

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

**Thursday 29 MARCH 2012
TRIBUNAL SITTING No. 96 / CASE 1
CASE REFERENCE: 04292**

Network Operator: Starcomm Limited

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

BACKGROUND

The amounts owed by Starcomm to PhonepayPlus result from the following previous cases:

- Case reference: 784649 – against the Service Provider, Mr Jaswinder Singh;
- Case reference: 827372 – against the Network Operator, Starcomm for due diligence requirements; and
- Case reference: 844739 – against the Network Operator, Starcomm for failure to supply premium rate outpayments for the Quarter Three Report.

On 16 June 2010, Starcomm requested an oral hearing for cases upheld against it (cases 827372 and 844739) in which fine sanctions and administrative charges amounted to a total of £28,123.78. Starcomm also owed PhonepayPlus a sum in the amount of £3,945.90, which was requested by PhonepayPlus in respect of its investigation into the provider Jaswinder Singh. Following the oral hearing which took place on 4 April 2011, Starcomm was sent an invoice in respect of administrative and legal costs totalling £37,596.00. The total sum therefore owed to PhonepayPlus by Starcomm was £69,665.68.

A further application by Starcomm for an appeal to the Independent Appeals Body (the “**IAB**”) was struck out.

On 29 September 2011, the IAB Chair directed Starcomm to satisfy within 14 days the sanctions already imposed upon it by the Tribunal in cases 827372 and 844739, as well as the costs for the oral hearing, and the withheld sum of £3,945.90. Following further correspondence the 13 October 2011 deadline was changed to 24 October 2011. Having not received payment, on 4 November 2011, the Executive reissued invoices totalling £69,665.68 in respect of the amounts owed and Starcomm was directed by the Executive to make payment. An invoice for a further administrative charge of £2,623.78 (in respect of case 844739), not dealt with in the IAB Chair Direction dated 29 September 2011, was also reissued on 4 November 2011 and is included in that £69,665.68 figure.

The invoices were sent on 4 November 2011 by email and by post to address(es) provided to the Executive by Starcomm and its director(s). The timeframe for settling the payment and complying with the sanction was set by PhonepayPlus as no later than 4pm on 14 November 2011, ten days after the invoices were sent. The deadline to pay the withhold of £3,945.50 was 5 December 2011.

Starcomm has failed to pay the outstanding invoices and has indicated on several occasions via meeting(s), telephone conversations and emails that due to financial hardship, it is unable to pay the outstanding amount owed to PhonepayPlus.

The Investigation

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

The Executive believed Starcomm's failure to comply with outstanding sanctions within a reasonable time and to pay administrative charges within the specified time contravened the Code and therefore raised the following potential breaches of the Code.

The Executive sent a breach letter to Starcomm on 9 February 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Paragraph 4.8.4(b) – Sanctions; and
- Paragraph 4.10.2 – Administrative charge.

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

1. The Executive submitted that the fines were imposed for case references 827372 (£25,000) and 844739 (£500) under the PhonepayPlus Code of Practice (11th Edition, amended April 2008). As Starcomm requested an appeal to the IAB of the oral hearing decision in these cases, the fines were suspended pending case management directions by the IAB Chair.

The Further Directions of the IAB Chair dated 29 September 2011 instructed Starcomm to make payment of the outstanding fines within 14 days. The Chair also ordered Starcomm to pay the withheld amount of £3,945.50 to PhonepayPlus by 5 December 2011. The Further Directions of the IAB Chair were issued after the 12th Edition of the PhonepayPlus Code of Practice came in force on 1 September 2011, and accordingly this breach was raised under this Edition of the Code. A request for payment was sent to Starcomm by the Executive by email on 24 October 2011, Further copies of invoices for the outstanding amounts were issued and sent to Starcomm on 4 November 2011 and Starcomm was provided with a further ten days to pay the amounts due. The deadline for the payment of the withhold amount was 5 December 2011.

PhonepayPlus has not received any payment in respect of the outstanding fines or the withhold. The Executive submitted that Starcomm had failed to comply with the fine sanctions within a reasonable time and had therefore breached paragraph 4.8.4(b) of the Code.

2. In response to the alleged breach, Mr Clive Aldred, on behalf of Starcomm, made both written submissions and informal representations to the Tribunal at the hearing on 29 March 2012. Starcomm submitted that the fine sanction of £25,000, together with the oral hearing costs of £37,596.00 were imposed by PhonepayPlus in breach of Starcomm's rights under Article 12 of Directive 2000/31/EC. Starcomm submitted that PhonepayPlus had exhibited a pattern of bias against Starcomm including, for

example, imposing a £500 fine in respect of case 844739 when fines for a similar breach were not imposed on Starcomm's competitors in analogous circumstances.

