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

**Thursday 1 September 2011**
**TRIBUNAL SITTING No. 84 / CASE 2**
**CASE REFERENCE: 01921**

Network Operator: All Mobile Network Operators

Service Provider: Echovox SA, Geneva, Switzerland

**THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE**

## BACKGROUND

### *The Executive's Monitoring of the 'Redmobile' Android Mobile Application 'Sexipix'*

In May and June 2011, PhonepayPlus' Research and Monitoring Team were in the process of monitoring a wide range of Android mobile application services promoted to consumers (the "App(s)").

One such App, observed initially via in-app banner advertisements, was noted to be produced by a developer called 'Redmobile' and was branded 'Sexipix'. Further investigations revealed that 'Sexipix' was one of three Apps that were marketed under the name 'Redmobile', all of which functioned in a very similar way.

The monitoring evidence gathered in relation to the 'Sexipix' App was put together in a slide presentation by the Monitoring Executive. This monitoring was undertaken on:

1. Version 1.0 of the Sexipix App, on 1 June 2011; and
2. Version 1.4 of the Sexipix App, on 2 and 7 June 2011

The following key points were identified for version 1.0 of the Sexipix App on 1 June 2011:

- The service was available on the 'Mikandi' Android app marketplace;
- The name given for the 'Developer' was 'Redmobile', with the email address, 'echovox69@gmail.com' and the website address, 'echovox.com';
- The App was advertised as a 'free' App and the description of the service gave no information relating to the premium rate service element, the pricing, or the frequency of the charges;
- The 'Mikandi' Android app marketplace page, offering an 'install' and 'cancel' option, contained some information regarding standard 'permissions' given on downloading the App;
- The Executive observed that, upon opening the App for the first time, a mobile terminating (the "MT") premium short message service (the "PSMS") message was received by the monitoring handset and the monitoring phone account incurred a charge of £1.50. The shortcode used to obtain the initial credit was 69686;
- Pricing information was not visible on the page when the App was opened, but was revealed when scrolling down: "*Credit: 3 1.50 GBP / SMS received – 1 SMS/day*". This was the first and only observation of any form of pricing information in relation to version 1.0 of the Sexipix App; and
- The Executive viewed three photographs. When attempting to view a fourth photograph, the screen faded out and a circular timer appeared for a lengthy period. At this time, the

App sent a text message and received a further charge to enable the fourth picture to be viewed clearly, and for further pictures to be viewed. The Executive observed that shortcode 88999 was used to obtain this additional credit.

The following key points were identified for version 1.4 of the Sexipix App on 2 June 2011 and 7 June 2011:

- The service was available on the 'Mikandi' Android app marketplace;
- The name given for the 'Developer' was 'Redmobile', with the email address: 'echovox69@gmail.com' and the website, 'echovox.com';
- The App was advertised as a 'free' App and the description of the service gave no information relating to the premium rate service element, the pricing, or the frequency of the charges;
- The 'Mikandi' Android app marketplace page, offering an 'install' and 'cancel' option, contained some information regarding standard 'permissions' given on downloading the App;
- The Executive observed that, on opening the App for the first time after installation, the monitoring phone account incurred a charge of £1.50. The monitoring handset did not show the messages sent and received by the monitoring phone account. However, the charges appeared on the monitoring phone bill dated 2 Jun 2011;
- Terms and conditions were available on the home page of version 1.4 of the Sexipix App. If the user scrolled to the bottom of the page, instead of viewing the pictures shown at the top, the pricing information stated: "*The service is published by Redmobile and charged 1.50 GBP per sms + price of a normal sms, entitling to download three images. The user can always download additional images through the issuance of an additional SMS. User's Sexipix account will be credited each day through an sms.*" This was a clearer description of pricing than that which appeared in version 1.0 of the Sexipix App;
- The Executive viewed images on the App on 2 June 2011 and incurred further charges at 16:19 and 16:20. After the last charge, the App showed '3' credits available. These were not used by the Executive, who exited the App but left the phone switched on;
- The Executive opened the App again on Monday, 7 June 2011, videoing the process at the same time. The App showed the user had '6' unused credits on this version of the App. The Executive observed that the monitoring phone bill had incurred a further charge over the weekend, on Sunday 5 June 2011; and
- The Executive clicked through and viewed six pictures. The Executive selected a seventh picture to view. A circular timer appeared for a lengthy period and the screen faded out in the background. The phone received a charge to enable further pictures to be viewed. The monitoring handset did not show the messages sent and received by the monitoring phone account. However, the charges appeared on the monitoring phone bill dated 7 June 2011.

Version 1.4 of the Sexipix App appeared to operate in a way that was capable of billing consumers without interaction with the App itself. The recurring charge described in the terms and conditions originated from this function of the App.

The Executive considered that the service was set up so that consumers ought to pay £1.50, plus the cost of a standard rate text message, each day as a minimum cost. This charge topped up the App by '3 credits' each day and enabled three pictures to be viewed. The service did not restrict usage to the number of credits held, but enabled the consumer to obtain additional credits through in-app billing.

On Sunday, 5 June 2011, the monitoring phone bill showed that charges were incurred as a result of an outgoing mobile originating (the "MO") message and an MT and PSMS

message being received. The handset was switched on in the PhonepayPlus office over the weekend, but it was not manned by any staff. No interaction with the handset occurred, yet charges were made. This was in keeping with the terms and conditions stating, "*user's Sexipix account will be credited each day through an sms*". However, the daily charges were not regular, as some days, such as Saturday, 4 June 2011, did not show any charges. This remained unexplained.

The Executive accessed the internal logs for the monitoring handset activity on 7 June 2011 using the 'Android SDK toolkit'. The Executive observed references to the handset's activity relating to the App, including "*Obtaining credit via 69686*".

In a letter dated 27 June 2011, the Executive asked the Service Provider for an explanation of the coding relating to the operation of the App. The answer given did not give details of the coding information required.

