive noted that the service call statistics for number range 0901161* showed that, for the first few months of operation, there had been on average only 28 calls per month. Furthermore, throughout the duration of the service, only ten calls had been made to the Dedicated Number. The Executive submitted that this evidence gave an accurate indication as to the popularity of the service.

The Executive observed that the pattern in the call statistics was that a significant spike in traffic to the ‘Gossip Box’ service occurred where popular live broadcast services, with widely promoted voting lines, were aired on television. The vast majority of these calls were very short in length, and this was unusual for a service designed for users to listen to messages left by other users and to add their own messages, known as ‘Gossip Boxes’.

Furthermore, the increase in traffic to the ‘Gossip Box’ service had not, in the Executive’s view, been based on randomly selected numbers from within the database of access numbers, which was the mechanic used within the website promotional material. Instead, certain numbers had been frequently called where these had overlapped distinctly with the voting lines advertised within the television shows.

The Executive submitted that the statistics strongly indicated that the ‘Gossip Box’ service was not being used by large numbers of users who had knowledge of the ‘Gossip Box’ service and had intended to use it. The Executive submitted, on the balance of probabilities, that a large majority of calls received on the 3,406 numbers allocated to the service were consumers of live broadcast services who had misdialled the intended premium rate number and had accidentally connected to the ‘Gossip Box’ service, thereby incurring a higher tariff for an unwanted service.

The Executive submitted that the Service Provider had taken unfair advantage of the circumstance set out above. The Service Provider had allocated 3,406 premium rate numbers to ‘Gossip Box’ with knowledge that misdialling occurred and that there would be a significant risk that consumers of live broadcast services, such as those specifically listed on the ‘Gossip Box’ website, may hit one of the 3,406 numbers allocated to the service. The Executive believed that the Service Provider expected, or ought to have expected, that the more numbers allocated to the service, the greater the likelihood of misdialling by consumers.

Furthermore, a large percentage of the premium rate numbers allocated to the service included a flat fee connection charge, such as £1.02 or £1.53 (Appendix C). In the Executive’s view, this took unfair advantage of the circumstance set out above, in that consumers who connected to the ‘Gossip Box’ service and disconnected the

call quickly, having realised that a mistake had been made, would still incur high costs and generate revenue for the Service Provider.

On 21 April 2011, the Executive received confirmation from the Service Provider that the majority of the 3,406 numbers allocated to the service had been disconnected and only five dedicated numbers remained active.

The Executive was made aware of voting lines being used in conjunction with the 'So You Think You Can Dance' live broadcast service with voting beginning on the weekend of 23 to 24 April 2011. Information obtained from BT (the Originating Communication Provider or OCP) indicated that no misdialling, potentially impacting consumers of this show, occurred on the five numbers dedicated to the 'Gossip Box' service. It appeared that the significant reduction in numbers allocated to the service had, in turn, reduced the potential harm that the Executive alleged arose from the operation of the service.

The Executive submitted that, from the point when the service was launched in March 2010 until 21 April 2011, the service had taken unfair advantage of a circumstance which may have made consumers vulnerable to incurring high charges for connecting to an unknown and unwanted service.

2. The Service Provider responded with the following arguments:

The Executive's submissions sought to radically extend the scope of "vulnerable"

The Service Provider examined previous PhonepayPlus adjudications and a report commissioned by PhonepayPlus on the subject entitled, "*Consumer Vulnerability and Premium Rate Service*", dated May 2010 (the "Report"). The Service Provider submitted that it was apparent that this case was entirely novel in terms of the way that the Executive had interpreted "*vulnerable*". The Service Provider submitted that it was not therefore foreseeable that the 'Gossip Box' service could be considered as being in breach of Paragraph 5.4.1(b) of the Code.

The Service Provider further stated that the Executive's case assumed that everyone with a landline or a mobile phone could be described as vulnerable if they watched TV shows which encouraged or promoted the use of premium rate phone numbers.

It was the Service Provider's opinion that the case must therefore have been based on so called 'transactional vulnerability', as it could not be attributed to a characteristic of the consumer. The Service Provider submitted that the question to be asked was whether it could or ought to have known that consumers would be vulnerable.

The Service Provider could not have anticipated customer confusion

The Service Provider confirmed that the 'Gossip Box' service was launched before the TV shows began, and at least one of the TV shows had changed numbers to ranges similar to some of the 'Gossip Box' numbers. It would have been easy, with hindsight, to suggest that the Service Provider had selected numbers that closely matched popular voting lines, but the Service Provider submitted that it had no prior knowledge of, nor had it any control over, which numbers would be used by these TV shows.

The Service Provider contended that it would have been extremely difficult to determine which numbers had previously been used by TV shows (whether to "de-conflict" their own services, or to target consumers in the way in which PhonepayPlus suggested had occurred in this case).

The Service Provider said that it had carried out this type of search in order to test the validity of the Executive's assertion and, despite extensive searching via Google and despite trawling through many forums devoted to such TV shows, the Service Provider said that it had only managed to find a handful of numbers which had previously been used.

The Service Provider pointed out that, where particular numbers had not been used previously by TV shows, it was impossible for any service provider to know that their numbers would be similar to those which were subsequently selected by a TV show. The corresponding TV show websites could not themselves reveal the numbers which they had used, as this would contravene the live voting process.

The Service Provider further submitted that it had no way of knowing that calls to the 'Gossip Box' service were misdialled numbers. The Service Provider said that it had received only one complaint directly, and while it was aware of the four complaints received by PhonepayPlus, it had not been alerted to these complaints until receiving the Paragraph 2.5.1 Formal Directions on 22 February 2011. The Service Provider said that, had PhonepayPlus alerted it more quickly and shared their concerns about potential misdialling, the Service Provider would have acted immediately to restrict the numbers associated with the 'Gossip Box' service while under investigation.

The Service Provider drew attention to the Executive's suggestion that it ought to have noticed that traffic spikes on the service matched the screening of these TV shows, but the Service Provider concluded that activity for the 'Gossip Box' service would naturally correlate with the screening of these TV shows.

With regards to the low call statistics in the first few months of the service, the Service Provider submitted that such low call statistics were entirely typical and natural given that the service was new and had hardly been promoted. The Service Provider said it was only when it started to market the 'Gossip Box' website that it saw increased usage. The Service Provider said that part of the marketing was via Google adwords, of which a screenshot overview was supplied to the Executive showing an online marketing pattern that correlated with advertising revenue around the periods of spiked call traffic. The Service Provider asserted that the data could be interpreted as showing that 79% of the callers that dialled the service came directly from the Google adwords click-throughs.

The Service Provider further stated that the ratio of calls to both click-throughs and views of its adverts was entirely what it would have expected and gave no reason to suggest that there was anything untoward to merit further investigation on its part. The Service Provider added that there were, of course, other advertising channels in use, such as banner placement on websites and promotion of the service on reality TV show forums, but these did not have the same degree of auditable information as the Google service.

The Service Provider added that its response to the request for marketing data was that it had not analysed the data as of yet. The Service Provider said that it had decided that the time and resources this would require would provide minimal value until PhonepayPlus could shed some clarity on the situation concerning the misdials by consumers. The Service Provider stated that it should be noted that the marketing data was already provided in the form of the call data supplied in the 12 April 2011 Response. The Service Provider further asserted that it had used a marketing tool to advertise various random numbers across several number ranges in order to see the response from users for various call rates and memorable number patterns. If a number had been misdialled, this would have skewed the marketing data, but would have been beyond the control of the Service Provider.

Consequences of extending the concept of vulnerability

The Service Provider submitted that an extension of the concept of vulnerability would be introduced if a breach of 5.4.1(b) were to be upheld and this would have far-reaching consequences for service providers in general. The Service Provider questioned whether the Executive was now of the view that a service provider must avoid using any numbers which (i) are similar to those used by any other services; and (ii) may not even be in use at the time of a service launch.

The Service Provider also queried whether the avoidance of such similar numbers should only apply in relation to numbers used by TV shows.

The Service Provider was of the view that this would grant TV shows a special status not enjoyed by any other users of premium rate service (PRS) numbers. The Service Provider said that it did not believe there was any basis in any regulation or statute for granting such status to TV shows. The Service Provider said that it could not see any basis upon which PhonepayPlus would be able to require service providers and Network Operators to refrain from using any numbers similar to those used by the TV shows, whether pre-existing or not.

The Service Provider further submitted that there was no guidance in the Code or any other legal authority which dictated how similar numbers should be. Nor, as far as the Service Provider was concerned, were there any rules governing challenges by service providers to such PhonepayPlus decisions. The Service Provider confirmed that it had allocated these 3,406 numbers to the 'Gossip Box' service in accordance with all current regulatory requirements.

The Service Provider further submitted that it is very difficult indeed for a service provider to determine what numbers have previously been used by TV shows, and even were they are able to do so, it would offer no guarantee whatsoever that those same numbers would be used in the future.

The Service Provider contended that, if the Executive's interpretation was correct, it would impose a regulatory requirement which would be extremely difficult to adhere to and service providers would not have any confidence that they were 100% compliant.

The Service Provider stated that there had been no previous cases that it could find that had interpreted "*vulnerable*" in a way that did not involve some sort of conduct towards the consumer by the service provider. The Service Provider submitted that this case was novel in that it was the consumer's error that had caused the problem, rather than some conduct by a service provider to induce the customer to make a call to a PRS.

The Service Provider was, therefore, of the view that the Executive was seeking to break new ground in this case by extending the scope of what service providers could be expected to do in advance of launching a service.

PhonepayPlus' previous use / consideration of the concept of vulnerability

The Service Provider submitted that, in order to be guilty of having acted recklessly, it would need to have been able to foresee that its conduct could have been seen as taking advantage of consumer vulnerability and to have decided to proceed regardless. The Service Provider was of the view that the accusation by the Executive significantly extended the concept, as was shown by an examination of previous cases and the conclusions of the Report on the concept of vulnerability.

In light of the above observation, the Service Provider was of the opinion that it was not operating a commercial practice designed to exploit any vulnerability, but was operating a service which people were expected to dial on their telephones.

The Service Provider said that, had it been alerted to the fact that four people had complained and, more importantly, that PhonepayPlus believed there might have been a wider problem with misdialling, the Service Provider would have acted much more quickly and taken the action that it eventually took.

In relation to this accusation of unfairness towards a vulnerable group, the Service Provider therefore rejected the suggestion that it had in any way sought to exploit any vulnerability. The Service Provider submitted that PhonepayPlus appeared to be trying to cast the net very widely in terms of a vulnerable group. The Service Provider further asserted that the suggestion that all consumers with a landline or mobile phone represent a vulnerable group was without precedent. It further reiterated its view that the suggestion that service providers must ensure that they never use PRS numbers which are remotely similar either to existing PRS, or PRS which may be launched in the future, would produce a requirement which would be unworkable and unjustified.

3. The Tribunal considered the evidence and found that, while the circumstance of the likelihood of misdialling was one which was capable of being taken advantage of, in this instance there was no specific action by the Service Provider that encouraged consumers to misdial and therefore no circumstances which made those consumers vulnerable. The Tribunal therefore concluded that there had not been a breach of the paragraph 5.4.1(b) of the Code.

However, the Tribunal expressed its concern that the specific circumstances of this case, in which the Service Provider was able to have so many numbers to allocate to a single service, increased the likelihood that the Service Provider could profit, whether intentionally or not, from consumers misdialling.

Decision: NOT UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breach was **minor**.

The Tribunal considered that there were no aggravating factors that were relevant to this case.

The Tribunal considered the following mitigating factor:

- Notwithstanding the upheld breach of Paragraph 3.2.2 of the Code, the Service Provider had co-operated fully throughout the remainder of the investigation.

The revenue in relation to the 'Gossip Box' service fell within the range of Band 5 (£5,000 - £50,000).

Having taken into account the mitigating factor, the Tribunal concluded that the seriousness of the case should be regarded overall as **minor**.

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanction:

- A Formal Reprimand

Taking into account the financial impact of the administrative charge, the Tribunal decided not to impose any further financial sanction (including a fine) in this case.

Appendix A – Screenshot of ‘Gossip Box’ website showing the link “Click here to join the fun”

Gossip Box

Hello and welcome to the all-new **Gossip Box**. Where you can have your say on all the up to the minute action and gossip on **Over The Rainbow, Celebrity Big Brother, X Factor, Britains Got Talent, I'm A Celebrity Get Me Out Of Here, Strictly Come Dancing, Xtra Factor, Big Brother, Popstar To Opera Star, So You Think You Can Dance, Hell's Kitchen, BBC Sports Personality Of The Year, Dancing On Ice, Got To Dance**.

Whether you want to show your support to a contestant, tell the world that you think they are drop dead gorgeous or basically have a good ol' gossip, this service lets you create your very own Gossip Box with the option to listen to what others have to say about it, or alternatively you can just browse and add your comments to other Gossip Boxes.

Basically this is your chance to sound off.

To **join in the fun**, click on the **button below** to be given your Gossip Box premium telephone number. Call charges depend on the number you are fortunate enough to be allocated, so see how lucky you are by pressing the button below.

>>> Click here to join the fun

Call charges above are from a BT landline, other operators may vary. If you are not the person responsible for paying the telephone bill then you should get their permission before calling. Service details may appear on the phone bill.

Gossip Box is not responsible for content made available through this service, and that by using the service, you agree that you may be exposed to content that is offensive, indecent, inaccurate, misleading, or otherwise objectionable. However, Gossip Box operates a self-policing policy. If you wish to flag any suspected abuse, please report it [here](#), noting the Gossip Box number it relates to. Gossip Box strictly does not condone any abuse and will act accordingly. Please note, it is strongly advised that the user does not record any personal contact details in their messages. Gossip Box also reserves the right to delete or deactivate any messages immediately and without notice. The Gossip Box service is in no way associated with Celebrity Big Brother, X Factor, Britains Got Talent, I'm A Celebrity Get Me Out Of Here, Strictly Come Dancing, Xtra Factor, Big Brother, Popstar To Opera Star, So You Think You Can Dance, Hell's Kitchen, BBC Sports Personality Of The Year, Dancing On Ice, Got To Dance or any of their associated companies. Service provided by CIS, PO Box 60830, London W6 6GG tel: 0844 469 7946. [Customer Complaints Code](#)

Internet 100%

Appendix B – Screenshots of ‘Gossip Box’ website showing the numbers: 09012162218 and 09046163763



Gossip Box

Hello and welcome to the all-new **Gossip Box**. Where you can have your say on all the up to the minute action and gossip on **Over The Rainbow, Celebrity Big Brother, X Factor, Britains Got Talent, I'm A Celebrity Get Me Out Of Here, Strictly Come Dancing, Xtra Factor, Big Brother, Popstar To Opera Star, So You Think You Can Dance, Hell's Kitchen, BBC Sports Personality Of The Year, Dancing On Ice, Got To Dance.**

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Basically this is your chance to sound off.

To join in the fun, click on the button below to be given your Gossip Box premium telephone number. Call charges depend on the number you are fortunate enough to be allocated, so see how lucky you are by pressing the button below.

>>>> To join in the fun dial 09012162218 Call cost £1.02 per call

Call charges above are from a BT landline, other operators may vary. If you are not the person responsible for paying the telephone bill then you should get their permission before calling. Service details may appear on the phone bill.

Gossip Box is not responsible for content made available through this service, and that by using the service, you agree that you may be exposed to content that is offensive, indecent, inaccurate, misleading, or otherwise objectionable. However, Gossip Box operates a self-policing policy. If you wish to flag any suspected abuse, please report it [here](#) noting the Gossip Box number it relates to. Gossip Box strictly does not condone any abuse and will act accordingly. Please note, it is strongly advised that the user does not record any personal contact details in their messages. Gossip Box also reserves the right to delete or deactivate any messages immediately and without notice. The Gossip Box service is in no way associated with Celebrity Big Brother, X Factor, Britains Got Talent, I'm A Celebrity Get Me Out Of Here, Strictly Come Dancing, Xtra Factor, Big Brother, Popstar To Opera Star, So You Think You Can Dance, Hell's Kitchen, BBC Sports Personality Of The Year, Dancing On Ice, Got To Dance or any of their associated companies. Service provided by CIS, PO Box 60830, London W6 6GG tel: 0844 489 7846. [Customer Complaints Code](#)



Gossip Box

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To join in the fun, click on the button below to be given your Gossip Box premium telephone number. Call charges depend on the number you are fortunate enough to be allocated, so see how lucky you are by pressing the button below.

>>>> To join in the fun dial 09046163763 Call cost £1.53per call & £1.53 per min

Call charges above are from a BT landline, other operators may vary. If you are not the person responsible for paying the telephone bill then you should get their permission before calling. Service details may appear on the phone bill.

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Appendix C – Screenshots of ‘Gossip Box’ website indicating the costs of £1.02 per call and £1.53 per call & £1.53 per minute



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To join in the fun, click on the button below to be given your Gossip Box premium telephone number. Call charges depend on the number you are fortunate enough to be allocated, so see how lucky you are by pressing the button below.

>>>> To join in the fun dial 09015202405 Call cost £1.02 per call

Call charges above are from a BT landline, other operators may vary. If you are not the person responsible for paying the telephone bill then you should get their permission before calling. Service details may appear on the phone bill.

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To join in the fun, click on the button below to be given your Gossip Box premium telephone number. Call charges depend on the number you are fortunate enough to be allocated, so see how lucky you are by pressing the button below.

>>>> To join in the fun dial 09045333333 Call cost £1.53per call & £1.53 per min

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