



Administrative Charge Awarded:

100%

Tribunal Sitting Number 129 / Case 1

Case Reference: 11498

Level 2 provider	Crosmo B.V
Type of Service	Purchase - other
Level 1 provider	OpenMarket Limited
Network operator	All Mobile Network operators

THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

Between 19 April 2012 and 4 January 2013, PhonepayPlus received 28 complaints from consumers, in relation to the non-subscription competition services Quizir 3.0 and Quizir Mobile (the “**Services**”). The Services were operated by the Level 2 provider Crosmo B.V. on the premium rate shortcode 85588. The Level 1 provider was OpenMarket Limited.

Quizir 3.0 was operational between 2 January 2012 and 10 September 2012 and Quizir Mobile was operational between 5 April 2012 and 10 September 2012. The Services were voluntarily suspended by the Level 1 provider on 10 September 2012, following communication with the Complaint Resolution team.

Consumers entered Quizir 3.0 via online web promotions and utilised PIN opt-in. Quizir Mobile was entered via Wireless Application Protocol (“**WAP**”), which used mobile originating (“**MO**”) opt-in.

The Services were non-subscription competition based services. Consumers were sent trivia questions, and could answer either ‘A’ or ‘B’ from the two answer options provided. Each correct answer provided an entry into the competition draw. The more correct answers a consumer gave the more chances they had to win. Advertised prizes included mobile phones and Apple products. The Quizir website, www.quizir.com, also referred to vouchers, “entertainment packs” and cash prizes being won.

Consumers were charged £1.50 to receive and £1.50 to answer questions. In addition, Quizir 3.0 had an additional sign-up fee of £3.00.

The Services were promoted using affiliate marketing.

The majority of complainants stated that the text messages they received were unsolicited and that they had not requested the Services. In addition, some complainants said they had not understood that they would be charged and/or the terms and conditions of the Services. The maximum cost incurred by a complainant was £97.50 (in one day) and the average complainant cost was £55.02.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph



4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 18 June 2013. Within the breach letter the Executive raised the following potential breaches of the Code:

Rule 2.3.2 – Misleading

Rule 2.2.5 – Pricing prominence

Rule 2.2.2 – Written information material to the decision to purchase

The Level 2 provider responded on 2 July 2013. On 11 July 2013, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.3.2

Premium rate services must not mislead or be likely to mislead in any way.

1. The Executive submitted that the Level 2 provider was in breach of rule 2.3.2 of the Code because consumers were (or were likely to have been) misled into subscribing to Quizir Mobile as a result of misleading affiliate marketing.

The Executive relied on the content of PhonepayPlus Guidance on “Promotions and promotional material (including pricing information), (the “**Guidance**”) states:

Paragraph 6.2

“PhonepayPlus recognises that the Level 2 provider, while retaining responsibility for the promotion under the PhonepayPlus Code of Practice, may not have immediate, day-to-day control of each individual action that an affiliate takes. However, the use of affiliates to market PRS products on a provider’s behalf does carry a greater risk than marketing which is under the direct, day-to-day control of the provider.”

Use of affiliate marketing

In written correspondence, the Level 2 provider accepted that it used affiliate marketing to promote the Services. It also highlighted:

“When we approve someone to generate traffic to our landing pages, they must agree not to use non-compliant traffic sources or creatives. This includes, but not limited to, typo squatting, using creative [sic] that indicate that the user already won, use of the word ‘free’ or ‘congratulations’, illegal sites and more.”

Complaints

The Executive noted the content of the following complaints:

“Wordsearch - App store - consumer says he was playing a free app called Wordsearch and all of a sudden something flashed up on his phone and said "you have won an iphone" He clicked

through then only when he got the bill he realised the charges and sent messages.”

“Received an uninvited web type message on my smart phone whilst viewing a Daily Mail news item. It was from www.quizir.com stating I had been chosen as a prize winner (a new iPad) it also showed testimonials from previous winners in a self congratulatory [sic] manner. I followed the link believing it was an instant win competition.”

“...my wife recall[ed] that she had been on a website "www.magicfreebiesuk.co.uk" and she had clicked on a link to www.allegra-insight.co.uk and enter a free competition to win an iPad. It required filling in a questionnaire on eating out and entering our mobile telephone number.”

