

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 20 August 2009
TRIBUNAL SITTING No. 34 / CASE 1
CASE REFERENCE: 804559/DL

Information provider:	Expanding Vision Ltd, Lancaster
Service provider:	2ergo Limited, London
Type of service:	Subscription quiz service
Service title:	'Equiz' (also branded 'Mobquiz', 'QuizBizz')
Service numbers:	82085, 83023, 87085 and 87666
Cost:	82085- £1.00 per minute 87085- £1.50 per minute 83023- £3 per minute 87666- £3 per minute
Network operator:	All Mobile Network Operators
Number of complainants:	79

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

The PhonepayPlus Executive ('the Executive') received 79 complaints regarding a promotional campaign for a subscription quiz service operated by the Information Provider on shortcodes 82085, 87085, 83023 and 87666. Users were charged different tariffs according to which shortcode was used – these charges varied from £1 per week to £3 per week.

Complainants provided PhonepayPlus with transcripts of various promotional text messages issued by the Information Provider. The promotional texts included a description of the prize available, a quiz question and an invitation to recipients to text 'CASH' plus the answer to a shortcode. Although not all complainants accessed the service, some of the complaints received raised concerns that consumers were responding to the promotion without having seen any pricing information or being aware of the fact that the service was subscription-based.

PhonepayPlus monitored one part of the service which operated on shortcode 82085 and established that no free subscription initiation text message had been issued to the monitoring handset prior to charges being incurred. This free message is required by the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code').

(i) The Service

The service, shortcodes and 'CASH' trigger word were not promoted via any website but were promoted using text messages and/or word of mouth. The text messages were similar across all shortcodes; each involved a prize (usually money), a quiz question, and instructions to send 'CASH' + an answer to the shortcode. The messages included a brand name – either 'Equiz', 'Mobquiz', or 'QuizBizz' – and helpline number (usually an 0844 number). The text message contained pricing information towards the end of the text message, along with the 'STOP' command instructions. Some complainants identified a line gap in the message (paragraph spacing), as a result of which pricing information was hidden from view and could only be seen by scrolling down.

On shortcode **87085** ('Mobquiz' and 'QuizBizz'), the following adverts were recorded by PhonepayPlus from complaints received and/or monitoring:

"FreeMsg: Get £500 cash! Is Englands patron saint George or David? Text CASH + answer to 87085. Mobquiz Help 08445796368 £1.50/wk Mon Draw Optout txt STOP 2 87085"

"FreeMsg: We want 2 give u £250! Is Mayday in Spring or Winter? Txt CASH + answer to 87085 Mquz 08445796368 £1.5/wk DrawnTue Optout txt STOP 2 87085"

"FreeMsg: Lucky duck wants 2 give u £350! Are ducks Yellow or Blue? Txt CASH + answer to 87085

[Gap found in text message]

QuizBizz is £1.5/wk DrawnTue 08445796368 Unsub txt stop 2 87085"

On shortcode **82085** ('Mobquiz' and 'QuizBizz'), the following adverts were recorded by PhonepayPlus from complaints received and/or monitoring, or supplied by the Service Provider in response to requests for information made under paragraph 8.3.3 of the Code of Practice:

"FreeMsg: Easter bunny wants u to win £500! Is Easter a time 4 Eggs or Turkey? Txt CASH + answer to 82085 Mquz 08445796368 £1/wk DrawnTue Optout txt STOP 2 82085"

"FreeMsg: Easter bunny wants 2 give u £500! Is Easter a time 4 Eggs or Turkey? Txt CASH + answer to 82085 Mquz 08445796368 £1/wk DrawnTue Optout txt STOP 2 82085"

"FreeMsg: Wud u like £500? Text DRAW to 82085 & join Mobquiz – get our weekly question right & be in the draw. £1/week. Help08445796368 Optout txt STOP 2 82085"

"FreeMsg: Win £500 each week – text JOIN to 82085 to register – Test ur Knowledge in our Skill Game for £1/week! Mquiz Help08445796368 Optout txt STOP 2 82085"

"FreeMsg: Win £500 every week in MobQuiz! Wina drawn weekly, text TEST to 82085 for 1st question. Just £1/week. Help08445796368 Optout txt STOP 2 82085"

“FreeMsg: U can win £500 EVERY week–Text DRAW to 82085 & get our weekly Mobquiz question right & be in the draw. £1/week. Help08445796368 Optout txt STOP 2 82085”

“FreeMsg R U a winner of £500 cash! Text cash + answer to 82085: Is Easter a time for Eggs or Turkey? Mquz Help 08445796368 £1/wk TueDraw Optout txt STOP 2 82085”

The Executive did not receive any complaints regarding promotional text messages using trigger words other than ‘CASH’ and ‘CHANCE’ but noted that pricing prominence was still a relevant issue.

