



### Tribunal Sitting Number 135 / Case 1

Case Reference: 10467

Level 2 provider: Mypengo Mobile B.V. (The Netherlands)

Type of Service: Competition service

Level 1 provider: OpenMarket Limited and Velti DR Limited

Network operator: All Mobile Network operators

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

#### BACKGROUND

Between 1 May 2012 and 9 September 2013, PhonepayPlus received 256 complaints from consumers in relation to a subscription (Sonxxie) and a non-subscription (Prize Rally) competition service (the “**Services**”) operated by the Level 2 provider Mypengo Mobile B.V. on the shortcodes 85150, 88688 and 80876. The Level 1 providers for the Services were OpenMarket Limited and Velti DR Limited. Prize Rally began operation in March 2012 and was voluntarily suspended by the Level 2 provider in June 2013. Sonxxie began operation in March 2013 and promotions for the service were voluntarily suspended by the Level 2 provider on 10 June 2013.

The Services offered consumers the opportunity to answer trivia questions. Each correct answer provided an entry into a monthly competition draw to win prizes such as an iPad mini or an iPhone 5. The Prize Rally service charged consumers a £4.50 sign-up fee, £3.00 per question answered (£1.50 to receive a question and £1.50 to answer a question) and a £1.50 reminder message 24 hours after a consumer stopped interacting with the service. The Sonxxie service cost £4.50 per week. The Services were promoted using affiliate marketing.

#### Complaints

The majority of complainants stated that they had not understood that they would be charged, they interacted with the Services in the belief it was free and reported viewing misleading promotional material. In addition, some complainants stated that they had received unsolicited promotional messages and had not requested or engaged with the Services. Further, some consumers reported interacting with the Services as a result of an invitation to become a mystery shopper or obtain free supermarket vouchers or other prizes, such as an iPhone, which never materialised.

#### Monitoring

Between 11 September 2012 and 25 April 2013, the Executive monitored the Prize Rally service. One complainant sent the Executive an email promotion, which contained the word “Congratulations” and informed the recipient that they had been selected as a contestant for the television programme “Deal or no Deal”. Within the email promotion was a link entitled, “Please click here to confirm your invitation”. On 11 September 2012, the Executive selected the link and a pop-up appeared which stated:

“Hurray!

Are you this month’s winner?

Please select a prize and enter your email on the next page for your chance to win”

The Executive selected the “OK” button and was presented with a webpage containing “three prizes” (**Appendix A**). The Executive selected a prize and was directed to the Prize Rally service landing page (**Appendix B**), which contained a trivia question. Upon selecting an answer the Executive was



directed to a webpage that contained a blank field to enter a MSISDN. The Executive entered a monitoring MSISDN and selected “Continue”. The next webpage directed the Executive to enter a four digit pin code that had been sent to the monitoring MSISDN (**Appendix C**). The Executive was presented with a webpage containing a trivia question and at the same time the monitoring MSISDN received four SMS’ charged at £1.50 each (one of which contained the first trivia question). The following day the Executive received a “reminder” SMS charged at £1.50, which repeated the last trivia question received the previous day.

On 18 September 2012, the Executive received an email that invited it to follow a link to watch a “crazy” video. Beneath the “watch video” link the email stated “(video contains secrets)”. In an additional monitoring session, the Executive clicked on the “watch video” link and noted that the journey was the same as outlined above in relation to the monitoring conducted on 11 September 2012, (the Executive received a “Hurray” pop-up, was directed to a promotional webpage with prizes (**Appendix A**) and then arrived at the Prize Rally landing page (**Appendix B**)). The Executive entered its MSISDN and also received the same SMS’ and charges as the monitoring session conducted on 11 September 2012.

On 21 September 2012, the Executive conducted an additional monitoring session by searching for “freeipadgear” on Twitter (**Appendix D**). The Executive selected the first promotion that stated, “FIG is giving away a free iPad,” and was directed to a promotional webpage containing various prizes. The Executive selected an iPad and noted that the prize was positioned next to the word “Free” in a large red font. The remainder of the monitoring session followed the same journey as detailed in relation to the monitoring session of 11 September 2012.

On the same date, the Executive searched Twitter for the term “free iPad” and selected a promotion that stated, “Take our survey and get FREE iPad for you”. The Executive was directed to a webpage entitled, “Special Free iPad for you,” which invited the user to take a survey and get a free iPad. Upon clicking on the “click here” button, the Executive arrived at the Prize Rally service landing page (**Appendix B**).

