

## THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 25 October 2012  
TRIBUNAL SITTING No. 112/ CASE 2  
CASE REFERENCE: 10352

Level 2 provider: Cellon Limited  
Type of service: Tick-Tack-Quiz- Quiz/competition service  
Level 1 provider: IMI mobile Europe 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 July 2012 and October 2012, PhonepayPlus received 18 complaints in relation to a competition service, "Tick-Tack-Quiz" (the "**Service**"), which operated on the shared premium rate shortcode 82344.

The Service was a quiz style competition, which consisted of a maximum of six trivia questions, which were billed by mobile terminating ("**MT**") text messages at a charge of £2.50 per message (each question cost 2 x £2.50, up to a maximum of £30). Consumers were not charged for answering questions; however each response automatically triggered a further question at a charge of £5 (2 x £2.50, up to a maximum of £30). Upon answering the sixth question, the user received a free text message with their score and the time in which they had completed the game. The competition ran from 5 June 2012 and was due to end on 30 September 2012. The winner of the prize was the entrant who had answered the most questions correctly in the shortest period of time.

The Service accepted entries from several different landing pages on the Service website, each landing page promoted the chance to win a prize such as an iPhone, Macbook Air or vouchers. The Service was widely promoted by affiliate marketers.

Examples of questions asked include:

- "Is Bill Gates the founder of Apple Inc.?"
- "Is the Olympic symbol made up of 5 rings?"
- "Did the Titanic sink because it hit an iceberg?"
- "Did the film the King's Speech win Oscar for best picture in 2012?"
- "Does Germany have a bigger land mass than Canada?"
- "Is Spanish the official language of the United States?"

Of the 18 complaints received, 12 stated that the messages received were unsolicited, six of the complainants were parents complaining on behalf of their child, four complainants stated that they were on a website, such as Facebook, and entered a competition to win a prize, such as, Tesco vouchers, and one of the complainants stated that he had entered a competition but was unaware of the pricing.

#### 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 (12<sup>th</sup> Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider on 2 October 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.2 – Transparency
- Rule 2.3.1 – Fair and equitable treatment

The Level 2 provider responded on 16 October 2012. On 25 October 2012, 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 ONE**

#### **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 had breached rule 2.3.2 of the Code as a result of the misleading nature of some its affiliate marketers’ promotions for the Service.

The Executive noted that the promotions were placed on Facebook by affiliate marketers who had been authorised to promote the Service by the Level 2 provider.

The Executive noted that a significant number of complainants stated that they had accessed the Service via misleading promotional material on Facebook and that these specific promotions had misled them into unintentionally incurring premium rate charges (**Appendix A**).

The Executive monitored promotions for the Service on Facebook. The Executive noted that in some instances a link was posted on a user’s “wall” which gave him/her the option to view who had viewed his/her profile. A further link was then provided enabling the user to win an iPhone. Subsequently, this led the user to the Service which gave the user a chance to win an iPad and not what was offered in the initial promotion (an iPhone).

The Executive also found that the Service was accessible through pages which took advantage of mistyped domain name traffic known as typo-squatting (**Appendix B**). This resulted in, for example, consumers who had mistyped You Tube with “yuotube” being directed to a page entitled “THANK YOU” and “Congratulations!” The user was then invited to complete a short survey for an opportunity to enter into a competition to win a Mac Book Air, a Samsung S130 or a £3,000 Tesco voucher. After completing three questions, and selecting one of the offers, the user was taken to the Service landing pages and after entering their mobile phone number, entered the Service. Consumers had the expectation that entering their mobile numbers would result in them obtaining the initial offer(s).

The Executive asserted that initial promotions for the Service misled consumers into entering the Service and incurring premium rate charges. Further, the Executive asserted that the references to trusted brand such as Facebook and Tesco resulted in consumers believing that the promotions were genuine. In addition, because it was mandatory for users to “share” the promotion with their friends, users were under the impression that the Service was trusted and had been recommended by a friend on Facebook.

The Executive asserted that users were misled or likely to be misled into using the Service for the following reasons:

- a) The use of popular brands including Facebook and Tesco which consumers trust;
- b) The trust in entering the Service on the apparent recommendation of a friend on Facebook.
- c) Consumers were induced into entering the Service in order to claim offers that did not exist.

Consequently, the Executive asserted that consumers had been, or were likely to have been misled, in breach of rule 2.3.2.

2. The Level 2 provider did not dispute the evidence presented by the Executive and stated that it was “very upset” that its affiliate marketers embarked on the promotions without its authority.

The Level 2 provider stated that, on becoming aware of the nature of the affiliate marketers’ promotions, it proactively managed the problem and made contact with the relevant parties at an early stage (and prior to contact with PhonepayPlus). The Level 2 provider asserted that during all of its activity in the UK it used its best efforts to monitor and control the marketing activities of the affiliate networks that were promoting the Service.

The Level 2 provider provided a timeline which demonstrated that there had been a number of spikes in traffic and the action the Level 2 provider had taken. The action taken included:

- i. Contacting the main media and marketing networks to ensure they were not using misleading marketing. In one email, the Level 2 provider’s representative stated that, “...we can’t take risks and run with publishers who can’t support or provide us with fully details of how they promote our services”.
- ii. Termination of its relationship with one affiliate marketing network on 15 July 2012.
- iii. Termination of promotion of the Service on 9 August 2012

During informal representations, the Level 2 provider stated that it had received and implemented compliance advice from the Level 1 provider. In addition, the Level 2 provider accepted that some of its affiliate marketers used typo-squatting and that it was responsible for any breaches caused as a result of its affiliate marketers.

Further, the Level 2 provider stated that although it had received a significant (although not large) number of enquiries, the number of complaints received was small given the scale of the Service.

The Level 2 provider added that the case against it could be distinguished from previous adjudications involving affiliate marketers, including the adjudication against the Level 2 provider Amazecell Limited (case reference 08341, dated 27 September 2012), as a result of the steps it had taken and proposed to take in future to prevent consumer harm.

3. The Tribunal considered the evidence, including the written and oral submissions made by the Level 2 provider. The Tribunal noted that the Level 2 provider accepted that the affiliate marketing promotions highlighted by the Executive were misleading for the reasons advanced by the Executive. Specifically, the Tribunal considered that enticing consumers into interaction with a Service with offers that did not materialise and the use of mistyped domain name traffic was highly misleading. Consequently, the Tribunal upheld a breach of rule 2.3.2 of the Code for the reasons advanced by the Executive.

**Decision: UPHELD**

## ALLEGED BREACH TWO

### 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 discernable”.

1. The Executive submitted that the Level 2 provider was in breach of rule 2.2.2 of the Code as key information was not communicated in an easily accessible, clear and/or easy to understand manner.

The Executive noted that the Service was promoted on a number of different landing pages on the Level 2 provider’s website. The Executive noted that for each promotion, the Service mechanics appeared to be similar, as were the key terms and conditions. The Executive also noted that throughout the promotion, pricing was mentioned three times; twice in the terms and conditions towards the bottom of the promotion and once below the call to action where consumer’s entered their mobile phone number (**Appendix B**).

The Executive noted that the terms and conditions positioned below the “SEND” button stated the following:

“This is not a subscription service. Pay per use: Each question cost £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. Minimum age: 18 with bill payer's permission. Privacy Policy.”

The Executive noted that the competition entry mechanic operated by giving consumers the opportunity to answer a maximum of six trivia questions (each priced at 2 x £2.50). The winner was the consumer who answered the most questions correctly in the shortest period of time. However this key information was only communicated to consumers in the main terms and conditions, which were positioned below the fold towards the bottom of the landing pages (**Appendix C**). Further, the Executive noted that the key terms and conditions were displayed in a grey font on a black background and therefore the Executive asserted that they were not clearly legible.

The Executive asserted in order for the user to have a realistic chance to qualify for a chance to win the prize, they would have to spend £30.

The Executive submitted that the information detailed above was key information and that without it a consumer could not make an informed decision as to whether or not to enter the Service. Further, the Executive submitted that the key information had not been easily accessible and/or clearly legible and presented in a way that was easy for users to understand. In light of the above, the Executive submitted that a breach of rule 2.2.2 of the Code had occurred.

2. The Level 2 provider stated that it had noted the Executive’s comments but that it was not its wish to deceive consumers by keeping information back or by acting in a reckless manner. In support of this assertion the Level 2 provider stated that the Service, including some promotional material, was tested and checked by two Level 1 providers. It added that it had implemented changes that were required by the Level 1 providers, including, in relation to making the terms and conditions more obvious to consumers.

During informal representations, the Level 2 provider added that the pricing statement was intentionally short to ensure that consumers read it but that it was of

the view it contained all the key information. The Level 2 provider also stated that, as the Service operated on a shared shortcode, it had had to demonstrate to the Level 1 provider that it was fully compliant before being given access to the billing platform.

However, the Level 2 provider accepted that on two or three of its landing pages the font colour used had resulted in the information not being displayed in a clear enough manner. The Level 2 provider attributed this to the page designer.

The Level 2 provider stated that it intended to change the terms and conditions of the Service and change the font colour to make it more obvious to consumers.

3. The Tribunal considered the evidence, including the written and oral submissions, and admissions, made by the Level 2 provider. The Tribunal noted that the key information was provided below the fold on some landing pages. The Tribunal viewed the appropriate landing pages, as a consumer would have viewed them, on a computer, and the Tribunal was satisfied that the key terms were not displayed in a manner which was easily accessible, clearly legible or easy to understand. The Tribunal noted that the Level 2 provider had submitted some of its landing pages to the Level 1 provider for comment, however the Tribunal noted that the Level 2 provider could not say whether the relevant landing pages had been viewed by the Level 1 provider and in any event concluded that it was the responsibility of the Level 2 provider to comply with the Code. For these reasons the Tribunal upheld a breach of rule 2.2.2 of the Code.

## **Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **Rule 2.3.1**

“Consumers of premium rate services must be treated fairly and equitably”.

1. The Executive asserted that users of the Service were not treated fairly and equitably in breach of rule 2.3.1 of the Code.

The Executive noted that consumers were given the opportunity to answer up to six questions. The winner of the competition was the consumer who answered the most questions correctly in the shortest period of time. In addition, the Executive stated that, below the call to action for consumers to enter their mobile number and interact with the Service, promotional material for the Service stated, “Pay per use £5.00 (2 x £2.50) per trivia question received,” and, “Charges stop when you stop playing”.

The Executive asserted that consumers should have been able to decide how many of the six trivia questions they wished to answer and how much money they paid (between £5 and £30) for their entry and chance to win the prize. However, the Service operated by automatically sending the consumer a further question at a charge of £5 every time an answer was given to a previous question. This continued until £30 of charges had been incurred. As a result, where a consumer only wished to answer one question, at a charge of £5, they would incur a charge of £10, as answering one question automatically resulted in a further question being sent.

The Executive submitted that the Service mechanic unfairly prohibited consumers’ ability to control how much they were prepared to spend on participation and how many questions they wished to receive and/or pay for. Further, the Executive added that due to the information that consumers were provided with before they enter the Service (see above), they were likely to have thought that they could choose to enter the Service by incurring just one £5 charge and receiving and answering just one of the six available questions. However, this was not the case as consumers who chose to answer one question were charged £10 and not £5 “Pay per use” as stated.

The Executive noted that the Level 2 provider stated that 8567 consumers participated in the Service. Of these 1340 individuals (16%) only answered one question and were charged £10 and not £5 “Pay per use” for doing so. 52% of consumers had paid £5 but had not answered any questions.

The Executive submitted that the billing mechanic was flawed and did not treat consumers, who understood the Service and wished to restrict how much money they were prepared to spend on their entry and chance to win the prize, fairly. In light of the above, the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code.

2. In written representations the Level 2 provider stated that it strongly challenged the point that Consumers were charged £10 instead of £5 after answering one question. However in informal representations, the Level 2 provider accepted that consumers were automatically sent a further question at a cost of £5 (up to a maximum of six questions) on answering a question. In addition, the Level 2 provider stated that once a consumer had answered six questions correctly, any consumers who answered less than six questions correctly had no chance of winning a prize.

Further, the Level 2 provider stated that the billing mechanic and service flow was equal for all consumers and that it was clear that a consumer merely had to stop answering questions for billing to cease. The Level 2 provider repeated that it did not wish to deceive any customers or treat anyone unfairly. The Level 2 provider provided the following table, which showed the volume and percentage of questions answered by consumers.

No of questions received	Charge £	Number of Customers	Percentage %
1	5	4489	52
2	10	1340	16
3	15	433	5
4	20	212	2
5	25	140	2
6	30	1953	23
	<b>Total</b>	<b>8567</b>	<b>100</b>

Further, the Level 2 provider asserted that 52% of consumers decided to stop at the first question, which it interpreted as showing that those consumers understood the terms of the quiz. The Level 2 provider also highlighted that the percentage of consumers (52%) who did not answer any questions was not unusual. Further, the Level 2 provider stated that 68% of consumers answered either no questions or one question before quitting the quiz and that there was a measurable time delay in their first response (noting it was a time based quiz); the Level 2 provider asserted that it had assumed that this was due to them not knowing the answer and therefore not proceeding to the second question of the quiz. The provider added that 23% of consumers decided to answer all six of the questions which it believe was a significant proportion of the customer base. The provider submitted that, bearing in mind that the quiz was both skill and time based, it believed that this was proof that the quiz was genuinely difficult and that the answering of a single question was not a reflection of the consumers lack of understanding of the information provided in relation to the Service.

3. The Tribunal considered the evidence, including the written and oral submissions made by the Level 2 provider. The Tribunal concluded that given the scale of

promotion, the number of entrants and the length of time of the prize draw, to have any realistic chance of winning a prize a consumer was required to answer six questions. The Tribunal rejected the Level 2 provider's interpretation of why so many consumers either answered zero or one question on the basis that the Level 2 provider had failed to provide any evidence to support its assertions and inferences. The Tribunal rejected the submission that consumers had been treated fairly as consumers were told that they had to answer all six questions for a chance to win the prize only after being charged for the first question at a cost of £5. In addition, the Tribunal did not accept that consumers had understood the terms and conditions because over 50% of consumers incurred a charge of £5 but did not answer any questions. The Tribunal was satisfied that the way the Service was promoted and operated did not treat consumers fairly because relevant information was not provided at the appropriate time. Accordingly, the Tribunal upheld a breach of rule 2.3.1 of the Code.

## **Decision: UPHELD**

## **SANCTIONS**

### **Initial Overall Assessment**

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

#### **Rule 2.3.2 – Misleading**

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

- The breach had a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers.
- The nature of the breach and the scale of the harm caused to consumers, were likely to have severely damaged consumer confidence in premium rate services.
- Consumers incurred unnecessary costs. For a large number of consumers, who did not answer any questions, the Service did not provide any value.
- The Service had the sole purpose of generating high revenue and did so through intentionally or recklessly misleading promotions and design.

#### **Rule 2.2.2 – Transparency**

The initial assessment of rule 2.2.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service misled consumers in relation to the chances of winning the prize.

#### **Rule 2.3.1 – Fair and equitable treatment**

The initial assessment of rule 2.3.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Consumers unknowingly had a very limited chance of winning a prize.
- The billing mechanic was fundamentally unfair and flawed.
- There were a high number of complaints.

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

### **Final Overall Assessment**

The Tribunal did not find any aggravating factors or relevant breach history.

The Tribunal took into consideration the following mitigating factor:

- The Tribunal accepted that the Level 2 provider ceased promotion of the Service in a timely manner; as a result the Service did not generate significant traffic and/or revenue after August 2012.

The Tribunal noted the statements made by the Level 2 provider in relation to its future and past conduct regarding affiliate marketing. However, the Tribunal believed that the previous measures taken and the proposed future measures are wholly inadequate to prevent future consumer harm.

The Tribunal noted that the Level 2 provider stated that it had made a number of refunds. However, the Tribunal noted that the level of refunds appeared to be low in comparison to both the number of users of the Service and those who had raised issues with the Level 2 provider, and consequently considered that the Level 2 provider had not done enough to enable the Tribunal to conclude that they had reduced the level of consumer harm sufficiently to be regarded as a mitigating factor.

The Level 2 provider's revenue in relation to the Service was within the range of Band 4 (£50,000- £100,000).

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

### **Sanctions Imposed**

The Tribunal noted the Level 2 provider's submissions regarding previous adjudications involving affiliate marketing, including against Amazecell Limited. However, the Tribunal found the case against the Level 2 provider to be more serious than the adjudication against Amazecell Limited. This was on the grounds that:

- i. Fewer complaints were made against Amazecell Limited.
- ii. Amazecell Limited had impressed the Tribunal with its openness. The Tribunal had also noted the steps Amazecell Limited had taken to attempt to control affiliate marketers and ensure future compliance. The Tribunal considered the steps taken and proposed future steps by Cellon Limited were wholly inadequate.
- iii. The competition mechanic in the adjudication against Cellon Limited meant that the vast majority of consumers had no realistic chance of winning the prize.

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

- A formal reprimand;
- A fine of £50,000; and
- A requirement that the Level 2 provider must refund all complainants 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.

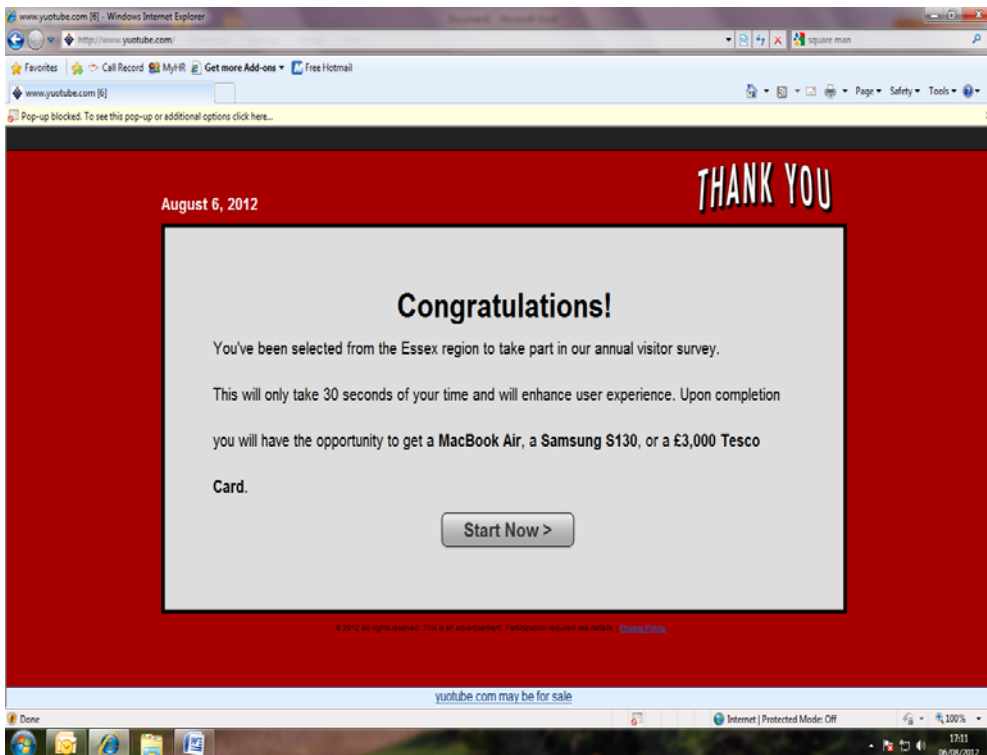


## Appendices

### Appendix A- Screenshot of an example of affiliate marketing for the Service on Facebook:



### Appendix B- Screenshot of an example of affiliate marketing for the Service using typo-squatting:



## Appendix C- Screenshots of examples of landing pages for the Service

This screenshot shows a web browser window displaying a landing page for a contest. The page features two iPads on the left. The main heading reads "Win The new iPad" with the subtext "The new iPad is here Do you want it?". Below this, a dark box contains the text "To send your answer and get a chance to win the prize Enter your mobile number". A text input field contains the number "07", and a blue "SEND" button is positioned below it. A disclaimer at the bottom states: "This is not a subscription service. Pay per use: Each question cost £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. Minimum age: 18 with bill payer's permission. Privacy Policy." The browser's address bar shows the URL: [http://www.tick-tack-quiz.co.uk/pages/uki/trivia\\_NewiPadSky\\_ukim/?referrer=1514&guid=950f3c6c-ee90-48e8-a43c-6cf51b262a80&nordrs=1](http://www.tick-tack-quiz.co.uk/pages/uki/trivia_NewiPadSky_ukim/?referrer=1514&guid=950f3c6c-ee90-48e8-a43c-6cf51b262a80&nordrs=1). The system tray at the bottom shows the date and time as 16:09 on 27/09/2012.

This screenshot shows a similar landing page for the "Win The new iPad" contest. It features the same iPad images and heading. The text below the heading asks "Answer the following question and it could be yours:". The question is "Which Tablet screen resolution is the highest?". Two blue buttons are provided as options: "Galaxy Tab 2" and "The new iPad". The same disclaimer and footer information are present. The browser's address bar shows the URL: [http://www.tick-tack-quiz.co.uk/pages/uki/trivia\\_NewiPadSky\\_ukim/](http://www.tick-tack-quiz.co.uk/pages/uki/trivia_NewiPadSky_ukim/). The system tray at the bottom shows the date and time as 14:47 on 20/09/2012.

New iPad Sky - Windows Internet Explorer  
 http://www.tick-tack-quiz.co.uk/pages/uk/irviva\_newiPadSky\_ukim/

Convert Select  
 Favorites Call Record MyHR Web Slice Gallery

New iPad Sky



# The new iPad

The new iPad is here  
 Do you want it?

Answer the following question and it could be yours:

Which Tablet screen resolution is the highest?

Galaxy Tab 2    The new iPad

This is not a subscription service. Pay per use. Each question costs £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. Minimum age: 18 with bill payer's permission.

[Contest Rules](#) | [Terms and Conditions](#) | [Privacy Policy](#) | [Customer Support](#)

Tick-Tack Quiz is a service operated and provided by Colton Ltd. Tick-Tack Quiz is an interactive SMS trivia contest, in which participants receive trivia questions on their cell phone from different fields of knowledge. By replying to the questions (via SMS) the users may score points for correct answers. The End-user that correctly answered the highest number of questions in the shortest possible time in any round during the competition period will be the winner. For detailed contest rules please click on [Contest Rules](#) above. The competition ends on 30-09-2012. By entering the received PIN code (password), you will receive a trivia question on your mobile phone. By answering the question you will receive the right question and go on up to 8 questions. Each question costs £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. By entering the received PIN code (password) online using the service you acknowledge and confirm that you have read the [Terms & Conditions](#), that you are the authorized mobile phone bill holder and/or that you have the consent of the mobile phone bill payer to use this service and that you are 18 years old. Tick-Tack Quiz is not affiliated with, sponsored by or endorsed by any of the listed products or retailers. Trademarks, service marks, logos, (including, without limitation, the individual names of products and retailers) are the property of their respective owners.

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