On shortcode **83023** (‘Mobquiz’ and ‘QuizBizz’), the following adverts were recorded by PhonepayPlus from complaints received and/or monitoring:

“FreeMsg: We want 2 give u £500 Is Mayday in Spring or Winter? Txt CASH to 83023 Mquiz. 08445796368 £3/wk DrawnTue Optout txt STOP 2 83023”

“FreeMsg: Lucky Duck wants 2 give u £250! Do ducks Swim or Run? Txt CASH + answer to 83023

[Gap found in text message]

QuizzBizz is £3/wk DrawnTue 08445796368 Unsub txt stop 2 83023”

“FreeMsg: QuizzBizz wants 2 give u £250! Are ducks Yellow or Blue? Txt CASH + answer to 83023

[Gap found in text message]

QuizzBizz is £3/wk DrawTue 08445796368 Unsub txt stop 2 83023”

“FreeMsg: Lucky Duck wants 2 give u £250! Are ducks Yellow or Red? Txt CASH + answer to 83023

[Gap found in text]

QuizBizz is £3/wk DrawnTue 08445796368 Unsub txt stop 2 83023”

“Free msg: Lucky Duck wants 2 give u £500, Are ducks yellow or red? Txt CASH + answer to 83023

[Gap found in text]

Quizbizz £3/wk drawntue unsub txt stop 2 83023”

On shortcode **87666**, ‘Equiz’ was launched with the following adverts that were recorded by PhonepayPlus from complaints received and/or monitoring:

“FreeMSG: 100 iPods for 100 winners- Is Ronaldo French or Portugese? Txt CASH + answer to 87666

[Gap found in text]

Join Evision for £3/week end 26/06 08445796340 txt stop to leave”

“FreeMsg: 50 IPODS for 50 winners! Is Ronaldo French or Portugese? Txt CASH + answer to 87666

[Gap found in text]

Join Evision for £3/week End 14/07 08445796366 Txt stop 2 leave”

*“FreeMSG Subscribe 2 Equiz 4 chance 2 win £250! Is Ronaldo French or Portugese?
Txt cash & Answer to 87666 by 0707.
[Gap found in text]
Cost £3 per/week. E Vision 08445796368 to Stop txt STOP”*

(ii) The Investigation

The Executive issued a request for information under paragraph 8.3.3 of the Code on 11 May 2009 to which the Service Provider responded on 14 May 2009. A further request for information was issued dated 18 May 2009 and a response to this correspondence was provided by the Service Provider on 22 May 2009. As the information received from the Service Provider on 22 May 2009 was limited, the Executive clarified its request and extended the deadline for provision of the information required. The Service Provider and Information Provider provided further information by email on 10 June 2009.

A formal breach letter dated 25 June 2009 was issued to the Service Provider by the Executive alleging breaches of paragraphs 5.4.1a, 5.7.2, 7.12.3a and 7.12.4. The Executive received a response from the Service Provider and the Information Provider on 10 July 2009, together with a request for PhonepayPlus to deal directly with the Information Provider and the undertakings set out at paragraph 8.3.4, as required by paragraph 8.7.1 of the Code.

The Tribunal made a decision on the breaches raised by the Executive on 20 August 2009 having heard informal representations from the Information Provider and the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE 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 submitted that the promotional material used for the quiz service, which, although it did not have a fixed brand name, had a distinct quiz question style, was capable of misleading recipients. It submitted that in general terms the recipient was misled by the Information Provider by the sending of promotional text messages which failed to make it clear that the quiz was unrelated to his or her Mobile Network Operator and was, in fact, a subscription service with a weekly price of £1, £1.50 or £3, dependent upon which shortcode was used for the service.

The Executive submitted that it was of the opinion that the quiz service was not easily identifiable as a unique self contained quiz service offered separately from the Mobile Network Operators. It also submitted that the use of characters such as the ‘Easter Bunny’ and ‘Lucky Duck’, rather than the Information Provider’s brand name, meant that the recipient could not identify the provider of the service immediately. The Executive submitted that the use of the ‘Lucky Duck’ was

particularly problematic as some complainants who were O2 customers appeared to have thought that 'Lucky Duck' was connected to an O2 promotion which used ducks.

The Executive submitted that this similarity encouraged a recipient to associate the quiz service with the Mobile Network Operator, and not a third party offering a charged subscription service, and therefore the Information Provider had not done enough to disassociate the service from the Mobile Network, thereby misleading consumers into entering the subscription service.

The Executive submitted that complainants had identified the positioning of the pricing and other information within the text as being a cause for consumers being misled by the promotional text messages. The Executive was of the opinion that the reason for the positioning of the pricing in some of the promotional messages (as transcribed above) where the pricing information was positioned after the helpline number, was so that some recipients would not see the pricing information before responding to the instructions relating to quiz entry.

The Executive also submitted that the promotional message "R U a winner of £500 cash!..." was misleading because, not only was the pricing placed after the helpline number, but also complainants could easily have misread the beginning of the message as being "U R a winner..." rather than "R U a winner...". However, having considered the IP's response on this issue, the Executive subsequently withdrew this allegation and therefore it was not considered at the Tribunal.

2. The Information Provider submitted that the Executive's allegation that a lack of pricing prominence had misled consumers was unfounded and that it would deal with the issue of pricing prominence in its response to the specific pricing prominence breach (i.e. paragraph 5.7.2 below).

The Information Provider provided some screenshots taken from the O2 website with information about the O2 promotion which used ducks. The Information Provider stated that it had noted from studying the O2 promotional details that, in addition to the fact that the offer was made available solely to O2 Pay-As-You-Go ('PAYG') customers, the only way in which customers were able to take part in this promotion, and be in a position to claim any of the 'Top-Up Surprises', was by first topping up their PAYG credit. The customer was then sent a code number direct to their mobile handset. The Information Provider stated that it was at that point, and only then, that the consumer was required to visit the 'Top Up Surprises' section of the O2 website, enter their mobile number and their unique top-up code number, and only then were they presented with an opportunity to claim one of the 'top-up surprises' available – a process with which they can only engage on the O2 website.

The Information Provider stated that the Executive's statements in its formal breach letter were wholly misleading as the term 'Lucky Duck' was not associated with O2. It stated that it was untrue and wilfully misleading to suggest that it sent out a promotion which tracked and mimicked the promotional activities of a leading Network Operator, not least since the O2 'Top-Up Surprises' promotion was self-evidently ongoing, not time-dependent, and available indefinitely to those customers who topped up their PAYG handsets with credit

and visited the O2 website with a unique code. In addition, the Information Provider stated that, given the very specific mechanics and processes involved in consumers making a claim for a 'Top-Up Surprise' (as described above), there could be no grounds of any kind for the consumer believing that its own text-based quiz promotion and O2's 'Top-Up Surprises' were one and the same.

The Information Provider stated that the strap line 'Lucky Duck' was an idea brought forward by its marketing team. It stated that promotional text messaging formed a key part of its commercial activities and it had not been its intention to impersonate a Mobile Network Operator in order to mislead consumers into engaging with its services.

The Information Provider further stated that it was not the role of companies involved in mobile marketing activity to proactively draw a distinction between themselves and the Mobile Network Operator to which the consumer was contracted, over and above identifying themselves within the promotion. The Information Provider stated that it had provided a customer helpline number on all its promotional material which, when dialled, always answered with the words "Hello Expanding Vision" or its equivalent, regardless of the time of day when the call was made, and whether the call was answered by a live operator or by an out-of-hours answering service.

The Information Provider submitted that the Executive had failed to establish a credible link between its promotion and that of any Mobile Network Operator, had therefore failed to establish the breach and there was therefore no case to answer.

3. The Tribunal considered the evidence and concluded that the status, origin and nature of the service promoted in the text messages were unclear and that the promotional texts were therefore misleading. The Tribunal noted that the complainants' evidence showed that a number of people believed the text message had been sent to them by their Mobile Network Operator. In particular, the Tribunal noted that a concurrent O2 promotional campaign with similar marketing imagery had led some O2 customers to believe that O2 had sent the text message to their mobile handsets, although it accepted there was no evidence that the Information Provider had intended there to be any confusion between its services and those of O2. The Tribunal also found that it was not clear from the promotional texts that responding to the texts would result in entry into a subscription service. The Tribunal also found that this lack of clarity about the status, origin and nature of the messages was compounded by the fact that a large number of complainants had believed the text messages to be unsolicited and therefore they had been received without any context and this made it more difficult for them to fully understand or appreciate the nature of the message. This lack of context meant that more steps needed to have been taken by the Information Provider to make it clear this was a commercial message about a subscription service. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO PRICING (PROMINENCE) (Paragraph 5.7.2)

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

1. The Executive submitted that the pricing information within the body of the promotional text messages was deliberately placed either after the helpline number was given, thereby pushing the information to the end of the text message, or after a gap was placed within the body of the text message, thereby forcing the reader to scroll through to the foot of the text message in order to see it. Although the Executive acknowledged that different users would have different mobile handsets, it was of the opinion that the positioning of the pricing information could not be justified and that the positioning suggested a deliberate intention by the Information Provider to prevent some users from having visibility of the pricing before responding to the instructions in the first part of the text message. The Executive submitted that pricing information displayed was not prominent nor presented in a way that did not require close examination.
2. The Information Provider made reference to screenshots it had provided to the Executive of what it believed to be '20 of the most popular handsets currently on the market in the UK'. The Information Provider provided two screenshots for each handset (one with two carriage returns and the other without) and stated that 34 of the 40 screenshot samples showed that the entire message content was clearly visible on the handset screens without the need for the consumer to scroll down to view any part of the text message.

The Information Provider stated that of the three handsets which did require the consumer to scroll, this was only to a negligible degree, and only in order to include the very end of the message within the view, whereas in fact the pricing information was clearly visible within the default screen view in all cases.

The Information Provider stated that the Executive's comments were unfounded and that it did not accept them. The Information Provider submitted that PhonepayPlus had not provided specific advice in relation to where the pricing information should be placed within a 160 character message and that there was no specific provision within the Code which required this. The Information Provider stated that the level of pricing prominence employed in these promotions was at least consistent with, or better still more prominent than, the vast majority of compliant pricing typically found across all promotions in all media.

The Information Provider stated that it was of the view that the overwhelming majority of habitual mobile phone users, which included over 98% of the UK adult population, were fully accustomed to the occasional requirement to scroll through text messages in order to view the complete text message, particularly now that all new mobile handsets released onto the UK market feature built-in text message concatenation, enabling consumers to formulate text messages well

beyond the 160-character limit to which in contrast it, as an Information Provider, was currently limited for the purposes of sending out promotional messaging. The Information Provider stated that scroll-through was now as commonplace on a mobile handset as it is on a website, where in fact it is common practice to display key terms and conditions associated with goods and services at the bottom of the home page.

The Information Provider concluded by stating that the screenshot evidence it had provided showed that pricing information was very clearly displayed on all the example handsets, and taking into account the statistical evidence presented above relating to habitual mobile phone users and the absence of any specific requirement for it to place pricing information at a particular point within a promotional text message, it refuted the suggestion that it had not acted within the requirements of the Code. The information Provider stated that pricing information was clear and prominent in its model, and even more so when judged by comparable standards for pricing information as applied across all promotional media.

3. The Tribunal considered the evidence and accepted, on a balance of probabilities, the evidence of the complainants who stated that they were either not aware of any pricing information at all or were required to scroll down to view such information. It therefore concluded that, at least for some recipients of the messages, the pricing information was not prominent and required close examination, contrary to paragraph 5.7.2. The Tribunal decided to uphold a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE SUBSCRIPTION SERVICES (Paragraph 7.12.3a)

'Promotional material must clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers'

1. The Executive submitted that the only suggestion in any of the promotional transcripts that the quiz service was subscription-based was in the provision of pricing information at the back-end of the promotional text messages. The Executive accepted that the pricing provided some indication that the service was subscription-based as it stated "£1/week" or "£1/wk", which was supposed to be translated by the recipient as being '£1 per week'. In promotional text messages relating to other shortcodes, the pricing stated "£3/wk" or "£1.5/wk".

The Executive submitted that it was of the opinion the promotional material did not clearly indicate that the service was subscription-based. The Executive submitted that if the pricing alone (i.e. "£1/week") was sufficient to suggest a subscription – in order to satisfy paragraph 7.12.3a – more was necessary to make the information prominent and plainly visible. The Executive made reference to the evidence in relation to the alleged breaches of paragraphs 5.4.1a and 5.7.2 of the Code and submitted that the pricing had been deliberately placed either after the helpline number was given, thereby pushing the information to the end of the text message, or after a gap was placed within the

body of the text message, thereby forcing the reader to scroll through to the foot of the text message. This resulted in the information being insufficiently prominent and not plainly visible.

The Executive submitted that the receipt of complaints in relation to the quiz service promotional campaign was evidence that the subscription element was not clearly indicated to complainants.

2. The Information Provider stated that the wording of the subscription element (i.e. “£1/week”) had already been accepted by a Tribunal in a previously decided case (reference 759300) as being clear in terms of the words employed, and that furthermore the pricing information was legible, prominent, horizontal and presented in a way that did not require close examination and, as such, it refuted the assertion that it had breached paragraph 7.12.3a of the Code.

The Information Provider further stated that the Executive's position appeared to be that in all circumstances the placing of pricing information after the helpline number and any use of carriage returns would mean the subscription information would automatically be insufficiently legible and prominent. The Information Provider stated that if this was the case, then the Code should state exactly that. It also stated that in the absence of this, the Executive was seeking to impose its subjective view as if it was set out in the Code. The Information Provider stated that its position with regard to carriage returns was that when appropriately used, as in this instance, they were an aid to both clarity and prominence.

3. The Tribunal considered the evidence and concluded that the format ‘£1/wk’ and ‘£1/week’ (or ‘£3/wk’, ‘£3/week’ and ‘£1.5/wk’ for the other shortcodes) used in the promotional texts was clear enough to indicate that the service was subscription-based. However, the Tribunal accepted, on a balance of probabilities, the evidence of the complainants that a number of recipients were either not aware of the subscription information at all or were required to scroll down to see the information. The Tribunal therefore concluded that such subscription information was not prominently placed within the promotional texts and therefore decided to uphold a breach of paragraph 7.12.3a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR SUBSCRIPTION INITIATION (Paragraph 7.12.4)

‘Subscription initiation

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 made reference to its experience of the operation of this service, and specifically to the operation of the service on shortcode 82085. The Executive submitted that the sending of the keyword 'CASH' to this shortcode resulted, not in the issuance of a free initiation text message as required by the Code, but a charged subscription service message which read as follows:

"Thanks! Winner drawn on Monday! Mobquiz is weekly quiz club. Win a top prize every week for just £1 until you text stop to 82085. Mobquiz Helpline 0844579636."

The Executive submitted that the Code specifically stipulated the need for a free initiation text message, and whilst the first charged text message issued on shortcode 82085 did contain the information required under paragraph 7.12.4 of the Code, it was not a free message.

2. The Information Provider stated that it fully accepted and acknowledged that the service mechanism was not set up correctly such that the subscription initiation details set out in Paragraph 7.12.4 of the Code were not provided by way of a free reply text message on receipt of the consumer's request to join the service. However, all the required information had been set out clearly within the charged text message. According to the Information Provider, the all-important information was therefore provided to the consumer, and thus no benefit of any kind accrued to it as a result of the oversight, which arose solely as a result of a service configuration request being emailed to the Service Provider by a relatively inexperienced member of the team, without including the necessary detail. The Information Provider emphasised that the charged text message had been triggered and sent automatically on receipt of the user's text message containing the service keyword, regardless of the delivery or otherwise of the initial free text message, unless a 'STOP' request had been received prior to the scheduled send.

The Information Provider made reference to an email dated 14 May 2009 from the Service Provider, sent in response to the Executive's initial communication dated 11 May 2009, which acknowledged the error and stated that it would be resolved with immediate effect. The Information Provider stated that no other promotional messaging for that service went out until after the service had been reconfigured to include a free-to-receive subscription text message.

The Information Provider stated that the error was not a manifestly serious matter since it did not give rise to any consumer harm per se, and that on the contrary, it had itself suffered some harm in terms of missing a commercial opportunity, since the mandatory free text message being typically followed by a charged text message would have afforded it an opportunity to provide additional up-sell or other sales messages.

The Information Provider subsequently submitted that this breach had been dealt with informally by the Executive and it was not reasonable for the Executive to now raise the breach again as part of the formal investigation.

3. The Tribunal considered the evidence and concluded that the subscription initiation message sent to consumers was not free, contrary to paragraph 7.12.4

of the Code. The Tribunal noted that this contravention had been admitted by the Information Provider and therefore decided to uphold a breach of paragraph 7.12.4 of the Code.

The Tribunal commented that it felt it was entirely appropriate for the Executive to have formally raised the breach of 7.12.4 along with the other breaches identified in its breach letter, notwithstanding the fact that the Information Provider had first been informed of this breach on an informal basis and had taken immediate steps to rectify the breach once alerted to it. The Tribunal noted the immediate steps taken by the Information Provider to rectify the breach and decided to take those into account as a mitigating factor when setting sanctions.

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:

- Concealed subscription services have been singled out for criticism by PhonepayPlus.
- The Information Provider's recent breach history.

In mitigation, the Tribunal noted the following factors:

- The Information Provider co-operated with the Executive when notified of the breaches; steps were taken to immediately rectify the subscription initiation breach so that the required free subscription initiation messages were sent out to consumers.

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

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

- The Information Provider is to remedy the breaches by immediately ceasing to promote the quiz service pending receipt and implementation of compliance advice to the satisfaction of the Executive;
- A Formal Reprimand;
- A £15,000 fine;
- The Information Provider to seek and implement compliance advice on all of its quiz services and related promotional material for a period of 12 months from the date of notification of the decision;

- Claims for refunds are to be paid by the Information Provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.