

## MATTERS DECIDED BY THE TRIBUNAL

Tribunal Sitting, Case Number and Date	Case Ref	Level 2 Providers	Service Title and Type	Case Type	Breaches Upheld Against	Procedure
98 Case 1 26/04/2012	03379	Alpha- Telecom Limited (UK) and Adrian Richards (trading as Excelsior International (Isle of Man)	"070" Personal Number Service	Level 2 Provider	Level 2 Providers	Track 2 Procedure
<p>Between September 2011 and October 2011, PhoneyPayPlus received a number of complaints from members of the public who reported receiving an unsolicited phone call saying, "Hello, hello, can you hear me?" before ending abruptly, or in a missed call, from an 070* number. Several complainants returned the call to the *070 number and unintentionally incurred a premium rate charge in doing so. The Executive submitted that it was likely that the unsolicited calls had been made using Automated Calling Equipment ("<b>ACE</b>").</p> <p>Eleven complaints of this nature were received in respect of numbers in the ranges 0704 920 4000-4999 and 0705 920 6000-6999, which were operated by the Network operator 2Communications Limited and allocated to the provider Alpha-Telecom Limited ("<b>Alpha-Telecom</b>"). Twenty complaints of this nature were received in respect of number ranges 0704 920 5000-5999 and 0704 921 000-0988, which were operated by the same Network operator and allocated to the provider 'Excelsior International Limited'. It emerged that this company had in fact been dissolved at the time it purported to enter into the contract with the Network operator on 9 May 2011. The contract was signed and performed by Adrian Richards who traded as Excelsior International ("<b>Excelsior</b>"). The Executive submitted that Alpha-Telecom and Excelsior were sharing use of the relevant ranges of 070* numbers and that in reality there was only one service in operation, which was marketed by the following websites of the respective providers; <a href="http://alpha-telecom.com">alpha-telecom.com</a> and <a href="http://excelsior-telecom.com">excelsior-telecom.com</a>. The Executive considered that Alpha-Telecom and Adrian Richards, trading as Excelsior, were both Level 2 providers in respect of the same service under investigation and were therefore jointly and severally responsible for the harm caused to consumers. The Executive raised the following potential breaches of the 12<sup>th</sup> Edition of the PhoneyPayPlus Code of Practice (the "<b>Code</b>"): </p> <ul style="list-style-type: none"> <li>• Paragraph 2.1.1 – Legality;</li> <li>• Paragraph 2.4.2 – Privacy;</li> <li>• Paragraph 3.9.2 – Responsibilities of Level 2 providers;</li> <li>• Paragraph 2.2.1(a) – Transparency;</li> <li>• Paragraph 2.2.5 – Pricing; and</li> <li>• Paragraph 2.3.1 – Fairness.</li> </ul> <p>The Tribunal upheld all of the breaches raised. The joint revenue for the service was in the range of Band 5 (£5,000 to £50,000). The Tribunal considered the case to be <b>very serious</b> and issued a Formal reprimand, a fine of £25,000 (for which the providers are liable jointly and severally) and a prohibition on each Level 2 provider from providing or having any involvement in, any premium rate service for a period of 12 months from the date of publication of this decision.</p>						
Administrative Charge Awarded						100%

## TRIBUNAL DECISION

Thursday 26 APRIL 2012  
TRIBUNAL SITTING No. 98 / CASE 1  
CASE REFERENCE: 03379

Level 2 Providers: Alpha-Telecom Limited and Adrian Richards (trading as 'Excelsior International')

Type of service:

Network operator: 2Communications Limited

### THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDERS UNDER PARAGRAPH 4.4 OF THE CODE

#### BACKGROUND

Between September 2011 and October 2011, PhonepayPlus received a number of complaints from members of the public who reported receiving an unsolicited phone call saying, "hello, hello, can you hear me?" before ending abruptly, or in a missed call, from an 070\* number. Several complainants returned the call to the 070\* number and unintentionally incurred a premium rate charge.

Eleven complaints of this nature were received in respect of numbers in the ranges 0704 920 4000-4999 and 0705 920 6000-6999. These number ranges were operated by the Network operator 2Communications Limited and allocated to the provider Alpha-Telecom Limited ("**Alpha-Telecom**"). Twenty complaints of this nature were received in respect of number ranges 0704 920 5000-5999 and 0704 921 000-0988, which were operated by the same Network operator and allocated to the provider 'Excelsior International Limited'. It emerged that this company had in fact been dissolved at the time it purported to enter into the contract with the Network operator on 9 May 2011. The contract was signed and performed by Adrian Richards, trading as Excelsior International, (hereinafter "**Excelsior**").