One complainant stated that his friend had shared an image on Facebook and upon clicking on the image, he was redirected to another website, whereupon a pop-up filled the screen informing him that he had come first place in a United Kingdom prize draw for an Apple product (**Appendix A**). The complainant was asked to select a prize, and was then taken to the promotional landing page for the service (**Appendix B**). The complainant provided screenshots of the promotional journey (**Appendix A**) which showed that he was misled into the belief that he had won a prize and was encouraged to enter the Service in order to claim the prize.

The Executive submitted that consumers interacted with the Services inadvertently with the expectation that they would be guaranteed a prize, rather than a chance to win a prize.

The Executive submitted that the following characteristics of the promotion misled, or was likely to have misled, consumers (**Appendix A**):

- i. The use of the wording “Congratulations”, “first in the United Kingdom’s (Apple) prize draw contest,” “you are entitled to choose (1) new prize as your reward!” and “Good news! We have (2) iPad’s in stock and your prize has now been reserved”, which appeared to indicate that the consumer had already won a prize.
- ii. The use of the wording, “ACT FAST REWARDS ARE LIMITED!” next to a countdown clock which created a false sense of urgency.
- iii. The use of the Apple icon and trademark symbol which would lead to consumers to believe that this was a genuine promotion by Apple.
- iv. The use of the wording “final qualifying question”, which created the false impression that only one more answer was required to secure the prize.

The Executive asserted that in light of the features of promotion used by affiliate marketers to promote Quizir Mobile, the Service did, or was likely to, mislead consumers into believing that they had already won a prize, when in fact, they only had a chance to win a prize if they entered the premium rate quiz competition Service at a cost of £3 per question.

The Executive accordingly submitted that for the reasons outlined above consumers had been, or were likely to have been, misled in breach of rule 2.3.2 of the Code.

2. The Level 2 provider accepted that the promotions were misleading and utilised unfair, aggressive marketing techniques. However, it stated that it was not responsible for a breach of rule 2.3.2 of the Code.

The Level 2 provider stated that the promotions were contrary to the “strict” terms and conditions of its affiliate marketing programme. The Level 2 provider asserted that its normal practice, as evidenced in its contract with the affiliate network, would be to approve all affiliate marketing



promotions before they commence. In relation to this particular promotion, it asserted that the publisher went ahead without its knowledge or approval.

The Level 2 provider provided a detailed chronology of its actions on discovering the unapproved promotion. The Level 2 provider stated that the promotion was live for two days before it was discovered and blocked. The Level 2 provider showed the Tribunal email correspondence to confirm its instruction to the affiliate network to block the responsible publisher. The Level 2 provider asserted that it had taken all “reasonable endeavours” once it was aware of the issue to prevent further consumer harm, which included ensuring the publisher was blacklisted from the industry. This was done nearly a month before the notification from PhonepayPlus on 10 September 2012.

During informal representations, the Level 2 provider restated its written submissions. The Level 2 provider detailed the extensive measures it had in place to control the risks around affiliate marketing. Yet, it accepted that there is always a chance that approved promotions will be changed and that controls are never going to be “watertight” as there is no risk for affiliate marketers (save for breach of contract action). It added that it had only experienced issues with one publisher but that it would use direct marketing, and not affiliate marketing, in the future due to the high risks involved.

3. The Tribunal considered the evidence including the Level 2 provider’s written and oral representations. The Tribunal noted that the Level 2 provider accepted that the affiliate marketing promotions for the Service (Quizir Mobile) were misleading. The Tribunal did not accept the Level 2 provider’s submission that it was not responsible for the content of the promotions. The Tribunal commented that Level 2 providers are responsible for the provision of the services they operate and that this includes how the services are promoted. The Tribunal concluded that, for the reasons given by the Executive, consumers were or were likely to have been misled into the subscribing to the Service. Accordingly the Tribunal upheld a breach of rule 2.3.2 of the Code. In the absence of evidence to the contrary, the Tribunal accepted that the misleading promotions were only in operation for a short period of time and that this should be taken into account when assessing the seriousness of the breach.

Decision: UPHELD

ALLEGED BREACH 2

Rule 2.2.5

In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.

