

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 4 December 2008 TRIBUNAL SITTING No. 16 / CASE 1

CASE REFERENCE: 761936/MS

Service provider & area:	mBlox Limited, London
Information provider & area:	Genius Games Ltd, Manchester
Type of service:	Lottery/Quiz Competition Services
Service title:	Magic Millions/Get Rich Quick
Service number:	80221
Cost:	£1.50 per message received
Network operator:	All Mobile Networks
Number of complainants:	16

### BACKGROUND

The PhonepayPlus Executive ("the Executive") received 16 consumer complaints in respect of chargeable messages from a quiz service called 'Magic Millions'. This total increased to 21 complaints throughout the course of the investigation. Complainants reported that they began to receive messages after entering into a lottery service on the website [www.magicmillions.co.uk](http://www.magicmillions.co.uk). Examples of two of the quiz messages received by complainants are as follows:

*"MagicMillions CashQuiz 1000 Pound Cash Prize > What year was the Falklands war? A) 82 B) 83 C) 84 Reply A, B or C"*

*"MagicMillions CashQuiz 1000 Pound Cash Prize > How many players in an ice-hockey team? A) 7 B) 9 C) 11 Reply A, B or C"*

Complainants appeared to be unaware that entry into the online lottery service, would result in automatic subscription to a reverse-billed text quiz subscription service.

### **The Executive's understanding of how the service operated**

The service operated for a 4 month period from 25 April 2008 to 25 August 2008, under the names 'Magic Millions' and 'Get Rich Quick'. The website [www.magicmillions.co.uk](http://www.magicmillions.co.uk) suggested that the primary element of the service was the Magic Millions prize draw. The website advised consumers that by selecting numbers for the draw and by entering their mobile phone number, they had a chance of winning one million pounds ("£1m").

The small print at the foot of the homepage of the website advised of the second element of the service, 'Get Rich Quick'. It stated that consumers also had a chance to win further cash prizes of £1,000 in the 'Get Rich Quick' competition. The small print on the website appeared as follows:

You must be 16 or over to play. The Magic Millions prize fund prize fund in any one draw is limited to £1,000,000.00. A million pound draw takes place twice a week, every Monday and Thursday. Further prizes of £1,000 cash can be won each Monday and Thursday in our Get Rich Quick competition. The first go of Get Rich Quick is free after which it is charged at £1.50 per

competition. Get Rich Quick is a subscription service. Players must have the bill-payers permission. Players will receive a question on the specified days of competition with the cash prize going to the first player to answer correctly. To unsubscribe, text STOP to 80221. Winners of Get Rich Quick will be notified by text within 7 days of each competition. A list of winners is available by contacting: Genius Games Ltd. The winning combinations for the Magic Millions draw will be selected at random by an independent adjudicator.

You may contact our customer care department on 0844 3577433 (Monday,-Friday 10 am – 4pm).

By taking part in any game or making any purchase on the Magic Millions / Get Rich Quick, the player agrees to receive marketing information and offers by SMS. Such offers will be sent only by Genius Games Ltd. Recipients of any such messages may opt-out of receiving any such messages by sending NOINFO to 80221, after receipt of any such message. Genius Games is registered with the Data Protection Act

In order to enter the first element of the service, users were invited to select 7 numbers between 1 and 50 and enter their mobile number into the website. The user then received a free mobile terminating (“MT”) message, for example:

*‘FREE MSG: U MUST Reply YES to this message to confirm you FREE Entry into the next million pound draw. UR numbers are 1, 13, 25, 37, 17, 4, 9 Good Luck.*

Users who replied ‘YES’ to the above SMS message were entered into the ‘Magic Millions’ draw and were also automatically subscribed into the ‘Get Rich Quick’ quiz competition, which cost £3 a week. From message logs supplied by the service provider, together with the Executive’s monitoring of the service, it appeared that the user then received a chargeable MT message, costing £1.50, examples of which are as follows:

*‘GetRickQuick Get Ur answer in by 8pm today>> What is the capital of Belgium? A) Liege B)Ghent C)Brussels Reply A:2cRorC’*

*‘MagicMillions CashQuiz 1000 Pound Cash Prize>> What is Tiger Woods real first name? A)Caleb B)Eldrick C) Timothy ReplyA:2cBorC’*

The Executive’s monitoring of the service (both website and text service) mirrored the consumer experience documented in the complaint logs.

### **Complaint Investigation**

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5f of the PhonepayPlus Code Practice 11<sup>th</sup> Edition (amended April 2008).

The Executive raised potential breaches of paragraphs 5.4.1a, 5.4.1b, 5.7.1 and 7.12.4 of the Code Practice in a letter to the service provider dated 28 August 2008. The service provider shut down the service upon receipt of this correspondence and responded in a letter dated 15 September 2008. The service provider also included a copy of the information provider’s response to the breach letter, but commented that it did not endorse the contents other than some of the ‘technical responses’ to the questions asked by the Executive under paragraph 8.3.3 of the Code.

