

**PHONEPAYPLUS LIMITED**

**and**

**STARCOMM LIMITED**

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**ORAL HEARING DECISION**

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**Tribunal members:**     **Michelle Peters (Chair)**  
                                  **Robert Chilton**  
                                  **David Jessel**

1. The oral hearing in this matter took place on 4 April 2011. At the hearing the PhonepayPlus Executive (“the Executive”) was represented by Selman Ansari of Bates, Wells & Braithwaite. Starcomm Limited (“Starcomm”) was represented by its Managing Director, Clive Aldred. Jodie Isaac, Peter Jackson and Sharma Francis of the Executive, and Mr Aldred of Starcomm gave oral evidence. The clerk to the Oral Hearing Tribunal (“the Tribunal”) was Alexander Macpherson of Counsel.

**Summary of Tribunal’s decision**

2. The Tribunal’s decision as to the alleged breaches of the PhonepayPlus Code of Practice (11<sup>th</sup> edition) (“the Code”) is as follows:

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- 2.1. The Tribunal finds that Starcomm was in breach of paragraph 2.1.1(b) of the Code because it failed to take reasonable steps to prevent the evasion or undermining of the regulation of premium rate services.
- 2.2. The Tribunal finds that Starcomm was in breach of paragraph 2.5.1 of the Code because it failed to provide information as to the length of calls, payments to service provider, and numbers held by service provider.
- 2.3. The Tribunal finds that Starcomm was in breach of paragraph 2.5.2(e) of the Code because it failed to pay over withheld sums to PhonepayPlus.

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- 2.4. The Tribunal finds that Starcomm was in breach of paragraph 2.1.3 and Annex 1, para 6.6 of the Code because it failed to provide information as to outpayments when requested to do so.
3. The Tribunal's decision as to the sanctions to be applied as a result of the breaches of the Code is as follows:

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- 3.1. Formal reprimand;
- 3.2. Fine of £25,000;
- 3.3. A 12 month bar on providing its network or services for the carriage of any category of premium rate services, suspended for a period of 42 days. The bar will come into effect on expiry of that period unless Starcomm (i) puts in place suitable systems, to enable it to comply with any future direction under paragraph 2.5.1(b) of the Code, and provides evidence of such systems, to the satisfaction of the Executive; and (ii) pays to PhonepayPlus the withheld sum of £3,945.90.

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- 3.4. Formal reprimand;
- 3.5. Fine of £500.

## **Factual background**

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4. In the course of 2008 the Executive launched an investigation into a series of complaints which had been made in relation to 'missed calls' received by consumers. Such calls were terminated after a single ring, leaving missed call information which showed that the consumer had received a call from a number beginning "07". Many complainants said they believed the 'missed call' number to be a mobile phone number. Upon calling that number, the consumer would hear either a recording of a ringing tone or a voicemail message. In fact, the "07" number in question was not a mobile phone number but an 070 "follow me" personal number , and the consumer would be charged a 50 pence connection charge plus 3.95 pence per minute for calling it. This is a well-recognised form of fraud which induces consumers to incur premium rate charges unknowingly and without receiving any benefit.
  
5. The relevant service provider for the numbers in question was Mr Jaswinder Singh ("Mr Singh"). Mr Singh did not co-operate with the Executive's investigation, and on 8 January 2009 a tribunal found that Mr Singh had been in breach of various provisions of the Code.
  
6. Starcomm was the network operator which contracted with Mr Singh in relation to the 070 numbers in question. As a part of the Executive's investigations, directions were issued to Starcomm on 24 November 2008 requiring it to provide specific information in relation to Mr Singh's service. Mr Aldred responded to this request for information on 26 November 2008. On that day a telephone conversation took place between Mr Aldred and Ms Isaac in the course of which Ms Isaac stated that the Executive was intending to instigate the emergency procedure in relation to Mr Singh's service, and that formal directions requesting that Starcomm withhold revenue would follow shortly.
  
7. On 4 December 2008 Ms Isaac sent further formal directions to Starcomm. These directions instructed Starcomm, amongst other things, to:

- 7.1. terminate access to the services in question (in fact it would appear that this had already been done);
  - 7.2. withhold all monies payable to Mr Singh in respect of the services;
  - 7.3. provide all documentation and support in respect of the inquiries made to establish the identity of Mr Singh;
  - 7.4. provide all documentation in respect of due diligence requirements including copies of contracts;
  - 7.5. provide details of the geographic or mobile terminating number for each 070 number allocated to Mr Singh;
  - 7.6. supply call volume statistics for the services, including total number of calls to the relevant premium rate numbers, the duration of each of those calls, and the total number of minutes generated;
  - 7.7. supply call revenue statistics for the services for the entire period of operation;
  - 7.8. give the details of the amount of the payments made to Mr Singh and the invoice/remittance references.
8. The date specified for the provision of the information above was 11 December 2008. On that day Mr Aldred responded to the directions by email. The information which Mr Aldred provided included the following:
- 8.1. He stated that the amount of revenue withheld was £798.62;
  - 8.2. No documentation was provided in support of the inquiries made to establish the identity of Mr Singh, but reference was made to a website operated by Mr Singh and to the fact of a personal meeting;
  - 8.3. No documentation in respect of due diligence requirements or copies of contracts was provided. Mr Aldred provided an email address and a work address for Mr Singh;
  - 8.4. Mr Aldred provided a list of the terminating numbers for the service. These numbers had had the last digit removed and replaced with an "x", and Mr Aldred stated that this was done in order to comply with the Data Protection Act;
  - 8.5. He did not provide any call volume or revenue statistics. He stated that "*There were no premium rate numbers allocated to this customer just 07 numbers*";

- 8.6. He did not provide information as to the amounts of the payments made to Mr Singh or the invoice/remittance references.
9. Within an hour of receiving this information, Ms Isaac responded by email to Mr Aldred to state that the information provided was insufficient. She stated that:
  - 9.1. Figures provided by other network operators suggested that the revenue generated by the service in the last month was significantly higher than the sum which Starcomm stated it had withheld;
  - 9.2. No information establishing Mr Singh's identity had been provided;
  - 9.3. No due diligence material had been provided;
  - 9.4. The full terminating numbers should be provided, together with the corresponding 070 numbers;
  - 9.5. The 070 numbers allocated were considered to be premium rate numbers, and the call volume and revenue statistics should be provided;
  - 9.6. Mr Aldred should provide the dates on which Mr Singh was paid, as well as the amounts, invoice references and evidence of payment.
10. A further response was requested by 5pm on Friday 12 December 2008.
11. Mr Aldred responded on Sunday 14 December. He stated that he had only just received Ms Isaac's email and that he would need a further five days to provide the information requested. He also:
  - 11.1. stated that one month's revenue had been withheld in the sum previously confirmed;
  - 11.2. stated that he was puzzled as to the inquiries which he was supposed to make in relation to Mr Singh's identity and sought further guidance;
  - 11.3. asked for documentation to support the contention that 070 numbers were premium rate numbers.
12. On Monday 15 December Ms Isaac telephoned Mr Aldred in response to his email. Ms Isaac recorded Mr Aldred as stating that:
  - 12.1. He considered his previous responses to have been sufficient;

- 12.2. He was not familiar with the Code, not having read it since 2002;
- 12.3. The Data Protection Act prevented him from providing the full terminating numbers;
- 12.4. He would try to provide the information requested, but would need another five days.
13. Ms Isaac agreed that Starcomm could have until Wednesday morning (17 December) to provide the further information, as the case against Mr Singh had to be submitted to an adjudication tribunal by the end of the week.
14. On 17 December Mr Aldred requested an extension until 10am on Friday 19 December to provide the information. In a telephone conversation later that day, it was agreed that the deadline would be extended to 5pm that day, with any outstanding minor pieces of information being provided by 10am on Friday. This was confirmed by email, and Ms Isaac stated that no information could be accepted after that time.
15. At 2.33pm on 17 December Mr Aldred provided further information as follows:
- 15.1. It was now stated that Starcomm was holding the larger sum of £3,945.90;
- 15.2. In relation to the terminating numbers, Mr Aldred stated: *"You already have the list of these numbers replace the X with digits 0-9"*;
- 15.3. A spreadsheet was provided setting out the number of calls made to the service for the months January to November 2008. This spreadsheet also set out the sums paid monthly to Mr Singh, calculated at 30p per call. It was stated that no call durations had been provided because *"all calls were less than 1 minute in duration but greater than 20 seconds"*;
- 15.4. It was stated that the service was not a pence per minute call tariff. The total cost to the consumer was 50p per call, with BT retaining 8p, Starcomm retaining 12p and Mr Singh receiving 30p;
- 15.5. No specific dates for payments or invoice references were given.
16. Ms Isaac responded, again within the hour, as follows:
- 16.1. She asked whether the withheld figure included the sum originally given;

- 16.2. She reiterated the request for the full terminating numbers;
  - 16.3. She stated that Starcomm needed to provide a breakdown of the duration of the calls made so that the assertion that they were all less than a minute could be checked;
  - 16.4. She stated that evidence of the payments to Mr Singh should be provided as well as the invoice numbers.
17. On 18 December Mr Aldred responded by email to state that:
- 17.1. the original figure for the sum withheld was an error;
  - 17.2. Mr Singh had stated that calls would never last longer than one minute. Mr Aldred would probably have to pay a programmer in order to obtain the information as to call lengths;
  - 17.3. initial investigations suggested that less than 5% of the calls lasted longer than one minute. The data underlying this assertion could not be supplied by the deadline.
18. There was further communication by email between Mr Aldred and Ms Isaac on 19 December. Mr Aldred provided a list of calls of a duration longer than one minute for certain months. When Ms Isaac queried the data which he had provided, Mr Aldred responded to state that: *"I have had to copy and paste the results of various queries ... into an Excel spreadsheet and it is likely I have probably pasted duplicate data twice into the spreadsheet. I was rushing as I have had to do some other urgent work."* Later that day Mr Aldred commented that he may have been billing Mr Singh incorrectly for some time *"since a big proportion of calls were over 1 minute in call duration"*.
19. On 22 December Ms Isaac stated that it was a concern to the Executive that Starcomm did not seem to know what proportion of revenue it should have been paying the service provider, and that it was not clear that the list of terminating numbers provided was genuine or complete. In any event, Mr Singh's case had been put before the adjudication tribunal and it was accordingly too late to provide further information to be considered.

20. On 8 January 2009 Mr Singh's case came before an adjudication tribunal. The breaches of the Code for which he was responsible were characterised as very serious, and sanctions were imposed consisting of a formal reprimand, a fine of £45,000, a bar on the service, and the payment of refunds.
21. Mr Singh has at no time since this adjudication paid the fine imposed by the tribunal. On 17 February 2009 Ms Francis of the Executive sent a formal direction to Starcomm in relation to any sums due to Mr Singh directing it to retain all revenue.
22. Starcomm did not pay over the money retained in relation to Mr Singh's service. In October 2009 Mr Aldred referred in an email to a credit note which had been raised in October 2005 in the sum of £669.75. He asked whether this amount should be deducted from the revenue withheld from Mr Singh.
23. In the course of the tribunal hearing it was at issue between the Executive and Starcomm as to whether Ms Francis told Mr Aldred that he should pay the full amount of the retention without deduction or set-off whatever the position was in relation to the credit note. In any event, no payment of the retained amount or any lesser sum was paid by Starcomm at that time.
24. On 14 January 2010 a breach letter with the case number 827372 was sent to Starcomm in relation to the matters set out above.
25. In September 2010 Ms Francis stated to Mr Aldred that the credit note in question had been set against two invoices due to be paid by Starcomm back in 2005 and that there was no sum outstanding to Starcomm. In October Ms Francis sent Mr Aldred a statement confirming this. Despite this, the withheld sum was still not paid to the Executive thereafter and remains unpaid to date.



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26. On 5 January 2010 the Executive issued a formal direction to Starcomm requesting details of its outpayments and revenue for the period October to December 2009, pursuant to paragraph 6.1 of Annex 1 of the Code. No such information was received, and so a reminder was sent on 25 January stating that a failure to comply was a breach of the Code. Again no response was received, and so a final request for the missing information was sent on 25 February advising that a failure to reply by 4 March 2010 would lead to an investigation. Again no response was received, and a formal breach letter was sent on 19 March 2010. On 26 March Mr Aldred finally provided the information on behalf of Starcomm. The Executive's response the same day warned Starcomm that any such failure in the future would result in an investigation.
27. On 1 July 2010 the Executive issued a formal direction for the same information for the period April to June 2010. Again, no response was received from Starcomm to that direction or to a reminder sent on 15 July. On 3 August 2010 a breach letter was sent to Starcomm with case number 844739. On 6 August Mr Aldred responded to provide the information requested.

### **Executive's case**

28. The Executive contends that Starcomm is responsible for the following breaches of the Code:

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- 28.1. Para 2.1.1(b): *"Network operators must ensure that PhonepayPlus regulation is satisfactorily maintained by ... taking all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services"*;
- 28.2. Para 2.5.1: *"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. Such information may include, but is not limited to ... (b) the number and length of calls to or from any number ... (e) all details of outpayments including amounts, bank details and dates of payment to*

*service providers (which may include such proof of payment as PhonepayPlus shall specify) ... (f) details of other numbers held by relevant service providers”;*

28.3. Para 2.5.2(e): *“When directed to do so by PhonepayPlus, network operators shall immediately ... (d) withhold such an amount of money as PhonepayPlus may require out of monies payable by the network operator to a specified service provider until permitted by PhonepayPlus to do otherwise ... (e) pay over to PhonepayPlus such an amount of any money withheld pursuant to ... subparagraph 2.5.2(d) above as PhonepayPlus may require in order to satisfy outstanding fines and/or administrative charges, such payment to be made within 30 days of such direction”.*

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28.4. Para 2.1.3 and Annex 1, para 6.6: *“All network operators must provide PhonepayPlus with quarterly reports upon the actual levels of outpayments that they are making as soon as is reasonably practicable following 30<sup>th</sup> June, 30<sup>th</sup> September, 31<sup>st</sup> December and 31<sup>st</sup> March”.*

29. The Executive contends in light of the above facts that Starcomm failed to provide the information requested of it, with the result that the investigation of Mr Singh was hampered. In particular, Starcomm failed to provide information as to the duration of each call, failed to provide revenue information, and failed to provide a complete list of terminating numbers for each 070 number.
30. The Executive also contends that Starcomm has failed to pay over the money withheld from Mr Singh as directed, and failed promptly to provide the payment information required of network operators.
31. The Executive contends that the conduct of Starcomm displays recklessness at best, and a complete disregard towards PhonepayPlus at worst. The Executive invited the Tribunal to impose sanctions including a fine, and it was proposed that this fine should include the fine accrued but not paid by Mr Singh.

### **Starcomm's case**

32. Mr Aldred made it clear at the outset of the tribunal hearing that he did not admit any of the breaches levelled at Starcomm. In relation to the provision of information, Mr Aldred relied upon various issues:

32.1. He stated that given Starcomm's small size it was not financially viable for it to have systems which would enable it to provide such information as the duration of calls made;

32.2. When asked to provide the duration of calls he had done his best to extract this information himself, but he was not sufficiently technically qualified to do so;

32.3. He characterised some of the information requested by the Executive as disproportionate. He described the deadlines imposed as being unreasonable;

32.4. Whenever information was provided it tended to produce a request for yet further information;

32.5. He had been (and continued to be) heavily involved in an ongoing court case, and accordingly the time he could devote to answering the Executive's requests was limited. He was also on holiday abroad for some of this period. He was the only individual at Starcomm responding to the Executive's requests and he had a business to run.

33. In relation to the failure to pay over the sum withheld from Mr Singh, Mr Aldred relied on the following issues:

33.1. Starcomm had been forced to pay the sum retained from Mr Singh into court following an order for security for costs made in litigation which Starcomm was pursuing in the High Court. It had no other means with which to pay the sum in question;

33.2. A credit note had been issued in Starcomm's favour in August 2005. When Mr Aldred raised the issue of the credit note with the Executive there was then a delay while further information was obtained in relation to it;

33.3. He had never consented to the credit note being set off against sums owing from Starcomm in 2005;

33.4. He stated in his statement prepared for the tribunal hearing that he had asked the Executive whether he could set off the credit note against the withheld sum,

but was told that he should pay over the full amount withheld. This did not seem right to him;

33.5. In oral evidence he queried whether he had in fact been told to pay over the full sum without deduction, and contradicted Ms Francis' evidence to that effect;

33.6. When the issue as to the credit note was cleared up in October 2010, he was told that payment of the sum would not necessarily end the investigation proceeding against Starcomm.

34. In relation to the failure to provide payment information in case 844739, Mr Aldred relied upon a number of factors:

34.1. He was attending a court hearing in Malaysia at that time and was subject to an 8-hour time difference. He did not have access to the internet to receive email or access the PhonepayPlus website, nor could he be contacted by phone;

34.2. There had been an unannounced change to the PhonepayPlus website which meant that the data could only be inputted through red buttons on the site;

34.3. There were no instructions provided as to how to use the modified site, and he had difficulties doing so;

34.4. There had been an admitted failure of the site between 1<sup>st</sup> and 2<sup>nd</sup> July 2010;

34.5. If the provision of the information had been important he would have expected it to have been highlighted. He had no reason to suspect that it was important.

## **Conclusions on breaches of the Code**

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#### Para 2.1.1(b): "reasonable steps to prevent the evasion or undermining of the regulation of premium rate services"

35. The Tribunal finds that the breach of the Code in this respect is made out. The history of Starcomm's dealings with the Executive over November and December 2008 shows that it failed to provide timely and complete assistance to the Executive in its investigation of Mr Singh.

36. It is significant that the Executive's investigation was being carried out under the emergency procedure in relation to a serious fraud. In these circumstances in

particular, the Executive is entitled to expect that the provision of requested information by the relevant network operator should be a high priority. Co-operation should be full, prompt, and without qualification.

37. As set out at some length above (a factual account which was largely not in dispute), on a number of occasions Mr Aldred either did not initially respond to certain requests or else he queried the Executive's right to the information in question. When information was provided it was in a piecemeal fashion and the information was often incomplete, unclear or contradictory. It is critical for effective regulation by PhonepayPlus that network operators both have the capability to provide relevant information promptly and do in fact do so. In our view, a failure in this respect seriously undermines the regulation of premium rate services.
38. Having considered the email correspondence between Ms Isaac and Mr Aldred carefully, the Tribunal does not accept Mr Aldred's criticism that the requests made were unreasonable or that the dates for compliance were unrealistic. Ms Isaac showed flexibility in granting Mr Aldred extensions, but was ultimately constrained by the need to proceed to adjudication promptly under the emergency procedure. Starcomm failed to respond with reasonable speed to the requests made.
39. The Tribunal also does not consider that it was a fair observation by Mr Aldred that every piece of information provided seemed to lead to a new request. Ms Isaac's further inquiries reasonably arose from the unhelpful nature of the material with which she was provided.
40. The requirements of the Code to provide particular types of information are considered further below, and all of these requirements are relevant to the breach of this more generic provision of the Code. In general the Tribunal considers that the responses of Starcomm to the Executive's inquiries fell far short of the reasonable steps which we would expect from a responsible network operator in relation to this paragraph of the Code.

41. The reasons put forward by Mr Aldred for this failure are not relevant to the question of whether or not the breaches occurred, but rather to the question of mitigation. The Tribunal will therefore consider them below in relation to the question of which sanctions, if any, should be imposed for these breaches.

Para 2.5.1: information as to the length of calls, payments to service provider, and numbers held by service provider

42. Starcomm failed to provide information as to the duration of calls. This information was critical to the assessment of consumer harm, as the cost of the calls to the relevant numbers increased once they were longer than one minute. Starcomm's initial position was that the 070 numbers were not premium rate numbers at all, and so it did not have to comply with this request. In fact, the adjudication tribunal in the case against Mr Singh concluded that a premium rate service was being operated on the 070 numbers in question. Mr Aldred then claimed that all calls would have been less than one minute in duration. This contention was later abandoned, and his final position was that a "*big proportion*" of calls were greater than one minute but that Starcomm lacked the technical capability to give full details and would need to hire a programmer if it were to do so. Starcomm is required by the Code to be in a position to give this information to the Executive when it is requested, and it was unable to do so.
43. Starcomm failed at any stage to provide supporting evidence as to the payments made to Mr Singh. Although a spreadsheet of purported payments was produced on 17 December 2008, it appeared that the payments made to Mr Singh had simply been calculated on the basis of multiplying the number of calls in any given month by 30p. This did not appear to be consistent with the later contention that a significant proportion of calls lasted more than one minute. This spreadsheet was never supported by underlying documentation and the invoice numbers and dates of payment were never provided. Starcomm is required by the Code to provide this type of basic accounting information and documentation, and it did not do so.

44. Starcomm failed adequately to respond to the request for details of telephone numbers. Starcomm was asked to provide details of the geographic or mobile terminating number for each 070 number allocated. Mr Aldred's first response was to provide a 20-page list of mobile numbers without the corresponding 070 number and with the last digit replaced by "x". He mistakenly relied upon the Data Protection Act in this respect. Subsequently it does not appear that Starcomm ever provided a comprehensive list of the terminating numbers for each 070 number allocated. Mr Aldred did provide some sample call logs for May and November 2008 where terminating numbers were matched to specific 070 numbers, but he subsequently accepted that this data may not have been reliable because he was "*rushing as I have to do some other urgent work*".
45. The requirement in the Code to provide these specific types of information is mandatory and unqualified. It is not sufficient for a network operator to make qualified endeavours to produce the information requested but to fail to do so. For each of these three specific types of information referred to in the Code, the Tribunal concludes that a breach of paragraph 2.5.1 is made out.

Para 2.5.2(e): payment of withheld sums to PhonepayPlus

46. Starcomm accepts that it withheld the total amount of £3,945.90 from Mr Singh. It also accepts that it has never paid this sum to PhonepayPlus as requested.
47. None of the issues relied upon by Starcomm negated its obligation to pay over the sum in question, and they are relevant (if at all) to mitigation only. In particular, it was not open to Starcomm to set off the withheld sum against any sum which PhonepayPlus may have owed Starcomm. The money withheld by Starcomm never belonged to Starcomm and should not have been treated as its own funds in relation to any disputed accounting position with PhonepayPlus.
48. The circumstances surrounding the failure to pay will be considered further below in relation to sanctions, but the Tribunal concludes that a breach of this paragraph of the Code is made out.

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#### Para 2.1.3 and Annex 1, para 6.6: providing information as to outpayments

49. Starcomm failed to provide the requested information when asked to do so, despite reminders. It was only when a formal breach letter had been issued that the information was belatedly provided on 6 August 2010, over a month after it had been requested.
50. Again, the matters relied upon by Starcomm in relation to this issue are only relevant, if at all, to mitigation. Network operators are obliged to be in a position to provide the information when requested to do so, and the efficient administration of the regulatory process relies upon the prompt production of such data.
51. The Tribunal is satisfied that a breach of this paragraph of the Code is made out.

### **Sanctions**

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52. Breaches of a network operator's duty to provide information in the course of an investigation by the Executive undermine the entire regulatory process. This process relies upon the provision by network operators of prompt, complete and accurate information when it is investigating a service provider. Such information often forms a crucial component of the investigation into complaints. If a network operator is unable or unwilling to provide full details without delay, then the investigation of the service provider is impeded and the entire regulatory structure of the Code placed in jeopardy.
53. The Tribunal does not consider that the circumstances surrounding the failure of Starcomm to provide the information and documentation requested amount to significant mitigation. Mr Aldred was at pains to emphasise that Starcomm is a small company, and that effectively it was up to him as sole director to comply with the Executive's requests. However, the regulatory burden which is put on network operators by the Code cannot be qualified because of the particular circumstances of



the operator in question. There is no reason why compliance should be waived, or consumer protection compromised, in relation to activities of smaller operators. It is true that the Code places a significant onus on network operators to be able to provide detailed information on request. However, that is what the effective regulation of premium rate services requires, and it is necessary for network operators to have the technical and financial resources to meet such requirements if they are to operate in compliance with the Code.

54. Thus the Tribunal does not consider that Starcomm can rely upon the fact that its limited technical and financial resources made it difficult to provide the information in question. Nor does it amount to significant mitigation that Mr Aldred was involved in protracted court litigation and had other work commitments at the time when he was required to produce the information. Network operators must have adequate systems to ensure that they meet their regulatory requirements. Such systems should not be compromised because of the commitments of one particular individual.
55. In any event, and quite apart from any practical difficulty which Starcomm may have had in providing information, the Tribunal considers that Mr Aldred's responses to the Executive's requests were at times unnecessarily obstructive and unhelpful. His reaction to Ms Isaac's requests was, on occasion, obstructive rather than cooperative, even allowing for any technical limitations which he was subject to owing to Starcomm's inadequate systems. Full and frank cooperation with the regulator is the minimum to be expected of any responsible network operator, but particularly in the serious circumstances surrounding this investigation.
56. Starcomm's conduct in relation to the payment of the sums withheld from Mr Singh was unacceptable. Starcomm had been specifically directed to retain this money, which otherwise would have been paid to Mr Singh and not retained by Starcomm, in order to safeguard the regulatory process. The sum in question never belonged to Starcomm and it was not open to it to use the money for other purposes. The Tribunal does not consider that the financial difficulties of Starcomm, and the fact that it was subject to an order to pay a significant sum into court, amounts to mitigation. On the

contrary, using the sum for Starcomm's own purposes constitutes a significantly aggravating factor in this case.

57. When the sum withheld was demanded by the Executive, Mr Aldred did not rely upon Starcomm's financial position to explain the failure to pay. Instead he relied (both at the time and at the tribunal hearing) upon the fact that a credit note for a much smaller sum had been produced in Starcomm's favour by PhonepayPlus back in 2005. Again, the Tribunal considers that the circumstances surrounding the credit note amount to aggravation rather than mitigation, for the following reasons:

57.1. The withheld sum never belonged to Starcomm. It was not open to Starcomm to include it in a general consideration of its accounting position with PhonepayPlus. It is hard to see how Mr Aldred could sensibly have believed that Starcomm was entitled to do this;

57.2. The Tribunal concludes, on balance, that Mr Aldred was specifically told by Ms Francis that he could not set off any amount which he believed he was due from PhonepayPlus. She gave specific oral evidence to this effect. In his statement prepared for the tribunal hearing Mr Aldred appeared to accept that he was told this, although he later contended in oral evidence that he could recall no such instruction;

57.3. If Mr Aldred genuinely believed that Starcomm was owed money by PhonepayPlus, and that a set-off was permissible, then Starcomm might have been expected at least to pay the balance. It did not do so;

57.4. In any event, it subsequently became clear that Starcomm had been credited with the sums due under the credit note years previously. The contention that PhonepayPlus may have owed Starcomm money was incorrect;

57.5. When this position was made clear later in 2010, Starcomm still failed to pay the withheld sum. It remains unpaid to date.

58. The Tribunal is not satisfied that a genuine query as to accounting was behind Starcomm's failure to pay the money. Rather it seems probable that the other reason relied upon – a shortage of funds when required to make a payment into court in ongoing litigation – was the true cause of the failure to pay and that the credit note

issue was raised as a smokescreen. Starcomm knowingly used funds for its own purposes which had been specifically earmarked to protect the efficacy of the regulatory process.

59. Of particular concern to the Tribunal was the fact that Mr Aldred stated that Starcomm is still not in a position (two years after the events which form the subject of these proceedings) to provide information as to call duration should it be called upon to do so again. While quotations have been obtained for the relevant technical improvements, the work has not been carried out. The Tribunal considers that Starcomm's operations are thus non-compliant on an ongoing basis and regards this as an aggravating factor. Mr Aldred's general lack of awareness in relation to Code compliance (as evidenced by his statement to the Executive that he had not read the Code since 2002) was also a worrying and aggravating feature.
60. The Tribunal recognises Starcomm's good record in terms of past breaches: there are no previous findings of a breach of the Code in relation to Starcomm. It is also correct that Starcomm complied with the direction to block access to the offending service (and indeed appears to have already blocked it before being required to do so). These points constitute some mitigation.
61. The Tribunal considers the breaches in case 827372 to have been very serious. However, the Tribunal does not consider that it would be appropriate to require Starcomm to meet the fine imposed on Mr Singh. There was no direct link between the consumer harm caused by Mr Singh's actions and the breaches levelled against Starcomm. The harm caused by such breaches is to the wider regulatory process and to confidence in premium rate services generally, rather than to any identifiable consumers in particular.
62. Had the breaches by Starcomm been of a due diligence nature, such that Starcomm's compliance with the requirements of the Code might have prevented the breaches by Mr Singh, the Tribunal may well have come to a different conclusion.

63. In all the circumstances, the Tribunal considers that a fine of £25,000 is appropriate to the facts of this case.
64. Two particular factors of this case caused the Tribunal to question whether Starcomm is a suitable entity to carry out the functions of a network operator under the Code and therefore to consider whether a bar on Starcomm providing its network and/or services would be appropriate. Those two factors were Starcomm's continuing inability to provide the call length information required by the Executive (whether in relation to this case or any other) and the ongoing failure (or refusal) to pay over the withheld sums of money. The Tribunal has concluded that a network operator should not be permitted to continue to provide services where it has been shown that it cannot meet its regulatory requirements and that a bar is an appropriate sanction in such circumstances.
65. However, the Tribunal has decided to give Starcomm a 42-day period within which to demonstrate that it has put in place systems to enable it to comply with any future direction given under 2.5.1(b) of the Code to provide details of call durations and to pay over the withheld sum from Mr Singh. If Starcomm does not do so, then a 12-month bar on providing its network or services for any category of premium rate services will come into force.
66. Accordingly, the Tribunal has decided to impose the following sanctions in this case:
- 66.1. A formal reprimand;
  - 66.2. A fine of £25,000;
  - 66.3. A 12 month bar on providing its network or services for the carriage of any category of premium rate services, suspended for a period of 42 days. The bar will come into effect on expiry of that period unless Starcomm (i) puts in place suitable systems, to enable it to comply with any future direction under paragraph 2.5.1(b) of the Code, and provides evidence of such systems, to the satisfaction of the Executive; and (ii) pays to PhonepayPlus the withheld sum of £3,945.90.

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67. Mr Aldred relied upon his personal commitments abroad as explaining Starcomm's failure in this respect. Again, performance of the obligations of a network operator should not be subject to the availability of any one individual. Systems should be in place to ensure compliance. In any event, the Tribunal does not accept that when Mr Aldred was attending court proceedings in Malaysia he would have been unable to access the internet in order to provide the information required, or indeed contact PhonepayPlus by telephone or electronic means if he encountered some problem when doing so.
68. It is noted that the technical problems with the website lasted less than 24 hours, and if Mr Aldred had indeed been unable to enter the information on 1 or 2 July, then he should have attempted again on receipt of Ms Francis' email stating that the problem had been resolved. It is not accepted that the use of the red buttons should have presented Mr Aldred with any difficulty, particularly given that it appears information had been provided via such buttons only three months previously, but in any event he should have contacted the Executive if he was encountering problems.
69. The Tribunal further notes that Starcomm's breach followed a similar failure only six months previously. This is an aggravating factor.
70. However, the Tribunal recognises that this breach of the Code is of a different level of seriousness to those in case 827372. In all the circumstances, the Tribunal considers the breach to have been of moderate seriousness, and it has decided to impose the following sanctions:
- 70.1. A formal reprimand;
  - 70.2. A fine of £500.

**Costs**

71. Paragraph 9.2.6 of the Code provides that Starcomm may be invoiced for the administrative and legal costs of the oral hearing. The Tribunal recommends that the

costs of the Executive should be reduced so that Starcomm does not have to pay for the time of its witnesses attending the hearing, other than for the time in which they were actually required to give evidence. The Tribunal also suggests that the Executive considers accepting stage payments for these costs.

**Michelle Peters**

(Chair of Tribunal)

**Robert Chilton**

**David Jessel**

Dated this 21<sup>st</sup> day of April 2011