

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

Thursday 2 February 2012
TRIBUNAL SITTING No. 92 / CASE 1
CASE REFERENCE: 03283

Network operator: Cheers International Sales Limited, London
Level 1 provider: Cheers International Sales Limited, London
Level 2 provider: Cheers International Sales Limited, London

**THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH
4.4 OF THE CODE**

BACKGROUND

The Executive of PhonepayPlus undertook some monitoring of various 09* premium rate numbers allocated by Ofcom to the Network operator. The Executive discovered a recorded message associated with an unknown service, permitting the caller to register their interest in the service. The message also advertised a website for those who had dialled the number in error: calledinerror.co.uk.

This website was operated by the Network operator (who was also the Level 2 provider), who confirmed that it operated its service called '*RegisterNow!*' across 89,997 premium rate numbers, and promoted the service using on-street promotional cards. The promotion related to new Voice over Internet Protocol ("**VoIP**") services and invited the consumer to register their interest for a fee, paid for by making the call to the advertised premium rate number beginning '09'.

The Executive analysed call traffic data which suggested that consumers were misdialling widely advertised voting or competition lines and connecting to the '*RegisterNow!*' service in error.

(i) Complaints received

While this investigation was not initiated by complainants, two complaints had been received during preliminary stages of investigation of this case. These complaints came from a company within the premium rate service industry ("**Complainant 1**") and a member of the public ("**Complainant 2**").

On 20 October 2011, an email was sent to PhonepayPlus outlining concerns following testing of voting lines allocated by Complainant 1. Tests had been done on the numbers used for a live TV broadcast and voting as a matter of routine but, due to misdialling one of the numbers, a member of staff from Complainant 1 reached an unknown service and was charged a higher price for the call.

On 24 October 2011, Complainant 2 misdialled when attempting to vote for a contestant on X Factor. Complainant 2 wrote to both his/her provider of telephony services, Utility Warehouse Discount Club, and to PhonepayPlus. Complainant 2 misdialled the number associated with the live TV broadcast and instead reached an unknown service and was charged a higher price for the call.

(ii) Timeline, including data analysis from 2010 and 2011

Data Analysis from 2010 (not related to 'RegisterNow!')

PhonepayPlus had corresponded with the Level 2 provider in the past relating to another service (the "**Other Service**"), which was allocated 3,406 premium rate, 09* numbers. During that correspondence, the Executive undertook some data analysis on the numbers called in the period between March 2010 and February 2011.

The Executive analysed this data and discovered the following in relation to the period from March 2010 to February 2011:

- 37,527 calls were made overall;
- 34,948 calls lasted less than one minute with 13,760 of them being under 15 seconds;
- 2,521 calls lasted between one minute and three minutes;
- 55 calls lasted between three minutes and 30 minutes; and
- five calls lasted over 30 minutes.

On 22 June 2011, the Executive presented the data analysis to the Level 2 provider, which was prior to the setting up and promotion of the '*RegisterNow!*' service.

Separate data for the Other Service was provided by the Level 2 provider on 12 April 2011 regarding calls made to the dedicated service number 09059339335 (the "**Dedicated Number**"). This number was not advertised on the Other Service website but was given out at the end of the introductory message explaining how the service worked, the cost of the service, and the options available on the Interactive (the "**IVR**") system. The cost of this dedicated number was 31ppm.

The length of the introductory message was approximately three minutes in duration and, when taken together with the above call duration statistics, few consumers listened to the introductory message instructions in full.

Only six calls were made to the Dedicated Number and these were made from only 4 separate phone numbers ("**Caller Line Identification**, or **CLIs**").

The Executive's analysis of calls made to the number range beginning 0901161 showed that calls were made to a very small group of numbers very frequently. As regards the timing of the calls, the Executive noted that the traffic to the service numbers in the 0901161 range was very small in the period from April 2010 to August 2010. This was then followed by a steep rise from October 2010 to December 2010.

In December 2010, the television programmes *Strictly Come Dancing* and *X Factor* were promoting premium rate numbers for consumers to vote for their favourite contestants. Another programme called *Dancing on Ice* also used premium rate numbers for voting. In all cases, these numbers were allocated by a different Network operator and were managed by a different service provider. In all cases the numbers were a few digits different to the number ranges that were operated by the Level 2 provider.

For example, the *X Factor* used numbers 09016161101 to 09016161116. If a consumer inadvertently added an extra 1 to the first five digits he or she would have connected to the Other Service selecting the last digit. The Executive stated that this may have explained

why there had been a steep rise in the number of calls to the Other Service number 09011616110.

