

The PhonepayPlus Sanctions Guide

A Guide to the Factors Considered by PhonepayPlus
when Imposing a Sanction

1. Background

Ofcom is the body set up under the Communications Act 2003 (“the Act”), with a primary duty to further the interests of citizens in relation to communications matters, and the interests of consumers in relevant markets, where appropriate by promoting competition.

The Act gives Ofcom the power to set Conditions that apply to providers of premium rate services for the purpose of regulating the provision, content, promotion and marketing of premium rate services, and to approve any code that provides such regulation and is appropriate.

The PhonepayPlus Code of Practice for premium rate services, 11th Edition, (the Code) was approved by Ofcom on 9 November 2006 and came into effect on 4 January 2007. Amendments to the Code were approved by Ofcom on 28 March 2008, and came into effect on 28 April 2008. This being so, PhonepayPlus is the authority responsible for the day to day regulation of premium rate services.

PhonepayPlus is a non-profit-making limited company. The Board of the company consists of up to ten members, all appointed in their individual capacities following an open recruitment and selection process. Up to three members of the Board have contemporary industry knowledge as practitioners, although they take no part in the adjudication process. The Board is supported by a permanent Executive.

Adjudications are conducted by the members of the Code Compliance Panel (Panel) sitting as a formal tribunal (Tribunal), which consists of a senior barrister or solicitor (the Chairman of the Panel) and two other lawyers duly experienced in and capable of chairing tribunals. In addition, three lay members will be appointed to the Panel.

2. Our Vision

Our vision is to ensure that anyone who uses a premium rate service can do so with absolute confidence. In pursuit of this vision, the PhonepayPlus Code of Practice sets appropriate standards for the promotion, content, and overall operation of premium rate services. We advise providers of premium rate services on compliance with the Code and investigate complaints about those services which appear to be in breach of it.

3. Our Process

If the Executive believes a premium rate service to be operating in breach of one or more of the provisions set out in the Code, it will compile an investigation report for submission to the Tribunal. The Tribunal, having taken into account both representations made by the Executive and the party in breach, will decide whether the service has been acting in breach of the Code and if so, what sanction it should impose. The range of sanctions available to the Tribunal is set out in paragraphs 2.6.1 of the Code in relation to network operators, and paragraph 8.9 of the Code in relation to service providers, or if a request has been made under paragraph 8.3.4 of the Code the information provider, in breach (together referred to as ‘service provider’).

4. Purpose of this Document

This guide sets out the factors which will assist the Tribunal in deciding what sanction it should impose, and applies to adjudications, reviews and oral hearings before the Tribunal. It is for illustrative purposes only is to be read alongside the Code and does not replace or supplant it in any respect. Each case will be taken on its own merits and sanctions applied may vary depending on analysis of impact and culpability, and any

mitigating and/or aggravating factors. Some or all of the sanctions can be applied depending on the circumstances.

5. Procedures Available

There are three procedures available to the Executive when dealing with potential breaches of the Code. These are:

Informal Procedure

The Executive uses this procedure where it believes that any apparent breach of the Code is of a 'minor' nature. Factors that the Executive takes into account when deciding to deal with a case under the informal procedure include whether there is little actual or potential consumer harm caused by the breach, whether the breach is only of a minor nature, and whether the breach history of the service provider demonstrates a reasonable compliance regime.

When the apparent breach(es) of the Code appears to be minor and of little consumer harm, the Executive will contact the service provider concerned and outline the nature of the apparent breach(es). If the service provider agrees to take corrective action, no regulatory measures are taken, but a record of the agreement to rectify the breach is recorded and published on the PhonepayPlus website.

Standard Procedure

The Executive uses this procedure where any apparent breaches require remedy and the breaches have the potential to cause or have caused significant consumer harm. A typical example would be where there are several potential breaches of the Code. Under the standard procedure, the Executive will write to the service provider concerned, outlining the apparent breach(es) of the Code, and will set a time limit (usually five working days) for a response. Once a response has been received or the time limit has expired, the case is presented to the Tribunal for adjudication.