On 25 April 2013, the Executive searched Google for “site.depositfiles.com habbo”. The Executive selected the first link on the list of search results and was directed to a website which offered a “Habbo Hotel” cheats hack password download. The Executive was taken through several screens which led it to believe that a hack was being downloaded. Eventually, the Executive was directed to enter a password, which had not been provided. Upon clicking “activate” the Executive was directed to a list of unrelated offers and surveys that it was instructed to complete in order to obtain the password. The Executive selected, “Mystery shoppers needed! Earn a £100 ASDA voucher,” and was immediately directed to the same promotional webpage containing three prizes seen by the Executive in the previous monitoring sessions. After selecting a prize the Executive arrived at the Prize Rally service landing page.

### The Investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “**Code**”). The Executive sent a breach letter to the Level 2 provider on 9 September 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 and proximity
- Rule 2.3.1 – Fair and equitable treatment



The Level 2 provider responded on 23 September 2013. On 3 October 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 had acted in breach of rule 2.3.2 of the Code because: i) consumers were (or were likely to have been) misled into interacting with the Prize Rally service; ii) the language contained within a service SMS misled consumers as to the likelihood of winning a prize.

#### Reason one

The Executive relied on the monitoring of the Prize Rally service conducted on 11, 19, and 21 September 2012 and 25 April 2013 as detailed in the “Background” section above. The Executive noted the following misleading aspects of the promotional material:

- i) The use of the wording “Congratulations! You have been selected to be a contestant on “Deal or No Deal”, which appeared to indicate that the consumer had been selected to appear on the television programme “Deal or No Deal”.
- ii) The use of the congratulatory language, “Hurray!...Are you this month’s winner?...How to claim,” which reinforced the mistaken belief that a consumer had either been selected to appear on the television programme “Deal or No Deal”, obtained a “crazy” video, obtained a cheats hack password or had been automatically awarded a prize.
- iii) The instruction to select a prize in conjunction with the congratulatory language was likely to have led consumers to believe they had secured a prize.
- iv) The use of the wording, “Must see: (1) new “crazy” video for you (Video contains secrets),” which was likely to have led consumers to believe they have been sent a link to a “crazy video”.
- v) The use of the wording, “...giving away a free iPad”, “Get the New Apple iPad FREE”, “FREE IPAD GEAR”, “Take our survey and get FREE IPAD for you” and “Special Free iPad for you” was likely to have led consumers to believe that the iPad on offer was free.
- vi) The use of the wording “Complete an Offer to Unblock this Password!”, “Access this password immediately upon participation in an offer below”, “To get PASSWORD, please complete the easy requirements>” and “Please participate in a quick survey or offer below to continue,” was likely to have led consumers to believe they would be provided with a password to access a “Habbo Hotel” cheats hack download.

The Executive noted that the promotions did not mention that the offer in fact led consumers into the Prize Rally service.

#### Reason two

The Executive relied on the complainant SMS logs provided by the Level 2 provider. It noted that the sequence of the SMS were replicated across all the complainant SMS logs. Consumers were asked two trivia questions; those that responded correctly received the following response:



“You’re a top player!”

The Executive submitted this message appeared to be a standard SMS sent to all consumers who had answered the first two questions correctly. Further, the Executive submitted that the statement would incentivise consumers to continue participating with the Prize Rally service as they were likely to have been misled into believing that their chance of winning was far greater than it actually was.

The Executive asserted that in light of the features of the promotions the Prize Rally service misled, or was likely to have misled consumers into believing that they had either been selected to appear in “Deal or No Deal”, would obtain a “crazy” video, would obtain a password for “Habbo Hotel” cheats hack and/or that they would be guaranteed a prize, when in fact consumers only had a chance to win a prize if they entered the Prize Rally service. Further, the opportunity to be a contestant, obtain a “crazy” video and obtain a password did not ever materialise. Further, consumers were likely to have been misled into the belief that their chance of winning a prize was higher than it actually was.

2. The Level 2 provider initially denied the breach of rule 2.3.2 of the Code. However, during informal representations the Level 2 provider accepted that some of the promotions were misleading and stated it understood that it was wholly responsible for the actions of its affiliates. The Level 2 provider accepted using affiliate marketing and explained that the promotional material referred to by the Executive had come from a “rogue” publisher.

The Level 2 provider stated that the initial date of the Executive’s monitoring was September 2012 and it was surprised at the length of time it had taken PhonepayPlus to communicate its concerns. It stated that had it been made aware of the problems in a timely manner it could have taken the appropriate action to prevent further consumer harm. In light of this, the Level 2 provider asserted it was unfair to use examples that were over a year old and to judge them with the industry knowledge and experience that had been gathered a year later. The Level 2 provider also stated that as PhonepayPlus’ monitoring spanned the period September 2012 to April 2013, it assumed that there had not been any other potential breaches in the interim, which demonstrated that the Level 2 provider’s efforts to improve the monitoring of its affiliates had been largely successful.

