Case Ref: 10352:

PHONEPAYPLUS LIMITED

Executive

and

CELLON LIMITED

Respondent

ORAL HEARING DECISION

Tribunal members: **David Cockburn (Chair)**
Louise Povey
Ruth Sawtell

DECISION

Upon an application for an oral hearing by Cellon Ltd ("Cellon") under paragraph 3.1 of Annex 2 of the PhonepayPlus Code of Practice (12th edition) ("the Code"), it is the decision of the Oral Hearing Tribunal that:

1. Cellon breached paragraph 2.3.2 of the Code in relation to its Quiz Competition Service known as Tick-Tack Quiz ("the Service") in that the Service misled or was likely to mislead.

2. Cellon breached paragraph 2.2.2 of the Code in relation to the Service in that the Service did not comply with the requirement that written information 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.

3. Cellon breached paragraph 2.3.1 of the Code in relation to the Service in that consumers of the Service were not treated fairly and equitably.

4. The sanctions determined by the Oral Hearing Tribunal are:
   4.1 a formal reprimand
   4.2 a fine of £37,500
   4.3 a requirement that Cellon 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 to provide evidence to PhonepayPlus that such refunds have been made.

5. Under paragraph 4.10.1 of the Code, the Tribunal recommends that Cellon be required to pay 100% of the relevant administrative charge. The Tribunal recommends that the relevant administrative charge is 50% of the total charges arising out of the applications for an oral hearing by M.E. Media Market Limited and Cellon, which cases were heard together on 6 June 2013, with the remaining 50% to be met by M.E.Media Market Ltd (see paragraphs 2, 67 and 68 of the Reasons).

REASONS

1. The oral hearing relating to this case took place on 6 June 2013. At the hearing the PhonepayPlus Executive ("the Executive") was represented by Mr Selman Ansari of Bates, Wells & Braithwaite. Cellon was represented by Mr David Pope of Dentons Ukmea Plc. Ms Arpan Boyall of the Executive, and Mr Sapir Diamant of the Respondents gave oral evidence in accordance with their written statements. Mr Pope produced a skeleton argument. The clerk to the Oral Hearing Tribunal ("the Tribunal") was Mr Alexander Macpherson of counsel.

2. This case was heard together with a similar case against M.E.Media Market Limited Limited ("M.E.Media"), case ref. 09826. Cellon is the parent company of M.E Media and the services operated by the two companies were similar. At the request of the parties and for efficient case management, the Tribunal agreed to a joint oral hearing of the two cases. The evidence in the two cases was taken at the beginning of the hearing and the submissions dealt with both cases. Nevertheless, the two cases remained separate and are the subject of two separate decisions by this Tribunal.

Acceptance of Liability for the Breaches

3. Cellon accepted, for the purposes of the oral hearing, that the Service was in breach of paragraphs 2.3.2, 2.2.2 and 2.3.1 of the PhonepayPlus Code of Practice (12th edition) as alleged by the Executive.

Description of the Service

4. The service operated by Cellon which forms the subject of this adjudication was called Tick-Tack Quiz ("the Service"). Cellon was registered with PhonepayPlus as the Level 2 provider in relation to the Service, and Netsize UK Limited ("Netsize") was the Level 1 provider.

5. The Service was a quiz competition consisting of six trivia questions with 'true' or 'false' answers. Each question was sent by a 'Mobile Terminating' text message ("MT text message") to the mobile phone of the consumer. The MT text message was charged at £2.50 for each message received. Two such messages were received at a total cost per question to the consumer of £5. When the consumer responded to the text question by responding 'true' or 'false', the next question was automatically sent by MT text message. Thus even if consumers did not attempt to answer a question received they would still be charged £5 for receiving it. If all six questions were received then the consumer would be charged a total of £30.

6. For the three-month period of each competition, the consumer who answered the most questions correctly in the shortest time would win a prize. The same competition was run across different promotions concurrently, and each promotion advertised different

prizes such as a MacBook Air, a Samsung S130 or a £3000 Tesco voucher. Only one prize was awarded in each three-month period. The prize awarded to the winner was the one offered in the promotion through which the winner had entered the Service.

7. Consumers accessed the Service by means of landing pages on a website (www.tick-tack-quiz.co.uk) which was designed and maintained by Cellon. At the bottom of the first webpage accessed there was a set of small print which, in some promotions, was in grey font on a black background. This contained the following text:

> *"This is not a subscription service. Pay per use: Each question costs £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. Minimum age: 18 with bill payers' permission.*
>
> *Tick-Tack Quiz is a service operated and promoted by Cellon Ltd. Tick-Tack Quiz is an interactive SMS trivia contest, in which participants receive trivia questions on their cell phone from different fields of knowledge. By replying to the questions (via SMS) the users may score points for correct answers. The End-user that correctly answered the highest number of questions in the shortest possible time in any round during the competition period will be the winner. For detailed contest rules please click on Contest Rules above. The competition ends on 30-09-2012. By entering the received PIN code (password), you will receive a trivia question on your mobile phone. By answering the question you will receive the next question and so on up to 6 questions. Each question costs £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing ..."*

8. The text was positioned such that with certain screen resolutions it would not all have appeared on the consumer's screen. The consumer would have had to scroll down to read the whole of the text.

9. After clicking on the answer to a multiple choice question, the consumer was taken to a further landing page which invited consumers to enter their mobile phone number. Immediately below the box in which the consumer was invited to type in the mobile number was some further text: *"This is not a subscription service. Pay per use: Each question cost £5.00 (2 x £2.50) + standard network rates charged on your mobile account. Charges stop when you stop playing. Minimum age: 18 with bill payer's permission. Privacy policy."* The longer passage of small print seen on the first landing page was again present at the foot of the page but most consumers would have had to scroll down to read it all.

10. On entering the mobile phone number, a PIN was sent by text to the relevant mobile phone, and the consumer was invited to enter this code into a further webpage. After doing this the first of the MT text messages was sent to the consumer's phone and the first charge of £5 was made. One example of a series of 6 questions sent by text was as follows: *"Is Bill Gates the founder of Apple Inc?", "Is the Olympic symbol made up of 5 rings?", "Did the Titanic sink because it hit an iceberg?", "Did the film The King's Speech win the Oscar for Best Picture in 2011?", "Does Germany have a bigger land mass than Canada?", "Is Spanish the official language of the United States?".*

Promotion of the Service

11. Cellon used two principal methods to promote the Service. First of all it paid for advertising on such established media sources as Google and Facebook. The promotional material used on these platforms was produced and controlled by Cellon directly, without there being any intermediary between it and the platform used.

12. Secondly, Cellon entered into contracts with a number of affiliate networks for the promotion of the Service. These affiliate networks in turn contracted with affiliate marketers for the latter to implement a promotional campaign for the Service. The affiliate marketers were incentivised by being paid on a cost-per-action basis: each consumer using the Service as a result of the affiliate marketers promotional material would result in a payment being made to that marketer. Cellon had little experience of the UK market, and it stated that it needed to work with the affiliate networks in order to access the market effectively.

13. It was common ground between the parties that the methods which some of the affiliate marketers used to promote the Service were thoroughly misleading.

14. In one example monitored by the Executive, a promotion promised to provide to consumers a facility which would enable them to see who had been viewing their Facebook profile. Upon clicking on the relevant link, the consumer was required to grant various permissions to the affiliate marketer in order to progress. These permissions allowed the affiliate marketer to access and utilise the consumer's Facebook profile and data, enabling the affiliate marketer to post status updates promoting the Service or its promotional material in the guise of personal endorsements from the consumer.

15. On having given these permissions, the consumer would then be given the opportunity to complete a 'fun' offer to win the new iPhone. By clicking on a hyperlink, the consumer was directed to the Tick-Tack Quiz website. Thus the promise of being able to see who had viewed the consumer's Facebook page was used solely as a means of directing the consumer to Cellon's landing page promoting the wholly unrelated Service and a different prize, an iPad. The promised facility on Facebook never eventuated.

16. Further examples monitored by the Executive involved promises of free Tesco or Asda shopping vouchers. Again, these vouchers were never provided, and the promise of them appears to have been intended solely to lure consumers towards the Service.

17. The Executive also monitored typo-squatting carried out by those promoting the Service. Typo-squatting is the practice of registering internet domain names which are mis-spellings of widely known and trusted internet brands with the intention of accessing the resulting internet traffic. The Executive typed in the url www.yuotube.com and arrived at a website that stated '*Congratulations*!' and directed consumers to the Service.

Evidence heard by the Tribunal

18. In her witness statement Ms Boyall, for the Executive, summarised some of the complaints received by PhonepayPlus. The Executive received 18 complaints regarding the Service in total. Many of these complaints referred to the fact that the

consumers were trying to access an entirely different service or product and were not aware that they had entered into a competition service. Many also stated that they were not aware that they were to be charged for anything. Cellon stated that it had received 175 'enquiries' from consumers about the Service.

19. Ms Boyall explained that Cellon had provided information as to the numbers of users of the Service. 8,567 consumers had entered the Service, and these consumers could be broken down by number of MT text messages received and charged as follows:

No of questions received	Charge	Number of consumers	Percentage
1	£5	4,489	52
2	£10	1,340	16
3	£15	433	5
4	£20	212	2
5	£25	140	2
6	£30	1,953	23
	Total	8,567	

20. Mr Diamant gave evidence that M.E.Media Market Limited and Cellon Limited are both companies in the MCR Group ("the Group"). Cellon had purchased the shares of M.E.Media in 2011 to form the Group, which provides sms-based trivia and quiz competition services in nine countries in Europe/Middle East, as well as in Australia and South Africa. At the relevant time, Mr Diamant's role was to oversee and maintain the Group's relationships with affiliate networks, and to supervise the media managers who had day to day contact with them. For the purposes of his evidence, Mr Diamant drew no distinction between the employees of M.E.Media and of Cellon.

21. Mr Diamant stated that Cellon would provide agreed promotional material to affiliate networks prior to launching a service in any jurisdiction. He stated that the practice had been to require affiliate networks to seek approval before any affiliate marketer altered the material but that the expectation was that only the material sent by Cellon would be used. He accepted that there was nothing in writing to this effect and that such a requirement had not been included in any of Cellon's contracts with affiliate networks. He stated that Cellon had not been in a commercial position to insist upon such contractual terms. Mr Diamant also stated that Cellon could not suspend the promotion of the Service until it had clear evidence of wrongdoing, as this would have been a breach of its contracts with the affiliate networks.

22. Mr Diamant also gave evidence that Cellon's employees would habitually monitor the effectiveness of individual campaigns and would respond to any spike in activity or any intelligence of possible wrongdoing.

23. The Service operated from 5 June to 9 August 2012. At various times in June and July 2012 employees of the Group became aware of massive spikes in sales relating to the similar 'Speedy Quiz' service operated by M.E.Media. It is also clear that Group employees heard rumours of misleading affiliate marketing over this period and contacted various affiliate networks to make limited enquiries as to the methods used to promote its services.

24. PhonepayPlus contacted Cellon on 2 August to ask for more information on the Service. Cellon suspended the service on 9 August. Since that time Cellon has not operated any premium rate services in the UK.

25. Total consumer spend on the Service amounted to £94,600. Of this sum, Cellon's gross revenue was £64,072.

26. Mr Diamant gave evidence that compliance with the Code and PhonepayPlus guidance was not his responsibility, and that such issues would have been the responsibility of Mr Zharovsky who would have passed on any appropriate information to other members of the team. Mr Diamant did not know what steps Mr Zharovsky took to ensure that the Service complied with the Code and Mr Zharovsky was not called to give evidence. However, Mr Diamant recalled an oral presentation about the UK market which Mr Zharovsky gave to the marketing team and which stated that the UK regulator was very strict about the control of affiliate marketing. He did not know if this information came from reading PhonepayPlus literature, from other people in the market, or from Level 1 providers, and he did not recall any particular reference to PhonepayPlus guidance or compliance updates.

27. Mr Diamant stated that Cellon obtained approval for this Service from the relevant Level 1 provider, but he accepted that the Level 1 provider at no time gave any assurance that the Service was compliant with the Code. Indeed, the contract with Netsize made it clear that Cellon remained responsible for the content of the Service.

Submissions of the Executive

28. For the purposes of the oral hearing, Cellon accepted that it was in breach of the Code as alleged by the Executive. It was nevertheless necessary for the Tribunal to consider the accepted breaches of the Code and the nature of the Service and its promotion in general in order to adjudicate on appropriate sanctions.

29. The Executive submitted that the consumer journey which resulted from the promotions of the affiliate marketers was wholly misleading. Consumers were lured towards the Service by being promised a wholly unrelated service which never materialised. In the case of at least one promotion, the consumer was required to allow the affiliates to exploit their Facebook account to give the false impression that the consumer had recommended the Service. The use of typo-squatting was also a practice which had been specifically deprecated by PhonepayPlus in published guidance, and which deliberately targeted consumers who were attempting to access a different service.

30. The Executive also submitted that the text contained in Cellon's website which explained how the Service operated was not easily accessible nor clearly legible and was presented in a way that made understanding difficult. The small print at the bottom of the screen was very small and, in some cases, required consumers to scroll down. In some promotions, the text used font colours and background colours which meant that it was not clearly legible. The words used were legalistic and confusing, and failed to communicate the content of the Service clearly to consumers. The text located next to the box where consumers were invited to enter their mobile phone number also failed to convey the contents of the Service clearly and accurately.

31. The Executive also submitted that the charging mechanic used by Cellon was fundamentally unfair and inequitable. This was because the answering of one question automatically triggered delivery of a further question and a further £5 charge. Thus if a consumer only answered one question they would be charged £10 for having received two questions.

32. In summary, the Executive contended that this was a very bad case involving very serious breaches of the Code and severe consumer harm. Cellon failed to monitor the Service effectively and failed to respond to complaints received promptly. Cellon failed to carry out appropriate due diligence into its affiliate marketers, and failed to heed or follow clear guidance produced by PhonepayPlus as well as previously published adjudications. Accordingly, the Executive stated its view that a fine of the order of £50,000 would be appropriate.

Submissions of Cellon

33. Cellon accepted that paragraphs 2.3.2, 2.2.2 and 2.3.1 of the Code had been breached by the Service and its promotion. However, it argued that, on any fair assessment of the seriousness of the breaches a fine of £50,000 was excessive.

34. Cellon pointed out that PhonepayPlus had recognised that the use of affiliate networks was common in the industry and perfectly acceptable in principle. Cellon stated that it had previously worked successfully with each of the affiliate networks used. While it acknowledged that it had not specified in its contracts that only approved marketing material could be used, it claimed that it had instructed the affiliate networks to do this.

35. Cellon contended that the Group had monitored the sales achieved by its services, and had at least taken some action when spikes in sales occurred. Cellon also relied upon the fact that its landing pages had been approved by the Level 1 provider, Netsize, and that Netsize was a far larger entity with much greater experience of the UK regulatory environment.

36. Cellon stated that it used the charging mechanic because it had seen it used by others, and argued that the landing pages do contain an explanation of how the charging mechanic operated even if the explanation could have been clearer.

37. In relation to mitigation, Cellon relied upon the fact that the most serious breach of the Code was caused by affiliate marketers rather than Cellon directly. Action had been taken in response to the complaints and increases in traffic. Refunds had been provided, and Cellon had not operated any services in the UK since it shut down the Service. It had admitted its breaches at the same time as requesting an oral hearing.

38. In summary, Cellon characterised its breaches as being largely inadvertent and caused to a considerable extent by misplaced reliance on third parties. While it accepted that the consequences of the affiliates' actions could be categorised as a 'serious' breach, the case had none of the characteristics found in a 'very serious' breach for the purposes of the Investigations & Sanctions Procedure ("ISP"), which would usually involve conduct equivalent to fraud or borderline criminal behaviour. In its submission, the breaches associated with the written information on the Service and the charging mechanic could only be categorised as 'significant'.

39. It contended that a fine of £50,000 as considered appropriate by the Executive was much too high in the light of various other fines that had been imposed in relation to the promotion of digital media. Cellon submitted that a fine of no more than £25,000 was appropriate.

Tribunal's decision as to breaches

40. The Tribunal finds that the Service was in breach of the paragraphs of the Code relied upon by the Executive. Cellon accepted the fact of these breaches at the time it applied for the oral hearing, and directed its case as to the appropriate sanctions only.

Tribunal's decision as to sanctions

Paragraph 2.3.2 of the Code: Misleading

41. The promotions operated by affiliate marketers on behalf of Cellon appear to have been deliberately designed to mislead. In particular, consumers were directed to Cellon's landing pages by the promise of desirable services which were not subsequently provided. Many consumers appear to have gone on to engage with the Service on the understanding that they would receive the promised services, rather than appreciating that they were entering an entirely separate competition service.

42. Obtaining the permission of consumers to use their Facebook account in order to promote the Service further is a feature which renders this breach of the Code more serious. The messages posted as a result of these permissions being granted are inherently misleading as they appear to be personal recommendations from a friend or acquaintance.

43. 'Typo-squatting' is also a practice to be deplored, as it illegitimately exploits consumers who have mis-typed a domain name. Marketers should not deliberately seek out consumers whom they know are attempting to access an entirely different service.

44. It is true that Cellon did not itself create or directly instigate the promotional methods in question. But under the Code it retains responsibility for the promotional material deployed on its behalf and for its benefit. There are good regulatory reasons why a Level 2 provider should not be able to disown the promotional material produced by third parties for its benefit, and PhonepayPlus guidance has clearly drawn attention to the fact that Level 2 providers retain responsibility for the actions of their affiliate marketers.

45. Quite apart from the significant financial loss caused, confidence in the premium rate services industry is likely to have been seriously undermined, particularly by those consumers who were charged significant sums of money (at a minimum of £5 even if no questions were answered) while seeking a service which failed to materialise.

46. In light of the deliberate attempt to deceive consumers by those who designed the promotional material, and the substantial consumer harm which resulted, the Tribunal considers that the breach of the Code under paragraph 2.3.2 should be considered 'very serious' for the purposes of the ISP. In particular:
    46.1. There was a clear and highly detrimental impact on consumers;
    46.2. The nature of the breaches was likely to have damaged consumer confidence in premium rate services severely;

46.3. The promotion of the Service was designed with the specific purpose of generating revenue streams for an illegitimate reason;
46.4. The promotion of the Service purported to provide a service or product that does not, and has never, existed (i.e. it was a scam).

Paragraph 2.2.2: Information on the Service

47. Enabling consumers to make an informed decision as to whether to engage with a premium rate service is a key compliance issue. This requirement of the Code relates both to general information as to the nature of the service in question and specifically as to information on charging arrangements. The written information needs to be easily accessible, clearly legible and easy to understand.

48. The font size, colour and position of the small print at the bottom of Cellon's webpages explaining the nature of the Service and the charging arrangements meant that the information was not easily accessible or clearly legible. Furthermore, even if a consumer had located and attempted to absorb the relevant text, the explanation as to how the Service operated was opaque. The opening statement "This is not a subscription service" was confusing, especially to someone who had entered the service through a misleading promotion, and the explanation of the Service's unusual charging mechanic was not made sufficiently clear. Further, it was not immediately apparent that a consumer would have to answer all six questions (at a cost of £30) to have a realistic chance of winning a prize. The fact that the questions had to be answered as quickly as possible, and that only the fastest set of responses would win, was also not given sufficient prominence.

49. On the webpage where consumers were invited to enter their mobile number, a further set of text was located in proximity to the 'Send' button. However, again the print was small and the content of the text confusing. Consumers were again informed that the Service was 'not a subscription service', and no adequate account of how the competition operated, or of the charging mechanism, was set out.

50. All of the revenue generated by the Service (that is £94,600 in consumer spend and £64,072 in Cellon's gross revenue) was derived from the offending webpages. The Tribunal considers the breach of paragraph 2.2.2 of the Code to be 'serious' for the purposes of the ISP. In particular:
50.1. The breach has had a clear detrimental impact on consumers;
50.2. The Service was designed with the intention of not providing consumers with adequate knowledge of the Service or the costs associated with it.

Paragraph 2.3.1: Fair and equitable treatment

51. The charging mechanic used by Cellon for its trivia competition service was an unusual one in that consumers were charged £5 per question received, rather than £5 per question answered. The combination of this feature with the fact that answering one question led automatically to the next chargeable text being sent meant that many consumers were charged for receiving questions to which they did not respond .

52. The mischief of this charging mechanic is particularly apparent when the figures showing the numbers of questions answered by consumers are considered. More than half of the consumers who used the Service (52%) did not even respond to the first

question received. They thus had no chance whatsoever of winning a prize and yet they were charged £5 for receipt of the question.

53. The written submissions of Cellon relied upon the fact that 52% of consumers did not proceed with the Service after receipt of the first question as evidence that consumers understood the terms of the quiz competition. The Tribunal finds, on the contrary, that the fact that more than half of those using the Service abandoned it before answering a single question suggests that these consumers were not aware of the nature of the Service into which they had inadvertently entered. As a result of the Service charging them per question received rather than per question answered, these consumers were all charged £5 in return for a nil chance of winning a prize.

54. The Tribunal finds that this charging mechanism will have been counter-intuitive to most consumers, and required a fuller explanation than it received if consumers were to have made an informed decision to proceed. The harm caused by the charging mechanic was enhanced because of the breaches which had occurred at earlier stages of the consumer journey. Many consumers appear to have attempted to abandon the Service at an early stage – presumably because they had been misled as to the nature of the Service – but they were charged nevertheless.

55. For those consumers who did respond to one or more questions, it was only those who replied to all six questions who were charged at £5 per question answered. Those who did not answer all six questions (some 77% of those who used the Service) were charged an extra £5 for the last question which they received but did not reply to. In light of the inadequate explanation of the way in which the Service operated, it is likely that many of these consumers will not have considered that they were treated fairly and equitably.

56. The Tribunal finds this breach of paragraph 2.3.1 of the Code to be 'serious' for the purposes of the ISP. In particular:
    56.1. The charges were relatively high, being at least £5 per consumer;
    56.2. More than 50% of those charged did not answer a single question and thus had no chance of winning the competition. The Service provided such consumers with nil value;
    56.3. An even higher proportion (77%) were charged £5 for a question which they did not answer. It was accepted that these consumers also had no realistic chance of winning the competition.

Aggravation and mitigation

57. The Tribunal considers that Cellon's failure to comply with previously published guidance from PhonepayPlus is a significant aggravating feature. Cellon was entering into a new market with its own regulatory regime. Although based in Israel, Cellon had easy access to the relevant guidance through the PhonepayPlus website. No satisfactory evidence was provided as to the steps taken by Mr Zharovsky (or anyone else at the Group) to acquaint himself as to the regulatory requirements and to ensure that appropriate guidance was given to Cellon personnel.

58. Specific guidance relevant to the issues raised in this case had been published by PhonepayPlus. In February 2012, a compliance update was issued relating specifically to '*Misleading digital marketing of premium rate services*'. This update emphasised

the responsibility which Level 2 providers had for the actions of their affiliate marketers, and set out some of the appropriate controls which could be put in place. It also contained a specific warning about typo-squatting. Further guidance published by PhonepayPlus related to '*Competitions and other games with prizes*' and '*Promotions and promotional material*', and this guidance dealt with some of the specific issues raised in this case. There is no evidence to suggest that Cellon was aware of any of this guidance when it launched the service in June 2012, as it should have been.

59. There had also been recently decided adjudications dealing with some of the issues raised in this case. The Executive relied upon three other adjudications in early 2012 relating to misleading digital marketing. The Tribual finds that Cellon should have been aware of these various adjudications.

60. The Tribunal also finds that, while the Group did take some action to monitor its affiliates and to respond to spikes in revenue, the action that was taken was not sufficient to be considered as significant mitigation. Indeed, the Tribunal finds that the failure to react more promptly and with more vigour to the complaints received and the sudden spikes in revenue seen in relation to similar services amounts to some aggravation of the breaches found. A significant part of the revenue was incurred after the Group began to be concerned that its services might be being promoted unlawfully. A more robust response and better control over its affiliates would have reduced consumer harm. Cellon failed to ensure that its contracts with affiliate networks required compliance with the Code and entitled it to suspend promotions upon receipt of complaints.

61. The Tribunal does not consider that the reliance Cellon placed upon the alleged clearance of its Service by its Level 1 provider constitutes mitigation. While Netsize did accept Cellon's webpages for use, at no time did Netsize indicate that it considered the webpages to be compliant with the Code or that it was taking responsibility for ensuring this. On the contrary, Cellon's contract with Netsize made it clear that responsibility for the content of the Service remained with Cellon at all times.

62. The Tribunal does find that Cellon's admission of the breaches of the Code at the time when it requested an oral hearing amounts to some mitigation, and it takes this into account.

Conclusion

63. Taking the breaches together, the Tribunal finds that overall they are to be categorised as 'very serious' for the purposes of the ISP. In particular, it is the deliberate misleading of consumers by affiliate marketers which leads the Tribunal to conclude that this is the appropriate level of seriousness for this case.

64. The Tribunal has considered the fines given in the previous adjudications to which the parties have referred. It recognises that consistency is a specific regulatory aim of PhonepayPlus, but it also accepts that it must specify an appropriate sanction based upon the particular circumstances and evidence relating to each case. Taking all the circumstances of this Service into account, including the revenue figures, the Tribunal imposes a fine of £37,500.

65. By consent, the Tribunal also issues a formal reprimand to Cellon in respect of these breaches of the Code.

66. Also by consent, the Tribunal orders that Cellon 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 to provide evidence to PhonepayPlus that such refunds have been made.

67. In relation to the administrative charge, Cellon submitted that its liability for the same should be determined by the extent to which the fine was reduced from the £50,000 suggested by the Executive. However, the Tribunal considers that there is no good reason for Cellon avoiding payment of the administrative charge in this case. A fine has been imposed significantly in excess of that which Cellon suggested it ought to have to pay, and the fact that an earlier adjudication panel had imposed an even higher fine does not constitute a good reason to excuse Cellon from an obligation to pay the administrative costs arising from its breaches of the Code and request for an oral hearing.

68. Accordingly, the Tribunal recommends that Cellon be required to pay 100% of the relevant administrative charge. The Tribunal recommends that the relevant administrative charge is 50% of the total charges arising out of the applications for an oral hearing by M.E. Media and Cellon Ltd, which cases were heard together on 6 June 2013, with the remaining 50% to be met by M.E.Media.

David Cockburn
(Chair of the Oral Hearing Tribunal)

Dated this 15th day of July 2013