

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 18 February 2010  
TRIBUNAL SITTING No. 47/ CASE 3  
CASE REFERENCE: 822044/CB

Information provider:	Elite Communications UK Limited
Service provider:	Dialogue Communications UK Limited
Type of service:	Subscription Service (mobile content download)
Title:	121 Girls
Service numbers:	69022
Cost:	£1.50 per message.
Network operator:	All Mobile Network Operators
Number of complainants:	Executive monitoring

## THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

### BACKGROUND

On 25 September 2009, the 'Metro' newspaper carried a small promotion for the '121 Girls' subscription service operated by the information provider on shortcode 69022. It was an adult video download service and was promoted with the use of the word 'FREE'. As a result this was monitored internally by the PhonepayPlus Executive.

During the course of its monitoring the PhonepayPlus Executive was also concerned that the service had charged the Executive £10.50 in a seven day period without having the prior permission to charge above the £4.50 limit. Furthermore, the promotion in the 'Metro' newspaper used the word 'FREE' in such a way that when taken into account with the font size and lack of prominence of the pricing and subscription information was likely to have misled consumers into accessing the service and that the subscription initiation message sent to consumers was not a free text message as required.

### Monitoring

Monitoring of this service was conducted by the Executive on 21 October 2009 and highlighted several service issues that appear to be in breach of the Code.

The Executive noted the following non-compliant elements of the service that directly prompted breaches of the Code being raised:

- that the service had charged the Executive £10.50 in a seven day period without having the prior permission to charge above the £4.50 limit,
- that the promotion in the 'Metro' newspaper used the word 'FREE' in such a way that when taken into account with the font size and lack of prominence of pricing and subscription information was likely to have misled consumers into accessing the service, and

- that the subscription initiation message sent to consumers was not a free message as required.

The Executive wrote to the Service Provider on 11 November 2009 setting out the monitoring experience that the Executive had recorded and requested service information under paragraph 8.3.3 of the Code.

The Service Provider provided a response dated 19 November 2009 and notified the Executive that much of the service information had been provided directly by the Information Provider as they were directly operating the service.

### **The Investigation**

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive issued a breach letter to the Information Provider dated 22 December 2009 and received a formal response from the Information Provider on 8 January 2010.

The Tribunal made a decision on the breaches raised by the Executive on 18 February 2010, having heard an Informal Representation from the Information Provider.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)**

*“Service providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality.”*

1. The Executive submitted that it wrote to the Service Provider on 11 November 2009 with a preliminary investigation letter requesting information about the ‘121 Girls’ service. This was following a monitoring exercise that had shown that the service was being promoted as charging £4.50 per week however the monitoring phone was actually charged £10.50 within the seven day period.

The Executive submitted that it had asked the Service Provider to explain why this service had not got the required prior permission for charges over £4.50 in any seven day period. To which the Service Provider had responded that this had been set up in error and that its marketing team had wrongly assumed that the service was compliant and that they had selected the application which would not charge over £4.50 in any seven day period (and would include the correct 0844 number for customer service contact).

The Executive submitted that the Service Provider had not used all reasonable endeavours to ensure that the ‘121 Girls’ service was operating to the technical quality that would have been expected. This reasonable endeavour could have been simply to have tested the service to ensure that it was operating technically correct before going live.

2. The Information Provider stated that, in March 2009, the Code of Conduct had been amended to restrict charges to a maximum of £4.50 every seven days (without the requirement for prior permission) and that it had amended all of its subscription applications to be fully compliant with this new regulation. The revised application was fully tested and all subscription services were transferred to this new compliant version. Any new services were also assigned to the new application.

It stated that the old application which was set to bill the user £4.50 every three days and, importantly, was compliant with the Code up until the change in March 2009, should, in hindsight have been removed/withdrawn from its SMS Campaign Management System (CMS). Unfortunately a member of its marketing staff who was not fully familiar with SMS services was offered a 4x1 advertisement in the 'Metro' Newspaper at short notice. The advertisement was placed allocating the key words Hot3 and Gran9. Mistakenly these two key words were allocated to the old application.

The Information Provider addressed the Executive's point that the reasonable endeavour could have been simply to have tested the service to ensure that it was operating technically correct. It stated that it had been assumed that the application was the fully tested and compliant application. Furthermore, to have carried out a test prior to placing the inserts, with the relevant commands Hot3 and Gran9 would have resulted in waiting, in this instance seven days to ascertain if the billing was correct.

It also stated that such testing should not be carried out by personnel from the marketing team, but should be a technical responsibility. However a mistake was made and the Information Provider accepted that this incident had highlighted faults in this operational procedure and as a result of this isolated error it had now implemented the steps in its service establishment process.

Documented Change Control Process for all SMS products;

- All redundant/outdated SMS applications must be removed from the live CMS and signed off as deleted by the Product Development Manager.
- All new allocations of applications and Keywords must be signed off by the Product Development Manager and Advertising Manager.

Please note that all new SMS applications are tested internally and signed off as compliant by the Product Development Manager.

Service Establishment Procedure:

All new advertised services or application changes can only be implemented by operational/technical staff and must be tested in isolation before handover to the Marketing team. Sign off for testing must be obtained from the Product Development Manager.

3. The Tribunal considered the evidence and concluded that although a breach had occurred, it had been caused by human error in the Information Provider's marketing department rather than being caused by inadequate technical quality. The Tribunal did not uphold a breach of paragraph 3.3.3 of the Code.

**Decision: NOT UPHELD**

**ALLEGED BREACH TWO  
PRIOR PERMISSION (Paragraph 5.1.3)**

*“A breach of any condition imposed in connection with a permission granted by PhonepayPlus in accordance with this Code shall be a breach of the Code.”*

1. The Executive made reference to its monitoring exercise of the ‘121 Girls’ subscription service on 21 October 2009 that showed the Executive incurred charges of £10.50 within a seven day period. The Executive also submitted that the service was promoted in the ‘Metro’ newspaper as costing £4.50 per week and this pricing expectation had been confirmed by the Information Provider (directly in the response dated 19 November 2009).

The Executive submitted that in January 2009, PhonepayPlus had informed industry that it was bringing in a requirement that no subscription services which charge over £4.50 in any seven day period may be provided without prior permission having been granted from 4 March 2009.

The Executive submitted that neither the ‘121 Girls’ service nor the shortcode 69022 had been subject to an application from the Service Provider for prior permission to be granted and the service had been found to be billing £10.50 in a seven day period.

2. The Information Provider stated that a new application was created to comply with the new guidance on 4 March 2009.

It stated that these changes were implemented and applied to all the existing services in operation. However, its technical team did not remove the outdated (non compliant) application from its SMS Campaign Management System (CMS) and had not renamed it appropriately to identify it as a non compliant application. In September 2009 a member of its marketing team created a new promotion and inadvertently selected and activated the wrong application on the CMS, which they assumed was a compliant service. This is the only time a non compliant application was inadvertently activated and as soon as it came to light the service was immediately withdrawn.

3. The Tribunal considered the evidence and concluded that the subscription service had operated with a charge of £4.50 without Prior Permission contrary to the Notice to Industry dated 4 March 2009. However, it found that the wording of paragraph 5.1.3 of the Code related to any condition imposed in connection with a Prior Permission that had already been granted and did not apply when there was no Prior Permission at all. The Tribunal did not uphold a breach of paragraph 5.1.3 of the Code.

**Decision: NOT UPHELD**

**ALLEGED BREACH THREE  
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

*“Service and promotional material must not mislead, or be likely to mislead, in any way”*

1. The Executive submitted that the '121 Girls' service was promoted in the 'Metro' for a period of four weeks being 25/09/009 to 16/10/2009. The promotion that appeared in the newspaper measured 4cm by 3cm.

It submitted that the promotion informed consumers that by texting the keywords 'HOT3' or 'GRAN9' to the shortcode 69022 they would receive a free 'BABE' or 'GRAN' video. The size of the font used in providing this information was large in comparison to the terms and conditions which contained the vital information to enable a consumer to make an informed decision.

The information within the terms and conditions stated as follows:

*'Box50285 EC3P 3WY.69022 1 vid free.Subscription 65p/day unlimited, billed £4.50 every 7 days.Send STOP to 69002 Help0845 059 0508'.*

It submitted that this information was provided in such a small font that it was not reasonable to expect that consumers would have a) noticed this information and b) been able to read the information even if it had been seen.

The Executive submitted that it was of the opinion that the use of the word 'FREE' on two separate occasions when taken into account the size of the subscription and pricing information displayed within this promotion would have been likely to have misled consumers into texting the keywords to the shortcode 69022. This would have been carried out with the misconception that a video would have been supplied without any charges (premium rate) having been incurred.

The Executive submitted that its monitoring exercise had shown that it was not possible to receive a 'FREE' video from the service without entering the subscription service.

2. The Information Provider stated that this promotion (HOT3 and GRAN9) was only run in the 'Metro' newspaper for four daily insertions and only because its internal monitoring of marketing material had highlighted that the small font size was an issue for the consumer. The advertisement was cancelled immediately and the 'Metro' withdrew the advert from print as soon as was possible.

It stated that the regulatory issues on marketing SMS services were quite complex and any SMS advertising was placed by experienced members of staff. Unfortunately on this occasion late space was offered to a member of staff who did not normally place SMS advertisements. As soon as this was spotted by our more experienced advertising staff the advertisement was removed.

In future only its Marketing Manager (who is experienced with SMS services and the regulations) must sign off any SMS advertisements prior to placement.

It stated that the use of the word 'FREE' has also been withdrawn from all promotional material and would not be used again.

3. The Tribunal considered the evidence and concluded that the use of the word 'FREE' combined with the relatively smaller size of the pricing information was likely to have misled consumers into thinking that if they were to text one of the keywords to the

shortcode they would receive some free content (without charge). The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR  
PRICING INFORMATION (PROMINENCE) (Paragraph 5.7.2)**

*“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.”*

1. The Executive submitted that the ‘121 Girls’ service promotion that appeared in the ‘Metro’ newspaper on 25 September 2009 contained pricing information that was not easily legible or prominent, and to read and understand required extremely close examination.

It submitted that the promotion had clearly displayed the information that enabled consumers to send the keyword into the shortcode which resulted in charges being incurred instantly from the service, however the prominence of this information was not replicated through within the terms and conditions which contained the following pricing information:

*“Box50285 EC3P 3WY.69022 1 vid free.Subscription 65p/day unlimited, billed £4.50 every 7 days.Send STOP to 69002 Help0845 059 0508.”*

2. The Information Provider stated that this promotion (HOT3 and GRAN9) was only run in the ‘Metro’ newspaper for four daily insertions and only because its internal monitoring of marketing material had highlighted that the small font size was an issue for the consumer. The advertisement was cancelled immediately and the ‘Metro’ withdrew the advert from print as soon as was possible.
3. The Tribunal considered the evidence and concluded that, the pricing information as seen in the promotion that was published in the Metro (Appendix A\_822044), was not easily legible or prominent and had required close examination on the part of the user. It also found that this had been exacerbated by the larger font that had provided the keywords and the shortcode with which to send them to. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FIVE  
SUBSCRIPTION SERVICE (PROMOTIONAL MATERIAL) (Paragraph 7.12.3a and b)**

*“Promotional material must:*

*a) clearly indicate that the service is subscription-based.*

*This information should be prominent and plainly visible and/or audible to consumers,*

*b) ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible”*

1. The Executive submitted that the ‘121 Girls’ service promotion that appeared in the ‘Metro’ newspaper on 25 September 2009 was presented in such a manner that the terms and conditions which contained the subscription information about the service were not clearly visible to potential consumers due to the size of the font used.

The following information was presented at the bottom of the promotion:

*‘Box50285 EC3P 3WY.69022 1 vid free.Subscription 65p/day unlimited, billed £4.50 every 7 days.Send STOP to 69002 Help0845 059 0508’.*

The Executive submitted that paragraph 7.12.3a stated that the promotional material for a subscription service should be prominent and plainly visible to consumers and that it was of the opinion that although the required information was present within the terms and conditions, the size of the font used within the advertisement had prevented consumers from clearly being made aware of the subscription element of the service until they had sent the opt-in keyword.

The Executive also submitted that the promotional material should ensure that the terms of use of the subscription service should be clearly visible. The Executive submitted that it was of the opinion that due to the size of the font used within the advertisement, the requisite subscription information had not been provided in a manner that made this clearly visible to consumers.

2. The Information Provider stated that this promotion (HOT3 and GRAN9) was only run in the ‘Metro’ newspaper for four daily insertions and only because its internal monitoring of marketing material had highlighted that the small font size was an issue for the consumer. The advertisement was cancelled immediately and the ‘Metro’ withdrew the advert from print as soon as was possible.
3. The Tribunal considered the evidence, namely the promotion that was published in the ‘Metro’ (Appendix A\_822044) and concluded that the subscription element of the service had not been prominent and plainly visible. It also found that the terms and conditions of the service had not been clearly visible. The Tribunal upheld a breach of paragraph 7.12.3a and b of the Code.

**Decision: UPHELD**

#### **ALLEGED BREACH FIVE**

##### **SUBSCRIPTION SERVICE (PROMOTIONAL MATERIAL) (Paragraph 7.12.4a-f)**

*“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:*

- a) name of service,*
- b) confirmation that the service is subscription-based,*

- c) *what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent,*
- d) *the charges for the service and how they will or can arise,*
- e) *how to leave the service,*
- f) *service provider contact details.”*

1. The Executive submitted that it monitored the ‘121 Girls’ subscription service on 21 October 2009.

The Executive submitted that it had sent the keyword ‘HOT3’ to the shortcode and received the following text message response which was reverse billed at a cost of £1.50:

*“Welcome2, 121 Girls. U will receive a link 4 unlimited access 2 pics + videos 4 only £1.50 a day. 2 stop send STOP to 69022. 4 help 2 recv ur pics 08713102037”*

It submitted that this message was the subscription initiation text message as required by the Code however it had failed to comply due to it being charged at a cost of £1.50 and was not free as per the requirement.

The Executive also submitted that paragraph 7.12.4 of the Code also required that the information set out within a-f was also present in the free subscription initiation text message. It stated that it was of the opinion that this text message had not explicitly contained a confirmation of the service’s subscription status (7.12.4b). It also stated that it had concerns that the billing information provided within the message being ‘£1.50 a day’ was not accurate and was inconsistent with both the print promotion and the Executive’s monitoring experience (7.12.4c).

The Executive submitted that due to the fact that the service text message had been charged, the Information Provider had failed to meet the requirements under paragraph 7.12.4 a-f of the Code in their entirety.

2. The Information Provider stated that this was the only time a non compliant application was activated and as soon as it came to light the service was immediately withdrawn. There was no deliberate intention to mislead or run a non-compliant service. This service was activated in error. The advertisement was also cancelled as soon as marketing anomalies were identified internally. This service operated for a very short period of only four daily insertions and only generated 129 messages in total.
3. The Tribunal considered the evidence and concluded that the subscription initiation text message had been charged at £1.50 and had not been free as required under the Code. The Tribunal upheld a breach of paragraph 7.12.4a-f of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

In determining the sanctions appropriate for the case, the Tribunal took into account the following aggravating factors:

- Subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive's investigation.
- The Information Provider asserted to have offered refunds to consumers.
- The Information Provider's proactive response and its subsequent level of engagement in working with the Executive.

The revenue in relation to this service was in the mid range of Band 6 (£1-£5,000).

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **moderate**.

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
- The Tribunal commented that it expected claims for refunds to continue to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

The Tribunal noted the Information Provider's willingness to work with the Executive and decided that copy advice was not necessary.

Appendix A – The promotion on its own

**FREE BABE MOVIE!**  
**TXT HOT3 To 69022**

**FREE GRAN VID!**  
**TXT GRAN9 To 69022**

H0C0265.ECSP 3NY69022 1 vid free Subscription 55p/day unlimited, billed £4.50 every 7days. Send STOP to 69022. Help:0845 053 0508

The promotion on as seen in the Metro

**TO LET**  
**N LUXURY WEST END APARTMENTS**  
 Part of London's West End. Just off...  
 • Air-Conditioning  
 • Under-Floor Heating  
 • Italian Designer Kitchens  
 • Contemporary Bathrooms  
 • Passenger Lift

**Forest Hill SE23**  
 2 bed purpose built flat, newly decorated...  
**0787 6255424**

**Spiritual**  
**Mr Habib**  
 Specialist for love, domestic family problems, success in...  
**020 8279 0703**

**Spiritual**  
**Mr Ayub Hydrara**  
 A Gifted African Healer & Advisor...  
**020 8586 8735**

**Pay After Positive Results**  
**Shelkh Lania**  
 30 Yrs of Experience...  
**020 8534 8006**

**El Haeji Yaqub**  
 International Chiropractic and God (Allah) African spiritual healer...  
**07981 016 817**

**Prof Khalifa**  
 International spiritual healer with 28 years experience...  
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 Clear debts of up to **£25K** and challenge:  
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 • credit cards • debt collection • court action  
 Highly Cost Effective - Small Initial Payments  
**NO HIDDEN COSTS OPEN 7 DAYS A WEEK**  
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**Health and Beauty**  
**The London Women's Clinic**  
 Expenses paid for sperm donation  
**020 7563 4306**

**Relaxing Massage**  
 Professional Oriental Massage 100% relieve tension and stress...  
**079 8822 8816**

**Reborn UK Massage**  
 Chinese, Thai, European Therapies Available...  
**0717 407635**

**CHAT OR DATE 10p**  
**WOMEN CHAT**  
 per min FREE!  
**0800 076 6888**

**Are you looking for no-strings fun?**  
**Text PENNY to 69996 for pics.**

**CHAT OR DATE 10p**  
**Men Across America**  
**0871 989 9797**

**CHAT OR DATE 10p**  
**Live Gay/BI Chat**  
**0871 989 9797**

**CHAT OR DATE 10p**  
**Asian Chat**  
 In Hindi & English  
**0800 076 6888**

**CHAT & MEET 5p**  
**MOBILE CALLERS: 60241**

**Noticeboard**  
**SIA Security Training**  
 Door Supervision Now £45  
 Level 2 CCTV Now £145  
 Physical Intervention £295  
 Close Protection Now £1395  
**02074216180**

**FREE BABE MOVIE!**  
**TXT HOT3 To 69022**

**FREE GRAN VID!**  
**TXT GRAN9 To 69022**