The Executive submitted that it was likely that the unsolicited calls had been made using Automated Calling Equipment ("**ACE**") as the complainants' descriptions of calls were similar, and some complainants had expressly stated that the call sounded like a recording.

The Executive also submitted that Alpha-Telecom and Excelsior were sharing use of the relevant ranges of 070\* numbers. The Executive's monitoring and the complaints indicated that there was only one service in operation that was being marketed by the following websites of the respective providers; alpha-telecom.com and excelsior-telecom.com. Accordingly the Executive considered that Alpha-Telecom and Excelsior were both Level 2 providers in respect of the same service under investigation and were therefore jointly and severally responsible for the harm caused to consumers.

#### 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 each of Level 2 provider on 2 April 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Paragraph 2.1.1 – Legality;

- Paragraph 2.4.2 – Privacy;
- Paragraph 3.9.2 – Responsibilities of Level 2 providers;
- Paragraph 2.2.1(a) – Transparency;
- Paragraph 2.2.5 – Pricing; and
- Paragraph 2.3.1 – Fairness.

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 ONE**

#### **Rule 2.1.1**

*“Premium rate services must comply with the law”*

1. The Executive relied upon regulation 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“**PECR**”), which provides:

*“It is an offence to use automated calling equipment (“**ACE**”) to transmit, or instigate the transmission of, recorded matter for direct marketing purposes unless the subscriber has previously notified the caller that he consents to that particular telephone line being used for such communications and his consent remains valid.”*

The Executive submitted that the unsolicited calls had been made using ACE, having regard to the similarity of the complainants' descriptions of the unsolicited calls and evidence that the calls sounded like a recording. The Executive further submitted that the complainants had not consented to receiving recorded matter transmitted by ACE to promote a premium rate service. The Executive submitted that accordingly, the Level 2 providers had failed to comply with the law, and had therefore breached Rule 2.1.1 of the Code.

2. The Level 2 providers did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded, on the balance of probabilities, having regard to the similarities between the complainants' descriptions of the unsolicited calls and the evidence that complainants had received a recorded message, that Automatic Calling Equipment had been used to transmit direct marketing of premium rate services without the complainants' consent, contrary to paragraph 19 of PECR. The Tribunal upheld the breach of Rule 2.1.1 of the Code against each of the Level 2 providers and accordingly concluded that Outcome 2.1 of the Code had not been met.

**Decision: UPHELD**

### **ALLEGED BREACH TWO**

#### **Rule 2.4.2**

*“Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the*

*Level 2 provider of that service must be able to provide evidence which establishes that consent.”*

1. The Executive submitted that the Level 2 providers were not operating a legitimate personal number service in accordance with the Ofcom guidelines, and had failed to provide evidence of legitimate end users for such a service. The Executive further submitted that there was evidence that the calls made to complainants had been transmitted by ACE. It was submitted that the complainants had not given their consent to being contacted. The Executive accordingly submitted that the Level 2 providers had breached Rule 2.4.2 of the Code.
2. Alpha-Telecom did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that none of the complainants had given their consent to being contacted. The Tribunal upheld the breach of Rule 2.4.2 of the Code against each of the Level 2 providers and accordingly concluded that Outcome 2.4 of the Code had not been met.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **Paragraph 3.9.2**

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

1. The Executive submitted that although the Alpha-Telecom and Excelsior websites (alpha-telecom.com and excelsior-telecom.com respectively) described a personal number service which appeared to fall within the Ofcom Guidance on the acceptable use of 070 numbers, a legitimate personal number service was not being operated and the Level 2 providers had accordingly failed to provide evidence of legitimate end users for such a service.

The Executive further submitted that the 070\* numbers allocated to the Level 2 providers were being used to make unsolicited calls to consumers to promote premium rate services using ACE, in contravention of the Ofcom Guidance.

The Executive submitted that accordingly, the Level 2 providers had failed to comply with the Ofcom guidelines in relation to designated number ranges and the service was accordingly in breach of paragraph 3.9.2 of the Code.

2. The Level 2 providers did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the Level 2 providers had used the number ranges they had been allocated to improperly generate revenue in breach of the Ofcom guidelines. The Tribunal upheld the breach of paragraph 3.9.2 of the Code against each of the Level 2 providers. **Decision: UPHELD**

## **ALLEGED BREACH FOUR**

### **Rule 2.2.1(a)**

*“Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious”*

1. The Executive submitted that the unsolicited phone calls which said, “Hello, hello, can you hear me?” and missed calls from 070\* numbers displayed on complainants’ handsets or obtained by calling “1471” (or equivalent), constituted promotional material for a premium rate service as defined by paragraph 5.3.29 of the Code.