Starcomm further submitted that it was unable to pay the invoices as they fell due as it was under serious financial hardship as a result of litigation in the High Court of Justice which had accrued costs of around £1,200,000. Starcomm claimed that such costs were the fault of PhonepayPlus as it had purportedly failed to comply with three injunctive orders of the High Court to prevent the Defendants in the case from operating a "Dialler Permission Certificate" granted to them on 4 July 2005 by PhonepayPlus.

Starcomm provided a cheque for the withhold amount of £3,945.90 on 29 March 2012. On the reverse of the cheque Starcomm had written, "in full and final settlement of all invoices" (or words to that effect).

3. The Tribunal considered the evidence and was left with no alternative but to conclude that Starcomm had failed to comply with the fine sanctions imposed upon it within a reasonable time in contravention of the Code. The Tribunal upheld the breach of paragraph 4.8.4(b) of the Code. The Tribunal stated that it was not in a position to go behind the fines imposed and took the view that these fines had been imposed after due process had been undertaken by PhonepayPlus. The Tribunal found that Starcomm had been given every opportunity to make representations and the Tribunal considered that PhonepayPlus had given Starcomm a reasonable opportunity to comply with its obligations. The Tribunal noted that no serious attempt to reach an agreement to make payments by instalments had been made by Starcomm. The Tribunal further noted that the withheld amount remained outstanding at the date of the Tribunal and that Starcomm had then sought to impose unreasonable conditions upon its payment of the withheld amount (by cheque) to PhonepayPlus.

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. The Executive submitted that the administrative charges were imposed in respect of the oral hearing which took place on 4 April 2011 and further proceedings in respect of case reference 844739. As Starcomm requested an appeal to the IAB of the oral hearing decision in these cases, the oral hearing administrative charges were suspended pending case management directions by the IAB Chair.

The Further Directions of the IAB Chair dated 29 September 2011 instructed Starcomm to make payment of the oral hearing administrative charges within 14 days. The Further Directions of the IAB Chair were issued after the 12th Edition of the Code of Practice came in force on 1 September 2011, and accordingly this breach was raised under this Edition of the Code.

A request for payment was sent to Starcomm by the Executive by email on 24 October 2011. Further copies of invoices for the outstanding amounts were issued and sent to Starcomm on 4 November 2011, and Starcomm was provided with a further ten days to pay the amounts due. An invoice in respect of the further

administrative charge of £2,623.78 (in respect of case 844739), not dealt with in the IAB Chair Direction dated 29 September 2011, was also reissued to Starcomm on 4 November 2011.

PhonepayPlus did not receive payment in respect of the administrative charges within the period specified and has not received payment since. The Executive submitted that Starcomm was in breach of paragraph 4.10.2 of the Code.

2. In response to the alleged breach, Starcomm repeated its submissions in respect of the potential breach of paragraph 4.8.4(b). Starcomm submitted that as a Network operator, it should not have been implicated in the breaches of the Code committed by the provider Mr Jaswinder Singh. Starcomm further sought an order that PhonepayPlus had breached Starcomm's Article 8 and Article 3 rights under Directive 2000/31/EC and was liable for Starcomm's legal costs and damages in respect of Starcomm's High Court action.
3. The Tribunal considered the evidence and was left with no alternative but to conclude that Starcomm had failed to pay the administrative charges imposed within the specified period in contravention of the Code. The Tribunal upheld the breach of paragraph 4.10.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 4.8.4(b) (Sanctions)

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:

- Starcomm's failure to pay fines incurred demonstrates a fundamental non-compliance with the obligations of the Code which in the Tribunal's view would undermine public confidence in the regulatory regime and premium rate services.

Paragraph 4.10.2 (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:

- Starcomm's failure to pay administrative charges incurred demonstrates a fundamental non-compliance with the obligations of the Code which, in the Tribunal's view, would undermine public confidence in the regulatory regime and premium rate services.

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 factor:

- Starcomm provided a cheque for the withhold amount (£3,945.90) on the day of the Tribunal hearing on 29 March 2012. The cheque could not be accepted by PhonepayPlus because Starcomm had written on the reverse of the cheque “in full and final settlement of all invoices” (or words to that effect). The Tribunal considered that this was an attempt to circumvent the regulatory regime.

There were no mitigating factors.

Having taken into account the aggravating and mitigating 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 (4.8.2(b)).
- An order to remedy the breach by paying the outstanding sums due (4.8.2(a)).

The Tribunal found that it would serve little regulatory purpose to impose an additional fine on Starcomm given the significant sum already outstanding without any immediate prospect of repayment. The Tribunal also took into account the fact that the Executive would be commencing formal debt collection proceedings to recover the outstanding amounts.