The Service Provider indicated that, to opt-out of the service, the user needed to uninstall the App. The monitoring evidence showed the absence of any clear instructions as to cancelling the premium rate service in any of the Apps monitored.

***Complaints received by PhonepayPlus***

The complaints received were small in number; however, they were consistent with relevant aspects of the monitoring evidence gathered. The records from the PhonepayPlus database in relation to the two complaints were supplied.

The Investigations Executive noted the comments made by one of the complainants who stated that:

"*I've not used my phone for anything at all. I've spoke* (sic) *to Echovox and they said that I had sent 10 texts to the number but I have not I was at work at the time. Vodafone have said that the 10 texts left my phone at exactly the same time how can that happen?*"

The complainant appeared to be confused by the charges and the fact that any texts sent appeared to have been issued by the App, and not by the consumer typing a message and choosing to send it to the relevant shortcode. This was consistent with the monitoring, which showed that the App controlled the outgoing and incoming messages.

The Service Provider was fully aware of how the App functioned, and the Investigations Executive observed that the information supplied to the complainant was unhelpful given that it was the App which controlled the issuance of SMS messages from the handset, although the complainant had been informed by the Service Provider that he had sent the messages. The user experience did not therefore match the explanation given by the Service Provider.

The second complaint received by PhonepayPlus indicated that 'Redmobile' Apps were available via other promotional mechanics. The example given by the second complainant was found on the website 'xhamster.com' and was of the form of a pop-up banner advertisement. This complainant contacted PhonepayPlus on 2 June 2011 and, on or about, the same day he incurred the charges.

The PhonepayPlus records for the second complainant stated that: "*The consumer clicked a banner advertisement…The advert was called 'striptease'. When he clicked on it without any warning it downloaded on his phone. He opened the App, and without any warning started receiving text messages from 69686…*" This was consistent with the Executive's monitoring of the Sexipix Apps.

The Monitoring Executive subsequently located and tested the 'Striptease' App. The Executive found three versions of the Striptease App, including version 1.6, which was the version found by the second complainant through advertising and was viewed by the Monitoring Executive on 14 June 2011. The other two versions of the App were numbered 1.5 and 5 and were viewed by the Monitoring Executive in or around the same period in June 2011.

**THE INVESTIGATION**

The case was allocated to the Investigations Team on 21 June 2011.

On 27 June 2011, the Investigations Executive issued its first letter to the Service Provider, requesting information under paragraph 8.3.3 of the Code. The Executive sought the suspension of the service and the Service Provider confirmed that this had occurred on 28 June 2011.

The Executive sought clarity as to the nature of the service developer as part of its request for information under paragraph 8.3.3 of the Code. In its second email of 28 June 2011, the Service Provider confirmed that the service had been suspended but referred to 'Redmobile' as its client.

On 1 July 2011, the Service Provider sent an email to the Executive in response to the Executive's letter of 27 June 2011. The Executive noted that it had requested information regarding the coding for the Apps and how they functioned, so as to automatically trigger the charges. Instead of giving such an explanation, the Service Provider provided only the Android disclaimer associated with the Apps. On 22 July 2011, the Executive sent an email to the Service Provider and asked for more information on this issue; however, nothing further was supplied.

The responses provided by the Service Provider on 1 July 2011 suggested that 'Redmobile' was, in fact, a brand name used by the Service Provider itself. The Executive considered that, despite the Service Provider referring to 'Redmobile' as a client in its email of 28 June 2011, there was no evidence of a client operating 'Redmobile' services. The service therefore appeared to be operated and promoted by the Service Provider.

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

The Executive sent a breach letter to the Service Provider on 16 August 2011 and raised alleged breaches of the Code under paragraphs 5.1.1, 5.4.1(a), 5.7.1, 5.8, 7.12.2, 7.12.3 and 7.12.4.

The Tribunal reached a decision on the Code breaches raised by the Executive on 1 September 2011.

**PRELIMINARY MATTER**

1. Prior to considering the breaches of the Code alleged by the Executive, the Tribunal was invited by the Executive to consider whether this service was a subscription-based service under paragraph 7.12.1 of the Code, as a decision in this regard would have an impact on potential breaches of paragraphs 5.1.1, 7.12.2, 7.12.3, and 7.12.4 of the Code.

   The Executive noted that the Code states in **paragraph 7.12.1**:

   "*Subscription services are those which incur a recurring premium rate charge.*"

The 'Redmobile' Apps included terms and conditions which advertised a recurring premium rate charge, stating in version 1.0 of the Sexipix App: *"1.50 GBP / SMS 1 SMS/day"* (Appendix A). Version 1.4 of the Sexipix App put the pricing within longer terms and conditions, stating that "*user's Sexipix account will be credited each day through an sms*" (Appendix B).

The evidence gathered by the Executive showed charges being levied without user interaction on Sunday, 5 June 2011 and Tuesday, 8 June 2011 – showing that Version 1.4 of the 'Sexipix' App was capable of triggering the daily charge.

The Executive noted that the Service Provider did not explicitly indicate that the service was a subscription-based service. However, in response to the letter from the Executive dated 27 June 2011, the Service Provider indicated that the only way of terminating the service was to uninstall the App.

According to the terms and conditions for the App, the minimum charge for the service was seven text messages in any seven-day period. This equated to £10.50 per week.

The service did not restrict users to only '3 credits' per day, which were awarded for the set cost of £1.50. As indicated in the terms and conditions for version 1.4 of the Sexipix App: "*the user can always download additional images through the issuance of an additional SMS*". This was observed by the monitoring evidence found during investigation of the service. Where three images were viewed and the user attempted to click on to another picture, the App would, without further warning, issue the required text message and levy a further charge to add an additional '3 credits' to the user's account.

The Executive submitted that this did not remove the recurring premium rate charge element of the service, but instead was an additional element to the subscription-based service.

