

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

**Thursday 15 March 2012  
TRIBUNAL SITTING No. 95 / CASE 3  
CASE REFERENCE: 04087**

**THIS PROCEDURE WAS BROUGHT AGAINST THE NAMED INDIVIDUAL UNDER  
PARAGRAPH 4.8.6 OF THE CODE**

**BACKGROUND**

**(i) Summary relating to Mr Barry Peak**

On 10 November 2011, the Executive presented a case to Tribunal relating to TGH Management Limited (formerly Transact Group (Holdings) Limited). The case related solely to the non compliance with a direction made under paragraph 3.1.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition, dated 1 September 2011) (the “Code”) for outstanding payments totalling £294,842.51 to be made to PhonepayPlus. The outstanding payments related to invoices that had gone unpaid following a previous case against Transact Group (Holdings) Limited, which culminated in decisions being made by an oral hearing tribunal in June 2010 and subsequently an Independent Appeals Body Tribunal in May 2011.

The Tribunal of 10 November 2011 upheld a breach of Code paragraph 3.1.4 against TGH Management Limited which overall it assessed as very serious. The Tribunal imposed the sanction of a formal reprimand, having taken into account the fact that the Executive had commenced debt recovery proceedings and the fact that the company was now in liquidation. The Tribunal also instructed the Executive to initiate this process which may lead to the prohibition of Mr Peak, a director of TGH Management Limited (an associated individual) under paragraph 4.8.2(g) of the Code.

**(ii) Relevant Code Provisions**

- Paragraph 4.8.6 of the Code states:

*“If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), **4.8.2(g)** or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing”.*

- The sanction available for imposition under paragraph 4.8.2(g) of the Code is worded:

*“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions...“prohibit a relevant party and/or an **associated individual** found to have been knowingly involved in a serious breach or a series of breaches of the Code from providing, or having any involvement in, any premium rate service or promotion for a defined period.”*

- An associated individual is defined at paragraph 5.3.9 of the Code:

*“Associated individual” is any sole trader, partner or director or manager of a premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus”.*

## **SUBMISSIONS AND CONCLUSIONS**

### **Knowing Involvement in a serious breach or series of breaches of the Code**

1. The Executive provided the following evidence to Mr Peak which indicated that Mr Peak was knowingly involved in a very serious breach of the Code in respect of the TGH Management Limited case considered by the Tribunal on 10 November 2011. The Executive also provided Mr Peak with evidence of other previous breaches (serious or otherwise) upheld against various providers, including TGH Management Limited on 11 January 2011).

#### **Case reference 03185 (1) – TGH Management Limited**

This case was adjudicated on 10 November 2011 and was the trigger case in which the Tribunal instructed the Executive to commence the prohibition procedure against “Barry Peak” under paragraph 4.8.6 of the Code. The case was brought against the Level 1 and/or Level 2 provider, ‘TGH Management Limited’, formerly Transact Group (Holdings) Limited.

The investigation related specifically to a failure by TGH Management Limited to act on a direction given by PhonepayPlus to make payment of outstanding payments of £294,842.51 (see sanctions related to case 807353 / 778256 below). On 23 August 2011, the Executive had sent a formal reminder for payment to be made by 30 August 2011.

As no payment was received, the Executive issued a formal direction under the Code on 16 September 2011, requiring TGH Management Limited to make payment in full by 30 September 2011. The Executive received no response or payment and subsequently a breach of paragraph 3.1.4 of the Code, for not acting on a direction, was upheld by the Tribunal.

The Tribunal imposed a sanction of a formal reprimand and found that the final assessment of the breach was very serious. TGH Management Limited commenced proceedings to voluntarily liquidate the company after receiving the breach letter from the Executive. A liquidator was appointed on 3 November 2011.

The following facts and evidence suggested that Mr Peak was knowingly involved in this breach:

- Mr Peak was at all relevant times, a director of TGH Management Limited and as such was responsible for the management of the company at the time that this very serious breach occurred;

- On 23 August 2011, Mr Peak was personally sent the overdue payment reminder, for which payment was not made;
- On 16 September 2011, Mr Peak was personally sent 'Direction' to settle outstanding invoices. The direction was not complied with;
- On 10 November 2011, Mr Peak attended the informal representation at the Tribunal and spoke on behalf of the company, TGH Management Limited, in response to the alleged breach; and
- As well as being a director of TGH Management Limited, Mr Peak was also a Chartered Accountant and the Group Finance Director.

The Executive also noted that Mr Peak was the company secretary for TGH Management Limited.

Further, the Executive formed the following views from the evidence:

- That Mr Peak would have been aware that significant financial sanctions and costs were likely to be incurred by Transact Group (Holdings) Limited from the outcome of the initial Tribunal hearing of case 807353 / 778256 where a £250,000 fine was imposed (see below); and
- Mr Peak was a director of Transact Group (Holdings) Limited (subsequently, TGH Management Limited), and Finance Director of the Transact Group at the time of case 807353 / 778256. This case was reviewed and proceeded through to the oral hearing process and then the Independent Appeals Body process, which incurred significant further costs. As such Mr Peak should have made some form of financial contingency planning to enable the company to have acted (by making some form of payment, if not total payment) on the direction for payment to be made to PhonepayPlus.

As a result of the action of TGH Management and its directors the sum of £294,842.51 remained unrecoverable and was likely to be subsequently met by the industry.

### **Case reference 807353 & 778256 (2) – Transact Group (Holdings) Limited**

This case was initially adjudicated upon on 29 October 2009. The case was brought under the PhonepayPlus Code of Practice (11<sup>th</sup> Edition) amended April 2008) ("**Code 11**") against the service provider, Transact Group (Holdings) Limited, which changed its name to TGH Management Limited on 11 January 2011.

The investigation related to various reverse-billed shortcode related services: chat and date, subscription and one off picture messages.

The Tribunal upheld the following breaches of the Code:

- 5.2 - Legality. (Privacy and Electronic Communications (EC Directive) Regulations 2003 - unsolicited promotions) The Tribunal considered the overall consistency of consumer complaints received by the Executive. It noted that

complainants had stated that they had not opted in or used similar services in the past and the Tribunal was not persuaded that the opt-in evidence provided by Transact Group (Holdings) Limited was sufficiently detailed to establish that there had been a valid opt-in;

- 5.4.1(a) - Fairness (misleading). The Tribunal found that complainants had been receiving chargeable text messages without interacting with the services under investigation;
- 5.4.1(b) - Unfair Advantage. The Tribunal found that when consumers had dialled 090 numbers related to the service, they were made vulnerable to reverse-billed text messages from Transact Group (Holdings) Limited. It followed that Transact Group (Holdings) Limited had taken unfair advantage of those consumers because, upon termination of the call, some consumers were immediately sent reverse-billed text messages to their handsets, and then on a regular basis without any knowledge or consent whatsoever;
- 5.7.1 – Pricing information. The Tribunal found that it had been possible for consumers to be charged without seeing terms and conditions (including pricing) on service WAP sites and that the charging mechanism had been triggered when users accessed service WAP sites for the first time;
- 5.8 – Contact Information. The Tribunal found on the evidence before it and on the basis of Transact Group (Holdings) Limited's acceptance, that contact information had been absent initially and then incomplete after that; and
- 7.3.3(a)&(b) – Virtual chat (spend reminders). The Tribunal accepted Transact Group (Holdings) Limited's acceptance, that message logs initially provided to the Executive were not correct (the logs had represented that the spend reminders and requirement for a positive consumer response had been present). It found that consumers had not been informed of their continued spend and had not been given the opportunity to provide a positive response to continue the service.

The Executive had argued that the message logs had been falsified as had been uncovered by independent verification. Transact Group (Holdings) Limited had stated that a technical error had caused the production of inaccurate logs.

- 7.12.4(a)-(f) – Subscription Initiation. The Tribunal considered the evidence and noted the Transact Group (Holdings) Limited acceptance that the initial message logs it had supplied to the Executive were not correct and, in fact, there had been a failure to send the subscription initiation text messages; and
- 7.12.5 – Subscription Reminder. The Tribunal considered the evidence and noted the Transact Group (Holdings) Limited acceptance that the initial message logs it had supplied to the Executive were not correct and, in fact, there had been a failure to send the subscription reminder text messages.

The Tribunal imposed the following sanctions: a formal reprimand; a fine of £250,000; and refunds. The final assessment of the case was very serious.

The Tribunal had taken into account the following aggravating factors in coming to its decision:

- The behaviour of Transact Group (Holdings) Limited had been reckless in its failure to adopt systems of adequate technical quality;
- There was material harm as there were 106 complaints;
- The costs paid by individual consumers was high;
- Concealed subscription services had been singled out for criticism by PhonepayPlus (and were evident within the case);
- Transact Group (Holdings) Limited had supplied the Executive with false and misleading information relating to the message logs; and
- The Tribunal considered that Transact Group (Holdings) Limited was a new company and, as such, had no breach history. However, the Tribunal noted the breach history of Transact Group Limited, which had the same directors.

On request from Transact Group (Holdings) Limited the case was heard at a PhonepayPlus oral hearing tribunal on 2 and 3 June 2010, the financial sanction of £250,000 was suspended pending the outcome of this hearing.

The oral hearing tribunal upheld all of the breaches found at the previous hearing.

The oral hearing tribunal imposed the following sanctions: a formal reprimand; a fine of £167,959 (a reduction from £250,000); refunds; a six month prohibition on Transact Group (Holdings) Limited, whether acting as Service Provider or Information Provider, being involved in or contracting for any premium rate text chat services with or without an element of dating; and a six month bar on all premium rate services operated or promoted by Transact Group (Holdings) Limited, whether acting as Service Provider or Information Provider on four specific shortcodes. The prohibition and bar were suspended for three months to allow Transact Group (Holdings) Limited to promptly seek compliance advice.

The oral hearing Tribunal decision stated that:

*“The Tribunal seriously considered making a recommendation that the Executive initiates proceedings to name...Mr Peak in light of his deception...because of Transact’s general and repeated failings of compliance as set out above. However, on a narrow balance, it has determined not to do so on this occasion...This Decision should be regarded as a final warning for...Mr Peak. Any future Tribunal may take an exceptionally dim view if, under a different legal guise, the same errors are perpetuated. If that were to be the case then a personal sanction may be inevitable”*

The final assessment of the case was again very serious. In addition to the fine sanction, the oral hearing Tribunal recommended that Transact be required to pay the costs of the Tribunal and 50% of the costs of the Executive. This administration cost totalled £52,342.51.

On request from Transact Group (Holdings) Limited the case was then heard by the Independent Appeals Body ('IAB') on 16 May 2011, the financial sanction (£167,959) and the administration costs (£52,342.51) were suspended pending the outcome of this hearing.

The grounds of the IAB appeal related to the fine sanction of £167,959 set at the oral hearing tribunal. The IAB found that *"...the submissions put forward by the appellant in favour of a smaller fine do not carry significant weight..."*

The IAB, when assessing the case, considered the appropriate level of fine should be £220,000 (an uplift from £167,959) and imposed further costs on Transact Group (Holdings) Limited of £27,500 (excluding VAT) in relation to the appeal.

The following facts and evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group (Holdings) Limited at the relevant time and as such was responsible for the management of the company at the time that these very serious breaches occurred;
- Mr Peak was sent and personally responded to the breach letter documentation, throughout the investigation of this case on behalf of Transact Group (Holdings) Limited, until the oral hearing and IAB stages when lawyers became involved; and
- Whilst the oral hearing Tribunal found that a former employee of Transact Group (Holdings) Limited was responsible for changing of coding and as a direct result, many of the breaches that were upheld, comments were made by that Tribunal that the breaches were only allowed to occur due to a *"...complete and catastrophic lack of control by Transact over their technical systems..."*, *"...Transact failed to learn any lessons from the previous sanctions against Transact Group Limited. Having apparently identified Mr S [the former employee] as the person at fault for all those breaches, Transact does not appear to have made any changes to its system..."*

The Executive also noted that Mr Peak was the company secretary for Transact Group (Holdings) Limited.

Further, the Executive has formed the following view from the evidence:

- That the failures of Transact Group (Holdings) Limited demonstrated the failures of Mr Peak, as a director responsible for the management of the company.

### **Case reference 844794 (3) - Telephone Entertainment Network Limited**

This case was adjudicated on 11 November 2010. The case was brought against the Information Provider, Telephone Entertainment Network Limited under Code 11. The investigation related to a 'virtual SMS chat' service that had been promoted in the Daily Sport newspaper for two days in July 2010.

In late 2009 and early 2010, the Executive specifically brought virtual chat services to the attention of the industry. This was through the publication of a help note and also a monitoring project to ensure that compliance was being met.

This project looked to test all areas of virtual chat from promotional material to the operation of the services. The results of this monitoring were documented to Telephone Entertainment Network Limited and the area of 'age verification' was highlighted as a concern requiring attention.

The Executive's case raised the following breaches:

- 5.7.1 – Pricing information was not provided in promotional material or on the service prior to the consumer incurring premium rate charges;
- 7.3.2(a) - Age verification – users age had not been verified by the operator at the first opportunity; and
- 7.3.2(d) – Age verification (stop information) – The service and its promotional material had not made consumers aware of the 'STOP' command before allowing access to the service.

The Tribunal upheld all three breaches of the Code, imposed a sanction of a formal reprimand and the Tribunal ordered Telephone Entertainment Limited to remedy the breach by seeking compliance advice in relation to this service and its promotion. The final assessment of the case was moderate.

The following evidence suggested that Mr Peak was knowingly involved in the breaches:

- On 3 March 2010, Transact Group Limited (Mr Peak was a director of this company but was not directly addressed) was written to (as were all other service providers) notifying them that virtual SMS chat services had become a concern for PhonepayPlus. This letter informed Transact Group Limited that service providers should ensure that their virtual chat services were compliant with the Code of Practice and warned that future non compliance may be met with a formal investigation.

Transact Group Limited was a service provider that Mr Peak was a director and company secretary of and also operated out of the same Cambridge based office as Telephone Entertainment Network Limited.

The Executive also noted that Mr Peak was the company secretary for Telephone Entertainment Network Limited.

#### **Case reference 755993 (4) – Transact Group Limited**

This case was adjudicated on 11 September 2008. The case was brought against the Service Provider, Transact Group Limited under Code 11.

The investigation related to a 'Text Chat and Dating' service that had been operated by the information provider, Argyle Infoservices Limited, Cyprus. It is unknown if Argyl Infoservices Limited was under the control of Mr Peak.

The Tribunal upheld the following breaches of the Code:

- 5.2 – Legality. The Tribunal found that consumers had not consented to receive promotional messages from Transact Group Limited;
- 5.4.1(a) – Fairness (misleading). The Tribunal found that the promotional messages sent to consumers were misleading by appearing personal in nature;
- 5.4.1(b) – Unfair Advantage. The Tribunal found that complainants had received reverse-billed unsolicited messages and as such this had taken unfair advantage and made consumers vulnerable because they were not able to prevent Transact Group Limited making use of the data and sending unsolicited messages; and
- 5.8 - Contact Information. The Tribunal found that the promotional messages sent to consumers did not contain the requisite contact details of the service or information provider.

The Tribunal imposed the following sanctions: a formal reprimand; a fine of £7,500 (£2,500 breach history uplift); and refunds. The final assessment of the case was serious.

The following evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group Limited and as such was responsible for the management of the company at the time that these serious breaches occurred.

The Executive noted that Mr Peak was the company secretary for Transact Group Limited.

The Executive noted that it did not appear that Mr Peak was copied into any of the investigation papers throughout this case.

#### **Case reference 735013 (5) – Transact Group Limited**

This case was adjudicated on 11 September 2008. The case was brought against the Service Provider, Transact Group Limited under Code 11. The investigation related to a 'Chat and Date' service that had been operated by the information provider, Argyl Infoservices Limited, Cyprus. It is unknown if Argyl Infoservices Limited was under the control of Mr Peak.

The Tribunal upheld the following breaches of the Code:

- 5.2 – Legality. The Tribunal found that consumers had not consented to receive promotional messages from Transact Group Limited;



- 5.4.1(a) – Fairness (misleading). The Tribunal found that recipients of service messages were unaware that they were being charged to receive the messages, or of the nature of the service received;
- 5.4.1b – Unfair Advantage. The Tribunal found that complainants had received reverse-billed unsolicited messages and as such this had taken unfair advantage and made consumers vulnerable because they were not able to prevent Transact Group Limited making use of the data and sending unsolicited messages;
- 5.7.1 - Pricing information. The Tribunal concluded that pricing information had not been provided to consumers in a clear and straightforward way prior to charges having been incurred;
- 5.8 - Contact Information. The Tribunal found that the promotional messages sent to consumers did not contain the requisite contact details of the service or information provider;
- 5.12 – Inappropriate promotion. The Tribunal considered that the apparently heterosexual adult service had been promoted at children, married men, women and a gay man;
- 5.14 – STOP command. The Tribunal found that the STOP command was not operational;
- 7.3.2(d) – STOP command being available and so informed to consumers. The Tribunal found that this had not been made available in the necessary promotional messages that consumers would have received; and
- 7.3.3(a) – Virtual Chat (spend reminder). The Tribunal found that Transact Group Limited had failed to send the appropriate service cost message after one user had exceeded the £10 total spend.

The Tribunal imposed the following sanctions: a formal reprimand; a fine of £15,000 (£5,000 breach history uplift); and refunds. The final assessment of the case was serious.

The following fact evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group Limited at the relevant time and as such was responsible for the management of the company at the time that these serious breaches occurred.

The Executive noted that Mr Peak was the company secretary for Transact Group Limited.

The Executive also noted that it did not appear that Mr Peak was copied into any of the investigation papers throughout this case.

**Case reference 747388 (6) – Transact Group Limited**

This case was adjudicated on 17 July 2008. The case was brought against the Service Provider, Transact Group Limited under Code 11.

The investigation related to a 'Virtual Text Chat' service that had been operated by the information provider, Mobility Methods (pty) Ltd, South Africa.

At the time of this investigation the Executive understood that the information provider was not part of the Transact 'group' of companies, under the management/directorship of Mr Peak. However, when submitting breach history to the latest Tribunal on 10 November 2011, TGH Management Limited stated that this was a "*Group Information Provider*".

The Tribunal upheld the following breaches of Code 11:

- 5.2 – Legality. The Tribunal found that none of the complainants had been provided with a simple means within the promotional messages of being able to opt out of the service and its promotions;
- 5.4.1(a) – Fairness (misleading). The Tribunal found that the content of promotional messages had misled consumers by appearing to be of a personal nature rather than commercial;
- 5.7.2 – Pricing information (prominence). The Tribunal found that the pricing information was not easily legible, prominent and presented in a way that did not require close examination; and
- 5.8 – Contact Information. The Tribunal found that the service promotional messages and WAP landing pages had failed to provide the requisite contact information.

The Tribunal imposed the following sanctions: a formal reprimand; a fine of £5,000 (£2,000 breach history uplift); and a bar on the service until compliance advice was sought and implemented. The final assessment of the case was significant.

The following fact evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group Limited at the relevant time and as such was responsible for the management of the company at the time that these significant breaches occurred.

The Executive noted that Mr Peak was the company secretary for Transact Group Limited.

The Executive also noted that it did not appear that Mr Peak was copied into any of the investigation papers throughout this case.

#### **Case reference 709322 (7) – Transact Group Limited**

This case was adjudicated on 12 February 2008. The case was brought against the Service Provider, Transact Group Limited under Code 11.

The investigation related to a 'Subscription Chat' service that had been operated by the information provider, Chaos Live the Transact 'Group Information Provider'.

The Tribunal upheld the following breaches of Code 11:

- 5.2 – Legality. The Tribunal found complainants had stated that they had not provided consent to receive promotional material and Transact Group Limited had failed to provide any evidence of an opt-in;
- 5.4.1(a) – Fairness (misleading). The Tribunal found that the content of promotional messages had misled consumers by appearing to be of a personal nature rather than commercial;
- 5.4.1(b) – Unfair Advantage. The Tribunal found that complainants had received reverse-billed unsolicited messages and as such this had taken unfair advantage and made consumers vulnerable because they were not able to prevent Transact Group Limited making use of the data and sending unsolicited messages;
- 7.12.4 – Subscription Initiation. The Tribunal found that the requisite subscription initiation messages had not been sent to consumers; and
- 7.12.5 – Subscription Reminders. The Tribunal found that free subscription reminder service messages had not been sent to consumers.

The Tribunal imposed the following sanctions: a formal reprimand; and a fine of £10,000. The final assessment of the case was significant.

The following evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group Limited at the relevant time and as such was responsible for the management of the company at the time that these significant breaches occurred.

The Executive also noted that Mr Peak was the company secretary for Transact Group Limited.

### **Case reference 707557 (8) – Transact Group Limited**

This case was adjudicated on 16 August 2007 and a review hearing on 27 September 2011. The case was brought against the Service Provider, Transact Group Limited under Code 11. The investigation related to a 'Sexual Entertainment' service.

The Tribunal upheld the following breaches of Code 11:

- 3.3.1 – General Duties of Service Providers. The Tribunal found that the service had been operating on the incorrect number prefixes as designated by Ofcom and the Mobile Network Operators;
- 5.4.1(a) – Fairness (misleading). The Tribunal found that the use of the word 'free' on the promotional material had misled consumers;

- 5.7.1 - Pricing information. The Tribunal concluded that pricing information had not been provided to consumers in the promotional only; and
- 5.11 – Use of the word ‘Free’. The Tribunal found that the service had been promoted as being free when that was not the case. An overlap with paragraph 5.4.1a of Code 11 was noted.

The Tribunal imposed the following sanctions: a formal reprimand; a bar on any premium rate service promoted by Transact Group Limited on a non premium rate number for 12 months or until compliant, whichever is the longer; and a fine of £5,000. The final assessment of the case was moderate.

The following fact evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Swayne was a director of Transact Group Limited at the relevant time and as such was responsible for the management of the company at the time that these moderate breaches occurred.

The Executive also noted that Mr Peak was the company secretary for Transact Group Limited.

#### **Case reference 278396 (10) and 276127 (9) – Transact Group Limited**

These cases were initially adjudicated on 28 February 2006 and were subject to an oral hearing on 27 October 2006. These cases were brought against the Service Provider, Transact Group Limited under the PhonepayPlus Code of Practice (10<sup>th</sup> Edition) (“**Code 10**”). The investigations related to a ‘live adult chat’ services and ‘recorded adult entertainment’ services.

On case 278396, the Tribunal upheld the following breaches of Code 10:

- 4.3.1 – Misleading. The Tribunal found that the promotion used appeared misleading by omitting relevant cost information;
- 4.4.1 – Pricing Information. The Tribunal found that the cost of using the service was not given in the promotional material;
- 5.4.1 Live services - The Tribunal found that the introductory message failed to state the identity of Transact Group Limited; and
- 5.5(c) – Live services. The Tribunal found that the promotional material failed to state that calls would be recorded.

The Tribunal imposed the following sanctions: a formal reprimand; and a fine of £5,000. The final assessment of the case was not recorded.

On case 276127, the Tribunal upheld the following breaches of Code 10:

- 4.3.1 – Misleading. The Tribunal found that the promotion used appeared misleading by omitting relevant cost information; and

- 4.4.1 – Pricing Information. The Tribunal found that the cost of using the service was not given in the promotional material.

The Tribunal imposed the following sanctions: a formal reprimand; and a fine of £2,500. The final assessment of the case was not recorded.

The following facts and evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Transact Group Limited at the relevant time and as such was responsible for the management of the company at the time that these breaches occurred; and
- Mr Peak was also involved in representing Transact Group Limited at the oral hearings.

The Executive also noted that Mr Peak was the company secretary for Transact Group Limited.

### **Cases against Rayshield Limited**

PhonepayPlus brought one case under the PhonepayPlus Code of Practice (9<sup>th</sup> Edition) ("**Code 9**") against Rayshield Limited.

On 7 August 2003, the Tribunal upheld a breach of paragraph 4.10.4 of Code 9 against Rayshield Limited for having a sexually suggestive promotion in non top shelf publication. The Tribunal imposed a sanction of a formal reprimand and the final assessment of the case was significant.

PhonepayPlus brought two cases under the PhonepayPlus Code of Practice (8<sup>th</sup> Edition) ("**Code 8**") against Rayshield Limited.

On 13 December 2001, the Tribunal upheld a breach of paragraph 4.11.4 of Code 8 (Services of a Sexual Nature) against Rayshield Limited for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a warning; and a fine of £1,000. The final assessment of the case was moderate.

On 10 February 1999, the Tribunal upheld a breach of paragraph 4.11.4 of Code 8 (Services of a Sexual Nature) against Rayshield Limited for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a fine of £500. The final assessment of the case was moderate.

The following fact and evidence suggested that Mr Peak was knowingly involved in the breaches:

- Rayshield Limited had been confirmed as having been under the control of Transact's directors (Mr Peak). As such Mr Peak was responsible for the management of the company at the relevant time that these moderate breaches occurred.

## **Cases against Advanced Interactive Systems Limited**

PhonepayPlus brought two cases under Code 8 against Advanced Interactive Systems Limited.

In late 1999, the Tribunal upheld a breach of paragraph 4.11.4 of Code 8 (Services of a Sexual Nature) against Advanced Interactive Systems Limited for having a sexually suggestive promotion in non top shelf publication. The Tribunal imposed a sanction of a warning; and a fine of £500. The final assessment of the case was not recorded.

Again, in late 1999, the Tribunal upheld breaches of paragraphs 3.4.1 and 3.4.2 (Pricing Information) of Code 8 against Advanced Interactive Systems Limited. The Tribunal imposed no sanctions. The final assessment of the case was significant.

The following fact and evidence suggested that Mr Peak was knowingly involved in the breaches:

- Mr Peak was a director of Advanced Interactive Systems Limited at the relevant time and as such was responsible for the management of the company at the time that these breaches occurred.

## **Cases against Global Communications Group**

PhonepayPlus brought two cases under Code 8 against Global Communications Group. In late 2001, the Tribunal upheld a breach of 4.11.4 (Services of a Sexual Nature) against Global Communications Group for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a warning; and a fine of £1,500. The final assessment of the case was moderate.

In late 2001, the Tribunal upheld a breach of 4.11.4 (Services of a Sexual Nature) against Global Communications Group for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a fine of £500. The final assessment of the case was not recorded.

The following fact and evidence suggested that Mr Peak was knowingly involved in the breaches:

- Global Communications Group has been confirmed as having been under the control of Transact's directors (Mr Peak). As such Mr Peak was responsible for the management of the company at the time that these breaches occurred.

## **Cases against Global Interactive Systems**

PhonepayPlus brought two cases under Code 8 against Global Interactive Systems.

On 28 September 2000, the Tribunal upheld breaches of paragraphs 3.4.1 (Pricing Information), 3.5 (Address Information) and 4.11.4 (Services of a Sexual Nature) of Code 8 against Global Interactive Systems for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a £1,000 fine. The final assessment of the case was moderate.

In early 2000, the Tribunal upheld breaches of paragraphs 3.4.2 (Pricing Information) and 4.11.4 (Services of a Sexual Nature) of Code 8 against Global Interactive Systems for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a fine of £500. The final assessment of the case was not recorded.

In early 2000, the Tribunal upheld a breach of paragraph 4.11.4 (Services of a Sexual Nature) of Code 8 against Global Interactive Systems for having a sexually suggestive promotion in a non top shelf publication. The Tribunal imposed a sanction of a fine of £300; and issued a warning. The final assessment of the case was not recorded.

The following evidence suggested that Mr Peak was knowingly involved in the breaches:

- Global Interactive Systems has been confirmed as having been under the control of Transact's directors (Mr Peak). As such Mr Peak was responsible for the management of the company at the time that these breaches occurred.
2. Mr Peak made the following arguments in relation to each case provided by the Executive in both his written submissions and during informal representations made to the Tribunal at the hearing on 15 March 2012:

**Case references 03185 (1) and 807353 & 778256 (2) – Transact Group (Holdings) Limited**

Mr Peak submitted both in his response to the Executive and during informal representations at the Tribunal hearing on 15 March 2012 that the overall case history and all the circumstances surrounding this case, and in particular the intricate involvement of various former employees of the group, were complex and involved serious misdemeanours on the part of certain individuals. Mr Peak stated that he was not knowingly involved in the original breaches and that this was something that the Oral Hearing tribunal also upheld and no action was taken at the IAB. Mr Peak further stated that Mr Swayne and he did all that they could to try and prevent the failure of the company, but that the sequence of events was regrettably set in motion by the original Tribunal decision on 29 October 2009 and then exacerbated by the sanctions handed down by the Oral Hearing Tribunal on 2 and 3 June 2010.

Mr Peak stated that he had no reason to doubt one of Transact Group (Holdings) Limited's employees (hereinafter referred to as Mr S) and believed what he was telling him and Mr Swayne at a meeting. Mr Peak further stated that, unbeknown to him at the time, Mr S was being far from honest with Mr Peak or Mr Swayne and they had since determined that there was a relationship with another employee (hereinafter referred to as Mr W) dating back to 2007 that had a considerable bearing on the actions of Mr S. Mr Peak therefore claimed that the vast majority of these breaches could be attributable to the actions of Mr S. Mr Peak asserted that he did not deliberately set out to not pay the sanction as alleged by the Executive. On the contrary he tried everything in his power to attempt to generate money to meet the payment obligation. Mr Peak therefore submitted that it should be held that he did not

deliberately set out not to pay the sanction and fees. That being the case, Mr Peak asserted that it should be held that he was not knowingly involved in the non payment breach.

### **Case reference 844794 (3) - Telephone Entertainment Network Limited**

Mr Peak stated with reference to this case that, by the time the service was monitored by PhonepayPlus on 27 July 2010, corrective action had already been taken by the company to correct the error that resulted in the breach. Mr Peak maintained that the breaches were caused by a genuine mistake and the company's review process picked up the error which was corrected quickly. Mr Peak stated that he had been made aware of the error after it occurred and was surprised that PhonepayPlus wanted to take the case to a formal hearing, especially given the circumstances. Given that the breach was a genuine mistake Mr Peak submitted that, as the breach was a genuine mistake, he had not been knowingly involved.

### **Case references 755993 (4) and 735013 (5) – Transact Group Limited**

Mr Peak asserted that the information provider in this case, Argyl Infoservices Limited, was completely independent of the Transact Group and was not under the control of management of Mr Swayne or Mr Peak. Mr Peak asserted that, at the time of this case he was involved in dealing with a potential acquisition of a separate organisation. Mr Peak asserted that it was certainly not the case that had been aware that the Argyl services were running in breach of Code 11. Mr Peak accordingly submitted that he was not knowingly involved in a breach of Code 11 in this case.

### **Case reference 747388 (6) – Transact Group Limited**

In relation to this case, Mr Peak argued that two separate members of staff within Transact Group Limited, a Mr M and a Mr W, identified the possibility of expanding the mobile business as a whole by recruiting additional information provider clients. Mr Peak argued that the information provider, Mobility Methods (pty) Limited, was completely independent of the Transact Group and was not under the control or management of Mr Swayne or Mr Peak. Mr Peak further argued that, in this case the information provider had been responsible for marketing and promoting the service and Transact Group Limited provided aggregator services.

Mr Peak stated that the Transact Group Limited employee, Mr S, prepared the initial response to the Executive's preliminary enquiry. On receipt of the formal enquiry letter Mr Peak stated that he drafted the written response to the Executive in conjunction with Mr S. Mr Peak asserted that he was not involved in setting up the service for the information provider. Mr Peak further stated that the client relationship with this information provider was handled by the partner services division of the Transact Group Limited. Mr Peak asserted that, given the relatively small volumes involved he was not directly involved in dealing with the client and whilst he acknowledged that breaches had occurred, they had been perpetrated by a third party client and not under Transact Group Limited's control. As such Mr Peak suggested that he was not knowingly involved in such breaches.



### **Case reference 709322 (7) – Transact Group Limited**

With reference to this case Mr Peak stated that, In June 2007, shortly after Mr W had joined the company, the company decided to extend its marketing promotions by using its database of opted in users who had previously either called or texted their services. Mr Peak stated that up until that point the primary method of marketing had been print media with only limited text based promotions. Mr Peak asserted that he was not involved in establishing and testing the service itself and, as such submitted that he was not knowingly involved in a breach of the Code.

### **Case reference 707557 (8) – Transact Group Limited**

Mr Peak stated that, during this period he was actively involved in the potential acquisition of a separate organisation during 2007 and especially during the second half of that year. Mr Peak therefore submitted that this case arose as a result of an innocent mistake made by a member of staff. Mr Peak further stated that it was found and rectified prior to ICSTIS's (now PhonepayPlus) intervention was a significant factor. Mr Peak accordingly asserted that he was not knowingly involved in this breach.

### **Case reference 278396 (10) and 276127 (9) – Transact Group Limited**

Mr Peak asserted that he was aware of the promotion of these services and was actively involved in dealing with these cases. He stated that he liaised with Transact Group Limited's solicitors in dealing with ICSTIS' solicitors and in describing to them the impact of the Notice to Industry from ICSTIS which was relevant to this case. Mr Peak asserted that Transact Group Limited's lawyers corresponded with ICSTIS directly on setting out its view. Mr Peak asserted that those within Transact Group Limited believed from the outset that the services at the heart of this case were outside the scope of ICSTIS' remit. Mr Peak further asserted that this belief was supported by Transact Group Limited's solicitors. Mr Peak therefore suggested that it was reasonable for him to believe that the services being promoted were not in breach and as such Mr Peak was not knowingly involved in a breach of the Code.

### **Cases against Rayshield Limited**

Mr Peak submitted with respect to case reference 49358 against Rayshield Limited that, while he appreciated that a breach was nevertheless upheld, he was not directly involved in the promotional side of the business. As such, he did not believe that it was appropriate for him to be classified as being knowingly involved in this breach.

With respect to case reference 71165 against Rayshield Limited, Mr Peak submitted that a separate employee (Mr D) was responsible for the Operational division that promoted the company's services. Mr Peak stated that, while he was aware of the advertising spend overall, he did not get involved in the detail of the individual advertisements being placed as there was a management team in place to do this. Mr Peak submitted that, in this case it appeared that breaches were admitted but he submitted that he was not knowingly involved in this breach.

With regard to case reference 98658 against Rayshield Limited, Mr Peak submitted that he was not involved in the responses to enquiries received from ICSTIS. Mr Peak

further stated that he had no knowledge or recollection of this particular case and as such did not feel that it would be appropriate for him to be upheld as being knowingly involved in this breach.

### **Cases against Advanced Interactive Systems Limited**

With respect to case reference 48904 against Advanced Interactive Systems Limited, Mr Peak asserted that it seemed to have been accepted that the adverts were placed without pricing and against the express instructions from Advanced Interactive Systems. Mr Peak further stated that, given the fact that the advertisement was placed by the information provider without pricing and against the express written instructions of Advanced Interactive Systems, Mr Peak submitted that he was not knowingly involved in this breach.

With regard to case reference 55809 Mr Peak asserted that it appeared as if Advanced Interactive Systems' staff were promoting services in the belief that compliance advice had been sought and that the services and their promotion were compliant. Mr Peak stated that, in such a circumstance, he suggested that the company believed that the services they were running were compliant and as such it should not be upheld that he was knowingly involved in this breach.

### **Cases against Global Communications Group**

With regard to case reference 57388 Mr Peak stated that, at the time of this case he was actually based and living overseas in Belgium, as part of the Transact Group's plans to expand overseas. A separate employee, Mr D, was responsible for the Operational division that promoted Global Interactive Systems' services. Mr Peak stated that, while he was aware of the advertising spend overall, he did not get involved in the detail of the individual advertisements being placed as there was a management team in place to do this. Mr Peak therefore asserted that in this case it would appear that the employee concerned believed that the promotion was not sexually suggestive. Mr Peak further asserted that it was clearly not the intention to deliberately break Code 8 and he was not directly responsible for the employee in question. Mr Peak therefore submitted that he was not knowingly involved in this breach.

With regard to case reference 71165 against Global Communications Group, Mr Peak argued that it appeared that in this case Global Communication Group acknowledged that two services were in breach but disagreed that two other promotions were in breach. Mr Peak asserted that a separate employee, again Mr D, was responsible for the Operational division that promoted Global Communications Group's services. Mr Peak stated that, while he was aware of the advertising spend overall, he did not get involved in the detail of the individual advertisements being placed as there was a management team in place to do this. Mr Peak further observed that in this case it appeared that breaches were admitted, although he submitted that he was not knowingly involved.

### **Cases against Global Interactive Systems**

With respect to case reference 55631 Mr Peak stated that the advertisement surrounding this case was placed by an information provider and it appeared to believe that the advertisement would not be in breach. Mr Peak further stated that, while he was aware that part of Global Interactive System's income was being generated by third party promotions, he did not get involved in reviewing all of the promotions being made. Mr Peak further noted that the case itself was raised as a result of an inter industry complaint.

With respect to case reference 57757 Mr Peak stated that it was impossible to comment on whether the advertisements concerning this case were in context or not. Mr Peak further stated that, given the scant information regarding this case it appeared that there was a difference of opinion as to the size of the pricing. In that respect Mr Peak submitted that he was definitely not knowingly involved. He also suggested that the advertisements were likely to have been placed on the basis that they were in the context of the magazines. If that were indeed the case, which Mr Peak suggested was likely, and given the fact that Global Interactive Systems were placing thousands of advertisements on a monthly basis in men's lifestyle magazines, Mr Peak submitted that he was not knowingly involved.

With regard to case reference 60350 Mr Peak again confirmed that he was also based in Belgium, at the time of this case. Again the separate member of staff, Mr D, was responsible for the Operational division that promoted Global Interactive Systems' services. Mr Peak again asserted that while he was aware of the advertising spend overall, he did not get involved in the detail of the individual advertisements being placed as there was a management team in place to do this. Given these circumstances, Mr Peak submitted that he was not knowingly involved in this breach.

3. The Tribunal considered the evidence and concluded that, Mr Peak was an associated individual of all of the companies against whom breaches of the Code had been upheld in the cases cited by the Executive. The Tribunal further concluded that, having decided not to consider cases that were adjudicated before 2006, there remained sufficient evidence to conclude that Mr Peak had been knowingly involved in the very serious breach upheld against TGH Management Limited (formerly Transact Group (Holdings) Limited) in case reference 03185. The Tribunal was satisfied that Mr Peak would have been aware that significant financial sanctions and costs were likely to be incurred by Transact Group (Holdings) Limited following the outcome of the initial Tribunal hearing of case 807353/778256 where a £250,000 fine was imposed. The Tribunal further noted that the case had been (i) reviewed, (ii) heard in an oral hearing process and (iii) further appealed to the Independent Appeals Body. The Tribunal further noted that significant additional costs had been incurred during this process and, as such Mr Peak should have made some form of financial contingency planning to enable TGH Management Limited to have acted (by making some form of payment, if not the total payment) on the direction for payment to be made to PhonepayPlus. The Tribunal was not persuaded that Mr Peak had been left with no choice but to, on behalf of TGH Management Limited, appeal the decisions and the company was then unable to meet his obligations. The Tribunal noted that the company had a significant turnover and no contingency planning had been undertaken at any stage to enable the company to comply with its regulatory obligations. The Tribunal was satisfied that Mr

Peak as the financial director was experienced in these matters and would have clearly understood the financial and regulatory consequences of the decisions taken by TGH Management Limited. The Tribunal noted that at no stage had any request been made for staged payments and no serious attempt to pay any of the outstanding amount had been made.

**Decision: UPHELD with respect to case reference 03185**

### **SANCTION**

Taking into account all the circumstances, the Tribunal was satisfied that it was appropriate to prohibit Mr Peak from providing or having any involvement in, any premium rate service for a period of three years from the date of publication of this decision. The Tribunal considered that no other sanction was open to it in the circumstances given the failure of Mr Peak to ensure that TGH Management Limited met its regulatory obligations. The Tribunal considered that it was inconsistent for Mr Peak personally to remain involved in the industry when he had been knowingly involved one very serious breach of the Code and had consequently been unable to ensure that TGH Management Limited satisfied its regulatory obligations. The Tribunal considered that in order to maintain confidence in the premium rate industry it was both necessary and proportionate to prohibit Mr Peak for a significant period. The Tribunal was satisfied that three years was an appropriate length of time taking into account the nature of the very serious breach upheld and the amount of the outstanding fine and administrative costs.