

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

**Thursday 2 February 2012  
TRIBUNAL SITTING No. 92 / CASE 2  
CASE REFERENCE: 02733**

Network operator: All Mobile Network Operators  
Service Provider: Wireless Information Network Limited, High Wycombe  
Information Provider: Unavalley BV, Amsterdam

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

**BACKGROUND**

Between 14 July 2011 and 31 August 2011, the Executive received 38 complaints in relation to a service called 'Tringaloo', which operated on shortcode 85111. The majority of the complainants stated that they were misled into completing an online survey which required them to input their mobile phone number. This resulted in them entering a quiz and incurring a premium rate charge of £1.50 per message sent and £1.50 per message received. The Executive noted that this was a non-subscription service to win prizes such as an iPhone 4.

The Executive carried out monitoring of the service and raised a concern about a free message which was also received by complainants and did not contain pricing or contact information.

**(i) Sample of complainants' accounts**

Between 14 July 2011 and 31 August 2011, the Executive received 38 complaints from members of the public in relation to the Tringaloo service.

Of the 38 complainants:

- 15 were parents complaining on behalf of their children;
- 22 stated that they were misled into completing the survey because they thought it was sent through websites such as 'Twitter', 'Wikipedia', 'YouTube' and others, and therefore trusted the brand;
- 7 questioned pricing prominence and some stated they did not see any pricing;
- 5 stated that the messages received were unsolicited; and
- 2 stated that the key terms and conditions were not prominent.

A sample of the complainants' accounts are below:

*"I mistyped facebook.com as faceebook.com, and a message purporting to be a facebook survey invited me to text 85111. Appreciate this is my fault but this service generated multiple text requests in the form of a quiz and I participated until I felt it was excessive & then found it was not related to facebook"*

*"My fiancé was tricked into a service she was on youtube and she clicked on a survey thing she thought it was through youtube and she picked the prize she wanted to play for. It says in very small writing that you will be billed £3 a week but that is misleading because she charged £63. She sent a stop message today. £31.50 for sent text £32.50 for received"*

*"It's my 10 year old daughters phone and last night she was just bombarded with theses questions and she just get replying I've gone through this phone and theres just no mention of £1.50 per reply I'm disgusted that this is allowed to happen." "It was free msg answer this question to win a free iphone answer a b or c."*

## **(ii) whocallsme.com**

The Executive visited whocallsme.com and noted that. between 17 June 2011 and 7 September 2011, recipients of messages from shortcode 85111 had posted messages on this website reporting similar experiences to the complainants' accounts above. The website contained blogs from parents on behalf of their children.

## **(iii) Allocation to the Informal Procedure**

On 13 June 2011, a PhonepayPlus Complaint Resolution Officer contacted the Information Provider with regards to receipt of complaints from members of the public in relation to a Tringaloo service operating on shortcode 85111.

The Complaint Resolution Officer raised the following concerns:

- Once a user stopped answering questions, they continued to receive free messages in an attempt to entice them into incurring further costs;
- The free messages received should have provided the pricing information;
- The free messages received should have stated the Information Provider's identity; and
- The free messages should have given details of a non-premium rate customer helpline number.

The Complaint Resolution Officer also recommended that, in order to view the key terms and conditions, a visitor to these websites would have to scroll down in order to view them. This issue had already been raised on several occasions by numerous members of the PhonepayPlus Complaint Resolution Team on 13 June 2011 and 29 July 2011.

At the time, the Complaint Resolution Officer noted that consumers stated that they came across this promotion by mistyping (referred to as 'typosquatting' within the media) 'Facebook' to 'Facebool', and were therefore misled into completing the survey as they were under the impression that it was related to the 'Facebook' service.

On 12 July 2011, the Complaint Resolution Officer recommended that, in the interest of good practice, every Message Terminating message (chargeable messages sent to a consumer's phone) used in the service should contain pricing information and, as a minimum, pricing information should be stated once a user had spent £10.

On 13 July 2011, the Information Provider responded by asking when the recommended changes needed to be made, and also questioned how the suggested changes would be communicated to the rest of the mobile industry in order to ensure there was a fair level playing field. The Complaint Resolution Officer replied on 15 July 2011 and confirmed that the advice had to be implemented immediately.

After this period, the Complaint Resolution Officer continued to receive complaints from consumers, stating that they had been misled into completing the survey and entering their mobile phone number onto the website. Pricing information was still a concern to the Complaint Resolution Officer as complainants were unaware that answering questions would result in charges.

On 29 July 2011, the Complaint Resolution Officer initiated a new Fast-track case, raising 'typosquatting' and scrolling issues with the Information Provider directly. The Complaint Resolution Officer stated that typosquatting should no longer be used as a form of marketing if the resulting webpage was similar to the page which users were trying to access. It was also made clear that failure to stop this marketing may result in a formal investigation. The deadline for the Information Provider to correct these concerns through the Fast-track procedure was 11 August 2011.

The Officer provided the Information Provider with a list of complainants, including the nature of the complaints in order to highlight the impact of the 'typosquatting'.

On 9 August 2011, the Officer received an email from the Information Provider, confirming that their affiliates had been instructed to stop this marketing.

On 11 August 2011, the Officer informed the Information Provider that the case had been closed, although further action may be taken if similar problems were identified in the future.

By 24 August 2011, the Officer had received a further 11 complaints and requested that the Information Provider offer refunds to these complainants.

#### **(iv) Allocation to the Standard Procedure**

During August 2011, and again in early September 2011, the service was monitored by the Executive. The monitoring showed that the Information Provider had failed to implement the pricing changes recommended by the Officer and 'typosquatting' remained an issue, even though the Information Provider had stated that they had instructed their affiliates to stop this type of marketing. For this reason, this case was escalated from the Fast-track procedure to a formal Standard procedure investigation.

#### **(v) How the service operated according to the Executive**

Initially, three services were monitored on 17 August 2011, each of which represented typosquatting of the popular websites: wikipedia.com, twitter.com and youtube.com. This monitoring was repeated on 5 September 2011. Both monitoring experiences were identical.

##### **Monitoring of the wikipedia.com/wikipedia.com service.**

On 5 September 2011, the Executive visited wikipedia.com and wikipedia.com and viewed the content contained in Appendix A.

After entering the URL address wikipedia.com or wikipedia.com, the Executive was taken to a screen containing text in a box stating:

*"Congratulations Wikipedia User ! You are the H9 winner for September 5<sup>th</sup> Please select a prize and enter your email on the next page to claim."*

The Executive noted that the message stated the correct name of 'Wikipedia'. The Executive also noted that, despite the message above stating otherwise, the next page did not contain a function that enabled users to enter their email address.

The second page (Appendix A) displayed the Wikipedia icon, together with a selection of prizes from which the user was to select one, by clicking “continue”. The same page displayed a countdown clock which seemed to indicate to the user that there was a deadline for claiming their prize. The Executive noted, however, that once the clock counted down to zero, it was still possible to enter the competition. The Executive further noted that the wording in the middle of the page stating, “*How to Claim: Please select a prize, enter your email address and fill out your shipping information,*” did not indicate to the user that he or she would be entered into a competition to win one of the prizes.

The third page contained a question with an option for the user to click the answer, “Yes” or “No”. After scrolling down the page, the user could gain access to the service terms and conditions. The Executive answered the question by clicking “Yes”.

The fourth page required the user to enter their mobile telephone number. The Executive entered the number of a monitoring phone.

The fifth page contained a message indicating that the Executive would receive a free message in a few seconds which contained a “pincode”. The Executive received the following message from shortcode 85111:

*“Fill in this unique pincode 87452 on the website for your chance to WIN THE MACBOOK. NO SUBSCRIPTION £1.50per question & answer.Please ignore if not requested.”*

Four minutes later and without any further action, the Executive received the following further message from shortcode 85111:

*“Fill in this unique pincode 87452 on the website for your chance to WIN THE MACBOOK. NO SUBSCRIPTION £1.50per question & answer.Please ignore if not requested.”*

The balance on the monitoring handset at the beginning of the monitoring was £10. After receipt of the above two messages, the balance remained at £10. The Executive entered the pin 87452 on the website and clicked on the “continue” button.

The balance was reduced to £8.50 and the handset received the following message:

*“Answer these questions. The Cha Cha is a? A. Dance B. Dog Send A or B to 85111”*

The Executive sent the text “A” to shortcode 85111 and the balance was reduced to £7. The Executive received a further charged message from shortcode 85111 which reduced the balance to £5.50:

*“Perfect! You are now in the race! How many colors does a rainbow have? A.2 B.7. Send A or B to 85111”*

The Executive stopped any interaction with the service at this point on 5 September 2011.

On 7 September 2011, the Executive received the following free message from shortcode 85111:

*“FreeMsg: You are in the race to win! Answer this: How many colors does a rainbow have? A. 2 B.7. Send A or B to 85111”*

On 8 September 2011, the Executive received the following additional free message:

*“FreeMsg:Win the new MacBook! Answer these questions: How many colors does a rainbow have? A. 2 B.7. Send A or B to 85111”*

### **Monitoring of the twtter.com service**

On 5 September 2011, the Executive visited twtter.com as opposed to twitter.com and viewed the content contained in Appendix B. The icon and background colouring was similar to those used on the genuine twitter.com website.

After typing twtter.com, the Executive received the following message on the website:

*“Are you sure you want to navigate away from this page? WAIT! WAIT! WAIT! Get your Ipad2 Now! Click cancel to stay on the page. Press OK to continue, or Cancel to stay on the current page.”*

The Executive clicked on the “OK” button and viewed the following (Appendix B, screenshot 1):

*“**Congratulations!** You’ve been selected to take part in our short anonymous 30 second questionnaire. To say “thank you”, you’ll have the opportunity to receive one of our exclusive offers including a Groupon and Win an iPad2. Start this short survey now. The offer is available today only: **September 5, 2011.**”*

On the same screen the Executive was asked to answer the first of two questions:

*“Are you Male or Female?”*

The Executive clicked “Male” and viewed the same message as above, together with the second question:

*“How often do you tweet?  Hourly  Daily  Weekly  Monthly  Other”*

The Executive clicked on “Hourly” and viewed a new screen (Appendix B, screenshot 2) which displayed a selection of prizes from which the user was to select one, by clicking either “Groupon”, “Round Trip Get Away”, or “Win a iPhone 4.”

The Executive clicked on “Win a iPhone 4” and viewed a new screen which contained a picture of the iPhone 4 and the following question:

*“It is possible to video call with the new iPhone?  Yes  No.”*

After scrolling down the page, the Executive was able to gain access to the service terms and conditions. The Executive clicked “Yes”, followed by the “continue” button.

The next page required the user to enter their mobile telephone number. The Executive entered the number of a monitoring phone.

The Executive stopped monitoring at this point on 5 September 2011.

### **Monitoring of the twiter.com service**

On 5 September 2011, the Executive visited twiter.com as opposed to twitter.com. The icon and background colouring was similar to those used on the genuine twitter.com website.

After entering the URL address twiter.com, the Executive viewed the following message:

***“What’s Happening?*** To mark our 5<sup>th</sup> anniversary we’ve decided to conduct a short survey of our users. You’ve been selected from the London region to take part. This will only take 30 seconds of your time and will enhance user experience. Upon completion you will have the opportunity to get a Macbook Air®, Apple iPhone 4®, or the iPad2®. **Start Now.**”

The Executive clicked “Start Now” and viewed the following:

*“Question 1 of 3 Are you male or female? Male Female.”*

The Executive clicked “Male” and viewed the following second question:

*“Question 2 of 3 Where are you viewing from right now? At Home At Work Other.”*

The Executive clicked “At Home” and viewed the following third question:

*“Question 3 of 3 How long do you spend on the internet every day? < 1 Hour 1-2 Hours 2-3 Hours 3+ Hours.”*

The Executive clicked “< 1 Hour” and was navigated to a new page which displayed a selection of prizes from which the user was to select one, by clicking either “Macbook Air”, “iPhone 4”, or “iPad 2.” The Executive clicked on the “iPad 2” icon and, after a short message which indicated that the service was “Checking availability”, the Executive was guided to a new page which contained picture of the iPad 2 and the following question:

*“It is possible to video call with the new iPad2?  Yes  No.”*

After scrolling down the page, the Executive was able to gain access to the service terms and conditions. The Executive clicked “Yes”, followed by the “continue” button.

The next page required the user to enter their mobile telephone number. The Executive entered the number of a monitoring phone.

The Executive stopped monitoring at this point on 5 September 2011.

### **Monitoring of the youtube.com service**

On 5 September 2011, the Executive visited youtube.com as opposed to youtube.com and viewed the content contained in Appendix C. The icon and background colouring was similar to those used on the genuine youtube.com website.

After entering the URL address youtube.com, the Executive viewed a screen containing the following message (Appendix C):

***“Congratulations!*** You’ve been selected from the London region to take part in our annual visitor survey. This will only take 30 seconds of your time and will enhance user experience. Upon completion you will have the opportunity to get a **Macbook Air®, Apple iPhone®, or a iPad 2® Start Now.**”

The Executive clicked on the “Start Now” icon and viewed the following message:

***“Question 1 of 3 Are you male or female? Male Female.”***

The Executive clicked “Male” and viewed the following second question:

**“Question 2 of 3** How many videos a week do you watch online? 0-3 4-10 10-25 25+.”

The Executive clicked “0-3” and viewed the following third question:

**“Question 3 of 3** How do you feel about advertisements in videos? Love them Ok with them Upset with them Hate them.”

The Executive clicked “Love them” and was navigated to a new page which displayed a selection of prizes from which the user was to select one, by clicking either “Macbook Air”, “iPhone 4”, or “iPad 2.” The Executive clicked on the “iPad 2” icon and was then guided to a new page which contained a picture of the iPad 2 and the following question:

*“It is possible to video call with the new iPad2?  Yes  No.”*

After scrolling down the page the Executive was able to gain access to the service terms and conditions. The Executive clicked “Yes”, followed by the “continue” button.

The next page required the user to enter their mobile telephone number. The Executive entered the number of a monitoring phone.

The Executive stopped monitoring at this point on 5 September 2011.

#### **(vi) How the service operated according to the Information Provider**

The Information Provider’s explanation of the service was provided in tabular form, as indicated in Appendix D.

#### **(vii) Specific concerns**

The Executive noted that the majority of the complainants stated that they entered the service by mistyping popular websites, such as ‘Facebook’, ‘Twitter’ and ‘YouTube’. They were then required to complete a survey and enter a mobile phone number for a chance to win items, such as an iPhone 4. Complainants stated that they were misled into completing the survey because they believed the survey was through the genuine ‘Facebook’, ‘Twitter’ or ‘YouTube’ websites because they resembled them. With the trust of the brand in mind, users entered their mobile phone numbers onto the website.

The Executive also noted that their own monitoring experience which included mistyping ‘Wikipedia’, ‘Twitter’ and ‘YouTube’, was consistent with experiences reported by complainants. In particular, the monitoring showed that this mistyping resulted in a landing page with key features that were very similar to those of the genuine web pages. The web pages also contained invitation to enter a short survey giving the opportunity to receive items such as an iPad 2. Users would then be invited to enter the consumer’s mobile phone number, then a pincode and answer a series of quiz questions sent by text. The texts were charged at £1.50 for each question asked, and a further £1.50 for each question answered.

The monitoring also showed that, when the Executive stopped answering the questions and stopped participating with the service, they received two free promotional messages, enticing them to participate further again with the service two and three days later.

## **THE INVESTIGATION**

The Executive believed that this service contravened the PhonepayPlus Code of Practice (11<sup>th</sup> Edition, Amended April 2008) (the 'Code') and raised the following potential breaches of the Code:

- Paragraph 5.4.1(a) – Fairness (Misleading);
- Paragraph 5.7.1 – Pricing information; and
- Paragraph 5.8 – Contact information.

On 7 December 2011, the Executive sent a breach letter to the Service Provider.

On 7 December 2011, the Service Provider and Information Provider returned signed undertaking forms requesting that the investigation should be pursued directly against the Information Provider. The Executive accepted this application and, on 21 December 2011, the Executive re-issued the breach letter.

On 21 December 2011, the Executive re-issued the breach letter to the Information Provider. The Information Provider responded to on 22 December 2011 and reiterated that the response sent by the Service Provider was the response they wished to have submitted to the Tribunal.

On 2 February 2012, and after hearing an informal representation from the Information Provider, the Tribunal reached a decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **Fairness (Misleading) (Paragraph 5.4.1)**

*“Services and promotional material must not:*

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

1. The Executive raised a breach of paragraph 5.4.1(a) for the following reasons

#### Reason 1:

The Executive noted that the service could be inadvertently accessed on the internet by mistyping websites, such as 'Facebook', 'Twitter' or 'YouTube'. Users were then requested to complete an online survey to 'get' or 'win' products such as an iPhone 4, or they were simply informed they had already won a prize. However, to 'get' or 'win' these products, users were required to enter their mobile phone number and then answer the questions received on their mobile handset. The Executive also noted from the monitoring carried out that the landing pages contained icons which resembled the actual Facebook, Twitter and YouTube websites.

Of the 38 complaints received by members of the public, 22 stated that they mistyped the website they wanted to view and only completed the survey and entered their mobile phone number for the competition because they were under the impression that the site belonged to the companies they were trying to view. They therefore stated they were misled into entering the service.

In addition to the complaints, the Executive also referred to its own monitoring:

#### **Monitoring of wikipedia.com**



With regard to the monitoring for the 'Wikipedia.com' service, the Executive noted that the first pop-up screen displayed the statement:

*"Congratulations Wikipedia User ! You are the H9 winner for September 5th Please select a prize and enter your email on the next page to claim."*

After clicking the "OK" button, the Executive was given the option to "claim" one of three prizes. It was the opinion of the Executive that the use of such language as "winner" and "claim" would give users the impression that they had already won a prize, and that all they had to do to claim it was to enter an email address and shipping information. At this point, there was no indication that to "claim" a prize would require users to enter a competition at a premium rate cost. It was only when users were required to answer a question that the terms and conditions were presented; however, this required users to scroll down to view them. Users could therefore answer the question and enter their mobile phone number without ever viewing or reading the terms and conditions.

The Executive noted in particular that the service featured the correct spelling of 'Wikipedia' and also displayed the well known 'Wikipedia' icon. The Executive submitted that this would be likely to mislead consumers into believing that this was a 'Wikipedia' prize and would entice them to enter their mobile phone number onto the website, and to proceed with the steps necessary to claim the prize. The Executive submitted that, in these circumstances, users would be likely to be misled.

#### **Monitoring of twttr.com and twiter.com**

When the Executive mistyped 'Twitter', a pop-up appeared which stated, "Get your iPad Now!", and by clicking on the "OK" button, a further screen displayed a page which resembled 'Twitter', as it contained the same colours and the 'Twitter' bird icon. The Executive submitted users therefore were likely to believe that this was the genuine twitter.com website and, based on this assurance, users entered their mobile phone number onto the website and proceeded with the steps to claim the prize.

The wording used in the service also suggested that users could complete a 30-second questionnaire and that this was to say "thank you" to the user who now had the opportunity to receive an exclusive offer. On completing the questionnaire, users were then given the option to pick a prize. Again, the wording "Congratulations" suggested that users had already won the prize chosen. It was the opinion of the Executive that users would or were likely to be unaware that they would have to answer questions incurring premium rate charges for a chance to win the prize they originally chose. The Executive submitted that, in these circumstances, users were likely to be misled.

#### **Monitoring of youtube.com**

The Executive then visited the website youtube.com and viewed a page with the heading "Thank You". This wording was presented using a similar design to the "YouTube" branding and appeared to assure users that the service was the genuine youtube.com website. This enticed users to enter their mobile phone number onto the website, and to proceed with the steps to claim the prize. On completing the questionnaire, users were then given the option to pick a prize. Again, the wording stated "Congratulations" and suggested that users had already won the prize chosen. It was the opinion of the Executive that users would or were unlikely to have been aware that they would have to answer questions incurring premium rate charges for a chance to win the prize they originally chose. The Executive submitted that, in these circumstances, users would be likely to be misled.

## Reason 2:

The Executive noted that, after completing the survey on twitter.com, there was an option available to receive one of three prizes. Below each prize, the “Quantity” remaining of the prizes available was stated. In all cases the “Quantity” was two or more.

When the Executive viewed the terms and conditions (which required users to scroll down to view), it stated “...*The number of prizes available to be won is 1x prize...*”

The Executive asked the Service Provider and the Information Provider to confirm the number of prizes available, to which they stated:

*“Our service only has 1 winner per given period. These marketing texts this publisher is using are incorrect towards our service.”*

The Information Provider replied by stating that its publishers held no partnership with the service, which was an affiliate marketer.

It was the opinion of the Executive that participants were more likely to participate with the competition if they were under the impression that the quantity of prizes available was far greater than it actually was.

The above experience was also mirrored in the monitoring carried out on the website youtube.com.

In light of the above, the Executive submitted that for Reason 1 and/or Reason 2, a breach of paragraph 5.4.1(a) of the Code had occurred.

2. The Information Provider stated that, during the summer months of 2011, the affiliate networks explored a new way of marketing by using “Mistypo” websites and performing surveys before re-directing to the service. This way of “new marketing” had been used by these affiliates not only for Mobile Entertainment Providers but also for E-commerce sites (such as Airline tickets), Coupon sites (such as Groupon) and so on.

The Information Provider stated that the big brands responded rapidly to avoid the mistypo traffic and most of the advertisers, including the Information Provider, responded quickly by (i) blocking these affiliates from its landing pages and (ii) amending its general terms and conditions with its worldwide affiliates. The Information Provider stated that it sincerely regretted that several consumers had other thoughts on the website while entering its service. With regard to “Fairness”, “Pricing Information” and “Contact Information”, the Information Provider stated that it had always been very proactive towards consumers. The Information Provider stated that it provided quick responses from its customer care team, together with the customer care team of its partner, WIN plc, and a very strong refund policy. The Service Provider offered to refund the 38 complainants in full. The Information Provider stated that it could contact all the complainants by simply calling them and report back to PhonepayPlus about refunds, which would be made by it or its partner, WIN plc.

3. The Tribunal considered the evidence and concluded that, with respect to reason 1, the use of similar colours, icons and logos misled users into believing the service was from or related to a trusted brand. The Tribunal further held that wording used on the initial promotional web pages misled consumers into believing that they had already won a prize, and provided no indication that they would be required to enter a premium rate competition in order to obtain the prize.

With respect to reason 2, the Tribunal noted that, according to the Executive's monitoring of twitter.com and youtube.com, the user was informed there were three different prizes available and the quantity remaining (displayed below each) was shown as two or more. The Tribunal considered that the information received subsequently from the Information Provider confirmed that there was only one of each prize available in a given period. The Tribunal concluded that consumers were therefore misled as to the quantity of prizes that were available to win.

**Decision: UPHELD ON REASON 1 AND 2**

## **ALLEGED BREACH TWO**

### **Pricing Information (Paragraph 5.7.1)**

*“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”*

1. The Executive raised a breach of paragraph 5.7.1 for the following reason.

On 5 September 2011, the Executive monitored the service and answered two questions. On that date, the Executive then stopped answering any further questions. On 7 September 2011, the monitoring handset received the following free message from shortcode 85111 (the '**7 September Message**');

*“FreeMsg:You are in the race to win! Answer this: How many colors does a rainbow have? A. 2 B.7. Send A or B to 85111.”*

The Executive did not respond to the message and, on 8 September 2011, the monitoring phone received the following second free message from shortcode 85111 (the '**8 September Message**');

*“FreeMsg:Win the new MacBook! Answer these questions: How many colors does a rainbow have? A.2 B.7. Send A or B to 85111”*

The Executive noted that neither of these messages provided any information as to the cost of answering the questions (which would have been £1.50 each) or that answering the question would trigger a further question (at a cost of £1.50 each) and/or that all further questions received and/or answers sent would also be charged at £1.50 each.

The Executive submitted that, whatever information may have been provided in relation to the cost of the service during interaction with the service on 5 September 2011, the free messages received on 7 and 8 September 2011 were further promotional messages in accordance with the Code and were therefore new calls to action. They should therefore have informed users of the cost of using the service, which they failed to do. This was particularly important in circumstances where the free messages were sent some time (two and three days) after interaction with the service, and where there was no indication in the free messages that they related to the service which the user had interacted with on 5 September 2011.

The Executive noted that the definition of a Promotion in paragraph 11.3.27 of the Code states:

*“Promotion’ means anything where the intent or effect is, either directly or indirectly, to encourage the use of premium rate services, and the term promotional material shall be construed accordingly.”*

The Executive further noted that the terms and conditions stated the following:

*“...On each given answer the Tringaloo Quiz Module will send a premium textmessage with its commands and new question. These textmessages will be charged for £1.50 sent & received. The Tringaloo Quiz Module will not send out any other premium related messages...”*

Following receipt of message logs for the complainants, the Executive noted that a number of MSISDNs (mobile numbers) also received similar free promotional messages which failed to state the cost of the service. The experience of consumers was corroborated by the Executive’s monitoring experience in September 2011.

The experiences of some of the complainants were as follows:

One message log showed that the user had received their first chargeable message on 11 July 2011, which the user did not respond to. The user then received a free message on 12 July 2011 which repeated the question that was in the previous chargeable message. On 14 July 2011, a further attempt was made to send a further free message with the same question, but the message log showed that the delivery of this message failed.

A second message log showed that the user had received a chargeable message on 2 August 2011. This particular user did not participate with the service and on 3, 4 and 7 August 2011, the user received free messages repeating the same question. These messages failed to state the cost of the service.

A third message log showed that the user had received their last chargeable message on 29 May 2011 and the user did not respond to it. On 30 May 2011 and again on 3 June 2011, the user received free messages repeating the original question asked in the chargeable message. These free messages did not state the cost of the service.

A fourth message log showed that, as advised by the PhonepayPlus Complaint Resolution Officer during earlier investigations of the service, the Information Provider had started for a limited period of time to include the cost of the service in all messages. The last chargeable message received was on 26 August 2011. This user did not respond to the message and, on 26 and 27 August 2011, the user received three further free messages which failed to state the cost of the service.

A fifth message log showed that the user received their last chargeable message on 11 July 2011 and did not respond to it. On 12 July 2011, an attempt was made to deliver a free message with a question, but it was unclear whether this message had been successfully delivered. On 13 July 2011, a further message was sent which was successfully delivered. This also contained the same question as the message sent on 12 July 2011. These messages failed to state the cost of the service.

A sixth message log indicated that the user had received their last chargeable message on 26 June 2011 and did not respond to it. On 27 and 28 June 2011, and again on 1 July 2011, the user received free messages containing questions. The messages failed to state the cost of the service.

A seventh message log indicated that the user received their last chargeable message on 6 July 2011 and did not respond to it. On 7, 8 and 11 July 2011, the user received free messages which contained questions. These messages failed to state the cost of the service.

An eighth message log indicated that the user stopped answering questions on 14 June 2011. On 15 and 16 June 2011, the user received two further free messages with questions which did not contain pricing information, but resulted in this particular user then answering the question and incurring a further premium rate charge.

The Executive noted that, on 13 June 2011, PhonepayPlus had informed the Service Provider and the Information Provider that these free messages should have contained pricing information. This advice had not been implemented in the instances noted above.

In light of the above, the Executive submitted that a breach of paragraph 5.7.1 of the Code had occurred.

2. The Information Provider stated that it had confirmed that it had been sending out 2-3 free marketing messages to inactive users containing trivia in order to encourage them to re-enter the skilled game.

The Information Provider also confirmed that the consumer tariff was not stated in these free marketing messages. The Information Provider stated that the 8 complaints from the end-users who received these free messages could be refunded for their previous spend.

The Information Provider further stated that the response on these free marketing messages was very low and it had decided to stop sending out these marketing messages on 7 December 2011.

It also said that, when end-users received a free marketing message and sent the word 'STOP', they did not receive any further free marketing messages from the Information Provider.

3. The Tribunal considered the evidence and found that users had not been clearly and straightforwardly informed on the promotional websites as to the cost of participating and that, where there was a period of inactivity by a user, a reply to further promotional/reminder messages from the service would trigger further charges. This was exacerbated by the fact that the further promotional/reminder messages did not contain any pricing information. The Tribunal also noted the Information Provider's admission that the pricing information had been excluded from the promotional/reminder messages in error, due to a technical problem. The Tribunal concluded that there had been a breach of paragraph 5.7.1 of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE**

#### **Contact Information (Paragraph 5.8)**

*"For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user."*

1. The Executive raised a breach of paragraph 5.8 for the same reasons stated above in relation to the alleged breach of paragraph 5.7.1 of the Code. In addition, the Executive further noted that neither the 7 September Message nor the 8 September Message provided any information as to the identity or contact details of the Service Provider or the Information Provider, or a non-premium rate customer service phone number. The Executive therefore submitted that, in the circumstances, the identity and contact details of the Service Provider and the Information Provider were not otherwise obvious, and with regard to the customer service number, reasonable steps had not been taken to bring this to the attention of the user.

In light of the above, the Executive submitted that a breach of paragraph 5.8 of the Code had occurred.

2. The Information Provider confirmed that, in the free marketing messages, the contact details and the customer care phone line were not stated. The Information Provider once again suggested that the 8 MSISDNs (mobile numbers) associated with the referenced call logs could be refunded in full. The Information Provider again confirmed that the response to these free marketing messages was very low and the decision had already been taken to stop sending out these marketing messages from 7 December 2011.
3. The Tribunal considered the evidence and noted that paragraph 5.8 of the Code required that, in all promotions, the identity and contact details in the UK of either the service provider or the information provider must be clearly stated. The Tribunal found that further messages received from the service following the inactivity of users were promotional for the purposes of paragraph 11.3.27 of the Code and, therefore, the identity and contact details of the service provider or information provider were required in these messages. The Tribunal found that there were no identity or contact details contained in these messages and, therefore, concluded that there had been a breach of paragraph 5.8 of the Code.

**Decision: UPHELD**

## **SANCTIONS**

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

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

- The Information Provider had failed on more than one occasion to promptly implement PhonepayPlus' advice to cease 'typosquatting' marketing.
- The cost paid by individual consumers was high, as users of the service were charged £1.50 per message sent and £1.50 per message received. One of the message logs showed that a user had incurred a cost of £168 in a very short period of time.

The Tribunal noted the Information Provider's statement that refunds had been paid to complainants, but further noted that some complainants had informed PhonepayPlus that they had not received refunds. The Tribunal therefore considered that there were no mitigating factors in this case.

The revenue in relation to the service was in the range of Band 1 (£500,000+).

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

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

- A direction to remedy the breaches of paragraphs 5.7.1 and 5.8 of the Code;
- A Formal Reprimand;
- A fine of £100,000; and
- A direction for the Information Provider to pay all claims made by complainants for refunds of the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid.

Appendix A – screenshots of wikipedia.com and wikipedia.com

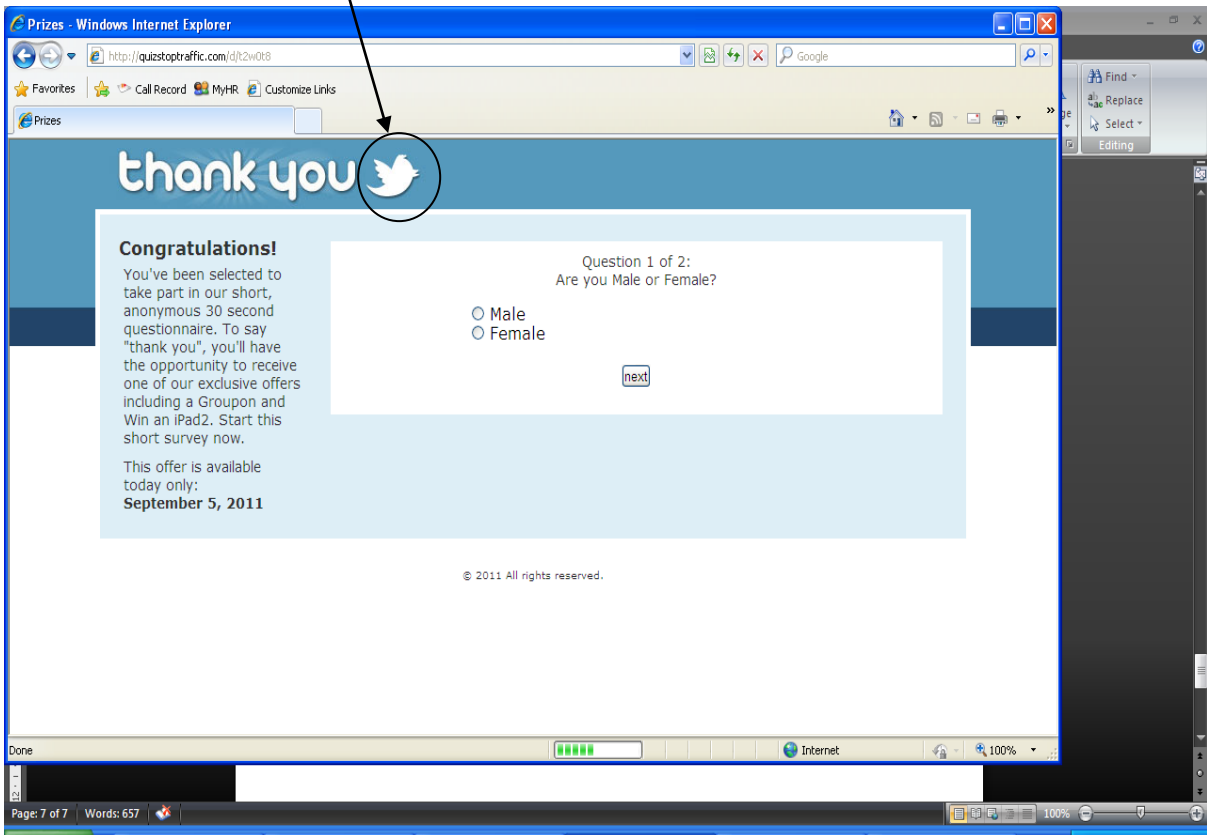
Display of the Wikipedia icon and correct spelling of 'Wikipedia':



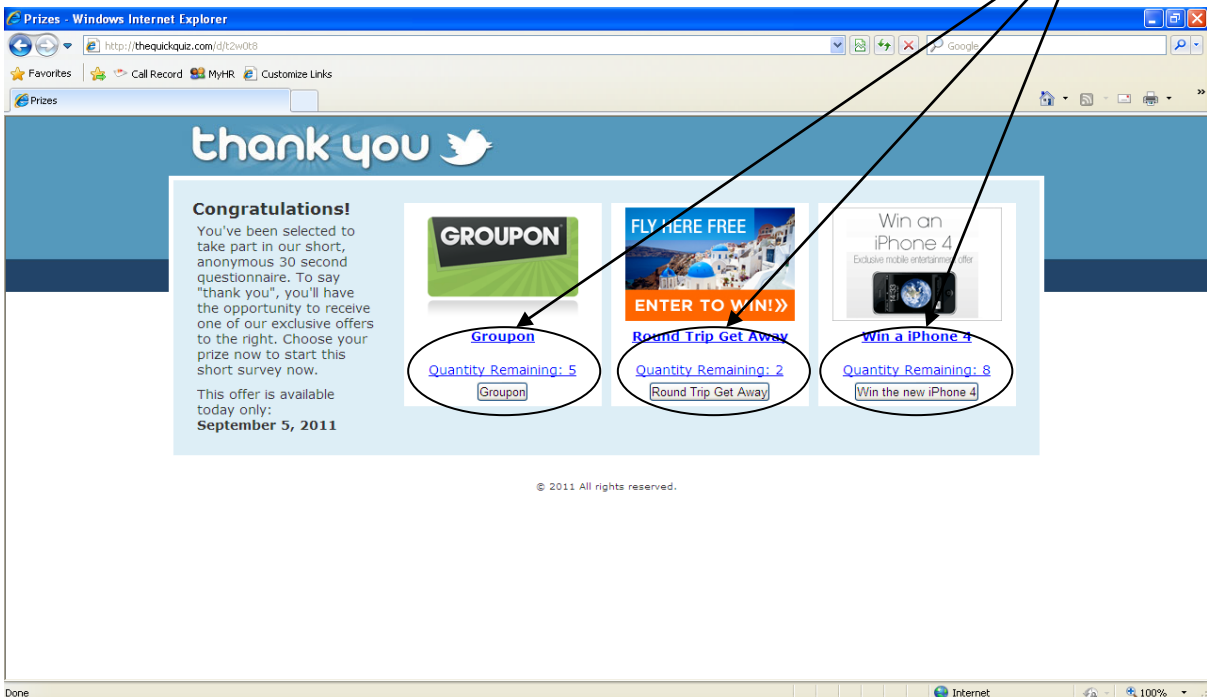


## Appendix B – screenshots of twitter.com

Screenshot 1 – The icon and background colouring were similar to those used in 'Twitter':

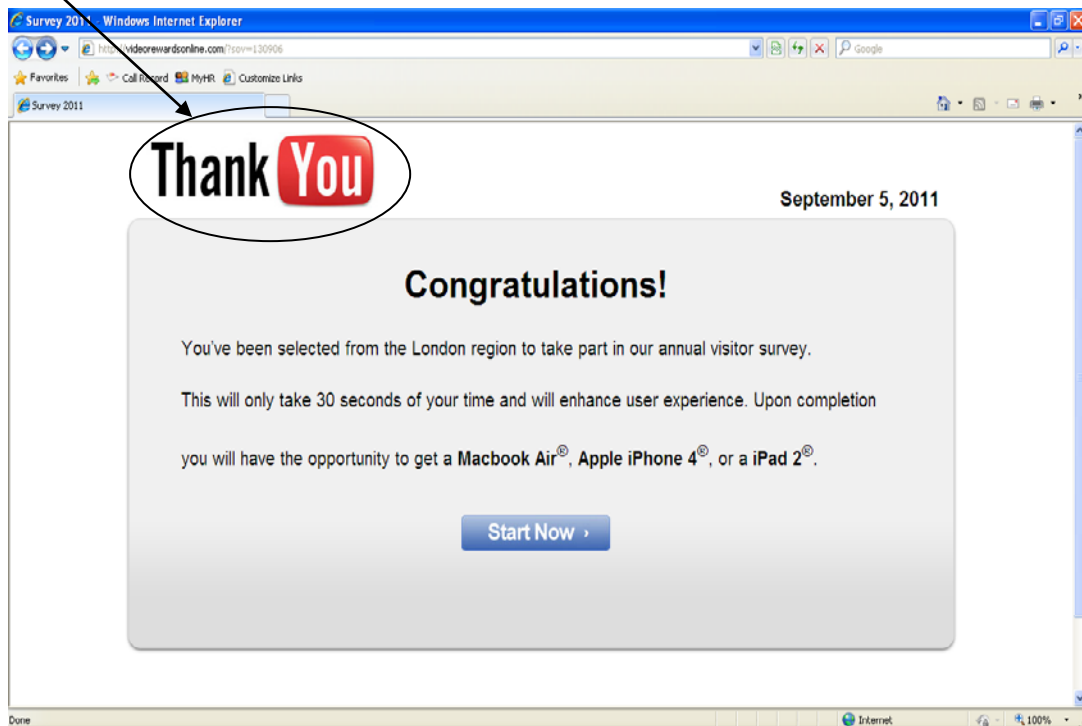


Screenshot 2 – Display of a selection of prizes, together with the quantity of remaining prizes:






## Appendix C – Monitoring of youtube.com

Message headed “Congratulations”. The Executive noted that the icon was similar to ‘YouTube’:






## Appendix D - How the service operated according to the Information Provider

Direction	Action	Message text English	Type	Price in f
<b>Registration – Internet – (Landing page)</b>				
	Enter MSISDN on landing page	TEXT ON LANDINGPAGE: Now fill in your PINCODE for your chance to win this iPhone 4 -	Data entry	-
<b>Tringaloo</b>	PIN code sent from Tringaloo	Fill in this pincode #PIN# on the website for your chance to WIN THE IPHONE. NO SUBSCRIPTION £1.50 per message sent and received.Please ignore if not requested	Text	free
<b>(Cap of 50 correct Questions. After that he will receive a text with an invitation to the final round)</b>				
<b>Tringaloo</b>	Questions send out from Tringaloo (50 correct Questions sent out Maximum)	You are now in the race to win! Answer this here: What is the Capital of the United Kingdom? A.London B. Amsterdam. Send A or B to 85111	Text	1,50
	User responds with A or B	A or B	Text	1,50
<b>Tringaloo</b>	Questions send out from Tringaloo (Cap of 50 maximum correct answers)	Quiz A: User will receive the next question: Perfect! #Question#. Send A or B to 85111 now.  Quiz B: User will receive the next question: Not correct. Try this one: #Question#. Send A or B to 85111 now.	Text	1,50

	User responds with A or B	A or B	Text	1,50
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**in UK you can send a maximum of 3 free marketing messages per week**

	<p><b>**1 day after registration 1x Free MT</b></p> <p><b>**3 day after registration 1x Free MT</b></p> <p><b>**5 day after registration 1x Free MT</b></p>	<p><b>When a user starts answering the A-B Game again he will receive one free Reminder Message</b></p>		
<b>Tringaloo</b>	Reminder Message 1	You are still in the race to win! Answer this here: What is the Capital of the United Kingdom? A.London B. Amsterdam. Send A or B to XXXXX	Text	Free
	User answers the questions	A or B	Text	1,50
<b>Tringaloo</b>	Questions send out from Tringaloo	<p>Quiz A: User will receive the next question: Perfect! #Question#. Send A or B to 85111 now.</p> <p>Quiz B: User will receive the next question: Not correct. Try this one: #Question#. Send A or B to 85111 now.</p>	Text	1,50
	User answers the questions	A or B	Text	1,50
<b>Tringaloo</b>	Final Round Invitation (after 50 questions)	Free Message: You are now at the end of the Game. When you have made it to the finals we will invite you beginning of July-2011. Good luck!	Text	Free

Final Round Open Question				
<b>Tringaloo</b>	Final Open Question	Welcome to the final round! Answer the final question to win an iPhone4. The fastest correct answer wins: Which heir to the UK throne just got married?	Text	Free
	User sends answer	William	Text	Free