

Tribunal Sitting Number 132 / Case 1
Case Reference: 16955
Level 2 provider Immediato B.V.
Type of Service Competition - non-scratchcard
Level 1 provider Echovox SA
Network operator All Mobile Network operators

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

BACKGROUND

Between 2 October 2012 and 26 June 2013, PhonepayPlus received 42 complaints from consumers in relation to a subscription competition service, which operated under the brand name “Funfone” (the “**Service**”), and was operated by the Level 2 provider Immediato B.V. on the premium rate shortcode 88999. The Level 1 provider was Echovox SA. The Service operated between 14 February 2012 and 30 May 2013, when it was voluntarily suspended by the Level 2 provider following correspondence with PhonepayPlus.

Consumers subscribed to the Service, using mobile originating (“**MO**”) opt-in and were entered into a draw to win a prize, such as an iPad. Consumers were also given access to the Level 2 provider’s second service, “RINGTONE”. Consumers received weekly credits which could be redeemed for mobile content on the “RINGTONE” service website.

Consumers were charged £4.50 per week for the Service. The Service was promoted online using affiliate marketing. The majority of complainants stated the SMS messages they received were unsolicited and they had not engaged with the Service. In addition, some complainants acknowledged entering the Service but stated they had not understood that they would be charged.

The Investigation

The Executive conducted this matter as a Track 2 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 July 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.5 – Pricing prominence
- Rule 2.2.2 – Written information material to the decision to purchase

The Level 2 provider responded on 12 August 2013. On 22 August 2013, and after hearing informal representations, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

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 was in breach of rule 2.3.2 of the Code because consumers were (or were likely to have been) misled into subscribing to

the Service as a result of misleading affiliate marketing. The Executive asserted that the affiliate marketing for the Service was misleading for the following reasons:

- i. Consumers were likely to have been misled into believing that they had already won a prize.
- ii. Consumers were likely to have been misled into believing that the reviews of the Service were recent and that they related exclusively to the Service.

The Executive relied on the content of PhonepayPlus Guidance on “Promotions and promotional material (including pricing information)”, (the “**Guidance**”) states:

Paragraph 3.1

“If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, an important term or condition likely to affect their decision to use the service.”

Paragraph 3.2

“PhonepayPlus expects that all promotions must be prepared with a due sense of responsibility to consumers, and promotions should not make any factual claims that cannot be supported with evidence, if later requested by PhonepayPlus to do so.”

Paragraph 6.2

“PhonepayPlus recognises that the Level 2 provider, while retaining responsibility for the promotion under the PhonepayPlus Code of Practice, may not have immediate, day-to-day control of each individual action that an affiliate takes. However, the use of affiliates to market PRS products on a provider’s behalf does carry a greater risk than marketing which is under the direct, day-to-day control of the provider.”

Use of affiliate marketing

The Executive noted that, in written correspondence, the Level 2 provider accepted that it used affiliate marketing to promote the Service. The Level 2 provider stated that it only used trusted affiliate networks to promote the Service and they had to abide by strict terms and conditions that specified using pre-approved promotional material and prohibited certain practices such as typosquatting and content locking.

Complaints

The Executive noted the content of the following complainants’ accounts:

“I was on accuweather site and a pop up survey came up for accuweather saying you could win an ipad if you filled in the survey I did this and then had to enter phone no and text ok...this is a scam [sic]”

“I was on my endomondo running app and the pop up came through making out it was part of my Facebook. Had the Facebook back round [sic] and everything. It made out it was from Virgin media, and said as a customer of Virgin media I could win an ipad if I made one clock. Nowhere did it say I’d be charged or I wouldn’t have clocked the link [sic]. I assumed it’d be free as it was through my Facebook account.”

“My son followed a youtube video about a Minecraft game hack..which asked to click on a link to download the file. This then asks for a password which is accessed only

through completing a survey e.g. to Win an iPad, and subscribing to a Premium text service. [sic]"

Monitoring

On 11 September 2012 the Executive monitored the Service. A push notification appeared on the monitoring handset which stated:

"<Macbook Pro Unclaimed>
You Have (1) Pending Prize, Optout:xap"

Upon clicking on the link for the "unclaimed prize", the Executive was directed to an "Android Rewards page". The Executive selected an iPad 3 prize and was informed there were two iPads in stock and that it was required to answer a final qualifying question and enter a mobile number on the next page to continue (**Appendix A**). The Executive was redirected to a Service landing page where it was presented with a question to answer. On the next page, the Executive was directed to enter its mobile number (**Appendix B**). After entering the monitoring mobile number into the website, the monitoring phone received a free SMS message containing the subscription details including the trigger keyword for MO opt-in. The Executive sent the MO opt-in message and, in response, received a subscription confirmation message.