1. The Executive asserted that the Level 2 provider acted in breach of rule 2.2.5 of the Code because pricing was not prominent and proximate to the means of access on some of the landing pages for the Services.

The Executive relied on the content of the Guidance on Promotions and promotional material (the “**Guidance**”). The Guidance states:

Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).”

Paragraph 2.8

“Pricing information where consumers are unlikely to see it, or where it is hard to find, is unlikely to be judged as ‘prominent’, or ‘proximate’, by a PhonepayPlus Code Compliance Panel Tribunal (‘PhonepayPlus Tribunal’).”

Paragraph 2.10

“Lack of prominence, or proximity, most often takes place online (both web and mobile web), where the price is provided in small print elsewhere on the page from the call to action. We have sometimes seen pricing information in the middle of the terms and conditions of a service, promotion or product, rather than as clear and correct ‘standalone’ information; the price is sometimes provided separate from the page with the call to action, or lower down on the page in such a way as to make the consumer have to scroll down to see the price. Any of these practices are unlikely to be viewed as compliant with PhonepayPlus’ Code of Practice by a PhonepayPlus Tribunal.”

Generally, the Executive noted that most of the Services’ landing pages contained pricing information. However, it asserted that it was in a small font and the colouring made it unclear and difficult to read. Further, on some pages pricing was not prominent, as it was positioned at the bottom of the page and not presented as standalone information.

Quizir Mobile

Originally, the Executive had concerns in relation to the prominence and proximity of pricing on the Quizir Mobile landing page. However, it was later accepted that pricing was adequate (although it could be made more prominent).

Quizir 3.0

The Executive submitted that pricing was not always proximate to the means of access to the Service or prominent (**Appendix C**). The Executive submitted that throughout the promotional material, attention was drawn toward the product/prize that was to be won, to the detriment of pricing information. Images of the mobile phones, Apple products or the ‘spin the wheel’ were all large, clear and colourful, and given prominent focus. Attractive images were given central focus, thereby making the pricing information secondary.

The Executive’s above assertions regarding the prominence and proximity of the pricing information to the means of access to the Services was reflected among a number of the statements made by complainants, as they stated that they either did not see any pricing information, or they did not appear to understand that they would be charged.

“Consumer disputes Quiz service which has not advised of charges correctly - no warning of additional texts and charges.”

“On responding to the message I was suckered into a quiz with multiple questions and excessive prompts. Some 19 inbound messages were received and I had responded 9 times before I suspected a scam and stopped responding and blocked the number. My mobile account showed that both inbound messages were being charged at £1.50 each. There was no prior indication that these charges were being levied nor of any indication of the number of possible interactions that might have been involved.”

As a result of the reasons set out above, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.5 of the Code.

2. The Level 2 provider strongly denied the breach, submitting that pricing was compliant with the Code and Guidance.

Quizir Mobile

The Level 2 provider gave a detailed account in relation to the compliance of pricing information contained on the Quizir Mobile landing pages. As a result, the Executive accepted that pricing was compliant with rule 2.2.5.

Quizir 3.0

In relation to Quizir 3.0, the Level 2 provider submitted that pricing information was given on every landing page using a uniform structure with the price information presented as stand-alone information and not 'hidden' elsewhere on the page, i.e. in the bottom section of the page. It added that there were no hidden costs at the bottom of the page. Further, it stated that not every page contained a 'means of access' to the service. It said that the landing page with the 'means of access' showed the same price information just below the 'continue button' and the MSISDN entry field, prior to pressing the 'continue button'. It said it believed the price information in the PIN service was therefore 'proximate'.

The Level 2 provider accepted there would be a lack of prominence, or proximity, if pricing information was 'hidden' elsewhere in the middle of the terms and conditions, promotion or service. But it said the pricing information was placed transparently in one line separated from the bottom section of every page, as standalone information within the design section of the promotion. Regarding the colour font of the pricing information, it stated that it did not agree with the Executive's judgement that the colour contrast (black/white and also blue/white) was not clear. It also said the pricing information was included in the promotion, in bold, and there was no need to scroll down to see the pricing information.