For the reasons stated above, the Executive considered that this service was a subscription service under paragraph 7.12.1 of the Code.

2. In its response to this preliminary matter, the Service Provider accepted that this was a service which incurred a recurring charge.

   However, the Service Provider confirmed that a disclaimer was already installed within Android, which alerted end-users to the fact that the service was *"Services that cost you money"*.

   The Service Provider also stated that the Terms & Conditions for the App indicated that the end-user's account would be credited £1.50 each day. The Service Provider confirmed that this amounted to a charge of £10.50 and conceded that the maximum allowed in the UK was £4.50 per week. The Service Provider confirmed that it had changed the settings for the App so that end-users' accounts could be credited £1.50 every three days, although the service had been suspended in the UK and refunds were being provided to all end-users that had contacted the Service Provider's helpdesk, "Tango".

3. The Tribunal concluded that the service was a subscription service within the meaning of paragraph 7.12.1 of the Code, as it incurred a recurring charge and it noted that the Service Provider had accepted this.

**SUBMISSIONS AND CONCLUSIONS**

**ALLEGED BREACH ONE**
**PRIOR PERMISSION (Paragraph 5.1.1)**

*"PhonepayPlus may require that particular categories of service must not be provided without its prior written permission for any service within that category. PhonepayPlus will give reasonable notice of such a requirement and the category of service to which it applies, and will publish a full list of such service categories from time to time. Prior permission may be granted subject to the imposition of additional conditions. Such permission may be withdrawn or varied upon reasonable grounds and with notice in writing."*

1. The Executive stated that, where a service is found to be a subscription service (as defined in paragraph 7.12.1 of the Code) carrying a subscription charge which costs a consumer more than £4.50 in any seven-day period, PhonepayPlus requires the service provider to apply for prior permission before launching the service. This is widely known in the industry, and has been publicised by the Executive since its adoption on 4 March 2009. The Service Provider appeared to have not obtained any prior permission for the service in breach of paragraph 5.1.1 of the Code.

   The Executive relied on evidence set out above relating to the preliminary matter to establish this service was a subscription service under paragraph 7.12.1 of the Code.

   The service was advertised as including a recurring daily charge and the accumulation of seven charges made the weekly subscription fee £10.50. The service therefore required prior permission.

   The Executive observed that the 'Redmobile' Apps functioned on an additional pay-per-view basis, incurring further charges on top of it being a subscription-based service, and would therefore also require prior permission to include additional conditions associated with such services.

2. The Service Provider responded by admitting the breach. The Service Provider had noticed that a mistake had been made and changed its subscription charges from £1.50 per day to £1.50 every three days. These changes had been implemented at the beginning of April 2011.

3. The Tribunal considered the evidence and found that, as this was a subscription service incurring a recurring charge of greater than £4.50 in any seven-day period, prior permission would have been required to operate the service prior to the Service Provider's alteration to the subscription charge at the beginning of April 2011. The Tribunal therefore concluded that, since prior permission had not been sought to operate the service, a breach of paragraph 5.1.1 of the Code had occurred. The Tribunal noted that, even after the change in billing frequency at the beginning of April 2011, prior permission was still required, as the service was, in effect, a pay-per-view service, which is another category of service that requires prior permission.

**Decision: UPHELD**

**ALLEGED BREACH TWO**

**FAIRNESS (MISLEADING) (PARAGRAPH 5.4.1a)**

*"Services and promotional material must not: a mislead, or be likely to mislead in any way..."*

1. The Executive acknowledged that there was some overlap between the issues considered here in regard to a potential breach of paragraph 5.4.1(a), and those considered specifically in relation to the apparent lack of pricing information and the potential breach of paragraph 5.7.1 of the Code. However, this potential breach was considered primarily in regard to the consumer experience when selecting the Apps and downloading them to the smartphone.

   The Executive submitted that the consumer was, or was likely to be, misled in relation to the nature of the service, which may have resulted in the consumer choosing to download the Apps without any knowledge or understanding of the premium rate service or how the payment mechanics associated with the Apps would function.

   The information that was available to the consumer before installing the Apps did not mention that the service involved any premium rate charges. The Executive submitted that the service promotion was misleading because of the omission of key facts relating to the subscription element, how it operated, and the basis for the premium rate charges associated with the Apps themselves.

   The Executive considered the following key factors as relevant in relation to the monitoring evidence for all the 'Redmobile' Apps:

   - All the Apps were advertised as "free" (Appendix C);
   - Before downloading the Apps, the description given did not include any reference to premium rate services, shortcodes or premium rate numbers, or the cost of the service;
   - There was also no reference to premium rate services, shortcodes or premium rate numbers after downloading the Apps until after the first premium rate charge had been incurred;
   - The standard 'permissions' required to be accepted prior to downloading the Apps made reference to *'services that cost you money'* (as illustrated with respect to the 'Sexipix' App at Appendix D). This was a standard permission required where the Apps controlled outgoing and/or incoming messages (although this would not have been evident to many consumers). The Executive submitted that *'cost'*, as referred to in the standard permissions, did not equate with, *'premium rate service'* or *'premium rate charges'.* It may simply have referred to standard rate messages that were consumer-led when operating the Apps, or to specific in-app billing costs, which may be optional in nature in relation to other apps on the market. Therefore, the Executive considered that this was insufficient information to notify consumers of the true nature of the service.

   The consumer was therefore misled, or likely to be misled, into selecting the Apps and downloading them without any knowledge or understanding of the premium rate service, or how the payment mechanic associated with the Apps would function. This was based on both the information that was provided and the key information that was omitted from promotional material.

The Executive stated that both complainants suggested that they did not expect the charges that they incurred in association with the 'Striptease' App. The second complainant specifically raised *'misleading pricing'* as a concern. The PhonepayPlus record for this complainant stated:

"*He opened the App, and without warning started receiving text messages from 69686, which billed him £2.25. The text messages had no pricing information or customer help line on there. The consumer claims there isn't any pricing displayed on the advert or app.*"

The Executive submitted that this promotional material misled, or was likely to mislead, as set out above, and was therefore in breach of paragraph 5.4.1(a) of the Code.

2. The Service Provider's response was that downloading the Apps was free. The charge for viewing the pictures was £1.50 for every three pictures and this was indicated in the Android disclaimer which stated *"Services that cost you money"* The Service Provider admitted that it had received some complaints about this in-app billing mechanism and stated that it had offered full refunds. The Service Provider further informed the Executive that it had stopped the MT for these services, although the application was still sending the MOs at a charge of £0.12 each. The Service Provider said that it would refund all complainants, but it had never received any bank or PayPal details to implement such refunds.

3. The Tribunal considered the evidence and concluded that the term *"free"* was misleading as end-users were charged immediately upon downloading the Apps, and no part of the service was actually free. The Tribunal further concluded that the term *"Services that cost you money"* in the Android disclaimer was not sufficient to make the fact, nature and cost of the subscription charges clear.

**Decision: UPHELD**

**ALLEGED BREACH THREE**
**PRICING INFORMATION (COST) (PARAGRAPH 5.7.1)**

*"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."*

1. The Executive observed from monitoring all the 'Redmobile' Apps that the initial charge for the service was triggered by opening the Apps for the first time following completion of the download process.

The Executive assessed the pricing information that was supplied to consumers prior to that charge being incurred.

In relation to Version 1.0 of the 'Sexipix' App, no pricing information was supplied in any promotional material.

The first (and only) indication of price was found when the Executive opened the App and scrolled down the homepage. The Executive found this pricing information to be unsatisfactory, as it did not fully inform the consumer clearly and straightforwardly of the cost of using the service. Notwithstanding this observation, the Executive considered that the breach had already arisen as the initial charge had already incurred prior to this point.

In relation to Version 5 of the 'Dedipix' App, the Executive found that no pricing information was supplied in any promotional material (Appendix E).

The first indication of price was found when the Executive opened the App and scrolled down on the homepage (Appendix F). This pricing information was submitted to be unsatisfactory because it did not fully inform the consumer clearly and straightforwardly of the cost of using the service. Notwithstanding this observation, the Executive considered that the breach had already arisen as the initial charge had already incurred prior to this point.

The Executive referred also to confirmation given by the second complainant regarding the lack of pricing information in relation to Version 1.6 of the 'Striptease' App. In this version of the App, no pricing information was supplied in any promotional material (Appendix G). The first indication of price was, in fact, found when the Executive opened the App and scrolled down on the homepage (Appendix H). This pricing information was clearer to read and interpret, although it was buried in the terms and conditions. Notwithstanding this observation, the Executive considered that the breach had already arisen as the initial charge had already incurred prior to this point.

A potential aggravating factor in relation to this breach was the fact that the service could be accessed by users selecting pictures on a pay-per-view basis and without the user needing to scroll down the homepage. The user was not, therefore, guaranteed to view pricing information at any point prior to incurring further charges, beyond the initial charge that was triggered by opening the App.

This service therefore appeared to operate in breach of paragraph 5.7.1 of the Code.

2. The Service Provider responded by apologising and admitting that a mistake had been made. The Service Provider admitted that end-users would have to scroll down the homepage in order to read the pricing information.

3. The Tribunal considered the evidence and concluded that in all the App versions the consumer had not been fully informed of pricing before incurring a charge. The Tribunal noted that this breach was admitted by the Service Provider. The Tribunal concluded that a breach of paragraph 5.7.1 of the Code had occurred.

**Decision: UPHELD**

**ALLEGED BREACH FOUR**
**CONTACT INFORMATION (PARAGRAPH 5.8)**

*"For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user."*

1. The Code requires the identity of the service provider or information provider to be clearly stated. The Executive submitted that use of the name 'Redmobile' was considered to be unhelpful, since the Service Provider was Echovox SA based in Geneva. The Executive noted the email address used by the 'Developer' contained reference to 'Echovox', but was not an official email account for the business. While there was reference to the Echovox website, it was not made clear that these services were operated and promoted by Echovox SA.

While 'Redmobile' may have been a project run by part of the Echovox business, the Executive submitted that the Code provision required the identity of the Service Provider to be clearly stated and this was not provided for in these Apps.

Further to the above, the Service Provider is required to provide clear contact details in the UK, including the required non-premium rate number for customer services. The Service Provider confirmed that there was no non-premium rate customer service phone number provided for these services. The only contact details given for 'Redmobile' was a Googlemail account, 'redmobileapp@gmail.com'.

2. The Service Provider's response was that it did not realise that the contact information had to be shown clearly.

3. The Tribunal considered the evidence and concluded that the provision of an email address was, on its own, not sufficient for the purposes of complying with paragraph 5.8 of the Code. The full identity of the Service Provider, Echovox SA, had not been provided and the required non-premium rate phone number for consumers had not been provided. The Tribunal concluded that there had been a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FIVE**
**LEAVING A SUBSCRIPTION SERVICE ('STOP' COMMAND) (PARAGRAPH 7.12.2)**

*"It must always be possible for a user to leave a subscription service by using the 'STOP' command."*

1. The Executive stated that, where the service was found to be a subscription service under paragraph 7.12.1 of the Code, the service was required to comply with the other paragraph 7.12 provisions of the Code.

The Service Provider had indicated in its response to the Executive's letter dated 27 June 2011 that the only way to cancel the service was to uninstall the Apps.

The Executive submitted that all the Apps were designed to trigger premium rate charges without user interaction and, by way of example this was observed on the monitoring handset for the charges levied on Sunday, 5 June 2011 with respect to the 'Sexipix' App. Where the App itself triggered further charges without the consumer's knowledge or interaction, it was not possible to stop the App at any time before a further charge could be incurred and it was not possible for the consumer to leave the subscription service at all without the removal of the App itself.

The Executive submitted that the 'STOP' command function would technically work as normal, but the App would initiate further charges, thereby continuing the recurring charges for the subscription service. It therefore seemed as though the consumer could not leave the subscription service by using the 'STOP' command. Paragraph 7.12.1 of the Code is not concerned with this successful technical process, but rather with the overall operation of the service and the consumer's ability to control and terminate any subscription services to which they were associated.

The Executive submitted that this appeared to be in breach of paragraph 7.12.2 of the Code.

The Executive further considered that the absence of instructions given to consumers in relation to the need to uninstall the App to prevent further charges was an

aggravating factor; however, this was partly dealt with in relation to the potential breach of paragraph 7.12.3 below.

2. The Service Provider responded by stating that there was no way to apply the 'STOP' command within the Android platform. The Service Provider further confirmed that the consumer would have to uninstall the App to leave the service.

3. The Tribunal considered the evidence and concluded that the 'STOP' command, even when used, did not enable users to leave the subscription service (as evidenced by the Executive's monitoring of the service). In addition, the Tribunal noted that no other information was provided as to how the user could leave the service. The Tribunal concluded that a breach of paragraph 7.12.2 of the Code had occurred.

**Decision: UPHELD**

**ALLEGED BREACH SIX**
**SUBSCRIPTION SERVICES (PROMOTIONS) (PARAGRAPH 7.12.3)**

*"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 he terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible, c advertise the availability of the 'STOP' command."*

1. The Executive stated that, where the service was found to be a subscription service under paragraph 7.12.1 of the Code, the service was required to comply with the other paragraph 7.12 provisions of the Code.

   While the evidence was taken from the monitoring of versions 1.0 and 1.4 of the 'Sexipix' App, the breach applied to all versions and brands of the 'Redmobile' Apps.

   The Executive submitted that the key information required in all promotional material used to advertise subscription services was missing from the consumer experience leading up to the downloading of the App.

   The Executive considered that the first indication of a subscription-based service was found when scrolling down on the landing page of the App.

   The Executive submitted that this information was supplied too late in the consumer experience to meet the obligations set out in the Code. Furthermore, the information was not presented in a way which was either clear to understand or clearly visible.

   As indicated above, the service did not enable proper use of the 'STOP' command, and it also failed to advertise the only means by which the subscription service could be cancelled, which was to uninstall the App itself.

   The Executive submitted that the service operated in breach of paragraph 7.12.3 of the Code.

2. The Service Provider responded by admitting that it did not advertise the fact that the App should be uninstalled in order to stop the subscription service.

3. The Tribunal considered the evidence and found that all three elements of paragraph 7.12.3 of the Code had not been complied with as the promotional material did not clearly indicate that the service was subscription based; the promotional material did not ensure that the terms of use of the subscription service were clearly visible; and the promotional material did not advertise the availability of the 'STOP' command.

The Tribunal also noted that there was no information provided as to how to leave the service. The Tribunal concluded that there had been a breach of paragraph 7.12.3 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH SEVEN**

**SUBSCRIPTION INITIATION MESSAGE (PARAGRAPH 7.12.4)**

*"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 stated that, as the service was found to be a subscription service under paragraph 7.12.1 of the Code, the service was required to comply with the other paragraph 7.12 provisions of the Code.

   The Executive submitted that users did not at any time receive a free initiation subscription message containing the requisite information set out in paragraph 7.12.3 of the Code. The messages, observed by the Monitoring Executive, were charged subscription service messages.

   The Executive submitted that the service appeared to operate in breach of paragraph 7.12.4 of the Code.

2. The Service Provider's response was that the Android disclaimer appeared to end-users shortly before downloading the Apps and provided information about the service by stating *'Services that cost you money'*.

3. The Tribunal considered the evidence and concluded that there was no free initial subscription text message which contained the information required to comply with paragraph 7.12.4 of the Code.

**Decision: UPHELD**

**SANCTIONS**

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

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

- The behaviour of the Service Provider had been reckless in relation to its failure to take any steps to ascertain and comply with relevant UK rules on the use of its Apps;

- The nature of the service (particularly the use of in-app billing without clear pricing information) was capable of undermining consumer confidence in the app market and the use of premium rate services;

- The cost of the subscription service had the potential to be high, as consumers were able to view several pictures without knowledge that they were being charged for viewing them;

- Concealed subscription services have been singled out for criticism by PhonepayPlus; and

- The breach history of the Service Provider.

In mitigation, the Tribunal noted the following factor:

- The Service Provider had stated that it would offer refunds to complainants.

The revenue in relation to this service was in the low range of Band 5 (£5,000 to £50,000).

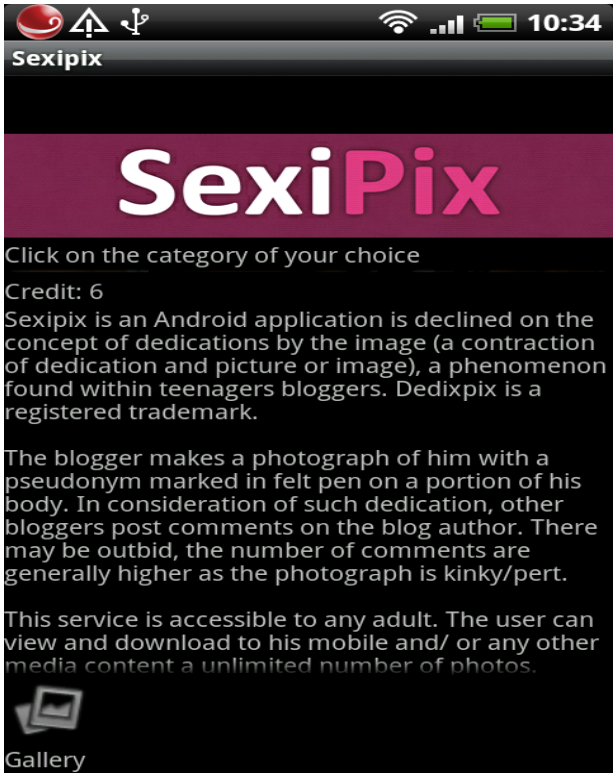
Having taken into account the aggravating factors and the mitigating factor, and also the revenue generated by the service, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

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

- A Formal Reprimand;
- A £30,000 fine (compromising a £20,000 fine and a £10,000 uplift for a similar breach history);
- A bar on the service and related promotional material until the Service Provider seeks and implements compliance advice to the satisfaction of the Executive; and
- Claims for refunds should continue to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

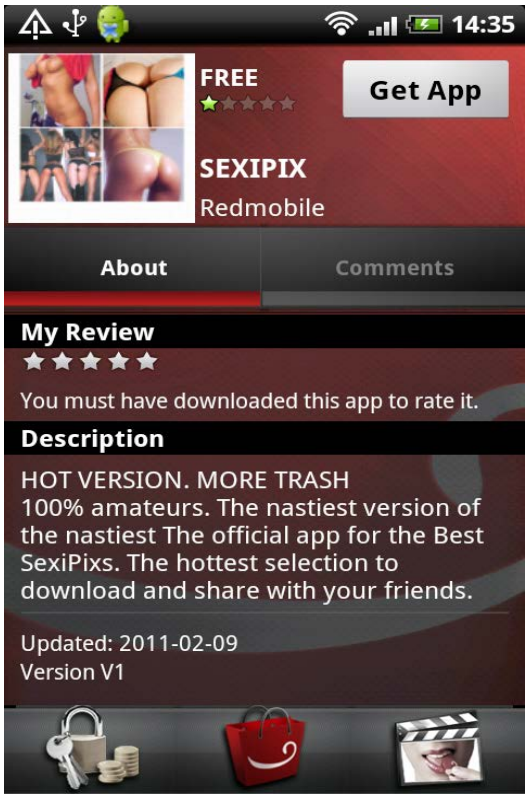
**Appendix A – Screenshot of version 1.0 of 'Sexipix' App showing terms and conditions**

**Appendix B – Screenshots of version 1.4 of 'Sexipix' showing terms and conditions**

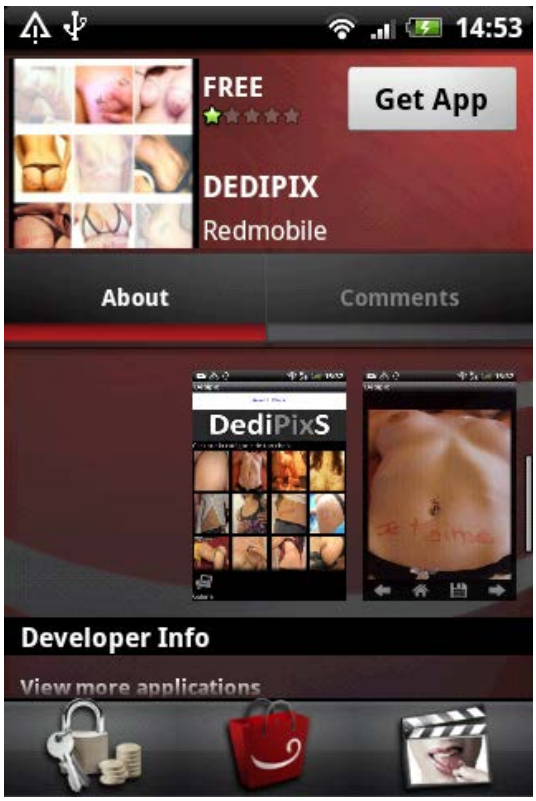



**Appendix C – Screenshots of all Apps, advertised as 'free'**

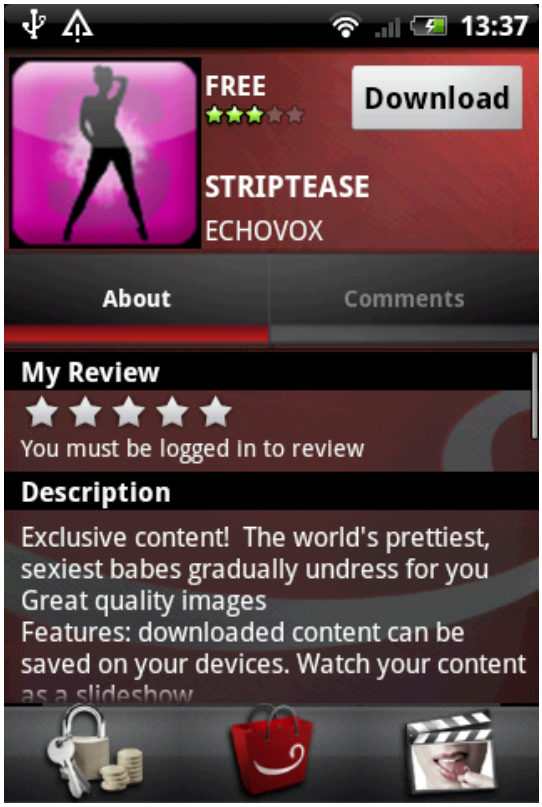
**'Sexipix'**



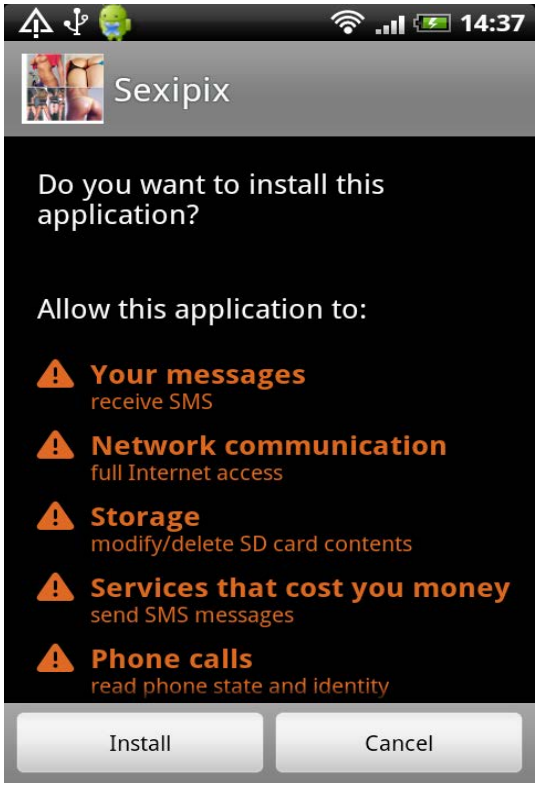

**'Dedipix'**

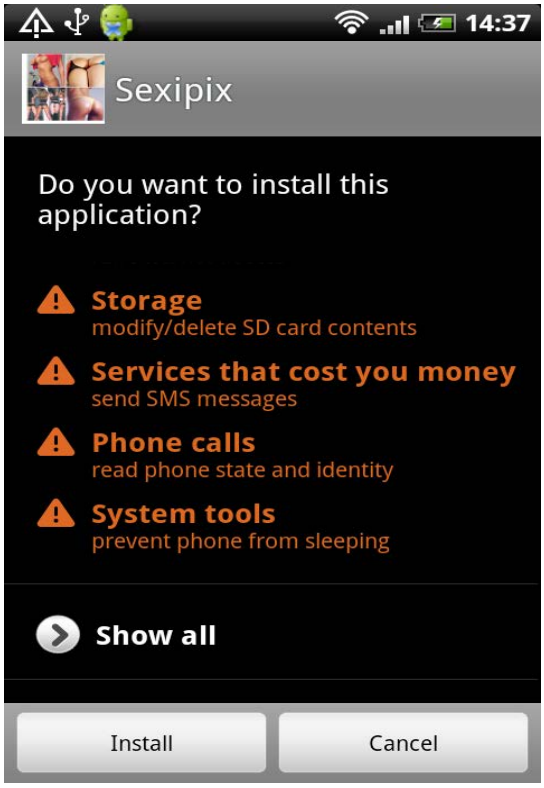


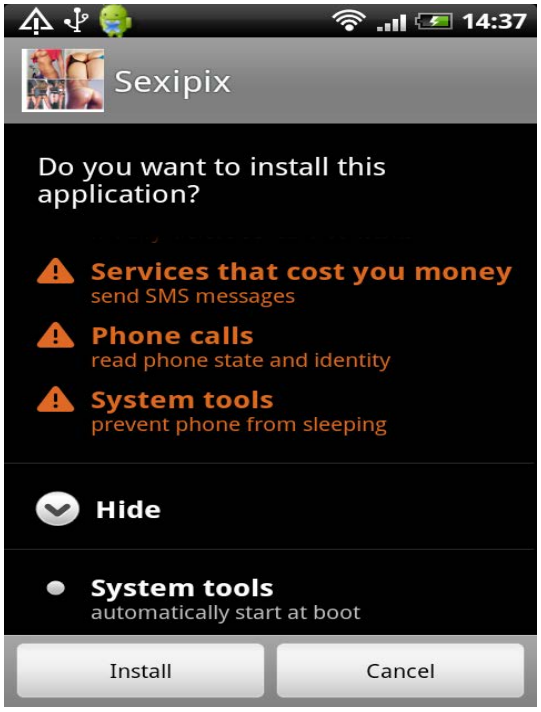

**'Striptease'**



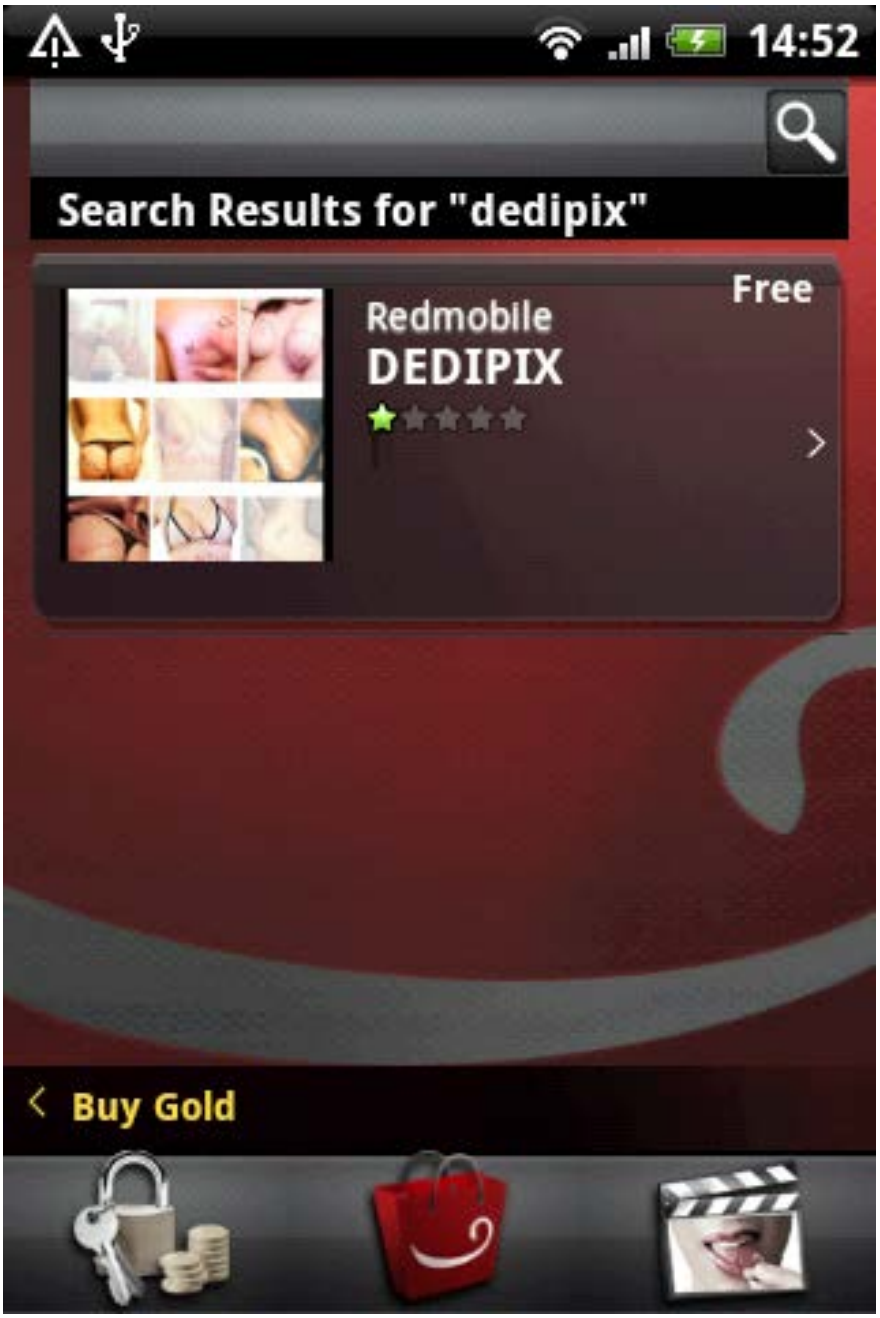
**Appendix D – Screenshot of 'standard permission' (or Android disclaimer) indicating that the Apps are 'services that cost you money'**



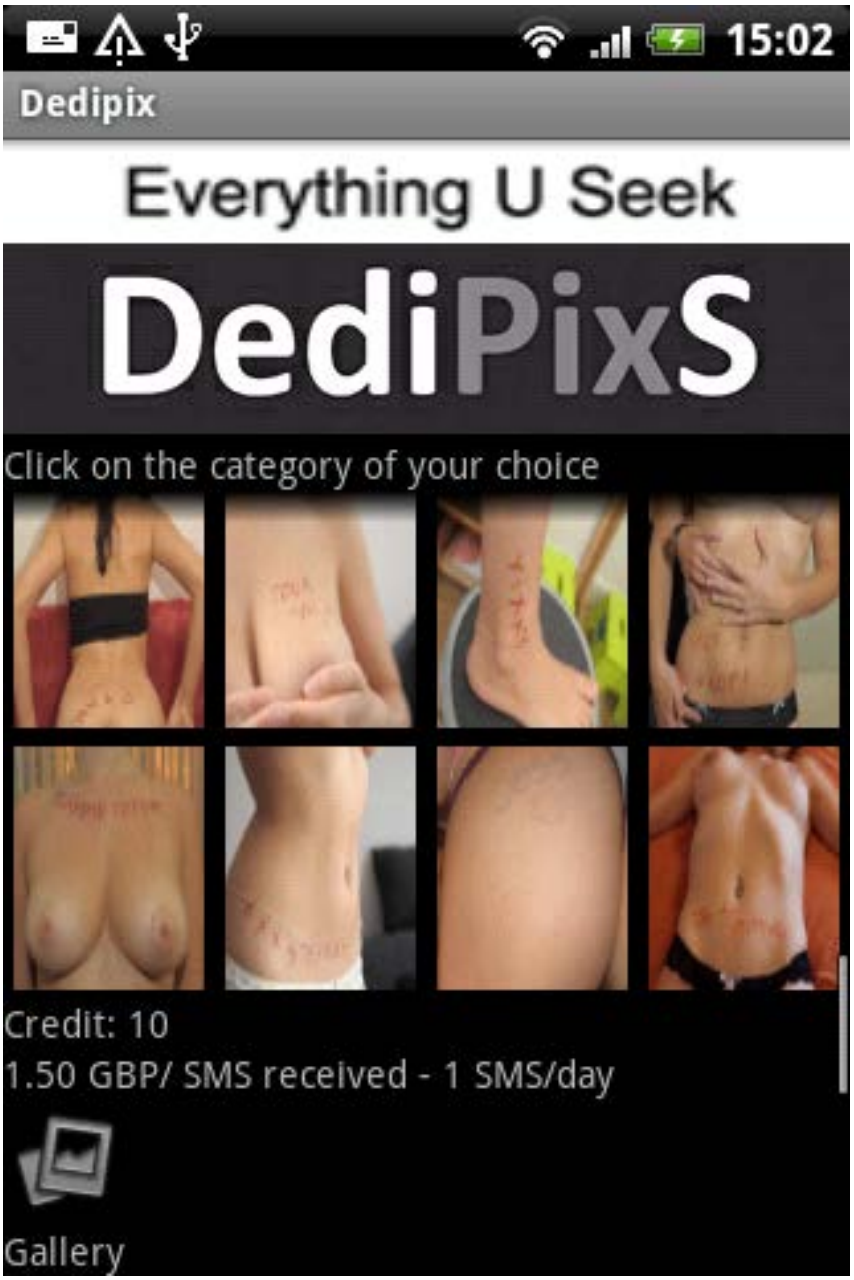



**Appendix E – Screenshot of ‘Dedipix’ App promotional material**



**Appendix F – Screenshot of 'Dedipix' App pricing information**



**Appendix G – Screenshot of version 1.6 of 'Striptease' App pricing information**

## Appendix H – Screenshot of Version 1.6 of ‘Striptease’ App pricing information