Reason one – consumers were likely to have been misled into believing that they had already won a prize

The Executive asserted that consumers were likely to have interacted with the Service inadvertently with the expectation that by entering their mobile number they would instantly win a prize. In reality they entered the Service which gave them the opportunity to win a prize. The Executive submitted the following characteristics of the promotion misled, or were likely to have misled consumers:

- i) The push notification stated, "<Macbook Pro Unclaimed> You Have (1) Pending Prize, Optout:xap", which appeared to indicate that the consumer had already won a Macbook Pro and by following the link they could instantly claim the prize.
- ii) The use of the words "Congratulations", "You have come first in London's mobile contest!" and "You are entitled to choose (1) brand new prize!" appeared to indicate that the consumer had already won a prize, when they were being led to enter a premium rate service (**Appendix A**).
- iii) The use of the prize selection process which created the impression consumers were able to select a prize and that there was only a limited number of prizes available. The use of the wording "ACT FAST REWARDS ARE LIMITED" and a countdown clock created a false sense of urgency and may have encouraged consumers to engage with the Service (**Appendix A**).
- iv) The use of product reviews below the list of prizes appeared to add legitimacy to the Service.
- v) The use of the wording "final qualifying question", created the false impression that only one more answer was required to secure a prize (**Appendix A**).

The Executive noted that the misleading elements of the promotion were presented to the consumer prior to being directed to the Service landing page, which contained information relating to the operation of the Service.

The Executive asserted that in light of the features of the affiliate marketing promotions, consumers were misled into the belief that they had already won a prize, when they only

had a chance to win a prize if they subscribed to the premium rate service at a cost of £4.50 per week.

The Executive accordingly submitted that for the reasons outlined above consumers had been, or were likely to have been, misled in breach of rule 2.3.2 of the Code.

Reason two – consumers were likely to have been misled into believing that the reviews of the Service recent and that they related exclusively to the Service

The Executive noted that the Service webpages contained consumer reviews (**Appendix C**). In the absence of any indication to the contrary, the Executive asserted that users would have assumed that the reviews were from consumers who had participated in the Service and consequently won prizes.

On 22 August 2012, the Executive conducted monitoring into an entirely separate service operated by a different Level 2 provider. During the monitoring session the Executive obtained screenshots of customer reviews for that service. Two of the reviews were identical to the reviews later seen by the Executive during its monitoring of the Service on 11 September; despite the reviews being in relation to two entirely separate services and weeks apart.

The Executive submitted that the user reviews (which promoted the Service) were misleading as consumers were led to believe that other consumers had recently uploaded positive reviews of the Service and had won prizes.

The Executive further submitted that the Level 2 provider had confirmed, in correspondence, the name of the winner for the promotion ending in March 2013 (which was the promotional period in which the Executive's monitoring was conducted). Therefore it further submitted that the consumer reviews were fictitious because they referred to a number of consumers recently having won prizes, when this was impossible as there was only one recent prize winner.

2. The Level 2 provider accepted that the affiliate marketing promotions could be considered misleading. The Level 2 provider also accepted that, under the Code, it was responsible for the actions of its affiliate marketers. However, the Level 2 provider stated that it did not design, approve or agree with the affiliate marketers' promotional material and that the promotions were not compliant with the terms and conditions that it imposed on all of its contracted affiliate marketing networks.

The Level 2 provider provided data that appeared to show that only 1.26% of consumers who were redirected to the Service landing page through the non-compliant affiliate marketer's promotion actually subscribed to the Service. The Level 2 provider submitted that the low subscription rate demonstrated that the "average consumer who is, "reasonably well-informed and reasonably observant and circumspect", would not be misled by the marketing. The Level 2 provider highlighted the fact that none of the complainants had viewed the affiliate marketing promotions, described by the Executive in its monitoring. Therefore it asserted that the complainant's accounts were not evidence of consumers who had been misled by the affiliate marketing. Despite this, the Level 2 provider acknowledged that to some consumers the affiliate marketing could be viewed as misleading and for this reason the marketing used by the affiliate was prohibited under its own terms and conditions, which were imposed on its affiliate networks.