The Level 2 provider also highlighted that the low resolution photocopied screenshots provided by the Executive did not give a true representation of what a consumer viewed on his or her screen.

In addition, the Level 2 provider presented comprehensive submissions on the, "average consumer, who is reasonably well-informed and reasonably observant and circumspect". It submitted that pricing information across both Services was sufficiently clear for the "average consumer". The Level 2 provider stated this was especially the case as consumers were sent a text message containing pricing information prior to incurring any premium rate charges.

Further, the Level 2 provider questioned whether the action taken in suspending the Services' shortcode was proportionate.

In conclusion, the Level 2 provider stated:

"Care is taken not to exaggerate the promotional assets or to obscure or conceal the price of the PIN service and the MO service. According to Crosmo, the transparent mechanism of the opt-in process, the structure of the promotional pages and the information in the text messages is balanced per PIN service and MO service, prior to purchase or any other commitment to the PIN



service or the MO service. If consumers are asked to provide their MSISDN, all on a voluntary basis, they are given adequate opportunities to check the accuracy of their input before making any purchase or any commitment.

“Where appropriate, Crosmo responds by accepting or rejecting the consumer’s response, in strict accordance with the rules of the Code and the normal use of the PIN service or MO service by both (promotional) partners and consumers.”

The Level 2 provider elaborated further on its written submissions during its informal representations. It highlighted that it believed that, objectively speaking, the pricing was clear. In addition, the Level 2 provider indicated it had relied upon paragraph 5.11 of the Guidance and believed that pricing should be on the page *prior* to the means to entry to the Service.

In addition, the Level 2 provider showed the Tribunal the Service on a tablet device and smartphone to demonstrate that pricing was prominent and that the consumer did not need to scroll below the fold to see pricing information.

3. The Tribunal considered the evidence, including the written and oral representations made by the Level 2 provider. In relation to Quizir Mobile, after careful consideration, the Tribunal found that a breach of rule 2.2.5 was not made out because, amongst other factors, the pricing was near to the method of entry to the Service and therefore ‘proximate’. However, the Tribunal commented that it was desirable to make pricing more prominent in some of the Service’s promotions to prevent consumers being misled.

In relation to Quizir 3.0, the Tribunal found the Level 2 provider was incorrect in its interpretation of paragraph 5.11 of the Guidance as it had taken the Guidance out of context. The Tribunal noted that pricing was set out on most of the Service webpages, albeit it was not always prominent, and it was also communicated in a free text message sent to consumers prior to any charges being incurred. However, the Tribunal concluded that pricing was not prominent and proximate on the webpage containing the means of entry to the Service (Appendix C). Accordingly, and on the limited basis set out above, the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH 3

Rule 2.2.2

All written information which is material to the consumer’s decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Spoken information must be easily audible and discernible

1. The Executive submitted that the Level 2 provider acted in breach of rule 2.2.2 because consumers were not fully and clearly informed of important operational terms before entering into the Services and that such information would have been material to a consumer’s decision to purchase.

The Executive relied on the content of the Guidance on Promotions and promotional material and Competitions and Games with other prizes.

Paragraph 5.6 Promotions and promotional material

“Once on a webpage that promotes a PRS, consumers should not have to scroll down (or up) to



view the key terms and conditions (especially, but not limited to, the price – see section 2 of this Guidance), or click on a link to another webpage. The PhonepayPlus Tribunal is likely to take the view that scrolling up or down to read key terms and conditions, or requiring the consumer to click on a link to view them, is in breach of Rule 2.2.5 of the PhonepayPlus Code of Practice.”

Paragraph 5.7 Promotions and promotional material

“Level 2 providers should ensure that consumers do not have to scroll, regardless of screen resolution, to view the key terms and conditions of a service, or click on a link to view key terms and conditions. Key terms and conditions should be placed prominently on all website pages of the service that a consumer has to click through.”

Paragraph 1.1 Competitions and Games with other prizes

“All promotional material should provide clear details as to how the competition operates. Consumers must be made aware, before entering into the service, of any information that is likely to affect their decision to participate. Clear terms and conditions should include, but are not limited to:

- Information on any restrictions on number of entries or prizes that can be won;
- The incremental cost and the full cost of participation, where this is known.”

Eligibility terms

The Executive submitted that consumers were not clearly made aware of the key terms and conditions relating to eligibility at the outset when viewing the promotional material, and instead terms were not stated or hidden in lengthy terms and conditions on a separate website. The Executive submitted the key information was as follows:

- The more correct answers a consumer gave the more chances they had to win.
- Consumers were required to obtain a certain number of points (5000) to be eligible for the right to win a prize.
- There needed to be a minimum of 100 entrants in the competition.

Length of promotional campaign

The Executive noted that there was variation in the length of promotions depending on when a consumer joined the Services. The Executive submitted that a consumer may have had more chance of winning if s/he had participated in a shorter campaign period. Therefore, it asserted that the start and end date of the campaign period was key information relevant to the consumer’s decision to purchase.

Consequently, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.2 of the Code as consumers were not fully and clearly informed of key information regarding the operation of the Services, prior to entering the Services.

2. The Level 2 provider denied the breach and stated that it did not agree that consumers were not fully and clearly informed of all key terms.

The Level 2 provider asserted that it was reasonable to assume that a consumer would know that the more correct answers a consumer gave, the more chance they had to win.

In relation to the dates of the campaign period, the Level 2 provider asserted this was not a material term and in any event it had implemented a voluntary spending cap of £99 per participant per competition, after which a user would be blocked from re-entering the service. As a result, a consumer could only answer a limited number of questions. In addition, the Level 2 provider stated that it did not agree that the start date of the campaign should be part of the express terms in the promotion. Such requirement is also not strictly prescribed by paragraph 1.1 of the Guidance on 'Competitions and other games with prizes', which requires the closing date and time of the competition to be included in the terms and conditions, and not the start date.

Further, consumers did not need a certain number of points to qualify for the right to win the prize nor did the minimum number of participants need to be 100; although the Level 2 provider stated that invariably this term was always met. The Level 2 provider accepted the terms were stated in the terms and conditions but asserted that this was in error and the terms were not applicable to the competition. This was supported by the fact that it was not possible to obtain 5000 points as a result of the voluntary spending cap.

In conclusion, the Level 2 provider stated that:

“[A]ll key information which is likely to affect the decision to participate, under normal circumstances, was included in the express terms of the promotion, so in the promotion, and not conditional on purchasing the PIN service or the MO service. The potential lack of key information for assuming a breach of rule 2.2.2 of the Code has been primarily based on incorrect fact finding by reviewing the Promotional Terms on the website www.quizir.com and an incomplete view of the operational mechanics for both the PIN service and the MO service to select the winner. “

During informal representations, the Level 2 provider accepted that its full terms and conditions were not accurate (but this was not intentional). It added that all key terms were accurate and included in promotional material. As a result, it submitted that consumers had not been adversely affected.

3. The Tribunal considered the evidence, including the Level 2 provider's detailed written and oral submissions in full. The Tribunal noted that some of the terms included in the full terms and conditions were not accurate and/or applicable to the Services. However, the terms that were applied to the competition were more favourable to consumers and as a result consumers had suffered little, if any, detriment. Further, on the particular facts of the case, the Tribunal found that the omitted or inaccurate terms outlined by the Executive were not material to consumers' decision to purchase. Accordingly, the Tribunal concluded that the Level 2 provider had not acted in breach of rule 2.2.2 of the Code on this occasion. However, the Tribunal commented that a consumer cannot be said to have been treated fairly and equitably if s/he is not aware of the terms and conditions of a service and/or has no way of knowing what the full terms and conditions are. As a result, the Tribunal stated that it would have been minded to uphold a breach of rule 2.3.1 of the Code had it been raised.

Decision: NOT UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of the breaches of the Code were as follows:

Rule 2.3.2- Misleading

The initial assessment of rule 2.3.2 was **serious**. In determining the initial assessment for the breach of the Code the Tribunal applied the following criterion:

- The promotion was designed with the intention to mislead consumers by not providing consumers with adequate knowledge of the Service or the costs associated with it (prior to reaching the Level 2 provider's landing pages).