The Level 2 provider explained that the promotional material referred to by the Executive had not been approved and had it been brought to its attention earlier it would have prevented the “rogue” affiliate from operating. The Level 2 provider highlighted that 155 of the 230 complaints in relation to the Prize Rally service were generated after the Executive’s monitoring and as such it believed that timely communication of issues could have prevented 67% of the complaints. The Level 2 provider stated that it had later identified the “rogue” affiliate and established that its promotions had generated £74,800 of revenue over a year.

In relation to controlling the risk resulting from the use of affiliate marketing, the Level 2 provider stated it had put the following controls in place:

- i) Pre-approval of all advertising flows by the Level 2 provider.
- ii) Proactive monitoring conducted by the Level 2 provider – increased traffic alerts and investigation of peaks.
- iii) Contracts with the affiliate networks containing strict rules and penalty clauses
- iv) Ensuring affiliate networks follow any relevant legal requirements, regulations and contractual obligations set by the Level 2 provider including updating them about recent adjudications affecting the rules and regulations.



- v) Reviewing the due diligence procedures of the affiliate networks.
- vi) Implementation of the pin check procedure as a third party verification in response to concerns in the market about consent to charge.
- vii) In April 2013, sought third party assistance to provide compliance advice and auditing assistance as a result the Level 2 provider's landing pages were amended.
- viii) Meeting with PhonepayPlus and attending the PhonepayPlus Forums to gather industry knowledge.
- ix) In July 2013, contracted with GoVerifyIt to provide screen grabs for every opt-in.

In relation to the misleading promotional material the Level 2 provider stated:

- i) "Hurray" was not a congratulatory message. It was a celebratory message because the entrant had succeeded in obtaining a chance to win a prize.
- ii) The difference between obtaining a "crazy" video and the chance of winning a prize is substantially different and therefore not misleading. In these circumstances it would be reasonable to assume a consumer would have inspected the terms and conditions.
- iii) The Executive did not subscribe to Prize Rally service after the Habbo Hotel cheats hack promotion.
- iv) The promotional wording referred to by the Executive should not be viewed in isolation. Overall, the consumer journey explained that a consumer only has a chance to win a prize.
- v) The question "Are you this months winner?" made it clear to consumers that they had not already been declared the winner of a prize.

In relation to the second reason advanced by the Executive, the Level 2 provider stated that the content of the SMS' had remained the same since early 2012 and PhonepayPlus had not raised any concerns. The Level 2 provider explained that the SMS that stated "a top player" did not state that the consumer was "the top player". The Level 2 provider indicated that its statistics demonstrated that only 7.6% of players play two or more trivia questions, therefore it was reasonable to assume that consumers who have played two or more questions were "a top player". Further, the phrase implied that they were one of a number of well performing players, which was a correct assumption.

Detailed informal representations were made on behalf of the Level 2 provider. It submitted that it understood that it bears full responsibility for the marketing of its services. By way of background the Level 2 provider stated it had been operating since 2007 and operated across 20 territories. In relation to the company structure, the Level 2 provider stated that it was the sister company of Mobile Minded BV and its parent company was Creative Clicks. The Level 2 provider has 30 employees.

The Level 2 provider stated that when it became aware of the potential breaches in September 2012 it was disappointed that it had not been given enough information to ascertain the specific affiliate marketer responsible. In May 2013, the Level 2 provider proactively investigated to obtain the identification of the rogue publisher so it could prevent it from marketing the Services. The Level 2 provider stated it was extremely difficult to work with affiliate networks with any certainty because the publishers were often many layers away from the network. It clarified that it worked with five to six networks but that they would work with as many as 50 publishers. Despite conducting monitoring at the time the rogue affiliate operated, the Level 2 provider stated that it did not see a spike in revenue or a problem with the conversion rate. The Level 2 provider asserted that over the last year it had evolved and was now more aware of the risks associated with affiliate marketing, as was the industry in general. At the beginning of June 2013, the Level 2 provider ceased utilising affiliate networks and



instead sought direct marketing solutions by buying traffic in-house to ensure full control of the promotional material. It commented that it did not know at this early stage whether this would prove to be a successful method of working.

Despite the Level 2 provider's written submissions, the Level 2 provider agreed during informal representations that it would not have pre-approved the promotions found by the Executive during its monitoring and it agreed that the promise of a "free" iPad was misleading.