The Executive made a further request for information in a letter to the service provider dated 6 October 2008, to which the service provider responded on 14 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 4 December 2008.

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH ONE

#### MISLEADING (Paragraph 5.4.1a)

*“Services and promotional material must not:*

*a mislead, or be likely to mislead in any way...”*

1. On the basis of the content of the consumer complaint logs and its monitoring of the service, the Executive considered that consumers might have been misled into entering the text quiz subscription service. The website [www.magicmillions.co.uk](http://www.magicmillions.co.uk) did not make it abundantly clear that by entering into the lottery (for which there was no charge), consumers would also automatically be entered into a text quiz service and would receive reverse-billed quiz questions on a regular basis.

The part of the website which referred to the quiz service was at the foot of the landing page and required consumers to scroll down in order to read it; something which did not appear to have been made clear. The Executive considered the breach aggravated by virtue of the fact that the information lacked clarity due to the small font size, which was much smaller than the writing in the main body of the webpage. Also, the terms and conditions for the quiz service were located amongst other text, and were not addressed with appropriate clarity.

2. The service provider did not respond to the breach raised. The information provider's response, (which was not endorsed by the service provider), stated that all persons playing the game were sent a free SMS message, 24 hours before receiving their first billed question. The information provider also stated that the Executive's need to scroll down to the bottom of the page in order to see the terms and conditions must have been due to the resolution of its monitor. The information provider stated that on all the monitors it had tested, the terms and conditions were immediately visible. The information provider therefore refuted that there had been a breach of paragraph 5.4.1a of the Code.
3. The Tribunal considered the evidence and determined that the website was misleading because it did not make it clear that, by entering the draw, the consumer would be automatically subscribed to the reverse-billed quiz service. The Tribunal considered that the primary focus of the website as far as users were concerned was to obtain free entry into the draw. The subscription element was not something that consumers would be expecting and the terms at the bottom of the website page, which users had to scroll down to read, did not make the true nature of the service sufficiently clear.

The Tribunal commented that the misleading nature of the website was aggravated by the content of the SMS message subsequently received by users, which informed them that they must reply “YES” for a free entry in the draw. In fact, this positive response activated a subscription service, which resulted in a weekly charge. The Tribunal therefore upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

## **ALLEGED BREACH TWO**

### **UNFAIR ADVANTAGE (Paragraph 5.4.1b)**

*“Services and promotional material must not:*

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

1. The Executive noted from the complaint logs, that consumers who stated that they did enter a lottery on the website [www.magicmillions.co.uk](http://www.magicmillions.co.uk), did not initially realise that they had been charged to receive quiz questions by SMS message, until closer inspection, namely upon checking their remaining credit or upon receiving their telephone bill. As noted above in respect of paragraph 5.4.1a, the complainants who entered the lottery did not expect to be entered into a quiz service, and were charged £1.50 per quiz question received. The Executive considered that complainants might have been misled into entering the lottery service, in order to be subscribed to the chargeable quiz subscription service, which it felt was taking unfair advantage of consumers and contrary to 5.4.1b.

The Executive subsequently commented that whilst it maintained that the service was misleading, the reasons raised in respect of this breach either overlapped with those previously raised in respect of paragraph 5.4.1a of the Code, or were not relevant.

2. The service provider did not respond to the breach raised. In the information provider's response (which was not endorsed by the service provider), it again claimed that a subscription message, containing all the required information, was sent 24 hours prior to the first billed quiz question being sent i.e. prior to the user receiving the premium rate service (as opposed to prior to receiving the first free quiz question). The information provider refuted that there had been a breach of paragraph 5.4.1b of the Code.
3. The Tribunal considered that the misleading nature of the website had been properly dealt with under paragraph 5.4.1a of the Code and there was no additional evidence to suggest that the service had taken unfair advantage of any characteristic or circumstance which made consumers vulnerable. The Tribunal therefore did not uphold a breach of paragraph 5.4.1b.

**Decision: NOT UPHELD**

## **ALLEGED BREACH THREE**

### **PRICING INFORMATION (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 considered that the pricing information for the quiz service on the website [www.magicmillions.co.uk](http://www.magicmillions.co.uk) was neither clear nor straightforward and therefore users were not fully informed of the cost of using the service. The actual

wording and similar font size used taken from the foot of the website landing page, is as follows:

You must be 16 or over to play. The Magic Millions prize fund prize fund in any one draw is limited to £1,000,000.00. A million pound draw takes place twice a week, every Monday and Thursday. Further prizes of £1,000 cash can be won each Monday and Thursday in our Get Rich Quick competition. The first go of Get Rich Quick is free after which it is charged at £1.50 per competition. Get Rich Quick is a subscription service. Players must have the bill-payers permission. Players will receive a question on the specified days of competition with the cash prize going to the first player to answer correctly. To unsubscribe, text STOP to 80221. Winners of Get Rich Quick will be notified by text within 7 days of each competition. A list of winners is available by contacting: Genius Games Ltd. The winning combinations for the Magic Millions draw will be selected at random by an independent adjudicator.