Dancing on Ice used numbers 09016161001 to 09016161012. Again this number was similar to the range that was dedicated to the Other Service.

Data Analysis 2011

The Executive obtained data for calls made to 09* numbers dedicated by the Level 2 provider to its own 'RegisterNow!' service during the preliminary stages of the investigation of this case.

Data provided by the Level 2 provider on 3 November 2011 showed that 89,997 numbers were dedicated to the service. Of these numbers, only 643 individual numbers had been called in the period between 30 August 2011 and 27 October 2011. These 643 numbers were called 12,503 separate times in that period.

The Executive observed the following in relation to those 12,503 calls:

- 8,974 calls made in that period were under 18 seconds in duration;
- 1,668 calls made in that period were between 18 and 28 seconds in duration; and
- 1,861 calls made in that period were over 28 seconds in duration.

The Executive further observed that a significant number of calls were made to only 11 numbers which were all close to the numbers below, and were associated with voting lines or competition lines and were advertised during TV broadcast services.

TV Programme/Competition	Advertised TV Voting Line	Level 2 provider's similar service number	Number of calls to Level 2 provider's service number
Celebrity Big Brother / Big Brother	09016161701	09011616170	1,829
X Factor	09016161101	09011616160	876
STV Channel (Scotland)	09041611111	09011611111	655
X Factor	09016161101	09011616161	408
Strictly Come Dancing	09015222001	09015202201	328
Strictly Come Dancing	09015222001	09015202209	267
Strictly Come Dancing	09015222001	09015202213	254
X Factor	09016161101	09011616110	242
Strictly Come Dancing	09015222001	09015202214	211
Strictly Come Dancing	09015222001	09015202211	208

Channel 5	09041615555	09011615555	121
TOTAL CALLS:			5,399

The above table showed that the above 11 numbers which belonged to the 'RegisterNow!' service received 5,399 calls between them. This comprised 43% of all the calls to the 'RegisterNow!' service.

Evidence linking the calls made to the Level 2 provider's 09* numbers and the TV broadcasts

The links made between the large number of calls to a number of the Level 2 provider's 09* numbers and TV broadcast shows were confirmed in a number of ways.

The operators of STV Channel (Scotland) and Channel 5 confirmed in emails to PhonepayPlus dated 24 October 2011 and 26 October 2011 respectively, that the numbers used for competitions on their TV broadcast services were similar to some of the Level 2 provider's 09* numbers. Both TV programmers further confirmed that their numbers were active at the same time as the increase in the volume of calls to the corresponding, similar 'RegisterNow!' service numbers.

In addition, the complainants both explained that *X Factor* numbers were similar to some numbers dedicated to the 'RegisterNow!' service. The numbers mentioned by those complainants were 090116161609, which was a digit too long but, as indicated above, connected to the 'RegisterNow!' service on 09011616160 (876 calls) and 09011616161 (408 calls).

On 3 November 2011, the Level 2 provider provided PhonepayPlus with data from its support service, calledinerror.co.uk. This data contained user explanations for the misdialling incidents. The user explanations suggested that some of the 'RegisterNow!' numbers were similar to Big Brother (otherwise referred to as Celebrity Big Brother), Strictly Come Dancing, and X Factor.

Furthermore, as indicated in email records from the Level 2 provider dated 16 August 2011, (and provided to PhonepayPlus on 10 November 2011) all individual 09* numbers associated with the 'RegisterNow!' service were only advertised nine times on nine promotional cards. The call traffic shown in the above table did not therefore reflect the promotional campaign exposure for these numbers that was coordinated by the Level 2 provider.

(iii) Monitoring undertaken by the Executive

PhonepayPlus observed that some of the Level 2 provider's 09* numbers were similar to the Big Brother voting lines, 09016161701, 09016161702, and 09016161707.

On 27 September 2011, the Executive picked at random one of the numbers that was similar to the Big Brother voting line, but was within the Level 2 provider's number range beginning 0901161.

The number dialled was 09011616102, which connected to an unknown service. It appeared to be unknown because the service was not identifiable from the information given in the introductory recorded message. Instead the system 'registers your interest in the service', gave the cost of the call, and then advertised the website calledinerror.co.uk. This was a

domain name used by the Level 2 provider to direct people to its new customer services webpage.

The recorded message showed that it took approximately 34 seconds to reach the end of the message and obtain information regarding the calledinerror.co.uk website. Therefore, anyone disconnecting before 28 seconds was unlikely to have heard the promotion of the website, and would not have known that they could report their call and obtain a refund.

The Executive registered its call on the calledinerror.co.uk website and gave the name Jack Gregory, together with a Gmail account email address. The Level 2 provider corresponded with this address via email on two occasions on 28 September 2011. The Level 2 provider then corresponded with the Executive via the PhonepayPlus email account.

