

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 17 February 2011 TRIBUNAL SITTING No. 71/ CASE 2
CASE REFERENCE: 840404

Service provider & area:	Pan International Telecommunications Limited, Cayman Islands
Type of service:	Fixed-line / '070' Personal Number Service
Service title:	'4pns.co.uk'
Service number:	0704920****, 0709980****, and 0709983****, 070798* ****.
Cost:	070492 - 50p connection & 10p per min 070798 - 50p connection & 10p per min 070998 - 50p per min
Network Operators:	2Communications Limited, Switchconnect Limited, Starcomm Limited
Number of complainants:	25

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

BACKGROUND

Between May and June 2010, the Executive received complaints in relation to '070' numbers across three Network Operator platforms. Almost all the complaints reported an unsolicited telephone call and a man's voice saying "Hello! Hello, can you hear me?". Further, it was reported that the call ended abruptly. Some complainants stated that they were not able to answer the phone and reported missed calls.

The Executive was concerned that the nature of the call had prompted recipients to find out the '070' number that had called them either via the missed call list on their mobile or using 'last known caller' services provided by their mobile network, and then call back the number identified.

The Executive noted the consistency of the complainant's comments and the receipt of an unsolicited call on one of the PhonepayPlus fixed line numbers.

'070' Numbers

The Executive noted that Ofcom has designated '070' numbers for use only as personal "follow me" numbers which are charged at a higher rate (up to 50 pence per minute from a landline). Ofcom does not allow end-user revenue share on '070' numbers.

The service was described by the Service Provider as being a personal number service that offers end users the opportunity to have calls redirected to various preferred routes, including mobile phone lines or fixed lines at work and home. Also, end users can dial into their own personal '070' number and following some simple instructions, including the entry of a unique PIN, can route outgoing calls to business colleagues or associates showing the '070' personal number instead of the private number thereby offering anonymity. The cost of the call for the end user was either 50 pence per min (on pn2 numbers) or with a 50 pence connection charge and 10 pence per minute call charge (on pn7 numbers).

The Investigation

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

Following requests by the Executive for information in relation to the service over the course of September and October 2010, the Executive issued a breach letter to the Service Provider dated 18 January 2011. The Executive received no response from the Service Provider.

The Tribunal made a decision on the alleged breaches raised by the Executive on 17 February 2011.

PRELIMINARY MATTER FOR DECISION DEFINITION OF A PREMIUM RATE SERVICE UNDER s120 OF THE COMMUNICATIONS ACT (Paragraph 11.3.1)

1. As a preliminary issue to be considered by the Tribunal, the Executive submitted that the 'service' was a regulated premium rate service for the following reasons:
 - The recorded message and/or ringing tone heard by the Executive and complainants amounted to a service for the purposes of section 120(7)(a) (and within the meaning of section 120(8)(a) of the Communications Act 2003 ('the Act')), being contents of communication delivered over the Electronic Communications Network.
 - The callers to the numbers were charged on connection to the service and some of the monies paid by the complainants to their billing networks, having first been paid to the Network Operator, had been received by the Service Provider. In the Executive's view these facts satisfied sections 120(7)(b), (c), and (d) of the Act. There was a lack of any evidence suggesting that complainants had made contact with any valid end-users other than the Service Provider's IVR system.
 - The service involved the use of 070 numbers which were charged at a cost exceeding 10 pence per minute (50 pence per call plus 10 pence per minute from a standard BT line for some numbers and 50 pence per minute for other number ranges). This satisfied the requirements of the Premium Rate Services Condition as set and published by Ofcom.
2. The Service Provider did not respond to the Executive's submissions in relation to this preliminary matter.
3. The Tribunal accepted the submission of the Executive and found, for the reasons given by the Executive, that the recorded message and ringing tone amounted to a service for the purposes of section 120(7)(a) of the Act and that the elements of section 120(b)-(d) were satisfied. The Tribunal also accepted the Executive's submission that the requirements of the PRS Condition had been fulfilled with regards to the tariff that was applied to the calls which had provided the premium rate service. The Tribunal concluded that this '070' service was a premium rate service and that it was one which was regulated by PhonepayPlus.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE DESIGNATED NUMBER RANGE (Paragraph 3.3.1)

“Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a network operator has restricted certain codes or number ranges from being used for particular purposes or for the provision of particular categories of service, those codes or number ranges must not be used in contravention of these restrictions. Ofcom’s designations will have precedence over any issued by a network operator.”

1. The Executive submitted that Ofcom guidelines set out restrictions for the use of these number ranges, including those allocated by the relevant Network Operators to the Service Provider.

The Executive made reference to the ‘4pns.co.uk’ website which advertised a personal number service and submitted that this fell within the guidelines set out by Ofcom.

It made reference to the complainants’ comments and its own monitoring and submitted that there appeared to have been a repeated practice whereby individuals had been induced to access the ‘070’ number ranges allocated to the Service Provider through a method of cold calling and the recorded message that played as follows:

“hello, hello, can you hear me?”

It submitted that this repeat practice had resulted in increased traffic and revenue for the Service Provider and had been a misuse of ‘070’ numbers in contravention of the restrictions imposed by Ofcom.

The Executive submitted that it also received a call at its offices which appeared to trigger a recorded message at the point of connection and had played the same recorded message.

The Executive submitted that complainants had stated that they had perceived some urgency in the voice heard and their description of the call appeared to the Executive to be similar to the call it had received. It submitted that this suggested the use of automated calling equipment (‘ACE’) to generate calls to an indiscriminate set of fixed line and mobile phone numbers and deliver the recorded message when the call was answered.

It submitted that the recorded message had not included a number; however the nature of the call had led recipients to believe that the call was urgent, personal, and required an immediate call back. It submitted that the nature of the call would have prompted recipients to use Caller Line Identification (CLI) at the earliest opportunity.

The Executive submitted that the Service Provider had the capability to use any ‘070’ number in its possession to make outbound calls for any purpose as it had used a number obtained by the Executive for monitoring purposes to call the Executive to prove that the number was working. The Executive submitted that the complainant’s evidence showed that ACE had been used to generate calls to consumers and induce them to call back using the ‘070’ lines and generate revenue for the Service Provider.

The Executive submitted that ACE had been used to transmit a recording for the purposes of direct marketing (in this case a call to action), in order to promote a premium rate service operating on the '070' number range and increase traffic and revenue. The Executive submitted that the Service Provider had used this number range in contravention of the restrictions imposed by Ofcom.

2. The Service Provider did not respond to the Executive's submissions in relation to this breach.
3. The Tribunal considered the evidence and concluded that the calls from the 070 numbers had been made to consumers' phones in order to induce a call back and thereby generate increased traffic and revenue. The Tribunal found that this contravened Ofcom's requirement for 070 numbers to be used for personal numbering services only and not for premium rate services or any other purpose including revenue generation. The Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO LEGALITY (Paragraph 5.2)

"Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful."

1. The Executive submitted that under Section 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 'Regulations') it is an offence to use ACE to transmit, or instigate the transmission of, recorded matter for direct marketing purposes unless the subscriber has previously notified the caller that they consent to that particular telephone line being used for such communications and their consent remains valid.

The Executive submitted that none of the 25 complainants had stated that they had consented to receive calls from a service using ACE and several complainants explicitly stated that the calls had been unsolicited.

It submitted that the Executive's offices had also received a call which appeared to trigger a recorded message on connection. The Executive submitted that complainant comments mirrored the message that it had received. The call consisted of a person urgently speaking the phrase: *'Hello, hello, can you hear me?'*

It also submitted that the recorded message had not included a number; however the nature of the call had led recipients to believe that the call was urgent, personal, and required an immediate call back. It submitted that the nature of the call would have prompted recipients to use Caller Line Identification (CLI) at the earliest opportunity.

The Executive submitted that ACE had been used to transmit recorded matter for the purposes of direct marketing, in order to promote a premium rate service, operated using 070 prefixed numbers. It submitted that the complainants' evidence indicated that no consent had been obtained to receive direct marketing (in this case a call to action) using ACE technology and that the call had been unsolicited. It submitted that the service had been operated by the Service Provider in breach of paragraph 19 of

the Regulations and it followed that there had been a breach of paragraph 5.2 of the Code.

2. The Service Provider did not respond to the Executive's submissions in relation to this breach.
3. The Tribunal considered the evidence and concluded, on the balance of probabilities, that:
 - the phone calls received by users and the Executive had comprised a recorded message
 - the recorded message was a call to action (to call back) and was therefore direct marketing for the purposes of the Regulations; and valid consent of the users to receive calls containing recorded matter for the purposes of direct marketing had not been obtained.

The Tribunal concluded that Section 19 of the Regulations had been breached and therefore upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE MISLEADING (FAIRNESS) (Paragraph 5.4.1a)

*“Services and promotional material must not:
mislead, or be likely to mislead in any way...”*

1. The Executive made reference to the recorded message that had consisted of a person urgently saying: *‘Hello, hello, can you hear me?’*

It submitted that the nature of the recorded message and the service overall was misleading by suggesting that the caller might know the consumer personally and that the caller was urgently trying to contact them. This was exacerbated by the fact that the call was terminated within approximately five seconds, which was likely to have prompted a return call.