The Executive noted that whilst pricing information was available on the landing page of the website, consumers had to scroll down in order to find it and it was located amongst other information and other terms and conditions. Furthermore, once the information had been located, the Executive noted it was embedded within other text and was difficult for consumers to find, read and understand, prior to their entering into the service and incurring charges.

2. The service provider did not respond to the breach raised. The information provider commented that the subscription SMS message informed users as to how consumers could unsubscribe. Furthermore, the terms and conditions on the website stated that quiz questions would be received at a cost of £1.50 per message, each and every Monday and Thursday. For these reasons, the information provider considered that consumers were made aware of the cost of the service, prior to any billing taking place and refuted that there had been a breach of paragraph 5.7.1 of the Code
3. The Tribunal considered the evidence and noted that consumers had to scroll down to view the pricing information, which was embedded in other text and difficult to read. However, the Tribunal commented that the reasons raised by the Executive in respect of a lack of prominence of pricing information would have been better raised as a breach of paragraph 5.7.2 of the Code (which specifically states that “pricing information must be easily legible, prominent, horizontal and presented in a way which does not require close examination”). The Tribunal commented that it would have upheld a breach of 5.7.2 had it been raised, because the pricing information was not easily legible and prominent and it would have required close examination by the consumer. However, since the website landing page did display pricing information about the subscription service, and this was available for consumers to see before they entered the service, the Tribunal did not consider that there was a breach of 5.7.1 in this case.

**Decision: NOT UPHELD**

#### **ALLEGED BREACH FOUR**

##### **SUBSCRIPTION INITIATION (Paragraph 7.12.4a-f)**

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

- a name of service,*
- b confirmation that the service is subscription-based,*
- c what the billing period is ... 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. During the Executive's monitoring of the lottery service via the website [www.magicmillions.co.uk](http://www.magicmillions.co.uk), the first text message received in relation to the quiz subscription service was the free quiz question itself, the contents of which are as follows:

*“FREE MSG: MagicMillions CashQuiz 1000 Pound Cash Prize >  
How much is VAT? A)12.5 B)17.5 C)20 Reply A,B or C”*

The Executive noted that the message was not an initial subscription message containing the provisions as required by paragraph 7.12.4a-f of the Code.

2. The service provider did not respond to the breach raised. In the information provider's response (which was not endorsed by the service provider) it again claimed that a subscription message, containing all the required information, was sent 24 hours prior to the first billed quiz question being sent i.e. prior to the user receiving the premium rate service (as opposed to prior to receiving the first free quiz question). The information provider therefore refuted that there had been a breach of 7.12.4 of the Code.
3. The Tribunal considered evidence supplied by the Executive in respect of its monitoring of the service, but determined that since the Executive had sent “STOP” immediately after receiving the first free quiz question, it had not been engaged in monitoring the service for a sufficient period of time to test whether or not a free subscription message had been sent 24 hours prior to receiving the first chargeable quiz question. The Tribunal therefore concluded that it could not rely on the Executive's monitoring evidence in respect of this alleged breach. However, the Tribunal noted from the call logs provided by the service provider, that there was no evidence that consumers had been sent initial free subscription messages in the form required by paragraph 7.12.4a-f of the Code, either before or after the first free quiz question. The Tribunal upheld a breach of paragraph 7.12.4 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

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

- The service deliberately misled consumers into signing up for a reverse billed quiz subscription service, via a free lottery service.
- The cost paid by individual consumers was high; ranging from £3-£4.50 per week with some consumers incurring costs as high as £21.00; and

- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following mitigating factors:

- The information provider had issued refunds to some complainants, and
- The service provider suspended the service immediately upon receipt of the breach letter.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £35,000; The Tribunal did not impose an additional fine in respect of the service provider's breach history, in view of the service provider's current compliance activity. The Tribunal stated that if future cases were brought to PhonepayPlus involving services which demonstrated a failure in the new compliance structure, it would be open to the Executive to recommend that future Tribunals take into account the fact that there was no additional fine imposed for breach history in this case.
- The Tribunal imposed a bar on the service until compliant. The Tribunal commented that it doubted whether the service which had been the subject of the complaints could be made compliant with the Code.
- The Tribunal also ordered that claims for refunds are 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.

### Comment

When considering the case in the round, the Tribunal raised concerns about the lack of due diligence carried out by the service provider as to the nature of the service being run by the information provider and also noted the lack of information made available by the information provider to both the service provider and the Executive. The Tribunal emphasised the need for service providers to carry out appropriate due diligence when contracting with information providers.