

IN THE PHONEPAYPLUS ORAL HEARING TRIBUNAL

IN THE MATTER OF:

PHONEPAYPLUS LTD

-v-

2ERGO LIMITED

**ADJUDICATION BY CONSENT
("CONSENT ORDER")**

Introduction

1. This consent order shall relate to the matter under PhonepayPlus case references 845069, 845942, 845962 and 845965, and the oral hearing listed for determination on 14th, 15th and 16th December 2011. The oral hearing was requested by 2ergo Limited in respect of the above four cases.
2. This consent order is made following acceptance by 2ergo of liability for the all breaches set out in the Statement of Case herein and acceptance by the Executive that those breaches arose primarily from Information Provider sources. This order further sets out the agreement of both parties as regards the sanctions to be imposed on 2ergo Limited and as to where costs should fall.
3. The agreed sanctions have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the twelfth edition of the PhonepayPlus Code of Practice.

Sanctions

4. The sanctions hereby agreed by the parties in respect of each of the four cases are as follows:-
 - 4.1 Cell Serv. Limited
 - 4.1.1 £20,000 fine.
 - 4.1.2 Formal Reprimand.

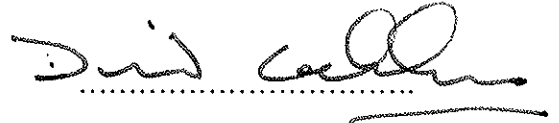
- 4.1.3 Remedy breach by seeking and implementing compliance advice on the services (and all services) to the satisfaction of the Executive.
- 4.1.4 Refunds to complainants who make a valid claim.
- 4.2 8398 Limited
 - 4.2.1 £20,000 fine.
 - 4.2.2 Formal Reprimand.
 - 4.2.3 Remedy breach by seeking and implementing compliance advice on the services (and all services) to the satisfaction of the Executive.
 - 4.2.4 Refunds to complainants who make a valid claim.
- 4.3 TXT PROMOS. LTD
 - 4.3.1 £20,000 fine.
 - 4.3.2 Formal Reprimand.
 - 4.3.3 Remedy breach by seeking and implementing compliance advice on the services (and all services) to the satisfaction of the Executive.
 - 4.3.4 Refunds to complainants who make a valid claim.
- 4.4 Expanding Vision Limited
 - 4.4.1 £10,000 fine.
 - 4.4.2 Formal Reprimand.
 - 4.4.3 Remedy breach by seeking and implementing compliance advice on the services (and all services) to the satisfaction of the Executive.
 - 4.4.4 Refunds to complainants who make a valid claim.
- 5. The total fine in respect of the four cases is, therefore, to be £70,000.
- 6. All fines are to be paid within 7 days of this Order.

Costs

- 7. Each party is to bear its own costs.

Oral Hearing date

8. The oral hearing dates of 14th, 15th and 16th December 2011 are vacated.

A handwritten signature in black ink, appearing to read 'David Cockburn', written over a dotted line. The signature is cursive and somewhat stylized.

David Cockburn (Chair)
On behalf of the Oral Hearing Tribunal
1 December 2011

IN THE PHONEPAYPLUS ORAL HEARING TRIBUNAL

PHONEPAYPLUS LIMITED (“PPP”)

v.

2ERGO LIMITED (“2Ergo”)

STATEMENT OF CASE FOR THE EXECUTIVE

Introduction

1. Investigations took place following complaints concerning a number of services provided by four Information providers contracted with 2Ergo.

1.1 The Information providers, services (with the number of complaints shown in brackets) and shortcodes concerned were as follows:-

Cell Serv Ltd

Case Ref: 845069

Shortcode(s)	82023
	87085
	87448

Services	The Music Site	(5)
	Xtramob	(3)
	Xmob	(7)
	Quiz 500	(2)
	GUAC Pub Quiz	(5)

1.2 Expanding Vision Ltd

Case Ref: 845942

Shortcode	85066	
Service(s)	Utext	(1)

1.3 TXT Promos Ltd

Case Ref: 845965

Shortcode	82023	
Service(s)	Jukeboxmob	(1)

1.4 8398 Ltd

Case Ref: 845962

Shortcode	82023	
	83023	
	84025	
	80333	
	80039	
Service(s)	Make me Risk Quiz	(9)
	Club3mobile	(3)
	321Quiz	(14)
	Technical Quiz	(8)
	Moola	(4)
	Well good quiz for cash	(1)

2. 2Ergo requested that PPP should deal directly with the Information Providers concerned pursuant to paragraph 8.7 of the Code of Practice (11th Edition) (“the Code”). The request was declined.
3. Following the provision of letters from PPP setting out the apparent breaches of the Code, the response to those breaches by 2Ergo and the refusal of PPP to deal directly with the Information providers, 2Ergo provided notices requiring an oral hearing in respect of each of the cases referred to above.
4. Cell Serv Ltd

4.1 Paragraph 3.2.2 of the Code – Provision of information:

“Service providers must provide to PhonpayPlus without delay such information as it may require for any purpose relating to this Code [...]”