The monitoring led the Executive to request information from the Level 2 provider regarding the service. The Level 2 provider responded with information relating to a specific service called '*RegisterNow!*' and suggested that consumers with sight of the promotional material would know the service with which they had interacted.

(iv) '*RegisterNow!*' service as explained by the Level 2 provider

During the preliminary investigation the Level 2 provider gave the following information relating to the service.

- The service was called '*Register Now!*' and that the '*Register Now!*' brand could be found in large letters on the front and back of the distributed leaflet, as well as information on what the user was registering for.
- The leaflets were distributed by hand outside popular pedestrian areas (including shopping areas and transport links) in cities across England. The distribution was said to have started on 30 August 2011.
- According to the information provided, leaflet distributors had worked in inner and outer London, Peterborough, Milton Keynes, Southampton, Aldershot, Northampton, Solihull, Stoke-on-Trent, Portsmouth, Reading, Eastbourne, Ipswich, Sandwell & Dudley, Bristol, Walsall, Maidstone, Worthing, Tunbridge Wells, Wellingborough, Peterborough, Canterbury, Brighton, Luton, Aylesbury, Norwich, Swindon, Birmingham and Cambridge. The Level 2 provider provided details of travel arrangements to these destinations to PhonepayPlus on 10 November 2011.
- The Level 2 provider stated it has used leaflet distribution as a marketing tool for 8 years across a range of services. The data capture service was to be marketed on a large scale with 810,000 promotional cards printed. Each of the 89,997 numbers allocated to the service was printed on 9 promotional cards.

On 9 November 2011, the Executive received a batch of 500 promotional cards for inspection. This inspection confirmed that one of the print runs contained 90,000 cards, in 180 trays, and each tray contained 500 cards. It also suggested that each of the 09* numbers was printed nine times. The print run inspected by PhonepayPlus therefore contained 10,000 numbers.

Within the recorded message on the '*RegisterNow!*' service, information was provided relating to the website calledinerror.co.uk. The Level 2 provider stated that the 'calledinerror' online enquiry form was a generic service, for which any caller who had misdialled any of its numbers by mistake could enquire about the misdial and apply for a full refund.

As this was a generic enquiry form, the response given by the Level 2 provider to users of the website was of a generic nature. The Level 2 provider confirmed that it explained to consumers who used the 'calledinerror' enquiry form what the service was, as seen in the email to 'Jack Gregory'.

The Level 2 provider stated that this was a unique service which had been pioneered for consumer protection purposes.

The data captured was to be used at sometime in the future for the marketing of new VoIP services being supplied by Yoyofone. The Level 2 provider explained that Yoyofone was a service operated by another provider within the Level 2 provider's corporate group. On or round 4 November 2011, the Executive noted that this other provider was named on the Yoyofone website within the Privacy Policy webpage and the Terms and Conditions webpage.

On 5 December 2011, the Executive noted that the details on these Terms and Conditions had changed to include the Level 2 provider instead of the other provider. According to cached web pages, the changes were made between 11 (or 14) November 2011 and 5 December 2011.

The service was to be marketed as described by the Level 2 provider in the following terms:

"The VoIP based services offered to the user i.e. the Yoyofone service offers substantial savings for calls, included unlimited international call plans, as well as many other features for national and international dialling. If a consumer who registers an interest starts to use the Yoyofone service we would expect them to make substantial savings on call charges compared to fixed or mobile call charges."

It was understood by the Executive that the data captured by the 'RegisterNow!' service had not been used to market this or any other services at the date of the formal investigation letter.

THE INVESTIGATION

The Executive believed that this service contravened the PhonepayPlus Code of Practice (12th Edition, dated 1 September 2011) (the "**Code**"). The Executive sent a breach letter to the Level 2 provider on 9 December 2011 and raised the following potential breaches under the Code:

- Part Two Outcomes and Rules:
 - Outcome 2.3 – Fairness
 - Rule 2.3.1 – Fairness (Outcome)

 - Outcome 2.4 – Privacy
 - Rule 2.4.3 – Consent for data collection

- Part Three Registration and Responsibilities:
 - Part 3.6 - Data Protection
 - Paragraph 3.6.2 – Data collection services

On 23 December the Level 2 provider responded to the breach letter.

On 2 February 2012, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE FAIRNESS

Outcome 2.3:

“That consumers of premium rate services are treated fairly and equitably.”

Rule 2.3.1:

“Consumers of premium rate services must be treated fairly and equitably.”

