

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

EYE GAMES LIMITED

Respondent

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ADJUDICATION BY CONSENT ("CONSENT ORDER")

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**Introduction**

1. This Consent Order shall relate to the matter under PhonepayPlus case reference 29236, and the oral hearing listed for 1 December 2014, requested by the Respondent.
2. This Consent Order is made following admissions of liability by the Respondent for the breaches set out in the schedule to this Consent Order, with the Respondent for commercial reasons preferring to settle the case by way of agreement rather than protracted adversarial proceedings.
3. This Consent Order further sets out the agreement of the parties in respect of the sanctions to be imposed on the Respondent and the administrative charges to be paid. The agreed sanctions and administrative charges have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the PhonepayPlus Code of Practice (twelfth edition) ("the Code").

**Agreed sanctions**

4. The sanctions hereby agreed by the parties are:
  - a. a fine of £60,000;
  - b. a formal reprimand; and
  - c. a requirement that the Respondent refund all consumers who claim a refund, for the full amount spent by them for the relevant services, 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.

#### **Administrative charges**

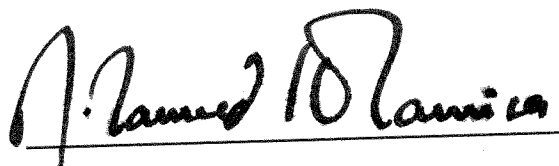
5. The Respondent shall pay the legal and administrative charges incurred by PhonepayPlus in relation to this case in the sum of £25,000.

#### **Payment of fine**

6. The fine and administrative charges are to be paid within 28 days of the date of this Consent Order, subject to any alternative payment arrangements which may be agreed between the parties.

#### **Oral hearing date**

7. The Oral hearing date of 1 December 2014 shall be vacated.



Mohammed Khamisa QC (Chair)  
On behalf of the Oral Hearing Tribunal  
29th November 2014

Schedule

IN THE PHONEPAYPLUS TRIBUNAL

CASE REF: 29236

BETWEEN:

PHONEPAYPLUS LIMITED

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-and-

EYE GAMES LIMITED

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SUMMARY OF SERVICE AND ADMITTED BREACHES OF THE CODE

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The Service

1. The service is a subscription competition service operating on shortcodes 82344, 85222 and 88222 under the brand name "Win Trivia" (the "Service"). The Service was promoted and accessed by a promotion appearing on smartphones. The Service was operated by the Respondent. The Respondent was directly contracted to the Level 1 provider IMI Mobile Europe Limited.
2. There were various price points for the Service. These comprised a £1.50 or £2.50 entry fee, and a weekly charge of between £2.50 and £4.50.
3. The Service was the subject of 297 complaints between 4 June 2013 and 17 April 2014.
4. The Service was the subject of a number of information requests issued by the Executive to the Respondent which, amongst other things, attempted to determine the promotion of the Service. The Executive monitored the Service on 27 September 2013.

5. The Executive clicked on a banner advert hosted on the Accuweather app, which mimicked the style used by Facebook in its smartphone application to signify that a message had been received.. The banner was served on the Accuweather site by a third party Affiliate, which the Respondent maintained it had no knowledge of. The banner took the Executive through three pages of a third party marketer's pages, before the Executive was directed to the operative pages of the Service (the "Landing Pages"). All pages on the user journey prior to the Landing Pages were created by affiliate marketers. The Respondent maintained that there was no evidence of any complainants having arrived at the Landing Pages via the Facebook banner discovered by the Executive.

6. The first page of the affiliate promotion stated (in material part):

*"Congratulations!!*

*You have been selected in United Kingdom's prize draw!*

*You have chance to choose (1) prize as your reward!*

*Press OK to continue..."*

There was then an "OK" button.

7. Upon pressing that button, the second page of the affiliate promotion was accessed which was entitled "*Mobile Rewards*". The second page stated included the following text:

*"ACT FAST PRIZES ARE LIMITED!"*

8. Underneath these words, there was a clock that counted down the time that there was purported to be left in which the prize must be 'selected'. At the time of monitoring, this time was 3 minutes and 47 seconds. Those words and the clock were followed, upon scrolling down, by a list of Apple products. Each listing was accompanied by a 'popularity' rating in stars, brief specification details of the product, and, words that purport to show whether the particular item is "*in stock*". At the bottom of each entry was a button with the words "*Select This Prize*". Of the four products listed only one, the "*New iPad*" was shown as being in stock.

9. The third page of the affiliate promotion provided the following text:

*"Message from webpage*

*You Have Chosen the New iPad (64GB + 4G White).*

*Good News! We have (2) in stock and your prize has now been reserved!*

*Please answer the final qualifying question correctly and enter your mobile number on the next page to continue!"*

There was then a button that stated "OK". If the recipient pressed that button, the Landing Pages were accessed.

10. Further down the second page were a number of 'comments' from what appeared to be members of the public; the names, location and, occasionally, photos of these commenters were included with their comment. These comments purported to verify the competition.
11. However, identical and near identical 'reviews' had appeared in two wholly unrelated services operated by other Level 2 providers that had been subject to adverse adjudications involving breaches of the Code.
12. The Landing Pages comprised two, or alternatively, three pages. The first page of the Landing Pages stated (in material part):

*"Win the new iPad"*

Followed by a question with three clickable options for answers:

*"How many goalkeepers in a football team?"*

Underneath that text, in smaller font, appear the words

*"Answer the question for your chance to win an iPad*

*16+ to play"*

Underneath this is a further clickable link to:

*"Full terms and Conditions"*

13. The second page (conditional on the question in the first page being answered correctly) gave the consumer a chance to enter their mobile number *"for your chance*

to win". Underneath the box provided for entry of a consumer's mobile number were the words:

*"Join iPad Prize for £4.50 per week. 16+ to play."*

14. A further page appeared once a consumer had entered their mobile number. This third page stated (in material part):

*"You'll receive a text, reply with the word APPLE to complete entry."*

15. The wording of the aforementioned text was:

*"Free Message. Reply [Keyword] to [Shortcode] to confirm your entry to [service]. Ignore this if not requested"*

16. If a consumer responded to this text with the word "APPLE" (or another keyword prescribed by the Service, the key words being one aspect of the Service that varied), the consumer would be subscribed to the Service, for a weekly charge until they texted "STOP" to a shortcode. A further text would then be sent which stated (for example):

*"FreeMsg:U have joined ipad freeplay.gamenow.org.uk for Â£4.50 per week until u send stop to 85222.Care? 084532893092"*

### **The Admitted Breaches**

17. Breaches of Rules 2.3.2 and 2.2.2 are admitted by the Respondent in respect of the Service.

#### **Rule 2.3.2**

**Outcome 2.3 provides:**

#### ***"Fairness***

***That consumers of premium rate services are treated fairly and equitably."***

**Rule 2.3.2 of the Code provides:**

***"Premium rate services must not mislead or be likely to mislead in any way."***

18. There were various elements of the pages leading to the Landing Pages, with which the Respondent was not involved, which were misleading. The banner advert of the

Facebook promotion was misleading in that it presented an untruth (that there was a message waiting for the consumer in their Facebook inbox) in order to promote the Service.

19. The first page of the affiliate's promotion was misleading in that it stated that the consumer who has chanced on the promotion had been "*selected in United Kingdom's prize draw*" (and the message of "*Congratulations!!*" compounded this aspect of the breach).
20. The second page of the affiliate's promotion was misleading in that it stated that the consumer had to act fast and in accordance with the countdown clock. In fact, there was no indication that the prize draw was in any way time limited and certainly not by the 3 minutes and 47 seconds that the Executive's monitoring found. Therefore, the consumer was misled into thinking that they had to act fast in order to take advantage of the offer.
21. The second page of the affiliate page was misleading in that it stated that prizes were, or were not, "in stock", when it appears that there was always only one prize on offer in each variant of the Service (and hence the other 'prizes' were never in stock). Further the stating of prizes being "in stock" gave the impression that there was some interaction between the consumer selecting a prize that was more available than otherwise in a competition.
22. The second page of the affiliate flow was misleading in that it utilised reviews of the Service that were not connected to the Service and purported to give credence to the veracity of the Service.
23. The third page of the affiliate's promotion was misleading in that it stated that "*your prize has now been reserved*".
24. There were no breaches of Rule 2.3.2 in relation to the Service itself. Further, it is not known whether there were other consumers who actually experienced the user flow faced by the Executive.

### **Rule 2.2.2**

**Outcome 2.2 provides:**

***"Transparency and Pricing***

***That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”***

Rule 2.2.2 of the Code provides:

***“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 discernible.”***

25. In relation to the pricing information presented to consumers concerning the Service, the Executive maintained that there was no clear information on the weekly subscription charge. Charges were simply dealt with by the words:

*“Join iPad Prize for £4.50 per week. 16+ to play.”*

26. In the context of the preceding affiliate pages which contained misleading elements, the Executive maintained that these words failed to provide clear information about the full cost of participation in a way that did not make understanding difficult. The Respondent accepts this breach on the basis that this issue arose as a result of the affiliate pages.

27. The Executive maintained that the following were key terms and should have been presented in a more prominent position: (i) the method of exit from the service; (ii) the fact that the service was a prize draw; (iii) the closing date of the prize draw and when the winner would be selected; and (iv) the Respondent’s name and contact details. The Respondent has made the Executive aware that these terms have been clearly presented within other versions of the Service. The Executive is not aware to what extent such other versions were seen by consumers.

28. Therefore, some consumers would not have been made aware of how the competition operated, and of all information that was likely to affect their decision to participate, which may have been aggravated by confusion arising from the affiliate pages which preceded the Service.

### **Aggravating and Mitigating Factors**

29. The Executive noted the following aggravating factors which are accepted by the Respondent: PhonepayPlus has issued Guidance relevant to the agreed breaches of



Rules 2.3.2 and 2.2.2 of the Code relating to the use of affiliate marketing and the clear presentation of the key terms of a Service (specifically the PhonepayPlus Guidance on Competitions and other games with prizes, and the Guidance on Promotions and promotional material); and PhonepayPlus has also issued a number of relevant adjudications relating to non-compliant affiliate marketing.

### **Seriousness**

30. It appeared to the Executive that the case was overall to be regarded as serious and that appropriate sanctions should be imposed accordingly.