The provision then sets out a non-exhaustive list of such information.

PPP are entitled to request information in accordance with paragraph 8.3.3 of the Code during investigations or as part of the adjudication process. Failure to provide information so requested fully and accurately will amount to a breach of paragraph 3.2.2.

4.1.1 2Ergo failed to provide full and accurate information in that:

4.1.1.1 In respect of the message log for MSISDN [REDACTED] (a complainant in respect of the Xmob service). 2Ergo firstly supplied through its Customer

Service Team a message log and subsequently provided a second log from [REDACTED] of 2Ergo (Annexes 4.1 and 4.2 respectively).

These logs differ in various respects, and specifically:

26 February – message is different in each log;

1 March 2010 – Annex 4.2 shows a free message received, which does not appear at Annex 4.1;

22 March 2010 – Annex 4.1 shows migration from the Xmob service to the Xtra-mob service which is not shown in Annex 4.2. In addition there are numerous free subscription services in Annex 4.2 between 22 April 2010 and 22 July 2010 which are not shown in Annex 4.1.

4.1.1.2 Various message logs were provided by 2Ergo at the request of PPP. Those which related to complainants on the Vodafone network were independently verified and there are numerous discrepancies between those logs provided by 2Ergo on the one hand and by the independent verifier on the other. (Annex 4.3 and 4.4. respectively). Taking MSISDN [REDACTED] (a complaint in respect of Quiz 500) as an example specific differences are as follows:

- The 2Ergo message log shows that on 16/01/2010 the consumer received a free message from shortcode 87448 subscribing that consumer to Quiz 500. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 16/01/2010 the consumer received a free subscription reminder message. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 26/02/2010 the consumer received four free messages and a reverse billed SMS from shortcode 87448. These are not shown on the independently verified message logs;
- The 2Ergo message logs shows that on 12/02/2010 the consumer received a premium rate charged transaction from shortcode 87448. This is not shown on the independently verified message logs;

- The 2Ergo message log shows that on 12/03/2010 the consumer received a free message. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 16/03/2010, 16/04/2010, 16/05/2010 and 16/06/2010 the consumer received a free message which appears to be the subscription reminder message. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 17/04/2010 the consumer received a premium rate charged transaction from shortcode 87448. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 17/05/2010 the consumer received a free message and billed message from shortcode 87448. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 17/06/2010 the consumer received a free message and a billed message from shortcode 87448. Only the free message is shown on the independently verified message logs;
- The 2Ergo message log shows that on 16/07/2010 and 17/07/2010 the consumer received free messages. The independently verified message logs only show the free message sent on 17/07/2010;
- The 2Ergo message log shows that on 17/07/2010 the consumer received a premium rate charged transaction from shortcode 87448. This is not shown on the independently verified message logs;
- The 2Ergo message log shows that on 16/08/2010 and 17/08/2010 the consumer received free messages. The independently verified message logs only show the free message sent on 17/08/2010.
- On 17/08/2010 the independently verified message log shows that the consumer sent an MO text message (potentially STOP). This is not evidenced on the 2Ergo message log;
- The 2Ergo message log shows that on 16/09/2010 and 17/09/2010 the consumer received free messages. The independently verified message logs only show the free message sent on 17/09/2010.

- On the 17/09/2010 both the 2Ergo and the independently verified message logs made reference to an MO text message sent by the consumer. The 2Ergo log confirms this as STOP.

4.1.2 It is apparent that full and accurate information was not supplied by 2Ergo pursuant to PPPs requests.

Accordingly a breach of paragraph 3.2.2 has occurred.

4.2 Paragraph 5.1.1 – Prior Permission

“PhonepayPlus may require that particular categories of service must not be provided without its prior written permission for any service within that category [...].”

4.2.1 Cell Serv Ltd operated three services which were subscription services at £5 per subscription charge. These were:

- The Music Site
- Xmob
- Xtra mob

4.2.2 By notice of 22 January 2009 PPP informed the industry that:-

“Providers offering mobile subscription services charging over £4.50 in any given week..... must first apply for permission from PPP.”

This requirement came into force on 4 March 2009.