The Level 2 provider commented on the numbers of complainants and stated it had issued refunds to 57% of complainants, a further 18% had rejected the offer of a refund and it had been advised not to contact the remaining 25%, although in the future it hoped to be able to offer refunds to those complainants. The Level 2 provider stated that it was inevitable that services would receive some complaints but generally the number was below the expected rate.

3. The Tribunal considered all the evidence before it, including the written and oral submissions made on behalf of the Level 2 provider. The Tribunal found the Level 2 provider's comments during the informal representations to be particularly useful as the Level 2 provider's representative had direct and in depth knowledge of the Services and the issues in the case. The Tribunal commented that this was always more helpful than a representative who does not have direct knowledge of the issues.

The Tribunal noted that during informal representations the Level 2 provider accepted that the promotions for the Services found during the Executive's monitoring were not approved by it and in some instances misleading. Further, the Tribunal noted that the Level 2 provider attributed the non-compliant promotions to a "rogue" affiliate marketer but accepted that it was ultimately responsible for non-complaint promotions for its services.

In relation to the promotions viewed by the Executive, the Tribunal found that:

- i. It was highly misleading to tell consumers that they had been selected to be a contestant on a television programme or had won a prize when this was not the case. As a result, the Tribunal held that the "Deal or No Deal" and "free iPad" promotions were clearly likely to have misled consumers; and,
- ii. It is misleading to promote a service using an inducement that is wholly unconnected and/or different from the content of a service and which never materialises. It must be made clear to consumers that a premium rate service is being promoted throughout promotions. Consequently, the Tribunal found that consumers were likely to have been misled by the "crazy video" and cheats password affiliate marketing promotions.

The Tribunal commented that whether or not the use of the word "hurray" is misleading is dependent on the cumulative impression given to consumers. In relation to the promotions before the Tribunal, the use of "hurray" coupled with other factors, including the certificate like appearance of the promotion, was misleading

In relation to the sending of messages to consumers stating that they were a "top player", the Tribunal noted the Level 2 provider's submission that this was only sent to approximately 8% of consumers. However, the Tribunal stated that given the number of consumers who participated in the Prize Rally service, 8% equates to thousands of participants. As a result, the use of the wording "top player" was likely to have misled consumers into the belief that their chances of winning a prize were higher than it actually was.



For the reasons outlined above, the Tribunal found that consumers had been or were likely to have been misled by the affiliate marketing promotions for the Services in breach of rule 2.3.2 of the Code.

### Decision: UPHELD

#### ALLEGED BREACH 2

##### 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 acted in breach of 2.2.5 of the Code because pricing information was not prominent and proximate to the means of access to the Services.

The Executive relied on the definition of a “promotion” within the Code which 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 also relied on the content of the Guidance on “Promotions and promotional material (the “**Guidance**”).

#### Sonxxie service

The Executive relied on the complainants’ SMS logs provided by the Level 2 provider. The first SMS consumers received after entering their MSISDN onto a Sonxxie webpage stated:

“REPLY OK to 88688. This is a free message from Sonxxie”

As soon as a consumer responded to the SMS with the trigger word “OK” they were subscribed to the Sonxxie service and charged £4.50. The Executive asserted that the SMS encouraged the use of the Sonxxie service by instructing the recipient to reply with the trigger word and therefore the SMS came within the definition of a promotion and should have included the cost of the service. The Executive highlighted that it was feasible that some consumers may have received the SMS without viewing the web and WAP promotions and therefore would not have viewed any pricing information. The Executive stated that the complainant accounts supported this submission.

The Executive stated that where a premium rate service is promoted consumers must be clearly informed of the cost of accessing the service before any purchase is made (before the trigger word is sent to the service shortcode). Accordingly, the Executive asserted that as no pricing information was contained within the SMS promotion, the Level 2 provider had acted in breach of rule 2.2.5 of the Code.

#### Prize Rally service



The Executive relied on its monitoring detailed in the “Background” section. The Executive noted that there was no pricing information on most of the promotional pages for the service (**Appendix A, B and C**).

The Executive stated that whilst the webpage containing the means of access to the Prize Rally service (**Appendix C**) included pricing information, it was not prominent or proximate to the means of access to the service for the following reasons:

- i) The font size of the pricing information was significantly smaller than the “continue” button in the centre of the screen and was therefore not prominent.
- ii) The colour of the pricing information text was light grey on white background which considerably reduced the clarity and ease with which it could be seen. Therefore the text was not prominent.
- iii) The pricing information was not placed in close proximity to the call to action.