It submitted that the whole operation had misled consumers by creating a fictitious scenario. It submitted that consumers had been deliberately misled into calling back a premium rate number in order to establish the source of the ‘urgent message’ and thereby generate increased traffic and revenue.

2. The Service Provider did not respond to the Executive's submissions in relation to this breach.
3. The Tribunal considered the evidence and concluded that, on the basis of the complainant and Executive evidence, consumers had been misled into returning the missed call and calling the 070 number that had called them, in the belief that an individual was attempting to contact them urgently. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR PRICING INFORMATION (COST) (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 costs of the call had differed between the ‘070’ numbers used and that the service had charged 50 pence per call plus 10 pence per minute from a standard BT landline in relation to some lines and 50 pence per minute in relation to others. It submitted that the service had the potential to cost more than 50 pence overall, which was confirmed by individual complaints and the Executive’s monitoring of the service. In light of this, the Executive submitted that the service did not fall under the exemption from the requirement to provide pricing information under paragraph 5.7.5 of the Code.

It submitted that none of the complainants reported to have been informed of the cost of returning the call to the ‘070’ number at any point prior to incurring a charge and they were first made aware of incurring a premium rate charge on studying their phone bill.

2. The Service Provider did not respond to the Executive’s submissions in relation to this breach.
3. The Tribunal considered the evidence and concluded that two of the number ranges used in relation to the service had certainly cost more than 50p for users to call and the other had the potential to cost more than 50p and as such the service could not be exempt from the PhonepayPlus requirements on pricing information under paragraph 5.7.5 of the Code. The Tribunal found that the Service Provider had failed to provide any pricing information in relation to the service. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE 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 submitted that the numbers displayed on the consumers’ handset (“the CLI”) had been operated with the intent or effect of either directly or indirectly encouraging the use of a premium rate service and as such fell within the definition of promotion under paragraph 11.3.27 of the Code.

It submitted that none of the complainants had been provided with the contact details of the Service Provider at any point during the service either when the call occurred or when they returned a call to the premium rate service.

The Executive noted that there were contact details on the ‘4pns.co.uk’ website but that there was no information linking the CLI numbers to the service offered, and these contact details had not been supplied to complainants as part of the service promotion.

2. The Service Provider did not respond to the Executive’s submissions in relation to this breach.

3. The Tribunal considered the evidence and found that the CLI transmitted with the missed call and (where a call from the service had been answered) the recorded message had the direct or indirect effect of encouraging the use of premium rate services and as such fell within the definition of promotional material under paragraph 11.3.27 of the Code.

It found that the CLI transmitted with the call and the recorded message had contained no contact information in relation to the Service Provider. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH SIX 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 the call received at its offices and consumer complaints and submitted that the service had been operated by the Service Provider for a different purpose to that held out on the ‘4pns.co.uk’ website and that set out in the Ofcom guidelines.

It submitted that the calls made to consumers who had not consented to receive them and the deceptive nature of those calls had constituted an inappropriate promotion.

It submitted that the Service Provider had not used all reasonable endeavours to ensure that the services were not promoted in an inappropriate way.

2. The Service Provider did not respond to the Executive’s submissions in relation to this breach.
3. The Tribunal found that the recorded message transmitted using ACE and amounted to an inappropriate promotion due to the widespread and indiscriminate way in which the calls had been targeted at consumers. The Tribunal also noted from the complainant evidence that the urgent nature of the calls had the potential to cause anxiety in the recipients, as well as encouraging them to return the call and thereby incur unnecessary charges without realising it. The Tribunal concluded that the Service Provider had not taken any steps to ensure that the service was not promoted in an inappropriate way. The Tribunal upheld a breach of paragraph 5.12 of the Code

Decision: UPHELD

SANCTIONS

The Tribunal’s initial assessment was that, overall, the breaches taken together were **very serious**.

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

- The service was valueless to consumers.
- The behaviour of the Service Provider was deliberate in the operation of the service.
- There was societal harm due to the number of consumers affected.
- The cost paid by individuals was high as the tariff was charged at up to £2 per call from a mobile phone.
- The misleading and improper use of 070 numbers has been criticised by PhonepayPlus in previous adjudications.

The Tribunal considered various potential mitigating factors and concluded that none were applicable to this case.

The revenue in relation to this service was in the upper range of Band 4 (£50,000-£100,000).

Having taken into account the aggravating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **very 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 £125,000.
- The Tribunal ordered that the Service Provider be prohibited from involvement in or contracting for the provision of any premium rate service for a period of two years commencing from the date of publication of this decision.