Annex 4.5 contains a PPP help note and two notices which specifically relate to this particular requirement for prior permission.

4.2.3 Annex 4.6 contains screenshots in respect of the services listed above showing that they are in excess of £4.50 per charge.

4.2.4 Prior permission was not obtained for these services, although the subscription charge at a single charge of £5 was a charge greater than £4.50 in a given week.

Accordingly, breaches of paragraph 5.1.1 have occurred.

4.3 Paragraph 5.4.1 - Fairness

“Services and promotional material must not:-

(a) mislead, or be likely to mislead in any way,

(b) take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”

4.3.1 The complaints in respect of the Cell Serv Ltd services are herewith at annex 4.7.

The complainants more or less universally assert that they have not requested the services for which they have been charged.

4.3.2 The possibility that charges can be imposed on consumers by premium rate providers such as 2Ergo without them having chosen to engage in a service is a characteristic or circumstance that makes consumers vulnerable. 2Ergo imposing charges in such circumstances amounts to taking unfair advantage of that vulnerability.

The consumers have been charged without having chosen to receive the services and accordingly breaches of paragraph 5.4.1(b) have occurred.

In the alternative if the complainants did enter voluntarily into any of the Cell.Serv.Ltd services then they did so in error in that they did not intend to enter the services and they were misled or likely to have been misled. Accordingly breaches of paragraph 5.4.1(a) have occurred.

4.4 Paragraph 7.6.5

“Except where there are only instant prize winners, promotional material for competition services must state when the competition closes [...]”

4.4.1 In the service Quiz 500 the conditions of service do not state when the competition closes.

4.4.2 The relevant screen shots are at Annex 4.8.

Accordingly a breach of paragraph 7.6.5 has occurred.

4.5 Paragraph 7.12.5

“Once a month, or every time a user spent £20, if that occurs in less than a month, the information required under 7.12.4 above must be sent free to subscribers.”

Paragraph 7.12.4 requires, inter alia, notification that the service is subscription based and must provide information on how to leave the service.

4.5.1 In respect of MSISDN [REDACTED] (see Annex 4.3 and 4.4 above) it can be seen that, whilst the 2Ergo log shows free subscription reminder messages were sent to this MSISDN, the independently verified message logs demonstrate that free messages were not sent. See in particular entries for 16/03/2010, 16/04/2010, 16/05/2010 and 16/06/2010.

Accordingly a breach of paragraph 7.12.5 has occurred.

5. Expanding Vision Ltd

5.1 Paragraph 3.2.2 of the Code – Provision of information:

“Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code [...]”

The provision then sets out a non-exhaustive list of such information.

PPP are entitled to request information in accordance with paragraph 8.3.3 of the Code during investigations or as part of the adjudication process. Failure to provide information so requested fully and accurately will amount to a breach of paragraph 3.2.2.

5.1.1 The complainant in respect of this service has MSISDN [REDACTED].

Annex 5.1 which contains at:

- 5.1.1.1 The screen shots of the services
- 5.1.1.2 The complaint
- 5.1.1.3 Log provided by a former staff member of 2Ergo ('first 2Ergo log')
- 5.1.1.4 Log provided by 2Ergo in response to PPP request
- 5.1.1.5 Independent verifier's log.

It can be seen that there are various discrepancies between the logs. In particular on various dates both the first 2Ergo log and the independent verifier's log show charges (taking only the period June 2009 to February 2010) which do not appear on the logs supplied by 2Ergo at PPP's request – see, for example, 24/06/2009, 03/07/2009, 27/07/2009, 20/08/2009. In addition, the log provided by 2Ergo at PPP's request shows free messages received at the end of every month. However, such messages do not show on either the first 2Ergo log or the independent verifier's log.

The information provided by 2Ergo is incomplete and inaccurate.

Accordingly a breach of paragraph 3.2.2 has occurred.

5.2 Paragraph 5.4.1(b) – Fairness

“Services and promotional material must not:

- (a)

- (b) *take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”*

According to information supplied to PPP by Hutchinson 3 Mobile, additional charges were made to customers on various 2Ergo shortcodes which were used by Expanding Vision Ltd:

80039
87085
83023
84025
85066

This has been identified by 3 Mobile as having taken place in July, August, November and December 2009, and January, February and June 2010. Data showing this (imposing additional to charges which had already been levied for the same services) are shown in annex 5.2.

Consumers have on numerous occasions, by reason of these charges, been charged twice for a single service. Consumers were not aware that this had been occurring and were made vulnerable by reason of the fact that 2Ergo was in a position to charge them twice without their knowledge. 2Ergo took unfair advantage of their circumstance of vulnerability. A breach of paragraph 5.4.1(b) has occurred and continued over a considerable period.

6. Txt Promos Ltd

6.1 Paragraph 3.2.2 of the Code – Provision of information:

“Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code.”

The provision then sets out a non-exhaustive list of such information.

PPP are entitled to request information in accordance with paragraph 8.3.3 of the Code during investigations or as part of the adjudication process. Failure to provide information so requested fully and accurately will amount to a breach of paragraph 3.2.2.

- 6.1.1 The former Head of Investigations at PPP [REDACTED] received promotional messages from <http://mobicgames.uk.com> on a PPP monitoring phone [REDACTED]. Information was sought as to how the phone had opted into receiving promotional messages and 2Ergo responded with a message log. On 19 July 2010 [REDACTED] asked 2Ergo to confirm that the message log sent showed all activity of MSISDN [REDACTED] and 2Ergo responded with a full message log. The full message log contained two messages which had

been missing from the earlier message log received on 20 April 2010. It also demonstrated a WAP-push link received on 12 June 2010. The Information provider for that service was Cell Serv. This appeared to indicate a sharing of information between Cell Serv. Ltd and Txt Promos Ltd which had not been requested or authorised by the consumer.

Annex 6.1 contains:

- Log first provided by 2Ergo
- Second log provided by 2Ergo
- Screen shots from WAP-push connection.

6.1.2 It is apparent that full and accurate information was not supplied by 2Ergo pursuant to PPPs first request.

Accordingly a breach of paragraph 3.2.2 has occurred.

6.2 Paragraph 5.1.1 – Prior Permission

“PhonepayPlus may require that particular categories of service must not be provided without its prior written permission for any service within that category [...]”

6.2.1 Txt Promos Ltd operated the Jukeboxmobile service which was a subscription service at £5 per subscription charge.

6.2.2 By notice of 22 January 2009 PPP informed the industry that:

“Providers offering mobile subscription services charging over £4.50 in any given week ... must first apply for permission from PPP”.

This requirement came into force on 4 March 2009.

Please see Annex 4.5 for a PPP Help Note and two Notices specifically relating to this particular requirement for prior permission.

6.2.3 Annex 6.2 contains screen shots in respect of the service Jukeboxmobile showing that these subscription charges are in excess of £4.50 per charge.

6.2.4 Prior permission was not obtained for this service although the subscription charged at a single charge of £5 was a charge greater than £4.50 in a given week.

Accordingly a breach of paragraph 5.1.1 has occurred.

6.3 Paragraph 5.7.1 - Pricing

“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”

It is apparent from the screen shots at Annex 6.2 that the cost of the Jukeboxmobile service is not shown. The home page does not provide a link to terms and conditions. The log showing usage by the complainant shows that the first message was a charged premium message and the first time the user would have been informed of the £5 per month charge would have been on receipt of the reverse billed SMS message to the mobile handset.

Accordingly a breach of 5.7.1 has occurred.

6.4 Paragraph 7.12.4 – Subscription initiation.

“Users must be sent a free initial subscription message containing the following information before 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.”*

At Annex 6.2 the message log for the complainant ([REDACTED]) demonstrates that the first message received was at a premium rate cost on 13/06/2010.

Accordingly a breach of paragraph 7.12.4 has occurred.

6.5 Paragraph 7.12.5 – Subscription reminders

“Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers”

As can be seen in Annex 6.2 the complainant (MSISDN [REDACTED]) received a first message at premium rate cost on 13 June 2010 at 13.26. The complainant did not

successfully STOP the service until 15/07/2010 and in that period no free message in accordance with paragraph 7.12.5 was provided.

Accordingly a breach of paragraph 7.12.5 has occurred.

7. 8398 Ltd

7.1 Paragraph 3.2.2 of the Code – Provision of information:

“Service provider must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code. [...]”

The provision then sets out a non-exhaustive list of such information.

PPP are entitled to request information in accordance with paragraph 8.3.3 of the Code during investigations or as part of the adjudication process. Failure to provide information so requested fully and accurately will amount to a breach of paragraph 3.2.2.

Annex 7.1 contains the following:

- 7.1.1 contains details of complaints in respect of the “Make me Rich Quiz” service together with message logs also provided by 2Ergo.
- 7.1.2 contains screenshots for the “Club 3 Mobile” service together with complaints and a message log provided by 2Ergo.
- 7.1.3 contains screenshots for “321 Quiz” together with complaints and message logs provided by 2Ergo.
- 7.1.4 contains screenshots for “Technical Quiz” service together with the complaints and message logs supplied by 2Ergo.
- 7.1.5 contains screenshots for the “Moola Moola” service together with details of complaints and message logs also supplied by 2Ergo.
- 7.1.6 contains screenshots for “Well Good Quiz” together with a message log supplied by 2Ergo.
- 7.1.7 contains independently verified message logs in respect of certain Vodafone users (shown together with 2Ergo logs).

7.1.1 2Ergo failed to provide full and accurate information. Various message logs were provided by 2Ergo as shown in the Annexes above. Those which related to

complaints on the Vodafone network were independently verified and there are numerous discrepancies between those logs provided by 2Ergo on the one hand and by the independent verifier on the other. Taking MSISDN [REDACTED] (321 Quiz) as an example, specific differences are as follows:

- The first MO message on 21/01/2010 at 09.55 was to 84228, not 80333. Only a single free to receive message being sent on 21/01/2010, the independent verifier's log shows six £1.50 messages were sent from 84228 within a few seconds of each other at 9.55.
- On 15/05/2010 2Ergo show one premium rate message from 80333. The independent verifier's log shows two premium rate messages at £1.50 each, one at 20.01 and a second one at 20.30.
- On 23/06/2010 a charged premium rate message is shown in the independent verifier's log sent from 80333 which does not appear on the 2Ergo log.
- On 23/07/2010 a premium rate message is shown on the independent verifier's log sent from 80333 but does not appear on the 2Ergo log.
- On 14/08/2010 a premium rate message is shown on the independent verifier's log as sent from 80333 but does not appear on the 2Ergo log.

It is apparent that full and accurate information was not supplied by 2Ergo pursuant to PPPs requests.

Accordingly a breach of paragraph 3.2.2 has occurred.

7.2 Paragraph 5.1.1 of the Code – Prior Permission:

“PhonepayPlus may require that particular categories of service must not be provided without its prior written permission for any service within that category [...]”

7.2.1 8398 Ltd was operating the service “Well Good Quiz Win Cash” (shortcode 82023) which was a subscription service at £5 per subscription charge.

7.2.2 By notice of 22/01/2009 PPP informed the industry that:

“Providers offering mobile subscription services charging over £4.50 in any given week must first apply for permission from PhonepayPlus”

This requirement came into force on 4 March 2009.

Annex 4.5 above contains a PPP Help Note and two Notices which specifically relate to this particular requirement for prior permission.

- 7.2.3 Annex 7.1.6 contains a screenshot of the terms and conditions which shows a charge of £5 for subscription.
- 7.2.4 Prior permission was not obtained for this service although the subscription charge at a single charge of £5 was a charge greater than £4.50 in a given week.

Accordingly a breach of paragraph 5.1.1 has occurred.

7.3 Paragraph 5.4.1 – Fairness

“Services and promotional material must not:-

- (a) mislead or be likely to mislead in any way*
- (b) take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.”*

7.3.1 The complaints in respect of these services are in Annexes 7.1.1 to 7.1.6.

The complainants are universally certain that they have not requested the services for which they have been charged.

- 7.3.2 The possibility that charges can be imposed on consumers by premium rate providers such as 2Ergo without them having chosen to engage in a service is a characteristic or circumstance that makes consumers vulnerable. Imposing charges in such circumstances is taking unfair advantage of that vulnerability.

The consumers have been charged without having chosen to receive the services and accordingly breaches of paragraph 5.4.1(b) have occurred.

In the alternative if the complainants did enter voluntarily into any of the 8398 Ltd services then they did so in error in that they did not intend to enter the services and they were misled or were likely to have been misled. Accordingly breaches of paragraph 5.4.1(a) have occurred.

7.4 Paragraph 5.7.1 – Pricing

“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”

- 7.4.1 The screenshots of the “Technical Quiz” service at annex 7.1.4, show that there was no pricing information on the site when it was visited by PPP.

Accordingly a breach of paragraph 5.7.1 has occurred.

7.5 Paragraph 7.6.5 – Competitions

“Except where there are only instant prize winners, promotional material for competition services must state when the competition closes. [...]”

7.5.1 The Well Good Quiz for Cash screenshots at Annex 7.1.6 include the terms and conditions and do not state when the competition closes.

7.5.2 In respect of the Moola Quiz the screenshots are at Annex 7.1.5. Again, the terms and conditions do not provide a closing date for the competition.

Accordingly breaches of paragraph 7.6.5 of the Code have occurred.

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Bates Wells & Braithwaite London LLP

Solicitors for PhonepayPlus

26 October 2011