During the course of the Executive’s investigation into the Services, the Level 2 provider submitted a number of screenshots of the Prize Rally service in order to demonstrate that the pricing information appeared clearer on an enlarged screenshot and as such more accurately reflected the size of a computer screen and therefore the consumers’ view. However, the Executive noted that the screenshots provided by the Level 2 provider appeared to be different to the screenshots obtained by the Executive during its monitoring, in particular the pricing information appeared to have changed.

Accordingly, the Executive submitted that consumers would not be clearly informed of the cost of accessing the Prize Rally service before any purchase was made and the Level 2 provider had acted in breach of rule 2.2.5.

2. The Level 2 provider generally denied the breach and submitted that the pricing information was compliant with the Code and Guidance.

In relation to the Sonxxie service, it did not accept that the SMS was a “promotion” and stated it was a service message. The Level 2 provider asserted that the cost of the service was prominently and proximately communicated to consumers on the service landing pages preceding the receipt of the SMS and therefore consumers would have been sufficiently informed of the cost of the service. The Level 2 provider specifically referred to paragraph 2.8 of the Guidance, which it had interpreted as meaning that as long as a consumer was clearly informed of the price prior to purchase, it did not need to be included at every part of the promotional journey.

In relation to one complainant account stating that they had not understood they would be charged, the Level 2 provider asserted that the complainant had interacted with the Sonxxie service by responding to several questions before unsubscribing. The first message sent to the complainant stated the cost of the service. Therefore it submitted that it was unrealistic to suggest they were not aware of the pricing information.

In relation to the Prize Rally service, the Level 2 provider referred to the submissions detailed above in response to the breach of rule 2.3.2. The Level 2 provider stated that the price was not included on the first three promotional pages because the pages had been produced by an affiliate and it had not approved the content. In relation to the promotional pages that included the price, the Level 2 provider asserted that the promotional pages were over a year old and during this time the requirements in relation to pricing had changed. It stated it had altered the promotional pages in line with the adjudications that had been determined. The Level 2





provider highlighted the key terms and conditions, which included the price and stated that a consumer was required to tick a box to state they had read and understood them.

The Level 2 provider submitted that PhonepayPlus had previously viewed the landing pages and had not raised any concerns. The Level 2 provider provided larger images of the Services' screenshots, as it believed the size of Executive's screenshots did not accurately reflect the consumers' view. The Level 2 provider confirmed the pages were an updated and amended version and therefore different to the screenshots obtained during the Executive's monitoring.

The Level 2 provider made detailed informal representations and reiterated its written submissions.

3. The Tribunal considered the evidence and noted that the Code requirements and Guidance in relation to the provision of pricing information has been clear since September 2011. Therefore, the Tribunal did not accept the Level 2 provider's submission that the non-complaint pricing was as a result of the evolution of the requirements.

In relation to the Sonxxie service, the Tribunal found that consumers received a free message, which contained the method of access to the service, and therefore encouraged consumers to interact with the service, but did not contain pricing information. The Tribunal accepted that pricing information was set out elsewhere during the consumer journey; however it held that the definition of a promotion is wide and determined that the message was promotional in nature and therefore should have contained pricing information. The Tribunal rejected the submission that the message could be defined as being "separate from the service".

In relation to the Prize Rally service, the Tribunal commented that pricing information on the webpages containing the means of access to the service was small and in a colour which made viewing difficult and therefore it lacked prominence. The Tribunal also noted that the positioning of the pricing information was not proximate to the call to action.

Accordingly, and for the reasons set out above, the Tribunal found that a breach of rule 2.2.5 of the Code had occurred in relation to both Services.

### **Decision: UPHELD**

### **ALLEGED BREACH 3**

#### **Rule 2.3.1**

Consumers of premium rate services must be treated fairly and equitably.

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code for two reasons:
  - i) Consumers were charged for a "reminder" message 24 hours after ceasing interaction with the Prize Rally service.
  - ii) In relation to the Sonxxie service, a number of consumers received their subscription charge earlier than the seven days stated in the promotional material.

#### **Reason one**

The Executive noted that the cost of the service was a £4.50 sign-up fee and £3.00 per question played, consumers would receive an additional £1.50 charge for a "reminder" SMS



sent 24 hours after ceasing interaction with the service. Consumers were advised that if they wished to stop playing and did not want to receive the “reminder” SMS they should text “STOP” or send an email.

The Executive relied on the monitoring conducted on 11 September 2012 and detailed in the “Background” section. The Executive noted that it was charged £6.00 to receive four SMS, however, as it did not further engage with the Prize Rally service by answering the last trivia question, the Executive received a “reminder” SMS the following day and was charged an additional £1.50.

