

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

Thursday 24 May 2012

**TRIBUNAL SITTING No. 100 / CASE 1
CASE REFERENCE: 07657**

Level 2 provider:	Mobile Minded BV
Type of service:	Subscription/ competition
Level 1 provider:	Ericsson Internet Payment Exchange AB and Zenilco Center LTD
Network operator:	All Mobile Network Operators

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

BACKGROUND

During September and October 2011, the Executive received three complaints from members of the public in relation to the Bumbalee service (the “**Service**”) operating on shortcode 64546.

Monitoring carried out by the Executive revealed that the service was promoted on Facebook with an offer stating: “*FREE £150 worth of MORRISONS vouchers*”. When the promotion was selected, consumers were directed to share the promotion on their Facebook page and enter “*Thanks*” in the comment section. Consumers were then presented with a further screen containing a ‘pop-up’ advert stating: “*Complete one of the quick surveys below to redeem your £150 pound voucher!*” Upon clicking on a survey option, the user was directed to a premium rate service which used a web-based Payforit payment platform. The Executive noted that, contrary to the wording of the ‘pop-up’, there was in fact no survey but only a redirection to a premium rate competition website. Terms and conditions at the bottom of the premium rate service competition web landing page stated: “*Bumbalee is a subscription service, it will cost 5 times £2 a week until you send STOP to 64546*”. After completing the Payforit process, the user received a free message, which stated: “*BUMBALEE: [FreeMsg] U are subscribed to Bumbalee for 5 times GBP2 per 7 days until you send stop to 64546. Helpline: 0800 408 0791 or uk@bumbalee.com*”. In addition, a WAP-push message with a link to <http://quiz.bumbalee.com> was sent to consumers.

Executive monitoring of the Service highlighted irregularities, including obtaining a score of six despite not having answered any questions and consequently incurring eight premium rate charges of £2 each, totalling £16. Monitoring showed that there was no method of obtaining the Morrisons vouchers, with consumers instead being offered the opportunity to win an iPhone 5 by entering into a premium rate competition service. When contacted, Morrisons stated that it had not provided any vouchers or had any affiliation with the promotion.

The Executive established that Ericsson Internet Payment Exchange AB (“**Ericsson**”) was the Level 1 provider responsible for this service. The party contracted to Ericsson was Zenilco Center LTD (“**Zenilco**”). Following the provision of further information from Zenilco,

Mobile Minded BV (“**Mobile Minded**”) was identified as the Level 2 provider. Consequently, Zenilco was identified as a Level 1 provider in addition to Ericsson.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice 12th Edition (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 26 April 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading

The Level 2 provider responded on 10 May 2012. On 24 May 2012, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

After considering the evidence, including correspondence from the Level 1 provider, Zenilco, and Mobile Minded, the Tribunal accepted the Executive’s submission and was satisfied that Mobile Minded was the Level 2 provider.

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 for four reasons.

Reason 1- Availability of vouchers

Monitoring of the Facebook promotion demonstrated that consumers were offered a free Morrisons voucher worth £150 (as shown in **Appendix A, screenshot 1**). The monitoring established that the quantity of “*Free Vouchers remaining*” decreased from 397 at the beginning of monitoring to 388 and then 377.

The promotion stated that in order to qualify for the free Morrisons voucher, the user had to share the promotion with their friends on Facebook and post the comment “*Thanks!*”

Zenilco submitted that the vouchers were: “*[P]rovided directly by Morrisons or their advertisement agency, they are shared between all their affiliates and not allocated exclusively to Bumbalee*”.

On 14 March 2012, Morrisons denied having any affiliation to the promotion or providing vouchers and emphasised that the vouchers did not exist.

Accordingly, the Executive submitted that the vouchers did not exist and that users were under the impression that they would receive a free voucher and therefore misled into using the service.

Reason 2- Branding and the use of trademarks/ appearance of a genuine promotion

The Executive noted that the promotions repeatedly displayed the logos of Facebook and Morrisons (as shown in **Appendix A, screenshot 2**). The Executive submitted that the use of trusted brands' logos resulted in users believing that the promotion was genuine and therefore encouraged participation in the promotion.

In addition, the Executive submitted that users were misled or likely to be misled into using the service as a result of consumers being directed to share the promotion on their Facebook page in a manner which suggested the promotion was genuine.

Further, the Executive maintained that the use of a countdown in the number of available vouchers suggested users were rapidly claiming the free voucher, when in actual fact no vouchers existed.

Reason 3- Competition to win an iPhone 5

The Executive noted that the service commenced operation in August 2011 and was suspended in mid November 2011.

The Executive's monitoring showed that consumers were offered the chance to win an iPhone 5 by entering a competition (**Appendix A, screenshot 3**). The promotion stated that the iPhone 5 was "coming soon". The terms and conditions stated: "*The shown image of the iPhone 5 is based on a rumour. The actual iPhone 5 may differ from this picture. The prize will be sent to the winner after launch date*".

The Executive stated that at the time of the promotion (and by the date of the Tribunal) the iPhone 5 had not been launched and/or a launch date publicised. As a result, the Executive submitted that the Level 2 provider was promoting a product which was not available at the time the Service was promoted. The Executive maintained that the promotional wording "coming soon!" suggested that the launch of the iPhone 5 was guaranteed and would happen 'soon'. It is, however, the Executive's view that only a manufacturer could give such a guarantee without misleading consumers.

Reason 4- Cost of the Service

The terms and conditions on the promotion stated the following:

"Bumbalee is a subscription service. It will cost 5 times £2 a week until you send STOP to 64546. A quiz consists of 4 rounds (rounds end at Sunday 12:00pm, new rounds start a Sunday 12:01pm) and a new quiz starts every month. Each Month's winner will be selected in the 1st working week of the month. Customers, who enter their subscription code in order to confirm signup through our website, are agreeing to become subscribers. By signing-up for and/or using the service acknowledge and confirm that you have read the terms and conditions, that you are a resident from the United Kingdom, 18 years or older and authorized account holder and/or that you have the consent of the account holder. Subscriber compete to win the monthly prize. The monthly quiz consists of 10 questions per round, per week. High score players play open question tiebreaker. High score: answer the most questions in any given week (max 10) correctly compared to other contestants to get a high score. (multiple high scoring contestants all get invited to the knock out final) Closest/correct answers in knock out final wins. Multiple finalists, play additional tiebreakers. The shown image of the iPhone 5 is based on a rumour. The actual iPhone 5 may differ from this picture. The prize will be sent to the winner after launch date. For help: send HELP to 64546. Contact details: 0800 408 0791 (toll free number) or e-mail:

uk@bumbalee.com for more information or Terms and Conditions go to: www.bumbalee.com.”

The Executive noted that a user would have to play four rounds to be in with a chance to win and therefore the actual cost of using the service was £40 per month. Consequently, the Executive submitted, that users may have been misled into entering the service in the belief the cost was £10 for a chance to win when in fact they had to spend a minimum of £40.

The Executive accordingly submitted that for the four reasons outlined above rule 2.4.2 had been breached.

2. The Level 2 provider denied the breach and/or that it was responsible for any breach. Generally, the provider submitted that:
 - None of the three complainants raised any of the reasons for the breach and/or points raised by the Executive.
 - All requested information was provided to its best efforts and within the set deadline on all occasions.
 - It had responded to the investigation by immediately suspending the service, rectified technical issues and refunded users, who were impacted by the technical billing issue or by the Facebook promotion. Therefore, the provider was under the impression the matters were “solved” and was “surprised” to receive the breach letter.
 - The Service was set up as a Payforit service and the entire flow to subscribe was hosted by the operators to ensure transparent pricing, which gave it a sense of confidence that there were enough safeguards in place to ensure that the user could enter the service in a clear and transparent matter where he/she was aware of all the key terms and conditions (for example, detailed information on the cost of the Service on every step, subscribe me now button at the final stage, information message with preset template including price and opt out information sent after the user subscribes etc.).
 - The screenshots of the Morrisons promotion were provided with the breach letter. Receiving this information at an earlier stage would have made it easier and more transparent for the provider to satisfy the regulator’s need for information and would have resulted in a more targeted response. As a result of this the Executive had not acted in the spirit of the principles contained in the Code.

Provider’s response to Reason 1 – Availability of vouchers

The Level 2 provider submitted that it did not align itself with comments made by Zenilco regarding word of mouth advertising on Facebook and that the Morrisons promotion was offered by an independent publisher, which was not approved by the provider. The provider submitted that it “condemns” the promotion and would have addressed the situation more adequately had it been provided with all available information in a timely manner by the regulator.

In addition, the Level 2 provider stated that it: *“[P]romote[d] subscription based competition services, billed via [Payforit], through affiliate marketing channels. We have a direct relationship with affiliate partners, who, in turn, have direct relationships with publishers. Publishers are independent entities from the affiliates who bought online advertising space to promote our services. When a customer clicked on a banner promoted by the publisher they were brought to a lead-in page hosted and controlled by the publisher. By clicking on the call to action on the publisher lead-in*

page, the customer was then brought to the advertiser's landing page. This is the cumulative promotional process. As stated above this promotion is not ours but has been setup by a publisher. We have not been able to spot it ourselves due to the low volume of subscribers generated by this publisher. Neither did we receive any complaints with regards to this promotion in our customer care centre that would have led us to this promotion."

Provider's response to Reason 2 – Branding and the use of trademarks/appearance of a genuine promotion

The Level 2 provider repeated its submission that the Morrisons promotion was offered by a third party without its knowledge and/or consent and therefore it was not responsible. It was further submitted that the provider had taken appropriate action to ensure the affiliate would no longer be able to promote any of its products, and proactively contacted and refunded some users.

Provider's response to Reason 3 – Competition to win an iPhone 5

The Level 2 provider submitted that the Bumbalee landing page was fully compliant. All customers were fully and clearly informed of all information likely to influence their decision to purchase. Further, the pricing, billing frequency and the subscription nature of the service were detailed on the Payforit landing page. Full terms and conditions were detailed at the foot of this page above the web page fold (**Appendix A**).

In relation to the availability of the iPhone 5, the Level 2 provider maintained that consumers were fully informed that the iPhone 5 was not on the market, "[W]as based on a rumour", may have differed from the picture and would have been sent after the launch date. Additionally, the provider stated that in the event there had been an iPhone 5 winner, they would have been offered the opportunity of waiting for the launch, receiving a prize of a similar value or receiving cash to the value of the iPhone 5.

The provider maintained that no consumer harm was caused to users as they were made fully aware of the service they would receive.

Provider's response Reason 4- Cost of the Service

The Level 2 provider submitted that the Executive had misinterpreted the terms and conditions and in fact it was possible to win after playing for one week only if a user gained the maximum or highest score. The provider supplied the following game-flow to illustrate its submission:

1. *The user enters the service and receives his/her first set of 10 questions.*
 2. *The user plays these questions and reaches for example 8 points.*
 3. *The week after the user receives another set of questions, should he/she decide to play again and score 9 points the user will not (as suggested by the executive) receive 17 points in total. But the highest score in an individual round counts (in this case 9). This makes it possible for all participants to win.*
3. The Tribunal considered the evidence and noted the Level 2 provider's detailed submissions. It was said by the Level 2 provider that the promotion was carried out by an affiliate and they were not responsible. The Tribunal found that the Level 2 provider was responsible for the promotion by virtue of part 2 of the Code. In relation to Reason 1, the Tribunal noted that the Level 2 provider was unable to demonstrate

that the Morrisons vouchers were available. The Tribunal was satisfied that as the vouchers were never available the promotion was misleading. With regard to Reason 2, the Tribunal found that the use of trusted trademarks and brands would be likely to mislead a consumer into thinking that the promotion was valid and as such the use of these trademarks and brands was misleading. With regard to Reason 3, the Tribunal concluded that as no iPhone 5 existed and, as the Level 2 provider had no evidence that it was “*coming soon*”, it was misleading to run a competition to win the iPhone 5. The Tribunal further found the claim that the iPhone 5 was “*coming soon*” was misleading to consumers. In relation to Reason 4, the Tribunal found that the basis on which the competition was run, as set out in the terms and conditions, was not clear. For example it was not clear what would happen in respect of users who chose to opt-out of the service after the first round without completing all the other rounds, and in respect of the tie break questions. It was not clear from the terms and conditions whether the prize could be won after one week or whether the user would have to stay subscribed for four weeks. The Tribunal therefore concluded that for the four reasons given by the Executive, consumers had been misled, or were likely to have been misled. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal’s initial assessment of the breach of the Code was as follows:

Rule 2.3.2- Misleading

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

- The case had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.
- The Service had promotional material that was designed with the intention to not provide consumers with adequate knowledge of the Service or the costs associated with it.
- The Service was non-compliant in relation to a key responsibility, which indicated a systemic failure to meet the outcome relating to the fair and equitable treatment of consumers as set out in the Code.
- The Service generated substantial revenue through a non-compliant promotion that misled consumers.

The Tribunal’s initial assessment was that, overall, the breach was **serious**.

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal took into account the following three mitigating factors:

- The Level 2 provider stated that it had taken several steps to end the breach and/or remedy the consequences in a timely fashion, including, rectifying the technical issue, ceasing certain marketing activity and refunding some consumers.
- The Level 2 provider stated that it had refunded consumers affected by the technical issue and the marketing activity by the affiliate.

- The Level 2 provider took action to ensure the risks of the breach reoccurring were diminished in that it stated that it had solved the technical issue and ceased marketing activity with its affiliate.

The revenue in relation to this service was in the low range of Band 4 (£50,000-£100,000).

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

Sanctions Imposed

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

- A formal reprimand;
- A fine of £10,000;
- A requirement for the Level 2 provider to submit all premium rate services and promotional material to PhonepayPlus for compliance advice for a period of 12 months, any such advice to be implemented within two weeks; and,
- A requirement that the Level 2 provider must, within six months, refund all complainants who claim a refund, for the full amount spent by them on the service, 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.