Emergency Procedure

The Executive with the agreement of three Panel members will invoke this procedure when an apparent breach of the Code has taken place that is serious and requires urgent remedy.

Under the emergency procedure, the Executive will begin an immediate investigation and notify its findings to three Panel members. If the Panel members agree, access to the service in question will be barred and related outstanding revenue will be withheld. The service provider will be given five working days in which to respond. The case will be presented to the Tribunal for adjudication within ten working days of the provision of the service provider's response.

The service provider may, within two working days following notification of the use of the emergency procedure, apply in writing for a review of the use of the procedure setting out the grounds for review.

6. Purpose of Sanctions

Through its Code, PhonepayPlus has a range of sanctions it may apply against organisations and individuals found to be in breach of the Code. The intention of the Tribunal is to apply sanctions in accordance with the principles of good regulation, so as to protect consumers against harm, pre-empt breaches of the Code by organisations, and prevent the recurrence of future breaches.

7. Principles for Imposing Sanctions

When imposing sanctions the Tribunal will have regard to overriding principles of justice and fairness, which require the sanctions to be:

- proportionate
- consistent
- free from improper discrimination
- compliant with human rights
- transparent

The Tribunal is both accountable and transparent about the reasons behind its decision making. The processes followed comply with human rights legislation, and PhonepayPlus allows each party in breach the reasonable opportunity to make representations about whether a sanction should be imposed and if so, what type and at what level. PhonepayPlus will take account of any such representations. What PhonepayPlus considers to be a 'reasonable opportunity' will depend upon the facts and degree of urgency in each case.

When considering sanctions, the Tribunal will determine the impact of the breach, and the culpability of the party in breach, and will then take into account all relevant circumstances of the Code breach, including representations made to it by the party in breach. The Tribunal will then consider all appropriate mitigating and aggravating factors made known to it.

The decisions of all Tribunal hearings are published on the PhonepayPlus website.

8. Sanctions-setting Criteria

In order to ensure that the sanction is targeted, proportionate and appropriate to the breach in respect of which it is imposed, the Tribunal will consider all relevant circumstances. A non-exhaustive list of the factors which it will consider to identify the level of seriousness of the breach is as follows:

The Impact of the breach:

- The revenue generated by the service
- Materiality
- Actual consumer or societal harm
- The effect on vulnerable groups of people such as children
- The potential for further material consumer harm
- The degree of trust that the party in breach enjoyed
- The loss of confidence of consumers in premium rate services

Aggravating factors which may increase the severity of the sanction:

- Continuation of the breach after the party in breach has become aware of the breach or been notified of the breach by PhonepayPlus
- Incomplete, inaccurate or false information supplied by a party in breach as part of a defence
- Failure to co-operate with the PhonepayPlus investigation
- The past record of the party in breach for breaches of this nature
- The past record of the party in breach in relation to breaches of the Code
- The fact that the breaches occurred after the publication of sanctions warnings on similar services (for example, diallers or concealed subscription services).

Mitigating factors which may reduce the severity of the sanction:

- The extent to which any breach was caused, or contributed to, by circumstances beyond the control of the party in breach
- The extent to which the party in breach has taken steps in advance to identify and mitigate external factors and risks that might result in the breach
- The extent and timeliness of any steps taken to end the breach in question and to remedy the consequences of the breach
- The steps taken, or planned, by the party in breach to prevent future breaches of the Code
- The extent to which the party in breach has co-operated with, and supported the purpose of, the PhonepayPlus investigation.

After undertaking its analysis, and considering these and other factors, the Tribunal will determine the level of severity of the breaches, which are assessed within five bands – minor; moderate; significant; serious, and very serious. Aggravating and mitigating factors are assessed together, and their cumulative net effect might be to increase or reduce the severity level, or to have no impact on the severity level itself.

When considering breach history, the Tribunal will have regard to whether past breaches have been in respect of the same Code provisions as those presently being considered, and to the severity levels attributable to such past breaches. It will take into account any information available to it as to the compliance regime of the service provider, and its commitment to reducing the likely incidence of future breaches.

Having completed this analysis, the Tribunal will then consider sanctions appropriate to the breaches.

9. Range of Sanctions

PhonepayPlus has a range of sanctions on which it can draw, which are set out in paragraphs 2.6.1 and 8.9.2 of the Code, a full version of which can be found on our website at www.phonepayplus.org.uk.

The spectrum of sanctions for minor breaches ranges from informal advice, through formal reprimand, a requirement to remedy the breach and/or seek compliance advice, to a fine based on a portion of revenue received.

When the breach is more serious, the severity of the sanction will also increase. The spectrum then covers fines based on higher levels of service revenue, financial penalties and beyond this, barring and refunds – with additional sanctions of a requirement to seek prior permission for the service, or the barring of individuals responsible for the breach from operating in the premium rate industry for a defined period of time.

Refunds

The Tribunal may order a party in breach to issue refunds to complainants where there has been a serious breach of the Code and/or intent to mislead or defraud has been demonstrated. In practice the Tribunal will take into account when imposing a sanction whether the party in breach has already begun to issue refunds or intends to issue refunds.

PhonepayPlus¹ has set out the possible combinations of circumstances which are likely to order the trigger of an order for refunds. These are:

- there was an identifiable (and possibly excessive) financial detriment to individual consumers arising directly from a Code breach or breaches, and a consequential gain to the party in breach;
- there was a wilful intent by the service provider to deceive the consumer or engage in other forms of unconscionable conduct;
- the product or service was not supplied or was of a manifestly unsatisfactory quality;
- the marketing or promotional material was in some way fundamentally misleading and as a consequence consumers were misled into purchasing a service that they would not otherwise have wanted to purchase;
- the product was inappropriately priced to disguise the true cost to consumers which, had they been aware of it prior to purchase, would have significantly impacted on their decision to purchase. One example here is to describe the PRS as “free” when it clearly is not.

The Tribunal takes the view that whilst each case will need to be determined on its merits, the characteristics reproduced above are relevant guides to the likely situations where any combination would be likely to lead to the sanction of a refund being made.

Barring

The Tribunal has the ability to impose bars on the service provider. This can relate either to number ranges on which the service operates and/or particular service types and can be applied to some or all of the number range and/or service type – depending on the severity of the breach. Barring is always imposed for a defined period of time. The length of any bar is determined by the seriousness of the breach and all other relevant factors particular to the case.

¹ in its *Statement on the provision of refunds to consumers and the development of industry best practice for customer service* (published on 3 October 2006)

Fines

Fines can be imposed up to £250,000 per contravention and, if there is a series of contraventions arising out of the same incident, a fine can be imposed in respect of each individual breach. Fines will not necessarily be imposed in all cases but in cases where they are imposed, this is done so in a punitive capacity. The bands of case seriousness and the levels of fines they may attract are:

- Minor: up to £5,000
- Moderate: up to £20,000
- Significant: up to £50,000
- Serious: up to £100,000
- Very serious: up to the maximum of £250,000 per contravention

The fine levels set out above are approximations and are not absolutes. The seriousness rating of each breach is determined by examining the facts of the case for impact and culpability, and then taking into account all relevant mitigating and aggravating factors, all of which will have an effect on the level of fine imposed.

An example of a minor case might be where promotional material contained inadequate pricing information. Conversely, a very serious case might be where the promotional material is deliberately misleading in some fundamental way, for example. spam promotional material requesting that consumers call a premium rate number to prevent goods they had not ordered being delivered to them, or where promotional material is in breach of a law.

Fines in excess of £100,000

In very serious cases, the Tribunal may decide to apply a fine between £100,000 and £250,000. Some examples of this might include where:

- A service provider who was fined £100,000 or more for a particular service then essentially replicated the same or a similar service.
- The service in question is a replica or near replica of a service which PhonpayPlus has previously judged to be in breach of the Code and for which a fine of £100,000 or more had previously been applied to another service provider, and PhonpayPlus had published the adjudication on that service.

Fines per contravention

Following a decision by the Independent Appeals Body in July 2005, and following legal advice, PhonpayPlus has determined that in certain circumstances it can apply a sanction for each breach upheld, up to the maximum fine of £250,000 per breach. The decision to impose high fines for each contravention would occur in the most extreme cases where at least one breach attracts a £250,000 fine. An example would include where a service provider had already been sanctioned with the £250,000 fine and had then repeated the same or similar service. This would indicate a serious and wilful attempt to defraud or seriously mislead consumers with the full knowledge that its services were in breach of the Code. However, each breach will not necessarily attract the maximum fine, and any punitive sanction will be judged on the merits of the case.

Other sanctions

The Tribunal has available to it other sanctions designed to safeguard future compliance such as requiring a service provider to submit certain or all categories of service to PhonepayPlus for prior permission for a defined period

10. Applying Sanctions

When applying sanctions from the range available to it, the Tribunal will do so in a manner which:

- a. reflects the need to protect the consumer, and build consumer confidence in the premium rate services market;
- b. reflects the importance of the sanction impacting at the point in the value chain which is most likely to ensure future compliance with the Code;
- c. reflects the degree of responsibility for provision of the service in breach, or for managing the provider of such service;
- d. delivers the strongest safeguard that the breach of the Code in question is unlikely to be repeated;
- e. provides clarity and regulatory certainty as to the way the offending service, and services of a similar nature, are to be delivered in future.

11. Repeated Breaches of the Code

PhonepayPlus considers that sanctions imposed should protect consumers by acting as a deterrent against re-offending, and that where sanctions previously imposed have failed to prevent further breaches of the Code, it has the discretion to escalate its response in a number of different ways:

1. Repeated breaches may result in a limitation of the use of the Informal Procedure for subsequent minor breaches. It is clearly inappropriate to deal informally with a service provider that repeatedly offends, and if problems continue to arise with Code compliance, then breaches will be dealt with by the Executive under the standard procedure.

It should be remembered that the willingness of PhonepayPlus to use the Informal Procedure is always discretionary and will take account of the circumstances in the market place, and the over-arching need to sustain consumer trust in phone paid services, as well as the past performance of service providers and the robustness of their compliance regime.

2. Repeated breaches of a similar nature. Once an activity has been found in breach service providers are expected to take reasonable steps to prevent recurrence of such breaches either on their part, or where relevant, on the part of information providers with whom they have contracted. While the Tribunal will always take into account the individual circumstances of each case, including satisfying themselves that the breaches are of a similar nature, it has the discretion to escalate the overall impact rating into the next level of severity, and will do so in appropriate cases of repeat offending.

3. If the breach history of a service provider demonstrates material non-compliance with the Code, the Tribunal may impose a specified sanction, but suspend that sanction to afford the service provider the opportunity to demonstrate to the Executive that it has in place the systems and processes; and the supporting governance structure and resources, to better assure future compliance with the Code.

PhonepayPlus is willing to work proactively with a service provider affected by a suspended sanction to identify appropriate compliance systems and processes.

4. Service providers should be aware that use of the power in Section 8.7 of the Code – the ability for service providers to request that PhonepayPlus deals directly with the information provider - is discretionary. If a service provider demonstrates a persistent failure to take reasonable steps to comply with the Code and/or to encourage compliance by its information providers, and to exercise due diligence over information providers with a track record of repeat breaches, then PhonepayPlus may, after consulting the Tribunal, withdraw this discretion.

12. Implementation

The Tribunal will take into account as mitigation a short period of time for service providers to adjust their internal compliance arrangements, but will make no allowances for service providers where a breach of the same type has occurred across a range of information providers contracted to that service provider.

It is the responsibility of service providers to require all their information providers to comply with the terms of the Code, and to cease activity in breach of the Code for which they have been fined.

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