The Executive submitted that the promotional material did not include the Level 2 providers’ names, brands or non-premium rate UK contact telephone numbers.

The Executive further submitted that although the Level 2 providers’ websites (alpha-telecom.com and excelsior-telecom.com) provided a contact email address for the Level 2 providers, complainants were not supplied with information which linked the call from a 070\* number with the website and the service it purported to provide.

The Executive submitted that the Level 2 providers were in breach of Rule 2.2.1(a) of the Code.

2. The Level 2 providers did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the unsolicited calls were promotional material which did not contain the Level 2 providers’ names, brands or non-premium rate UK contact numbers. The Tribunal upheld the breach of Rule 2.2.1(a) of the Code against each of the Level 2 providers and accordingly concluded that Outcome 2.2 of the Code had not been met.

**Decision: UPHELD**

## **ALLEGED BREACH FIVE**

### **Rule 2.2.5**

*“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.”*

1. The Executive submitted that the unsolicited phone calls which said, “Hello, hello, can you hear me?” and missed calls from 070\* numbers displayed on complainants’ handsets or obtained by calling “1471” (or equivalent), constituted promotions of a premium rate service as defined by paragraph 5.3.29 of the Code.

The Executive further submitted that due to the misleading nature of the promotion, no cost information was provided to complainants before they returned calls to the premium rate number.

The Executive submitted that accordingly, the Level 2 providers were in breach of Rule 2.2.5 of the Code.

2. The Level 2 providers did not respond to the breach raised.

3. The Tribunal considered the evidence and concluded that no pricing information had been provided to consumers in the course of the promotion of the premium rate service. The Tribunal upheld the breach of Rule 2.2.5 of the Code against each of the Level 2 providers and accordingly concluded that Outcome 2.2 of the Code had not been met.

## **ALLEGED BREACH SIX**

### **Rule 2.3.2**

*“Premium rate services must not mislead or be likely to mislead in any way.”*

1. The Executive submitted that the consumers had only dialled the premium rate number after being prompted to do so by an unsolicited phone call which said, “Hello, hello, can you hear me?” or a missed call from an 070\* number.

It was submitted that the unsolicited calls were designed to intimate that the caller knew the consumer personally and/or that the caller was urgently trying to contact the consumer. The Executive submitted that the consumers who returned the call were unlikely to recognise that they were dialling a premium rate number because UK mobile phone numbers also start with 07\*.

The Executive submitted that the Level 2 providers had therefore breached Rule 2.3.2 of the Code.

2. The Level 2 provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the service was designed to mislead consumers into calling a premium rate service. The Tribunal upheld the breach of Rule 2.3.2 of the Code against each of the Level 2 providers and accordingly concluded that Outcome 2.3 of the Code had not been met.

## **SANCTIONS**

### **Initial Overall Assessment**

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

#### **Rule 2.1.1 – Legality**

The initial assessment of Rule 2.1.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the specific purpose of generating revenue without providing any value to the consumer.

#### **Rule 2.4.2 – Privacy**

The initial assessment of Rule 2.4.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service had been operated in such a way so as to demonstrate the Level 2 provider's intention of non-compliance with the Code and damage consumer confidence in premium rate services.

### **Paragraph 3.9.2 – Responsibilities of Level 2 Providers**

The initial assessment of paragraph 3.9.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the specific purpose of generating revenue without providing any value to the consumer.

### **Rule 2.2.1(a) – Transparency**

The initial assessment of Rule 2.2.1(a) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the specific purpose of generating revenue without providing any value to the consumer.

### **Rule 2.2.5 – Pricing**

The initial assessment of Rule 2.2.5 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the specific purpose of generating revenue without providing any value to the consumer.

### **Rule 2.3.1– Fairness**

The initial assessment of Rule 2.3.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the specific purpose of generating revenue without providing any value to the consumer.

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

### **Final Overall Assessment**

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

- The Level 2 providers had acted wilfully in operating premium rate services which misled consumers into incurring premium rate charges and provided no value to consumers.
- Alpha-Telecom had failed to respond to the Executive's request for further information and both Level 2 providers failed to respond to their breach letters.

There were no mitigating factors.

The revenue in relation to this service was in the mid range of Band 5 (£5-50,000).

Having taken into account the aggravating factors, 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 (for which the providers are liable jointly and severally); and
- A prohibition on each Level 2 provider from providing or having any involvement in, any premium rate service for a period of 12 months from the date of publication of this decision.