Rule 2.2.5- Pricing

The initial assessment of rule 2.2.5 was **moderate**. In determining the initial assessment for the breach of the Code the Tribunal applied the following criterion:

- Although pricing was contained on most of the Level 2 webpages and within a free text message sent to consumers prior to incurring any charges, pricing information was not sufficiently prominent and proximate to the means of access to the Service.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating factors.

The Tribunal took into consideration the following mitigating factors:

- The Level 2 provider stated that it had taken a number of reasonable steps to end and remedy the consequences of the breach in a timely fashion. It said this included blocking the responsible publisher from promoting the Service and having it, "blacklisted from the whole industry".
- The Level 2 provider asserted that it would promote the Services using direct marketing in future and no longer use affiliate marketers.
- The Tribunal noted that the breach of rule 2.2.5 only related to Quizir 3.0 which accounted for a small percentage (17%) of the overall traffic. Therefore the scale of consumer harm was limited.
- On the evidence before the Tribunal, only a small number of consumers were affected by the misleading affiliate marketing.

The Tribunal also noted that the Level 2 provider stated that it had taken some steps in advance to identify and mitigate against the risks involved in the use of affiliate marketers. This included, pre-approving promotions and signing an affiliates agreement. The Tribunal did not consider this to be sufficient to constitute a mitigating factor.

The Level 2 provider's revenue in relation to the Services was within the range of Band 1 (£500,000+).

Having taken into account the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **Significant**. The Tribunal commented that a case which concerned consumers being misled by affiliate marketing would normally warrant a high seriousness rating. However, in this case, the Level 2 provider had provided evidence of limited consumer harm and the proactive action it had taken to block the offending promotional material quickly. In addition, the harm occurred in August 2012, which was prior to many of the Tribunal's adjudications concerning misleading affiliate marketing.



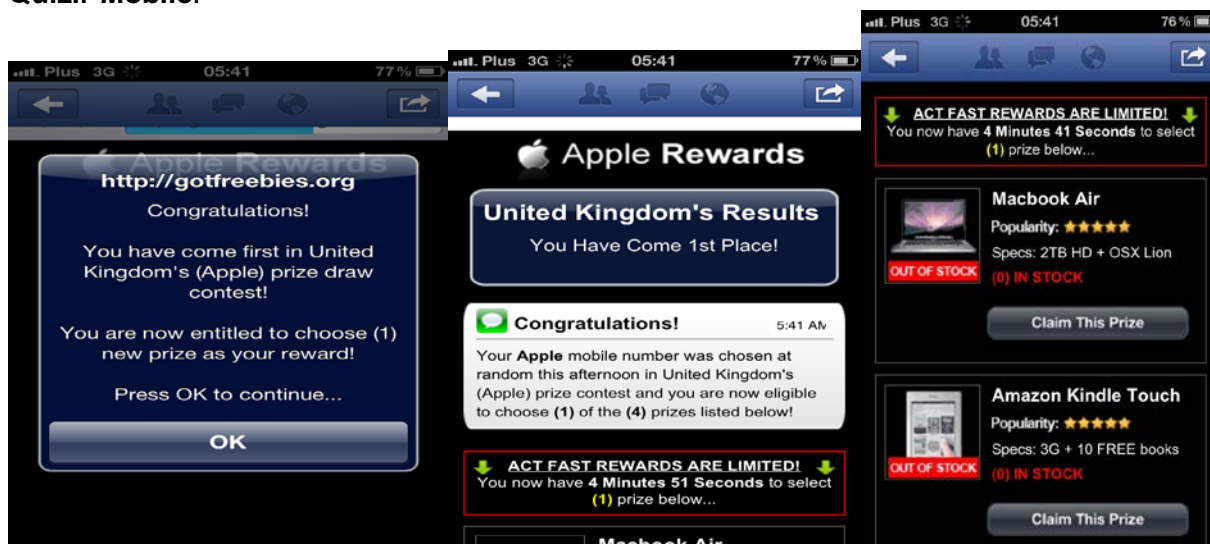
Sanctions Imposed

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

- a formal reprimand;
- a fine of £20,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

Appendix A: Screenshots provided by a complainant of misleading affiliate marketing for Quizir Mobile:



Appendix B: Screenshot of the Quizir Mobile (WAP) landing page:



Appendix C: Screenshot of a Quizir 3.0 (Web) landing page:

