

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 25 October 2012  
TRIBUNAL SITTING No. 112/ CASE 1  
CASE REFERENCE: 09826

Level 2 provider: M.E. Media Market Limited  
Type of service: Speedy Quiz - Quiz/competition service  
Level 1 provider: Netsize UK 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 1 May 2012 and 19 September 2012, PhonepayPlus received 181 complaints in relation to a competition service, "Speedy Quiz" (the "**Service**"), which operated on the shared premium rate shortcode 83500.

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 £5.00 per message (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 (up to a maximum of £30). Upon answering the sixth question, the user received a MT text message with their score and the time in which they had completed the game. The competition ran on a quarterly basis and 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 speedyquiz.co.uk website. Each landing page promoted the chance to win a prize such as an "iPhone4s" or "The new iPad". The Service was widely promoted by affiliate marketers.

Examples of questions asked included:

"Is the Olympic symbol made up of 5 rings?"  
"Did the Beatles (band) have 4 members?"  
"Has England's soccer team won the World Cup twice?"

Complainants raised a number of concerns, including, confusion as to why they had incurred charges. A large number of the complainants appeared to have been directed to the Service landing pages as a result of misleading promotions by affiliate marketers, which, for example, offered free supermarket vouchers or "cheats", on websites, such as Facebook. (**Appendix A**).

The Level 2 provider was notified that PhonepayPlus had received a number of complaints in relation to the Service and that a preliminary investigation was underway on 18 July 2012.

### 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 promotional material promoted by both its affiliate marketers and on its own landing pages.

#### **Reason 1: Affiliate marketers’ promotions**

The Executive noted that a significant number of complainants stated that they had accessed the Service via misleading promotional material on Facebook. The Executive monitored the Service and found promotions for the Service which offered consumers enticements including a free £175 Tesco voucher, a free £250 ASDA voucher and an application that purported to allow consumers to see who had viewed their Facebook profile (**Appendix A**). 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.

On clicking on the offer, consumers were directed to “share” the promotion on their Facebook “wall” and/or with their “friend’s list”. They were then required to complete a survey. Having clicked on one of the surveys, the consumers were taken to one of the Service’s landing pages. The consumer was then told to enter their mobile number. After a mobile number was entered, the promotion diverted to the Service competition and there was no further mention of the initial offer(s).

The Executive submitted that consumers had interacted with the Service inadvertently with the expectation that by entering their mobile number, they would gain access to the initial offer. The Executive asserted that the promotions were designed to mislead consumers as there was no evidence that the original offers were real and that consumers were misled.

#### **Reason 2: Landing page promotions**

The Executive viewed a number of different landing pages for the Service. The Executive asserted that one of the landing pages (**Appendix B**) was misleading for the reasons outlined below.

- i. The promotion made the statement, “There is (1) prize you can claim”. The Service model was a quiz style competition. The winner was the consumer who answered six questions correctly in the quickest time. Therefore to state that a consumer could “claim” the prize was incorrect and therefore misleading.

- ii. The promotion utilised the wording, “Hurry up!” next to a countdown clock that started at two minutes. Once the clock reached zero, it restarted at two minutes. The countdown clock served no genuine purpose and unfairly provided consumers with an unnecessary sense of urgency to enter their mobile number and interact with the Service.
- iii. The promotion, in a bold font, stated, “Congratulations!” At the stage in the Service it was displayed, the consumer had not won a prize and had only found their way to one of the Service’s landing pages. The Executive submitted that the use of “Congratulations!” in conjunction with the statements made within points (i) and (ii) above, only served to create an incorrect understanding that the consumer had already won the prize.
- iv. The promotion had two initial “Step[s]” that it requested consumers to complete before they entered their mobile number.
  - “Step 1: What is the name of the new iPad?”
  - Step 2: In order to win the prize, enter your mobile number and continue to play our trivia game:”
 Again, the Executive asserted that at this stage the consumer only had a chance to win a prize. Therefore, the use of the wording, “In order to win...” only served to create an misunderstanding that the consumer has already won the prize.

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 promoted the Service.

The Level 2 provider provided a timeline which demonstrated that there had been a number of spikes in traffic and detailed the action the Level 2 provider had taken. This 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 25 July 2012

In informal representations, the Level 2 provider stated that it had received and implemented compliance advice from the Level 1 provider. Although the Level 2 provider accepted that it had not submitted all of its landing pages to the Level 1 provider and was unsure as to whether it had submitted the allegedly misleading pages. The Level 2 provider added that in relation to **Appendix B**, the page was not misleading as the page was preceded by a banner (that was controlled by affiliate marketers) which would have made the meaning of the particular landing page clearer.

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 were misleading and therefore found that the promotions were misleading for the reasons advanced by the Executive. In relation to the landing page shown at Appendix B, the Tribunal found that the page was clearly misleading for the reasons outlined by the Executive. The Tribunal was particularly concerned by the use of the words “claim” and “congratulations” in promotional material before a consumer had actually won a prize and noted that the Tribunal had previously specifically commented on the use of such wording in promotional material. The Tribunal upheld a breach of rule 2.3.2 of the Code on the basis of the two 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 competition entry mechanic operated by giving consumers the opportunity to answer a maximum of six trivia questions (each priced at £5). The winner was the consumer who answered the most questions correctly in the shortest period of time.

The Executive asserted that the above information was key information and that without it a consumer could not make an informed decision as to whether or not to enter the Service.

The Executive observed that the Service was promoted on a number of different landing pages, which were controlled by the Level 2 provider, within the Level 2 provider’s website. Directly below each call to action for consumers to enter their mobile number, and initiate entry into the Service, the following statement was made:

“This is not a subscription Service. Pay per use: £5.00 per received trivia question. Charges stop when you stop playing. Minimum age: 18 with bill payer’s permission. Privacy Policy.”

The Executive asserted that the above information did not provide consumers with easy access to the necessary full Service entry information and specifically, the key information that is absolutely “...material to the consumers’ decision...” to purchase and enter the Service competition.

The key information was placed at the bottom of the promotional landing pages, which required the consumer to scroll down the page to see fully. Additionally, the

font size used to display the key information was smaller than the other information on the promotion and not always clearly legible, for example some pages used a grey font on a grey background or a grey font on a black background (**Appendix C**).

The Executive submitted that the information relating to the Service mechanic and how the winning entry would be selected was material to the consumer's decision to purchase and enter the Service and that it was not easily accessible or clearly legible for the following reasons:

- The location of the information within the paragraph of terms and conditions;
- The requirement for the consumer to scroll down the promotion to see the information fully;
- The use of a grey font colour on a black background or a grey font on a grey background.

As a result, the Executive submitted that consumers should have been (but were not) “fully and clearly informed” of the key information before any cost had been incurred.

In light of the above, the Executive submitted that a breach of rule 2.2.2 of the Code has 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 provider, 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.

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 the landing pages. The Tribunal viewed the appropriate landing pages, as a consumer would have viewed them, on a computer, and was satisfied that the key terms were not displayed in a manner which was easily accessible and/or clearly legible. 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. In any event the Tribunal 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 per trivia question received,” and, “Charges stop when you stop playing”.

The Executive asserted that it should be the consumers’ decision as to how many of the six trivia questions they wished to receive and answer and how much money they were prepared to pay (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 they provided an answer to the 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 the question would have automatically resulted in a further question being sent.

The Executive submitted that the Service mechanic unfairly prohibited the 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 entered 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.

On 29 August 2012, and in response to a request for information letter, the Level 2 provider informed the Executive that a total of, “61,405 individual consumers had entered the service”. It later transpired that of these, “...39,726 individual consumers...” had answered just one (or zero) questions. 52% of consumers had paid £5 but had not answered any questions and 13% of consumers that had answered one question but were charged £10 and not £5 “Pay per use” for doing so.

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 consumers 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	31975	52
2	10	7751	13
3	15	2531	4
4	20	1141	2
5	25	1155	2
6	30	16855	27
	<b>Total</b>	<b>61405</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 65% 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 27% 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 quarterly nature 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, was 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 their 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 July 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 1 (£500,000+).



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:

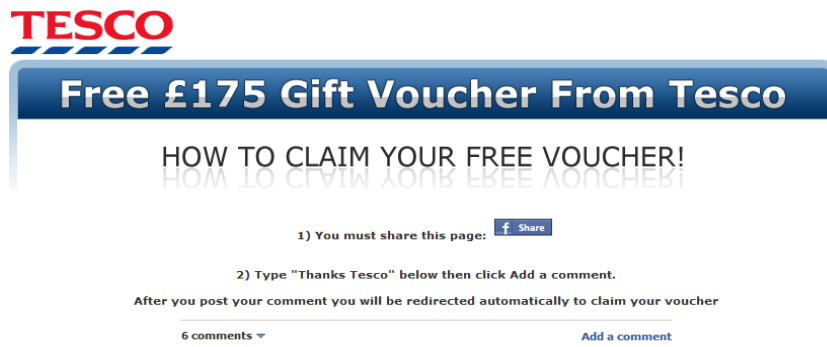
- i. Fewer complaints were made against Amazecell Limited.
- ii. Amazecell Limited had impressed the Tribunal with its transparency. The Tribunal had also noted the steps Amazecell Limited had taken to attempt to control affiliate marketers and ensure future compliance. The Tribunal considered the steps taken and proposed for the future by M.E. Media Market Limited were wholly inadequate.
- iii. The competition mechanic in the adjudication against M.E. Media Market 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 £500,000; 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 examples of affiliate marketing for the Service:



**TESCO**

## Free £175 Gift Voucher From Tesco

HOW TO CLAIM YOUR FREE VOUCHER!

1) You must share this page: [Share](#)

2) Type "Thanks Tesco" below then click Add a comment.

After you post your comment you will be redirected automatically to claim your voucher

6 comments [Add a comment](#)



shared a link.  
10 minutes ago

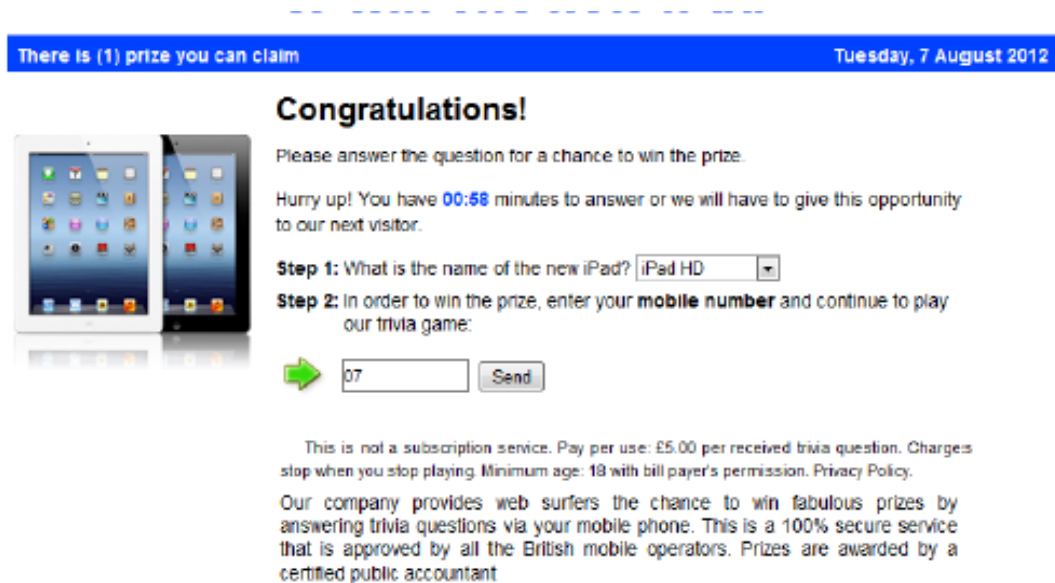
thanks asda the only place to shop for a bargain



**Get Free £250 Asda Shopping Voucher Now. (41 Left)**  
s3-eu-west-1.amazonaws.com

Claim your Free £250 Asda Shopping Voucher. Only a few left.

### Appendix B- Screenshots of an example of a landing page for the Service:



There is (1) prize you can claim Tuesday, 7 August 2012

## Congratulations!

Please answer the question for a chance to win the prize.

Hurry up! You have **00:58** minutes to answer or we will have to give this opportunity to our next visitor.

**Step 1:** What is the name of the new iPad?

**Step 2:** In order to win the prize, enter your **mobile number** and continue to play our trivia game:

This is not a subscription service. Pay per use: £5.00 per received trivia question. Charges stop when you stop playing. Minimum age: 18 with bill payer's permission. [Privacy Policy](#).

Our company provides web surfers the chance to win fabulous prizes by answering trivia questions via your mobile phone. This is a 100% secure service that is approved by all the British mobile operators. Prizes are awarded by a certified public accountant