1. The Executive stated that, in relation to Rule 2.3.1, and the Outcome at Part 2.3 of the Code, when considering the words' common usage, it considered that the word “fairly” meant “with justice”, and the word “equitably” meant “impartially” or “without bias”.

The Executive submitted that the analysis undertaken in both 2010 and in 2011 showed that, where a large group of 09* numbers were allocated to a specific service, the risk of numbers within that group being called by users who had misdialled another number promoted widely elsewhere was significant. The analysis further showed that a significant number of calls made to the *‘RegisterNow!’* service were associated with misdials, either by reference to the number dialled, or by reference to the time and date of the call.

In summary, the Evidence gathered by the Executive in support of this analysis was as follows:

- The Level 2 provider had knowledge of the 2010 data analysis undertaken by PhonepayPlus when setting up the *‘RegisterNow!’* service because it was shared with the Level 2 provider in correspondence dated 22 June 2011;
- The operators of STV Channel (Scotland) and Channel 5 confirmed that the numbers used for competitions on their TV broadcast services, were similar to some of the Level 2 provider's 09* numbers;
- Both complainants explained that 09* numbers used for the X Factor voting line numbers were similar to some numbers dedicated to the *‘RegisterNow!’* service;
- The calledinerror.co.uk report data supplied by the Level 2 provider showed users' explanations for the misdialling incidents and suggested that some of the Level 2 provider's numbers were similar to Big Brother, Strictly Come Dancing, and X Factor; and
- Each of the Level 2 provider's 09* numbers associated with the *‘RegisterNow!’* service were only advertised nine times on nine promotional cards. This level of promotion was inconsistent with the call traffic to those numbers.

The Executive further submitted that, where 09* numbers were called by consumers who had misdialled another 09* number promoted elsewhere, they connected to *‘RegisterNow!’* without any knowledge of the service. The consumers who called a 09* number without knowledge of the *‘RegisterNow!’* service had no intention of registering their interest in any VoIP service, or any other service associated with the Level 2 provider.

The Executive submitted that these consumers were not treated fairly or equitably in relation to the premium rate service because the consumer was charged for the call

and provided CLI data, which was collected without the consumer's informed consent. Consumers were charged for the call regardless of whether they had seen the promotional material or not. These circumstances arose as a result of the allocation of 89,997 09* numbers to the *'RegisterNow!'* service.

The Executive asserted that with or without the Level 2 provider's knowledge of the circumstance described, consumers were in any case not treated fairly. The Executive did however submit that in July 2011, or in any event before setting up the *'RegisterNow!'* service, the Level 2 provider knew that:

- consumers would misdial 09* numbers;
- several 09* numbers were used for widely marketed TV broadcast services, and associated voting or competition lines, in-keeping with a year-on-year pattern emerging relating to such voting lines or competition lines;
- specific numbers were used for some competition lines, such as STV Channel (Scotland) and Channel 5; and
- data collected from CIS 09* number usage could not be guaranteed as having been collected from those who have provide informed consent where a large collection of numbers were designated for the same CIS service.

The Executive submitted that the Level 2 provider had failed to take steps to ensure that consumers were treated fairly and equitably, such as:

- allocating a suitably sized collection of numbers to the *'RegisterNow!'* service for its intended purpose. It was arguable that one number could have been sufficient for the purpose of the service.
- undertaking assessment of the incoming call traffic for unexplained spikes; and
- disconnecting specific numbers identified by the Level 2 provider or by consumers who provided reports via the calledinerror.co.uk webpage, having allocated a large collection of numbers to the *'RegisterNow!'* service and observed misdialling occurring.

The Executive submitted that the Level 2 provider had not treated individual callers fairly or equitably for the following reasons:

- The decision to allocate 89,997 different 09* numbers to the *'RegisterNow!'* service increased the risks (shown in the 2010 data analysis in relation to a smaller allocation of 3,406 numbers) of consumers connecting to the service while misdialling.
- The Level 2 provider failed to make any assessment of incoming calls to observe any unexplained spikes in traffic. According to the described purpose of the *'RegisterNow!'* service, each caller ought to have been interacting with the service with knowledge of the promotional material. Any significant spike in traffic indicated that this was not the case for all callers, and that data was being collected from callers who may or may not have seen the promotional material. Furthermore, the location of the callers might have also indicated that not all callers had seen the promotional material, given the limited number of towns and cities where people could be engaged by it. Where the call traffic indicated that some callers had interacted with the service without knowledge of the

'RegisterNow!' service, the data collected was of limited or no value, yet the consumers were charged regardless of whether they connected to the *'RegisterNow!'* service with knowledge or in error.

- The Level 2 provider had the opportunity to disconnect numbers such as 09011616170, which was reported four times via the calledinerror.co.uk website on 8 September 2011, yet it did not disconnect the number. Instead the Level 2 provider allowed over 1,500 calls to be made on that one number when only 9 promotional cards were printed with that number on them. Furthermore, it was not known if any of these 9 cards were distributed prior to the spike in traffic being seen in association with the Celebrity Big Brother finale. In choosing to leave the number connected, data was collected and revenue generated from consumers, including those who had misdialled the number without knowledge of the *'RegisterNow!'* service.

The Executive submitted that consumers who misdialled the Level 2 provider's 09* numbers might have consented to the charge incurred by them making that call; however, the callers who did not have knowledge of the *'RegisterNow!'* service could not provide consent to the collection of their data for the purpose described by the Level 2 provider. The charge incurred by such callers paid for a service for which they had no prior knowledge.

The Executive noted that the Level 2 provider had provided access to the website calledinerror.co.uk and had promoted the website to callers who used the Level 2 provider's 09* numbers. The Executive submitted that such a website did not prevent the charge being incurred by callers who had no prior knowledge of the *'RegisterNow!'* service, and that the website was only promoted to callers who listened to the full recorded message on the *'RegisterNow!'* service, as the website was promoted only after the first 28 seconds of the call. The Executive observed that the majority of callers did not listen to the recorded message long enough to hear about the website. Out of a total of 12,503 calls made between 30 August and 27 October 2011, 8,974 calls were under 18 seconds in length and 1,668 calls were between 18 and 28 seconds in length.

While the calledinerror.co.uk website did offer callers the option to opt out of the *'RegisterNow!'* service, where the caller had no prior knowledge of the promotional material, the caller's data had already been collected without any informed consent being given.

The Executive submitted that the Level 2 provider knowingly allocated 89,997 to a service called *'RegisterNow!'* with the intention of collecting data from both (i) consumers who had knowledge of the promotional material (and therefore knowledge of the purpose of call), and (ii) consumers who misdialled the number with no knowledge of the promotional material. By failing to take the abovementioned steps to mitigate the potential harm, and by charging both sets of consumers a fee for the call, it was submitted that the Level 2 provider failed to treat consumers fairly and equitably. This appeared to be a breach of Rule 2.3.1 of the Code.

2. The Level 2 provider said it was, "genuinely non-plussed" by the reaction of the Executive to its use of large number blocks for single services. At a meeting with the Executive on 28 April 2011, when pressed on whether the Level 2 provider could use a specific number for a service, it was told by the Executive that it could use any number allocated to it as long as it was a legitimate service. The issues were also explored in depth at the Tribunal hearing relating to the Other Service on 1 September 2011.

The Level 2 provider believed that it was not disputed that:

- it was not unusual for it to use a large block of numbers for a single service given the nature of the unique position that it was in (a Network operator as well as a Level 2 provider);
- the Level 2 provider had been legitimately allocated the number ranges by Ofcom;
- the Level 2 provider had 'owned' these numbers and had used them for in excess of 8 years, which was well before any of the mentioned TV voting line shows were aired. It was very difficult to foresee which numbers were likely to be used for these shows given that they were voting lines and strict rules were applied concerning any prior knowledge of their use; and
- there was no way of identifying misdials unless a complaint was received.

The Level 2 provider was clear that there were no specific obligations regarding the use of large number ranges in either the Code or any other regulatory instrument or regulatory guidance.

The Level 2 provider said it took into account the discussion at the Tribunal and also the summary of the Tribunal findings in CAS-01231-Q89H0S and as a result, introduced the 'calledinerror' website to enable it to deal effectively and equitably with reports of misdialling. The Level 2 provider stated that it should also be noted that a caller using the calledinerror.com service received a full refund. The Level 2 provider would therefore refund at a loss, as the revenue share that it received from BT was only a percentage of the actual call charges received by the consumer.

At the previous Tribunal hearing of CAS-01231-Q89H0S the Level 2 provider asserted that the concerns over the similarity in numbers and the potential for misdialling as well as Ofcom's policy of allocating 10,000 block number ranges would be best dealt with as a matter of policy by PhonepayPlus and Ofcom rather than as a compliance issue. The Level 2 provider stated that the investigation of this case did, in its view, only add weight to that assertion.

Given the success and popularity of reality TV contests the Level 2 provider stated that it could well be argued that such services should use unique number ranges. The Level 2 provider firmly believed that under the present regulatory regime, TV voting lines **did not** and **should not** have special status. Given that the Level 2 provider was allocated its number ranges years in advance of the TV shows being launched, it stated that it would have thought that if anyone ought to have been checking for possible conflicts of number ranges, it ought to have been the TV companies that should have investigated whether there were any similar pre-existing allocations which might have led to mis-dialling. The Level 2 provider stated that it was worth noting that Complainant 1 operated many of the TV voting lines referred to in this case, including Celebrity Big Brother and the X Factor, and as another Level 2 provider, it was direct competitor of the Level 2 provider.

The Level 2 provider therefore considered that there were wider policy implications to this issue and if PhonepayPlus was not ready to consider the policy issues there should at least have been a level playing field in respect of misdialled calls.

In its view, no level 2 provider was immune from consumer misdialling.

3. The Tribunal considered the evidence and found that based on the knowledge of the Level 2 provider following the data provided by the Executive in June and July 2011, it had subsequently:
 - allocated and switched on (as opposed to merely possessing) 89,997 numbers solely for the *'RegisterNow!'* service;
 - failed to disconnect numbers that had been consistently misdialled by consumers despite the reports received from its *calledinerror.co.uk* service and its own observations; and
 - failed to place the details of the *'calledinerror'* service at the beginning of the call. Instead, details were provided 28 seconds into the call.

With regard to the first point above, the Tribunal noted the Level 2 provider's submission during its informal representations that it needed to use several numbers in order to effectively track the distribution levels of its promotional cards. However, the Tribunal did not consider that 89,997 numbers were needed to be able to successfully track the distribution of the promotional cards and noted that, even if the use of so many numbers had some benefit to the Level 2 provider for marketing analysis purposes, the use of so many numbers significantly increased the risk of 'capturing' misdials by consumers.

With regard to the second point above, the Tribunal noted the Level 2 provider's comment during its informal representations, that it had not considered disconnecting any numbers, despite the high call volumes to some of them, even though it admitted it would not have expected more than 30 calls to any particular number as a result of its promotional activities. However, the Tribunal found that in relation to the number 09011616170, in excess of 1,500 calls had been made despite the number being printed on only 9 promotional cards.

As a result of the Tribunal's findings, and in particular the steps taken (and not taken) by the Level 2 provider notwithstanding its knowledge of the 2011 data, the Tribunal concluded that consumers of the service had not been treated fairly and equitably and that therefore there had been a breach of rule 2.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO PRIVACY

Outcome 2.4:

"That premium rate services do not cause the unreasonable invasion of consumers' privacy."

Rule 2.4.3:

"Level 2 providers must ensure that consumers' personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer."

1. The Executive submitted that consumers who interacted with the *'RegisterNow!'* service without knowledge of the marketing campaign, the promotional cards, or the service mentioned in the recorded message associated with the Level 2 provider's 09*

numbers, had their personal information, in the form of CLI numbers, collected without their consent.

Furthermore, consent was not given for that personal data to be passed to another provider within the Level 2 provider's corporate group, who were operating or who had operated Yoyofone in the past.

Executive also submitted (as it did in relation to its allegations for breach one) that in July 2011, the Level 2 provider knew that:

- consumers would misdial 09* numbers;
- several 09* numbers were used for widely marketed TV broadcast services, and associated voting or competition lines, in-keeping with a year-on-year pattern emerging relating to such voting lines or competition lines;
- specific numbers were used for some competition lines, such as STV Channel (Scotland) and Channel 5; and
- data collected from CIS 09* number usage could not be guaranteed as having been collected from those who have provide informed consent where a large collection of numbers were designated for the same CIS service.

The Executive further submitted that Rule 2.4.3 of the Code required the Level 2 provider to take steps to ensure that consumers' personal information was not collected without their consent or passed to any other person without the consumer's consent, other than for the sole purpose of facilitating a refund. The Executive submitted that the decision to allocate 89,997 different 09* numbers to the *'RegisterNow!'* service established the inevitable consequence of personal information being gathered without consent. The Executive submitted that the Level 2 provider did not in these circumstances take any steps necessary to ensure this provision was met in relation to all callers.

2. The Level 2 provider did not dispute that there was a risk of misdialling. The Level 2 provider acknowledged that there was always a potential for misdialling with any telephone service, whatever the date or time of the call and whatever the number.

Whilst it was an inevitable consequence that in a very small minority of cases personal information was gathered without consent, the Level 2 provider stated that it made a significant effort to ensure that those consumers who had misdialled had a simple and easily accessible method for requesting a refund and deletion of their personal data from the Level 2 provider's database. In other words the Level 2 provider stated that it had made considerable efforts to mitigate the risk to consumers.

The Level 2 provider further stated that, as was discussed at the Tribunal hearing, there was no way of legislating or regulating against misdialling. Unless there was a blanket ban on the collection of CLI data, the risk would always be there. The Level 2 provider further argued that most businesses either knowingly or unknowingly collect CLIs without the consumer's informed consent, and cited the example of a consumer calling a utility service.

The Level 2 provider stated that it took full account of the Tribunal hearing dated 1 September 2011 and the concerns raised and it was for this reason that it launched the calledinerror.co.uk service. The Level 2 provider stated that this issue was definitely a policy issue (for Ofcom and PhonepayPlus) and submitted that it was not

appropriate for it to be dealt with by a single breach investigation. The risk of misdialling had consequences for all Level 2 providers.

3. The Tribunal considered the evidence and found that for those who had misdialled their data had been collected by the *'RegisterNow!'* service without their consent. The Tribunal noted that the collection of data without consent had repeatedly occurred. The Tribunal therefore concluded that there had been a breach of Rule 2.4.3 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Data Protection:

Paragraph 3.6.2:

“Services which involve the collection of personal information, such as names, addresses and phone numbers (which includes the collection of Calling Line Identification (CLI) or caller display information), must make clear to consumers the purpose for which the information is required and may be used in the future. The service must also identify the data controller (if different from the Network operator, Level 1 or Level 2 provider) in any different use to which the personal information might be put and give the consumer a clear opportunity to prevent such usage.”

1. The Executive considered that the Level 2 provider had established a service that was designed for the sole purpose of collecting personal information, including the collection of CLI data.

Paragraph 3.6.2 of the Code required the Level 2 provider to operate the service in such a way as to make it clear to consumers the purpose for which the information was required and may be used in the future. In relation to the *'RegisterNow!'* service, consumers who misdialled and connected to any of the Level 2 provider's 09* numbers without any knowledge of the marketing campaign, the promotional cards, or the service associated with those numbers, were not informed of the purpose for which the information collected was required, or how the data may be used in the future.

As with the other breaches raised in relation to this service, the Executive submitted that, in July 2011, the Level 2 provider knew that:

- consumers would misdial 09* numbers;
- several 09* numbers were used for widely marketed TV broadcast services, and associated voting or competition lines, in-keeping with a year-on-year pattern emerging relating to such voting lines or competition lines;
- specific numbers were used for some competition lines, such as STV Channel (Scotland) and Channel 5; and
- data collected from CIS 09* number usage could not be guaranteed as having been collected from those who have provide informed consent where a large collection of numbers were designated for the same CIS service.

The Executive therefore submitted that it appeared that the Level 2 provider knowingly operated the *'RegisterNow!'* service on 89,997 different 09* numbers, which led to the collection of data from consumers without making it clear to those consumers who had

misdialled, the purpose for which the information was required and how it may be used in the future. This appeared to be in breach of Paragraph 3.6.2 of the Code.

The Executive further submitted, in conjunction with the above, or in the alternative, that the Level 2 provider had failed to promote the service in a way which identified the data controller that was intended as the user of the collected information.

On or around 4 November 2011, the Executive observed that another provider within the Level 2 provider's corporate group was named as the provider on the Yoyofone website within the Privacy Policy webpage and the 'Terms and Conditions' webpage.

On 5 December 2011, the Executive noted that the details had changed to include the Level 2 provider instead of the other provider.

The data analysed by the Executive was collected prior to these changes being made on the website. The Executive submitted that an email from PhonepayPlus to the Level 2 provider dated 21 November 2011 notified the Level 2 provider that it had focussed its attention on paragraphs 2.3.1, 2.4.3, and 3.6.2 of the Code. The Executive submitted that the information given on the website before the described change was relevant for consideration by the Tribunal.

As the VoIP service was being operated by a party different from the Level 2 provider, the data controller for the purposes of the operation of the VoIP service linked to the collection of data by '*RegisterNow!*' needed to be identified and the consumer should have been given a clear opportunity to prevent such usage. The Executive submitted that the promotional material did not name the other provider as the provider of the VoIP service that was to be marketed at a later date.

The service website now suggested that there was no party other than the Level 2 provider who was associated with any aspect of the marketing campaign involving the data capture service or the VoIP service. Within the breach letter dated 9 December 2011, the Executive put forward the information found relating to the Yoyofone service website in November and December 2011, and the Level 2 provider was put to proof on its direct association with Yoyofone.

The Executive submitted that the Level 2 provider failed to make clear to consumers the purpose for which the information was required and may be used in the future; and that the data capture service failed to identify the other provider as the data controller.

The Executive submitted, on the basis of the above reasons, taken together or in isolation, that the Level 2 provider had operated the service in breach of Paragraph 3.6.2 of the Code.

2. The Level 2 provider stated that the '*Register Now!*' service was a data capture service for consumers interested in receiving information on a 'new state of the art VoIP service for international calls', and on the leaflet it stated that the service was supplied by the Level 2 provider. This meant that the Level 2 provider could collate user data and supply the user with information regarding VoIP services from a number of VoIP based services that the Level 2 provider had. The Level 2 provider stated that, currently Yoyofone was the only operational service, but it had another VoIP based service in development, which it also intended to promote using the data collected.

The Level 2 provider stated that it was the data controller and the other provider was a member of the same corporate group which was initially set up for Yoyofone when it was first developed in September 2010. In order to simplify marketing for the

promotion of the '*Register Now!*' service leaflets, the Level 2 provider stated that it changed the stated provider of the Yoyofone service to itself. Yoyofone was a brand name. This change was decided initially when the Level 2 provider first considered launching the '*Registernow*' service, but due to administrative planning, the change was not completed online until late October 2011. At this point the Level 2 provider stated that it was looking to use the data and contact users giving information on Yoyofone.

The Level 2 provider stated that it decided to await the outcome of this investigation before using the data collected to supply consumers with information on Yoyofone (or any other Cheers VoIP based service). The Level 2 provider submitted that, in essence, users had not therefore been misled, but instead there had merely been a delay in informing them about Yoyofone. Users were only aware that they would receive information on VoIP based service(s) from the Level 2 provider.

3. The Tribunal considered the evidence and found that in relation to the first limb of the rule, those who had misdialled and had not seen any promotion of the '*RegisterNow!*' service and had not been informed of the purpose for which their personal information was required and how it could be used in future. However, in relation to the second limb of the rule, the Tribunal did not consider that there was sufficient evidence to establish that personal information had been collected by the other provider within the Level 2 provider's corporate group and/or that it was otherwise a data controller for the purposes of this limb. The Tribunal therefore concluded that there had been a breach of the first limb of rule 3.6.2 of the Code.

Decision: UPHELD

SANCTIONS

1. Service Revenue

The revenue in relation to the service was in the lower range of Band 4 (£50,000 - £100,000).

2. Initial Overall Assessment

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

Rule 2.3.1 (Fairness)

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

- the service had a clear, detrimental and damaging impact on consumers;
- the nature of the breach meant that the service damaged consumer confidence in premium rate services; and
- as a result of the design of the service, the service had the potential to generate high revenues.

Rule 2.4.3 (Consent for Data Collection)

The initial assessment for the breach of Rule 2.4.3 of the Code was **significant**. In determining the initial assessment for the breach of Rule 2.4.3 of the Code the Tribunal applied the following criteria:

- the service was likely to have had a material impact on consumers and showed a substantial potential for harm; and
- the nature of the breach had the potential to cause a drop in consumer confidence in premium rate services.

Rule 3.6.2 (Data Protection)

The initial assessment for the breach of Rule 3.6.2 of the Code was **significant**. In determining the initial assessment for the breach of Rule 3.6.2 of the Code the Tribunal applied the following criteria:

- the service was likely to have had a material impact on consumers and showed a substantial potential for harm; and
- the nature of the breach had the potential to cause a drop in consumer confidence in premium rate services.

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

3. Final Overall Assessment

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

- The breaches continued after the Level 2 provider had become aware of them. By an email dated 21 November 2011, the Executive notified the Level 2 provider of its ongoing concern over a significantly large set of 09* numbers being allocated to one service, however, despite this notice, no action was taken by the Level 2 provider to reduce the set of numbers allocated to the service.

The Tribunal noted the Level 2 provider's comment that an end user misdialling was a circumstance beyond the reasonable control of any level 2 provider. The Tribunal's view was however that it was the Level 2 provider's actions that caused the circumstance of the breach and not those of the consumers who had misdialled.

The Tribunal further noted the Level 2 provider's comment that it had delayed the phased rollout of consumer notification of the VoIP service until the outcome of the investigation but it did not consider this to be a mitigating factor.

The Tribunal therefore determined that there were no relevant mitigating factors to take into consideration in this case.

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

4. Sanctions Imposed

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

- a Formal Reprimand;
- a fine of £50,000; and
- a bar for three months from the date of publication of this decision, to be suspended for 1 month to enable the Level 2 provider to obtain and implement compliance advice to the satisfaction of the Executive. In the event that compliance advice is not sought and satisfactorily implemented within the period of 1 month from the date of publication of this decision, the bar will take effect immediately.

The Tribunal further commented that it expected refunds to continue to be made to all consumers who claim a refund, for the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid, and to provide evidence to PhonepayPlus that such refunds have been made.