

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 16 August 2012

TRIBUNAL SITTING No. 106 / CASE 3

CASE REFERENCE:

Network operator:	2Communications Limited
Level 2 provider:	Alpha-Telecom and Adrian Richards t/a Excelsior
Type of service:	N/A
Level 1 provider:	N/A

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

### BACKGROUND

Services provided by Alpha-Telecom Limited and Adrian Richards t/a Excelsior International, the Level 2 providers, were the subject of a PhonepayPlus investigation and adjudication (case references 03379 and 02103 respectively) which resulted in sanctions being imposed by a Tribunal on 26 April 2012. The “services” which operated in breach of the Code were scams involving 070 misuse. 2Communications Limited was the Network operator and provided the 070 numbers to the Level 2 providers.

On 26 April 2012, a Tribunal held the Network operator in breach of its due diligence and risk assessment obligations pursuant to the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “Code”). The sanctions imposed by the Tribunal included 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. In addition, an administrative charge of £6,286.20 was imposed.

The Network operator was advised of the above sanction and administrative charge in an adjudication letter, sent on 09 May 2012. Invoices in respect of the fine and administrative charge were sent on the same date. The Network operator submitted an application for a review on 25 May 2012. On 1 June 2012, the application for review was refused on the grounds that the application was without merit.

The Network operator sent correspondence to the Executive stating that it was experiencing financial difficulties. However, the Network operator failed to provide evidence to support this assertion.

On 18 June 2012, an email was sent to the Network operator directing it to suspend and disconnect all 070 numbers allocated to the Network operator by Ofcom. This direction was issued under paragraph 4.8.4(a) of the Code.

The Network operator did not respond to the formal breach letter sent to it by the Executive.

### 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 July 2012. Within the breach letter the Executive raised further breaches of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “**Code**”) under the following provisions:

- Paragraph 4.8.4(b)- in relation to the failure to comply with a sanction
- Paragraph 4.10.2- in relation to non payment of an administrative charge

The Network operator did not respond to the alleged breaches. On 16 August 2012, the Tribunal reached a decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **Paragraph 4.8.4(b)**

*“The failure of any relevant party to comply with any sanction within a reasonable time will result in:*

*(b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed...”*

1. The Executive noted that on 26 April 2012 the Tribunal found the Network operator in breach of its due diligence and risk assessment obligations pursuant to the PhonepayPlus Code of Practice (case ref: 03656).

The adjudication resulted in the imposition of 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.

On 09 May 2012, the Executive sent the Network operator a post adjudication letter which included an invoice for payment of the fine to be made within ten calendar days and a direction to complete a form to aid the payment of refunds. As a result of the Network operator’s application for review, the deadline for compliance with the fine sanction and direction to complete the refund form was delayed until 1 June 2012. However, the deadline passed without receipt of payment of the fine or the completed refund form.

In light of the above, the Executive submitted that a further breach of the Code had occurred under paragraph 4.8.4(b).

2. The Network operator failed to provide any response.
3. The Tribunal considered the evidence and concluded on the basis of the Executive’s submissions that there had been a further breach of the Code. Accordingly, the Tribunal upheld a further breach of the Code under paragraph 4.8.4(b).

**Decision: UPHELD**

### **ALLEGED BREACH TWO**

#### **Paragraph 4.10.2**

*“Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.”*

1. On 26 April 2012, the Tribunal recommended that PhonepayPlus invoice the Network operator 100% of the £6,286.20 administrative costs incurred as a result of the investigation and Tribunal proceedings. On 9 May 2012, the Executive sent the Network operator a post adjudication letter, which included an invoice for the payment of the administrative charges within ten calendar days. As a result of the application for review, the deadline for compliance was delayed until 1 June 2012. However, the administration charge was not paid.
2. The Network operator failed to provide any response or settle the invoice.
3. The Tribunal considered the evidence and concluded on the basis of the Executive’s submissions that there had been a breach of the Code. Accordingly, the Tribunal upheld a breach of the Code under paragraph 4.10.2.

**Decision: UPHELD**

## **SANCTIONS**

### **Initial Overall Assessment**

The Tribunal’s initial assessment of the breaches of the Code was as follows:

#### **Paragraph 4.8.4(b)- Failure to comply with a sanction**

The initial assessment of paragraph 4.8.4(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator’s failure to pay the fine incurred demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

#### **Paragraph 4.10.2- Non payment of an administrative charge**

The initial assessment of paragraph 4.10.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator’s failure to pay the administrative charge demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

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

### **Final Overall Assessment**

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

- The breaches continued after the Network operator was made aware of them.
- The Network operator failed to provide a response to the breach letter.

The Tribunal noted that the Executive had referred the Network operator to Ofcom in accordance with section 120 of the Communications Act 2003.

The Tribunal concluded that the seriousness of the case should be regarded overall as **very 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
- A direction to remedy the breaches
- A prohibition on the Network operator from providing, or having any involvement in, any premium rate services for a period of two years, or until the breaches are remedied by payment of the original fine and the original and instant administrative charges, whichever is the earlier. The prohibition is suspended for 28 days to allow the Network operator time to settle the new and outstanding invoices and thereby prevent the prohibition from coming into force.