The Level 2 provider stated it had stopped the unauthorised affiliate marketing two and half days after it commenced and it provided evidence in the form of sales data. The

data showed 90 sales were generated through the rogue affiliate on 11 September 2012, (which was the first day the affiliate marketer marketed the Service) dropping to 37 and 31 on the following days. The Level 2 provider stated that it examined the traffic flow from the publisher because it was particularly high, after investigating and becoming aware of the prohibited advertising, it stopped the publisher from promoting the Service on 13 September 2012. In the days following, the sales figure from the specific affiliate marketer dropped to zero, demonstrating that the non-compliant publisher had been stopped. The Level 2 provider believed the only reason its pages were used by the rogue publisher was because at a similar time the publisher had been forced to stop marketing another Level 2 provider's service, which was the subject of a PhonepayPlus investigation. It believed the affiliate had simply transferred to the Service. The Level 2 provider pointed out that, if it had been aware of the publisher and the misleading promotions, it would have been alert to problems and could have taken action to prevent the publisher from promoting the Service.

The Level 2 provider stated it had practices in place to control the risk associated with using affiliate marketers. The practices included:

- only working with well-known and trusted affiliate networks and reducing the number of affiliate networks it contracted with;
- ensuring all contracted affiliate networks complied with strict terms and conditions prohibiting certain types of marketing;
- communicating any legal updates and changes to the affiliate network on a regular basis;
- a proactive in-house monitoring member of staff responsible for investigating sales peaks and the source of traffic; and
- a consumer complaint team who investigated problems and areas of concern.

In addition, the Level 2 provider stated that if it became aware that an affiliate was using misleading or unauthorised marketing methods, the affiliate would be blacklisted and prevented from promoting the Service again.

The Level 2 provider specifically addressed the submissions raised by the Executive in relation to Reason one. It stated that it was unaware of the affiliate marketing promotions but as soon as it had become aware, due to its own monitoring, it took action promptly. It asserted that the consumer harm was low due to the short period of time the publisher was in operation, largely as a result of the swift actions of the Level 2 provider.

In relation to the Executive's Reason two, the Level 2 provider accepted that the consumer reviews did not relate to the Service but that the reviews may have related to the website that was generating the traffic (the affiliate marketer's promotions). It stated:

"We are not saying that these reviews are true (as we do not know that) but these are not necessarily untrue as these could potentially be winners of other promotions to which customers could have been redirected. The website is merely intended to collect the various offers that are available in the market acknowledged that it did not know whether the reviews were true, as the reviews may relate to winners of other promotions to which customers could have been redirected. The website is merely intended to collect the various offers that are available in the market."

The Level 2 provider stated that the "average" consumer would understand that the reviews are not necessarily by winners from the Service but of the "Apple Reward" website. The Level 2 provider confirmed that the winner of the promotion ending in March 2013 would not have been known at the time of the Executive's monitoring and,

in any event, no personal data was ever used to promote the Service, unless the winner had given explicit consent.

In summary, the Level 2 provider stated that the majority of affiliate marketers only used promotions that it had approved (which is its correct practice). However, some affiliate marketers had been known to change the service it promoted and generated traffic to, every day, hour or even minute, depending on the results produced. It said the reality of the situation was that affiliate marketers are difficult to control and manage because even if a Level 2 provider spots a problem the affiliate networks are reluctant to reveal the source of a particular promotion and the identity of the publisher, for fear that if the information was released it would ultimately make the network redundant. The Level 2 provider believed the affiliate networks needed to be regulated directly as the current situation leaves a Level 2 provider in a “precarious position”. Even working with a trusted affiliate network can leave a Level 2 provider open to a rogue publisher suddenly using a prohibited promotion which could lead to the ruin of its reputation.

Detailed oral informal representations were made on the Level 2 provider’s behalf. Generally, it reiterated its written response and stated it accepted that the promotions were misleading and that it was responsible for the actions of its affiliate marketers.

By way of further background, the Level 2 provider explained that the company had been established for five years and operated across 30 countries. Throughout the period of operation in the UK, the level of complaints had remained low; particularly when compared with its services in other countries. The Level 2 provider gave a detailed breakdown of the complaints it had received and the actions it had taken to rectify them.

The Level 2 provider described how it had detected the rogue affiliate’s promotions and was able to shut it down after two and a half days. However, it was not able to provide any documentary evidence that it had stopped the publisher on 13 September as the instruction had been given to the affiliate network over Skype, which was a common method of communication for the Level 2 provider. It regretted not obtaining any written verification of the direction to cease the actions of the publisher from the affiliate network but it had not considered that it was necessary and, in any event, a significant period of time had since passed making it more difficult to obtain.

The Level 2 provider stated it was disappointed that it had not been provided with details of PhonepayPlus’ monitoring until very recently.

3. The Tribunal considered the evidence and submissions before it, the Tribunal noted that the Level 2 provider accepted that the affiliate marketing was misleading and that it was responsible under the Code. The Tribunal commented that it is highly misleading to state that a consumer has won a prize when this is not the case. Further, The Tribunal did not accept the Level 2 provider’s submissions in relation to the consumer reviews and considered that consumers would be misled into thinking the reviews were from consumers who had recently won prizes from the Service. Consequently, and for the two reasons given by the Executive, the Tribunal concluded that consumers were likely to be misled into entering the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
Rule 2.2.2

All written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Spoken information must be easily audible and discernable.

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.2.2 as a result of consumers not being made aware of all information material to the decision to purchase prior to subscribing to the Service. The Executive asserted that the following information was not easily accessible, clearly legible and presented in a way which did not make understanding difficult:
 - i) the Service was a prize draw and only one winner would be selected at the end of each promotional period;
 - ii) the length of the promotional period; and
 - iii) there was a free route of entry to the prize draw.

The Executive relied on the content of the Guidance on "Promotions and promotional material" and "Competitions and Games with other prizes".

Paragraph 2.15 Promotions and promotional material

"There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity."

Paragraph 5.6 Promotions and promotional material

"Once on a webpage that promotes a PRS, consumers should not have to scroll down (or up) to view the key terms and conditions (especially, but not limited to, the price – see section 2 of this Guidance), or click on a link to another webpage. The PhonepayPlus Tribunal is likely to take the view that scrolling up or down to read key terms and conditions, or requiring the consumer to click on a link to view them, is in breach of Rule 2.2.5 of the PhonepayPlus Code of Practice."

Paragraph 5.7 Promotions and promotional material

"Level 2 providers should ensure that consumers do not have to scroll, regardless of screen resolution, to view the key terms and conditions of a service, or click on a link to view key terms and conditions. Key terms and conditions should be placed prominently on all website pages of the service that a consumer has to click through."

Paragraph 1.1 Competitions and Games with other prizes

"All promotional material should provide clear details as to how the competition operates. Consumers must be made aware, before entering into the service, of any information that is likely to affect their decision to participate. Clear terms and conditions should include, but are not limited to:

- Information on any restrictions on number of entries or prizes that can be won;
- The incremental cost and the full cost of participation, where this is known;
- An adequate description, including the quality, of all prizes and other items being offered, and a clear list of the numbers of each prize on offer;
- Information on any restrictions placed on the availability of those prizes being offered;
- Where the prize consists of vouchers, either the value of a single voucher, or the total value, should be stated;
- The closing date and time of the competition, except in instances where there are only instant prize winners. Please note that, if no time is provided, the service is presumed to close at midnight on the day of the competition."

Paragraph 2.1 Competitions and Games with other prizes

“Any promotional material in relation to competition services must not:

- Imply that items can be claimed by all, or a substantial majority, of participants are prizes;
- Exaggerate the chances of winning;
- Suggest that winning is a certainty; or
- Suggest or imply that consumers can only use a premium rate service in order to participate, where a free, or significantly cheaper, alternative entry route is available”.

Reason one: The Service was a prize draw and only one winner would be selected at the end of each promotional period

The Executive submitted that consumers were not clearly made aware, when viewing the promotional pages for the Service, of the key term that the Service was a prize draw and only one winner would be randomly selected at the end of each promotional period (**Appendix B**). The Executive asserted that, in the absence of such key information, consumers were not properly and fully informed of a key operational term. The key term was included in the terms and conditions relating to the Service but only after being directed to the Service landing page and even then it was displayed at the bottom of the screen, below the fold and presented in a block of light grey text. It was therefore not prominent (**Appendix D**). The Executive noted that the screenshots provided by the Level 2 provider also showed key operational terms of the Service appearing at the bottom of the screen and below the fold.

Reason two: The length of the promotional period

The Executive noted that consumers were not informed of the length of the promotional period. The terms and conditions on the Service landing page provided the end date of the promotional period as 31 March 2013 but not the start date, which the Level 2 provider had confirmed, in correspondence, was 1 September 2012 (**Appendix D**). The Executive submitted, notwithstanding the fact the terms and conditions were not sufficiently prominent, the start date should have been stated as it could significantly affect the chance of a consumer winning, particularly as only one winner was selected over a six months period.

Reason three: There was a free route of entry to the prize draw

The Executive asserted that it was not made clear to consumers that there was a free route of entry to the prize draw. The Executive noted that within the terms and conditions on the Service landing page there was a link which provided a “free entry route” to the prize draw but the link was contained within a large dense block of light grey text and therefore not adequately prominent (**Appendix D**). The Executive asserted that the information was material to the consumer’s decision to purchase because if a consumer was only engaging with the Service to win a prize, they would be able to do so without incurring a charge.

Consequently, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.2 of the Code as consumers were not fully and clearly informed of key information regarding the operation of the Service, prior to entering the Service.

2. The Level 2 provider denied the breach and generally stated that it believed all the key terms had been fully and clearly communicated to the consumer prior to entering the

Service on the landing pages, in the terms and conditions and in the subscription request messages sent to consumers' mobile numbers. The Level 2 provider also added that no information had been omitted, withheld or concealed from the consumer.

The Level 2 provider explained that due to the screen size limitations on some mobile devices. It was not possible to display all key terms and conditions on one page, without the need to scroll down. For this reason it included key information in its subscription request message to ensure that consumers were fully informed before they subscribed to the Service. In addition, in November 2012, changes were made to the Service. These included adding a header, containing pricing information, at the top of all pages, which was intended to be the first text the consumer saw. In addition it made sure the terms and conditions at the bottom of the page were on one page and the consumer no longer had to click on an arrow to view them.

Specifically in relation to Reason one advanced by the Executive, the Level 2 provider did not agree that a consumer would be unaware of a key term because it was included in the terms and conditions at the bottom of the page. The Level 2 provider made detailed representations on the choice of the colour and font size of the terms and conditions and made clear that it had carefully considered the options so that clarity was not adversely affected.

In relation to the second reason advanced by the Executive, the Level 2 provider specifically referred to the Guidance and submitted that it did not class the start date as a key term that was required to be included and, furthermore, it was unlikely that knowing the start date would affect the consumer's decision to participate in the competition.

Lastly, in relation to the third reason advanced by the Executive, the Level 2 provider stated that the free route of entry was made clear to consumers in the terms and conditions and this was demonstrated by the 3979 consumers who had entered the promotion via the free route of entry. It stated that there were always certain limitations when marketing on a webpage but it believed that generally the Service webpages achieved the outcomes contained in the Code.

Detailed informal representations were made on behalf of the Level 2 provider. It provided a comprehensive summary of the consumer journey to subscribe to the Service and stressed that it believed the Service and its promotional pages were fully Code compliant.

3. The Tribunal considered the evidence and submissions before it. The Tribunal commented that in some circumstances it may be difficult to ensure that all key terms and conditions can be viewed clearly due to limitations caused by the device the page is viewed on. However, where the term is material to the consumer's decision to purchase it must be easily accessible, clearly legible and presented in a way that does not make understanding difficult. The Tribunal noted that the Service webpages contained a block of terms and conditions, some of which were key to the decision to purchase. The Tribunal found that the number of prizes awarded over a time period and the presence of a free route of entry were key terms material to the decision to purchase. The Tribunal noted that this information was contained within a block of other terms and conditions, which a consumer was required to scroll down to view (and in some circumstances click on an arrow to view). Accordingly, the Tribunal upheld a breach of rule 2.2.2.

Decision: UPHELD

ALLEGED BREACH 3

Rule 2.2.5

In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.

1. The Executive submitted that the Level 2 provider had breached rule 2.2.5 of the Code because pricing was not prominent and proximate to the means of access for the Service.

The Executive relied on the content of the Guidance on “Promotions and promotional material”. The Guidance states:

Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).”

Paragraph 2.10

“Lack of prominence, or proximity, most often takes place online (both web and mobile web), where the price is provided in small print elsewhere on the page from the call to action. We have sometimes seen pricing information in the middle of the terms and conditions of a service, promotion or product, rather than as clear and correct ‘standalone’ information; the price is sometimes provided separate from the page with the call to action, or lower down on the page in such a way as to make the consumer have to scroll down to see the price. Any of these practices are unlikely to be viewed as compliant with PhonepayPlus’ Code of Practice by a PhonepayPlus Tribunal.”

Paragraph 2.14

“The use of colour (see immediately below) also needs to be considered, as this could affect the need for close examination, regardless of font size.”

Paragraph 2.15

“There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity.”

Complainants’ accounts

The Executive asserted that issues regarding the prominence and proximity of pricing information to the means of access to the Service were reflected in a number of the complainant accounts. Some complainants stated that they either, did not see any pricing information or, did not appear to understand that they would be charged. The Executive relied on the following accounts:

“No where [sic] did it say I’d be charged or I wouldn’t have clicked the link.”

“I believed I was entering a FREE competition.”

“Received a free message, “you can win an iPad” clicked the link and put his number in. Then received a message saying it would be £4.50 per week.”

Executive monitoring

The Executive noted that during in-house monitoring on 11 September 2012, consumers had to answer a question which led to a webpage that required a consumer to enter their MSISDN (**Appendix B**). Consumers were then directed to a webpage displaying the subscription trigger keyword and shortcode for the MO opt-in (**Appendix E**). The Executive asserted that as this page provided consumers with all the information required to subscribe to the Service, it was the means of access to the Service. The Executive further asserted that this page should contain pricing information that was prominent, clearly legible, visible and proximate to the premium rate shortcode. The Executive submitted that the pricing was not visible because it was displayed at the bottom of the page and below the fold. This resulted in consumers scrolling down below the means of access to the Service to view it.

The Level 2 provider submitted a screenshot of a different landing page for the Service, however, the Executive noted that pricing information was still not sufficiently prominent or proximate to the means of access to the Service because it was in a small font in a block of text and attention was directed towards large orange buttons (to the detriment of the pricing information).

The Executive accordingly submitted that for the reasons outlined above rule 2.2.5 of the Code had been breached.

2. The Level 2 provider denied the breach, submitting that pricing was compliant with the Code and Guidance. Generally, the provider submitted that pricing information was communicated to the consumer in a clear manner and at various stages prior to subscription to the Service. It made reference to the following:
 - i) At the top of each landing page the text, "Join the Funfone subscription for £4.50/week and get access to 1000's top quality sounds, games, apps and pictures!" was stated. Therefore there was no requirement to scroll down to see the pricing.
 - ii) On all web pages, including the means of access webpage, the pricing information was at the beginning of the footer containing the subscription information.
 - iii) A free SMS message was sent to consumer's handsets prior to subscribing, stating the costs of the Service, and a consumer was required to respond to the message to subscribe.
 - iv) The top header was presented in 100% black font colour. The footer terms and conditions were presented in a dark grey font colour which was the closest "web safe" colour to black.

The Level 2 provider explained it had experienced a technical issue with some of the landing pages viewed by the Executive during its monitoring (**Appendix B and E**). The page was checked by the Level 2 provider pre-launch and it was content that the page was fully compliant. However, upon cross checking the page, it was discovered that on some handsets the terms and conditions did not automatically expand when a consumer arrived on the webpage. The Level 2 provider rectified the issue on 5 November 2012 and stated that consumers, using any make or model of handset, accessing the page would now see the expanded terms and conditions. The Level 2 provider asserted that at the time of the Executive's monitoring the problem was only evident on some handsets, it was operational for a short period of time and rectified as soon as the Level 2 provider became aware of the issue.

The Level 2 provider gave a detailed commentary on the complainants' accounts. For two particular complainants it highlighted that neither complainant had subscribed to the Service.

During informal representations, the Level 2 provider reiterated its written submissions and gave further information in relation to the webpage that was modified on 5 November 2012. It was not able to provide any written evidence to confirm the changes were made. In addition, the Level 2 provider highlighted that there was a double opt-in to subscribe to the Service.

3. The Tribunal considered the evidence and submissions before it. The Tribunal found that prior to 5 November 2012, pricing information was only viewable on the Service webpages where a consumer clicked on an arrow at the bottom of the page and read the terms and conditions. Post 5 November 2012, pricing was present on the Service webpages, however it was displayed in a small font and not positioned proximately to the method of entry to the Service. The Tribunal also noted that the pricing at the top of the webpages post 5 November 2013 stated that it was for the "Funfone" service, however, it was likely that consumers would not have realised that this was connected to the competition they believed they were entering. Further, the Tribunal noted that it was not sufficient that pricing was contained in a free SMS sent to consumers as a consumer was not required to view that message prior to entering the Service. Accordingly for the reasons advanced by the Executive, the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.2 – Misleading

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

- Very serious cases have a clear and highly detrimental impact, directly or indirectly, on consumers.
- The nature of the breach, and/or the scale of harm and potential harm to consumers, is likely to severely damage consumer confidence in premium rate services.
- The affiliate marketing promotions were designed with the specific purpose of generating revenue streams for an illegitimate reason.

Rule 2.2.2 - Written information material to the decision to purchase

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

- Promotional material for the Service did not include adequate detail relating to the competition, as a result, the legitimacy of the Service as a whole was put in doubt, as consumers did not have adequate knowledge of key terms prior to making the decision to purchase.

Rule 2.2.5 - Pricing prominence

The initial assessment of rule 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of breach meant that the Service damaged consumer confidence in premium rate services.

- The provision of pricing information is amongst the most fundamental obligations imposed on providers by the Code.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal found no aggravating factors.

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

- The Level 2 provider stated it had the following measures in place to identify and mitigate against the risks associated with affiliate marketing:
 - only working with a small number of “well-known” and “trusted” affiliate networks;
 - contracts with the affiliate networks it has a direct relationship with, which contain a number of restrictions on the types of marketing permissible;
 - communication of legal updates and changes to the affiliate network on a regular basis;
 - proactive in-house monitoring of spikes in traffic conducted by one member of staff;
 - consumer complaints team who investigate problems and areas of concern; and
 - blocking and blacklisting of non-compliant affiliate marketers and publishers.
- The Level 2 provider noticed a spike in the number of subscriptions, identified the affiliate responsible and suspended the non-compliant publisher before being contacted by PhonepayPlus. As a result, the non-complaint promotion was only live for two and a half days.
- The Level 2 provider voluntarily suspended the Service.
- The Level 2 provider stated it had taken the following action to ensure the risks of any breaches reoccurring are minimised:
 - Closer monitoring of the Service and its promotions.
 - Reducing the number of affiliate networks it contracts with.
 - Sending out an update message to affiliate networks to make them aware of the rules relating to promotions.

The Tribunal noted the Level 2 provider stated that it had offered to refund all complainants. The Tribunal did not consider that this was sufficient to be considered a mitigating factor as the Level 2 provider did not provide any evidence in support of this assertion. The Tribunal also noted that the Level 2 provider had been proactive in its correspondence with PhonepayPlus and sought to rectify issues prior to the initial request for information. However, the Level 2 provider had failed to provide sufficient documentary evidence to support its assertions and the Tribunal did not consider this to be a mitigating factor.

The Level 2 provider's revenue in relation to the Service was in the range of Band 3 (£100,000- £250,000).

The Tribunal noted the consumer harm occurred in Autumn/ Winter 2012, which was prior to many of the Tribunal's adjudications concerning misleading affiliate marketing. Having taken into account the mitigating factors, including that the non-compliant affiliate marketing promotion was live for a very short period of time, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

The Tribunal noted the Level 2 provider had already made changes to its promotional material. However, the Tribunal commented that it hoped that the Level 2 provider would voluntarily seek compliance advice and undertake a further review in light of the Tribunal's comments.

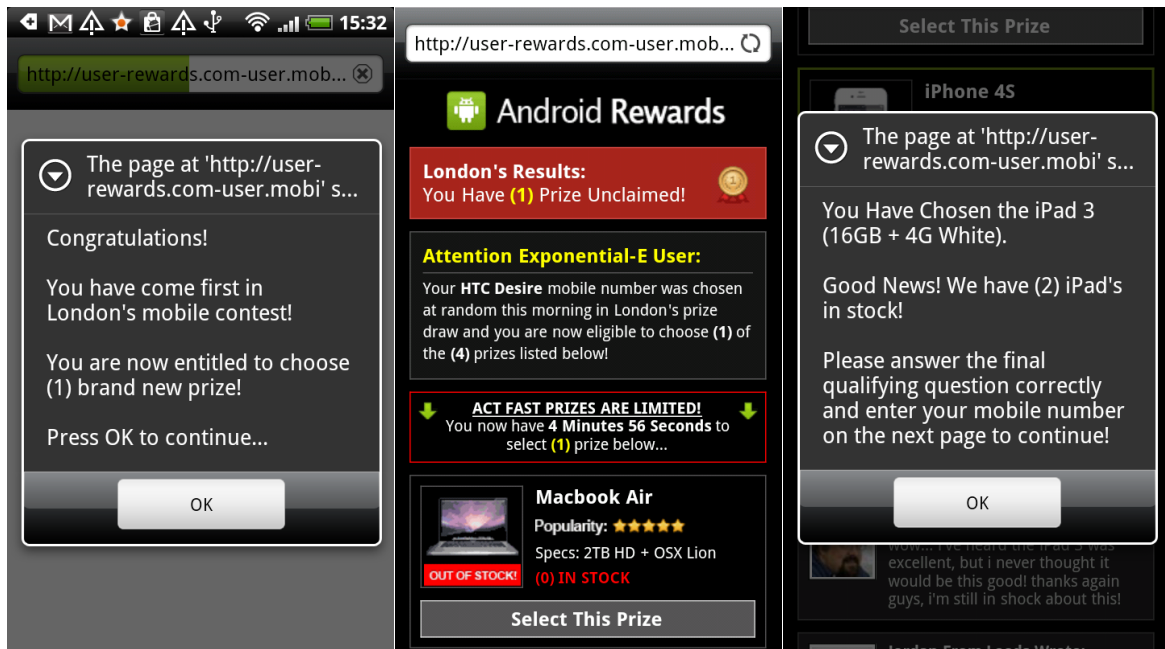
Sanctions Imposed

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

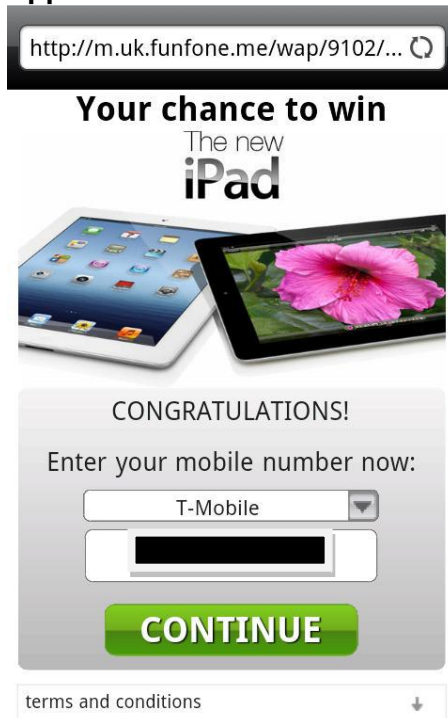
- a formal reprimand;
- a fine of £40,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices


Appendix A: Screenshot from the Executive's monitoring of the misleading affiliate marketing promotional material:




Appendix B: Screenshot from the Executive's monitoring of the Service webpage:




Appendix C: Screenshot from the Executive's monitoring of consumer reviews:




Chris From Essex Wrote:
wow... i've heard the iPad 3 was excellent, but i never thought it would be this good! thanks again guys, i'm still in shock about this!



Jordan From Leeds Wrote:
hey my kindle is so cool! I wasn't expecting it to arrive if i'm honest but it did and i just wanted to say thank you! Jordan Green



Sue From London Wrote:
So i got a message on my phone last week that i had an unclaimed prize and i thought it was one of those bogus things you see nowadays. However, after a little research online i soon discovered that it wasn't bogus at all and i just wanted to write in and say that my Macbook Air is absolutely fantastic!!! I was a windows PC user before last week and my Mac's got me hooked! everyone is sooo jealous ha ha :) you guys are fab! xxx



Alex From London Wrote:
To say there's over 8 million people in london, how the hell was my number chosen lol? either way, this rocks!

Appendix D: Screenshot from the Executive's monitoring of the Service terms and conditions:

CONTINUE

terms and conditions ↓

This is a subscription service. It will cost £4.50 per week until you send STOP to 88999 (£1.50 per message, 3 messages per week). After you completed your order of the service, you will receive 6 download credits which can be redeemed at www.uk.funfone.me (content starts at 2 credits per content item). This promotion ends on March 31st 2013 23:59 hrs GMT. Only one prize will be awarded. Participation in the promotion takes place automatically by subscribing to the service. Free entry route: click [here](#). The winner will be selected from all participants at the end of the promotion period. Please read the Game Terms that apply [here](#). Please ensure your phone is WAP enabled. Additional SMS/WAP/UMTS costs charged by your operator may apply. Click [here](#) to see the General Terms and Conditions that apply. By registering to this service you acknowledge that you agree to all applicable terms and conditions of Funfone, you are a UK resident, you are 18 years or older and authorized accountholder and/or have the consent of the accountholder. Funfone is not associated, sponsored or endorsed by any of the listed products or retailers. Trademarks, service marks, logos are property of their respective owners. Any tests, games and/or applications featured on this page are for entertainment purposes only. For assistance please call Funfone at 02030026245 or email support@funfone.me. This service is offered to you by Immediato B.V., Postbus 20581, 1001 NN Amsterdam, The Netherlands.

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Appendix E: Screenshot containing an example of a method of entry to the Service:

Your chance to win the new iPad

Your last step!

WE HAVE SENT YOU A TEXT
MESSAGE.REPLY WITH

OK
TO
88999

FOR YOUR CHANCE TO WIN THE NEW
IPAD



[terms and conditions](#)

