

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 26 APRIL 2012  
TRIBUNAL SITTING No. 98 / CASE 2  
CASE REFERENCE: 03656

Network Operator: 2Communications Limited

## THIS CASE WAS BROUGHT AGAINST THE NETWORK OPERATOR UNDER PARAGRAPH 4.4 OF THE CODE

### BACKGROUND

The Network operator entered into a service agreement with a provider named 'Excelsior International Limited' on 9 May 2011. It emerged that this company had in fact been dissolved at the time it purported to enter into the contract with the Network operator. The contract was signed and performed by Adrian Richards, trading as Excelsior International (hereinafter "**Excelsior**"). The Network operator also entered into a separate agreement with Alpha-Telecom Limited ("**Alpha-Telecom**") on 9 September 2011. The Executive submitted that the Network operator was aware of the Executive's investigation into another similar case involving Pan International and of the Tribunal's findings in that case in March 2011, at the time it entered into the service agreements. The Network operator allocated 070\* numbers to the providers Excelsior and Alpha-Telecom under these agreements.

PhonepayPlus had informed the Network operator of complaints of the misuse of 070\* numbers it had allocated to Excelsior prior to 1 September 2011, when the PhonepayPlus Code of Practice 12th Edition (the "**Code**") became effective.

In the investigation conducted against Alpha-Telecom and Excelsior (case reference 03379), the Executive raised six potential breaches of the Code against them as Level 2 providers. The Tribunal upheld all of the breaches raised. It found, inter alia, that Alpha-Telecom and Excelsior had used Automated Calling Equipment ("**ACE**") to make calls to consumers from 070\* numbers saying, "Hello, hello, can you hear me?" and had left missed calls, which misled consumers into calling the premium rate numbers back and incurring charges. The following sanctions were imposed on Alpha-Telecom and Excelsior (i) a formal reprimand (ii) a fine of £25,000 (applied jointly and severally) and (iii) a prohibition on each of the Level 2 providers from providing, or having any involvement in, any premium rate service or promotion for a period of 12 months.

The Executive submitted that the Network operator had failed to conduct adequate due diligence on Alpha-Telecom and Excelsior. The Executive argued that the Network operator had failed to conduct basic checks to verify the information given by the providers, for example, by searching the Companies House register of companies.

### The Investigation

The Executive conducted this matter as a Track 2 Procedure investigation in accordance with paragraph 4.4 of the Code.

The Executive sent a breach letter to the Network operator on 2 April 2012. Within the breach letter the Executive raised the following potential breach of the Code:

- Paragraph 3.3.1 – General responsibilities

The Tribunal made a decision on the alleged breaches raised by the Executive on 26 April 2012.

## **SUBMISSIONS AND CONCLUSIONS**

The Tribunal accepted that cases involving the illegitimate operation of 070\* personal number services fall with the scope of PhonepayPlus' regulatory regime.

### **ALLEGED BREACH**

#### **Paragraph 3.3.1**

1. The Executive submitted that the Network Operator failed to undertake a due diligence check of "Excelsior International Limited", prior to entering into a contact on 9 May 2011. It was submitted that if it had done so, the Network operator would have observed that the registered company "Excelsior International Limited" was dissolved on 13 January 2010.

The Executive further submitted that a thorough due diligence check should have been undertaken as part of the transition between the 11th Edition of the PhonepayPlus Code of Practice (amended, April 2008) and the 12th Edition of the Code (effective from 1 September 2011). It was submitted that at the time of the introduction of the 12<sup>th</sup> Edition of the Code, PhonepayPlus had already informed the Network operator of a number of complaints which indicated misuse of 070\* numbers allocated to Excelsior. The Network operator was also aware that scams using 070\* numbers had been perpetrated in the past using numbers allocated by it, particularly the Executive's investigation into Pan International's activities and of the Tribunal's findings in the associated case (reference 840404).

The Executive submitted that the Network operator did not undertake a thorough due diligence check of Alpha-Telecom. It was submitted that had the Network operator performed basic checks to verify the information given by the provider, for example, by checking the Companies House register of companies, it would have observed that the accurate company name was "Alpha-Telecom Limited". It would also have seen that two other companies had previously existed with the registered name "Alpha Telecom Limited", which were both dissolved before the contract with the Network operator was entered into.

The Executive further submitted that the Network operator had a history of failing to conduct proper due diligence. In particular, it was submitted that the Network operator did not perform proper due diligence checks before entering into a contract with Isis Holdings Limited. If the Network operator had done so, it would have observed that the entity's previous name was "Pan International", the company under investigation by PhonepayPlus at that time for misuse of 070\* numbers.

The Executive submitted that accordingly, the Network operator had failed to comply with paragraph 3.3.1 of the Code.

2. The Network operator submitted that it had met and exceeded the PhonepayPlus due diligence and risk assessment guidance. The Network operator submitted that in order to set up contractual relationships with companies, it requested the following information:
  - Company Name
  - Company Register (A copy of the register is required. The number alone is insufficient)

- Company Officer(s) name(s) and home address supported by identification document (Valid passport) and proof of residency (recent gas/electricity bill and recent telephone/internet provider bill)
- Company Bank Details
- Contact email & telephone number(s) for contract and financial matters
- Contact email & telephone number(s) for technical issues

The Network operator submitted that it had received all the required documents from Excelsior. It also observed that Adrian Richards had not informed the Network operator of any change in the status of “Excelsior International Limited” and that he had signed the contract as an authorised representative of that purportedly registered company.

The Network operator further submitted that it had proactively informed PhonepayPlus of the actions it had taken to improve its due diligence procedures without being requested to do so. It submitted that it had also enhanced its due diligence procedures and would in future strive to make further enhancements.

3. The Tribunal considered the evidence and concluded that the Network operator was in breach of its due diligence obligations in relation to both Excelsior and Alpha-Telecom.

In respect of Excelsior, the Tribunal found that on or after 1 September 2011, the Network operator had knowledge of the complaints PhonepayPlus had received concerning misuse of 070\* numbers within the ranges allocated to Excelsior. The Tribunal further found that the Network operator was aware of similar complaints having been upheld in February 2011 with regard to 070 numbers it had allocated. In these circumstances, the Tribunal found that the Network operator was on notice of events which should have alerted it to the likelihood that its prior due diligence measures with respect to Excelsior had been defective. The Tribunal noted that, while the PhonepayPlus General Guidance on due diligence did not expect providers to begin the due diligence process again, this applied only where relationships with clients were well-established and longstanding and had operated for years to the satisfaction of both parties. The Tribunal determined that, as Excelsior was a new client and as the Network operator was on notice of events which gave rise to a duty of care, there was an expectation that the Network operator should have carried out thorough due diligence on or after 1 September 2011.

The Tribunal commented that had the Network operator revisited its due diligence on Excelsior, it would have found the information given by the provider prior to entering into its agreement with the Network operator was defective as “Excelsior International Limited” was not a registered company and did not exist as a corporate entity at that time. The Tribunal noted that had the Network operator undertaken thorough due diligence, the scam perpetrated by Excelsior could have been identified earlier and steps could have been taken to prevent further consumer harm.

In respect of Alpha-Telecom, the Tribunal found that that the Network operator had failed to undertake thorough due diligence having regard to its prior knowledge the similar complaints regarding 070 scams that had been upheld and the continuing complaints against Excelsior. The Tribunal found that the Network operator had failed to verify the information provided by Alpha-Telecom by, among other measures, undertaking checks of the Companies House register of companies. Further, the Tribunal did not accept that the Network operator had tested the personal number service purported to be provided by Excelsior and Alpha-Telecom as, had it done so, it would have found that the service was not compliant with the Code as was found by the Executive when it tested the service. The Tribunal noted that the Network

operator failed to provide evidence that it had conducted any tests of the services purported to be provided, in spite of being asked to do so by the Executive.

The Tribunal upheld the breach of paragraph 3.3.1 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

### **Initial Overall Assessment**

The Tribunal's initial assessment of the breach of the Code was as follows:

#### **Paragraph 3.3.1 – Contracts**

The initial assessment of paragraph 3.3.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- had the network operator performed thorough due diligence it would have uncovered evidence of serious malpractice, which could have prevented consumer harm.

### **Final Overall Assessment**

In determining the final overall assessment for the case, the Tribunal took into account the following aggravating factor:

- the Network operator had knowledge of previous 070\* number scams and it was aware of complaints made by consumers to PhonepayPlus regarding the misuse of 070\* numbers allocated to Excelsior, which should have alerted the Network operator to there being a compliance issue.

There were no mitigating factors.

The revenue in relation to this service was in the range of Band 3 (£100,000 - £250,000).

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

### **Sanctions Imposed**

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

- A formal reprimand;
- A fine of £25,000; and
- A direction to make refunds to all complainants who claim a refund for the full amount spent by them on the service, save where there is good cause to believe that such claims are not valid, and to provide evidence to PhonepayPlus that any such refunds have been made.

The Tribunal recommended that the Executive issue a direction to the Network operator to provide documentary evidence of its due diligence, risk assessment and control procedures.