The Executive asserted that the provision of the “reminder” SMS at a cost of £1.50 constituted unfair and inequitable treatment of consumers, as the reminder SMS contained the same trivia question that had been sent the day before and consumers ought not to incur additional charges for repeated trivia questions in the event that they failed to respond.

The Executive noted that the reminder SMS was sent 24 hours after a SMS containing the same trivia question. The Executive asserted that it was unfair and inequitable to penalise consumers who failed to respond within a short period of time. The Executive submitted that consumers should have been given more time to respond to the first SMS.

#### **Reason two**

The Executive relied on the complainant SMS logs for the Sonxxie service, which showed that re-billing for the second charge occurred sooner than the stated £4.50 every seven days. The Executive noted that consumers were not informed that charging may occur more frequently and therefore were not treated fairly. The payment platform resulted in rebilling for all consumers occurring on the same day. Therefore, rebilling of the second subscription charge often occurred prior to the initial subscription elapsing. One complainant SMS log demonstrated that a complainant had been rebilled for the second charge two days after the initial subscription charge.

The Executive submitted that early re-billing constituted unfair and inequitable treatment of consumers as it conflicted with the information stated in the promotional material and the service initiation SMS. The Executive also submitted that consumers who wished to cease the service were penalised for not sending “STOP” within the first two to four days of the subscription, as opposed to the seven day subscription period. Accordingly the Executive submitted that the Level 2 provider had breached rule 2.3.1 of the Code.

2. Generally, the Level 2 provider denied the breach and stated that it believed consumers had been treated fairly and equitably. The Level 2 provider submitted that consumers are clearly informed (in both the key and full terms and conditions) about the pricing for the Prize Rally service therefore, consumers were aware that there was a charge for the reminder message. The Level 2 provider also submitted that the reminder message was part of the service costs.

The Level 2 provider explained that after receiving the reminder message over 10% of consumers continuing interacting with the service. Consumers were sent a repeat question to ensure that consumers were not given an unfair advantage. In addition, reminding a consumer after 24 hours appeared to achieve the best response rate and it believed this was common practice in the industry.

The Level 2 provider addressed the early re-billing submissions advanced by the Executive. It stated the re-billing system was set to collect subscriptions at the beginning of the calendar



week regardless of when the subscription commenced. The Level 2 provider asserted that over the course of a month the payment would equate to a payment every seven days. Generally the Level 2 provider stated that it believed the billing system was fair to consumers as it ensured that every consumer received the same questions and, no matter what time in any particular week a consumer entered the competition, they would have the same chance of winning the competition.

During detailed informal representations, the Level 2 provider reiterated its written submissions. In addition, the Level 2 provider stated that it would not now charge for reminder messages.

3. The Tribunal considered all the evidence before it and determined that consumers had not been treated fairly and equitably. In relation to Reason one regarding the Prize Rally service, the Tribunal commented that consumers should not be charged for a “reminder” message, this is particularly the case where a consumer does not gain any additional value as the message merely repeats a question that has already been received. The Tribunal commented that it had no issue in principle with a “reminder” message containing a repeated question being sent (to ensure no advantage is gained over other consumers), however it should be free. In relation to Reason two regarding the Sonxxie Service, the Tribunal held that as a result of the billing mechanism, consumers did not receive a full week’s subscription in the first week they subscribed. The time period covered by the first week’s subscription varied depending on the day of the week the consumer subscribed. The Tribunal held that in the absence of clear information stating that consumer would not receive a full week’s subscription for the charge; consumers were not treated fairly and equitably. Accordingly, for the reasons given above, the Tribunal held that consumers had not been treated fairly and equitably in breach of rule 2.3.1 of the Code.

**Decision: UPHELD**

### **SANCTIONS**

#### **Initial Overall Assessment**

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

#### **Rule 2.3.2 – Misleading**

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

- 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 2.2.5 – Pricing prominence and proximity**

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

- The provision of pricing information is amongst the most fundamental Code obligations. The breach was especially serious in relation to the Sonxxie service, which was likely to have resulted in consumers being unaware that they would incur charges.



- The nature of the breach and the scale of harm caused to consumers were likely to have severely damaged consumer confidence in premium rate services.

### Rule 2.3.1 – Fair and equitable treatment

The initial assessment of rule 2.3.1 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 the breach meant that the Services would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers was higher and/or the Services had the potential to generate higher revenue as a result of the breach.

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 took into account the following aggravating factor:

- The Tribunal noted that the Level 2 provider's sister company, Mobile Minded BV, had been subject to two adjudications in 2012, which involved some of the issues raised in the instant case. The Tribunal noted that the two companies have shared senior personnel and that there was overlap between the parties that had conducted informal representations.

The Tribunal noted that at the time of the monitoring, there had been at least five previous adjudications concerning misleading affiliate marketing. Two of which had concerned the Level 2 provider's sister company, Mobile Minded B.V.

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

- The Level 2 provider proactively sought and implemented compliance advice, which addressed some of the non-compliance.
- The Level 2 provider made a request to the Executive for specific information, which if provided may have assisted to limit consumer harm from late 2012.
- The Level 2 provider stated that on being alerted to the potential issues it immediately wrote to all of its affiliate partners and conducted an investigation. On later receiving information that enabled it to identify the "rogue" publisher, it identified the volume of traffic (which it communicated to the Executive) and terminated its relationship with the publisher.
- The Tribunal noted that the Level 2 provider stated that it had taken a number of steps to ensure future compliance, including:
  - Pre-approval of all advertising flows.
  - Proactive monitoring conducted by the Level 2 provider – increased traffic alerts and investigation of peaks.
  - Contracts with the affiliate networks containing strict rules and penalty clauses.
  - Ensuring affiliate networks follow any relevant legal requirements, regulations and contractual obligations set by the Level 2 provider including updating them about recent adjudications affecting the rules and regulations.
  - Reviewing the due diligence procedures on the affiliate networks.
  - Implementation of the pin check procedure as a third party verification in response to concerns in the market about consent to charge.
  - Meeting with PhonepayPlus and attending the PhonepayPlus Forums to gather industry knowledge.



- In June 2013, it stopped using affiliate marketing and instead sought direct marketing by buying in-house traffic to ensure full control of the promotional material.
- In July 2013, it contracted with GoVerifyIt to ensure that it could provide screen grabs for every opt-in.
- The Level 2 provider had refunded a large number of complainants. The Tribunal particularly commended the method of refund (Post Office refunds).

The Level 2 provider's revenue in relation to the Services was in the range of Band 1 (£500,000+).

The Tribunal noted that the consumer harm began in Autumn/ Winter 2012, which was prior to many of the Tribunal's adjudications concerning misleading affiliate marketing. The Tribunal also commented that some consumer harm may have been avoided had the Executive communicated full details of the alleged non-compliance in a timely manner. It welcomed the fact that the Executive had now put in place procedures to ensure that providers are made aware of potential issues at an early stage. The Tribunal noted that the breaches and circumstances of the case would normally result in a higher seriousness rating and more onerous sanctions. However, having taken into account the mitigating factors in particular, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

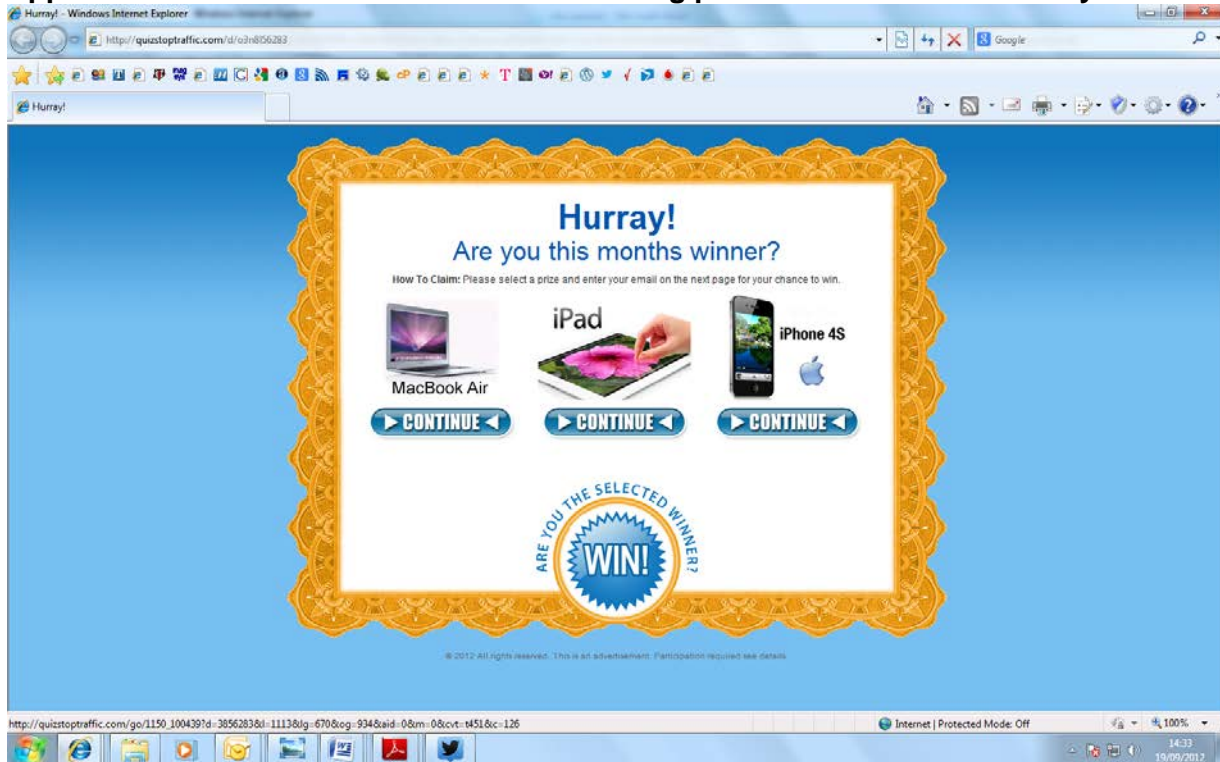
### Sanctions Imposed

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

- a formal reprimand;
- the Tribunal warned the Level 2 provider that it had noted that senior personnel connected to the Level 2 provider had been involved in three recent adjudications, as a result, any future non-compliance, especially if it is of a similar nature, may result in significant consequences;
- a fine of £100,000; 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

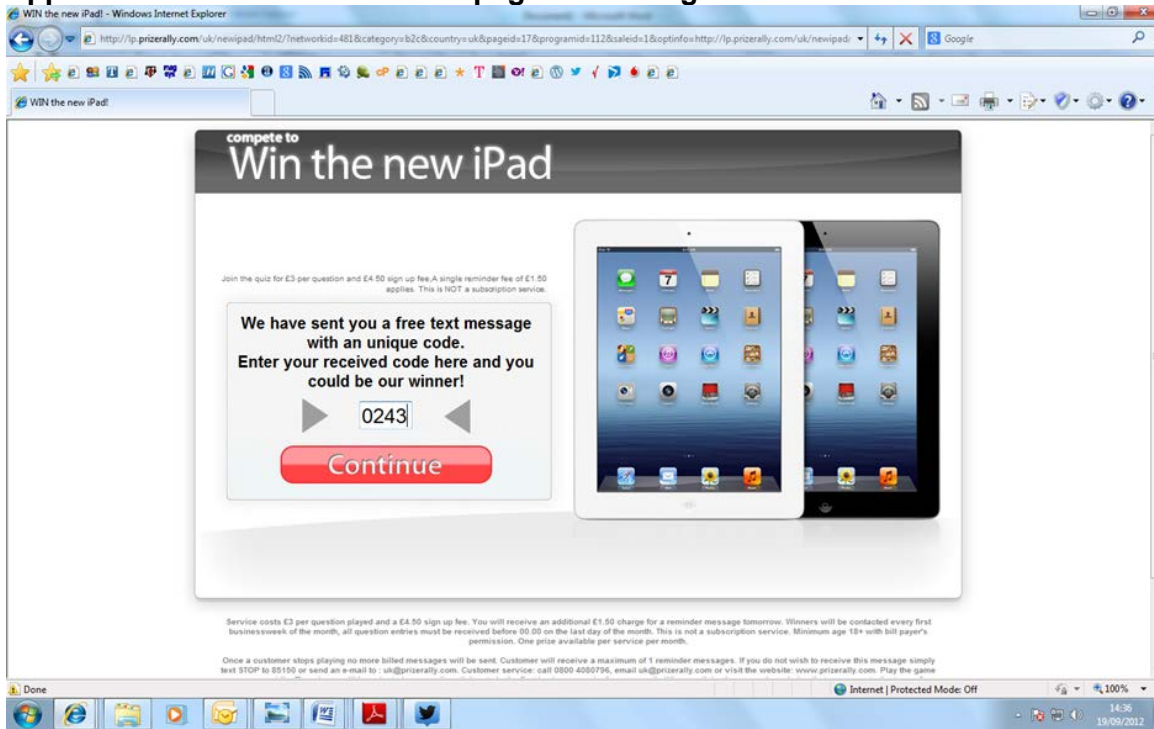
**Appendix A: Screenshot of an affiliate marketing promotion for the Prize Rally service:**



**Appendix B: Screenshot of a landing page for the Prize Rally service:**



## Appendix C: Screenshot of a webpage containing a “means to access” to the Prize Rally service:



## Appendix D: Screenshot of Twitter search results for “freeipadgear”:

