

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 28 May 2009 TRIBUNAL SITTING No. 28 / CASE 3
CASE REFERENCE: 798482/AP

Service provider & area:	Ericsson IPX AB, Guildford
Information provider & area:	Yuuzoo Pte Limited, Singapore
Type of service:	Games and downloads/ subscription
Service title:	'IQ Quiz (How dumb or smart are you?)'
Service number:	88878
Cost:	£4.50 per week
Network operator:	Mobile Operators
Number of complainants:	2

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received two complaints regarding services operating on shortcode 88878 by Yuuzoo Pte Limited (the 'Information Provider'). These complaints related to subscription services operated by the Information Provider. The 'IQ Quiz (How dumb or smart are you?)' service ('IQ Quiz') operated by the Information Provider was monitored by the Executive on 12 March 2009.

One of the complainants stated to have seen an invitation on the social networking site Facebook requesting that the complainant complete an 'IQ Quiz' which had been recommended by one of the complainant's 'Facebook friends'. On accepting the invitation, the complainant was entered into a subscription service. The Executive monitored the service and found that profile pictures of 'Facebook friends' were used, and that these friends were specifically named as individuals who had already completed the 'IQ Quiz'. During monitoring, the Executive completed the test and was then required to enter a mobile phone number in order to receive the results of the 'IQ Quiz'. The complainants reported to being unaware that entering their mobile phone number on the website would result in them being entered into a subscription service at a weekly cost of £4.50.

Promotional material

When the Executive monitored Facebook, having downloaded an application to complete a '*There/ Their/ They're Test*,' it noted that on the same webpage a text box displayed the following wording:

'[name removed], where does your IQ Score rank?'
#1 = your friend Sunitosh scored a 127

#2 = your friend Natalie scored a 119'

During the course of monitoring, the Executive noted that the named friends 'Sunitosh' and 'Natalie' were 'Facebook friends' of the individual who monitored the promotion. The Executive clicked on a 'Take the Quiz' button and completed the whole test without having to scroll down further to where key terms and conditions were visible including subscription details and pricing. When the test was completed, a screen appeared inviting the user to enter his mobile phone number in order to find out the score of the completed quiz. It was at this point that the Executive ended the monitoring of the promotion.

The Services

'IQ QUIZ' and 'Crush-O-meter'

The Executive understood the service to be an 'IQ QUIZ' service to find out 'HOW DUMB OR SMART ARE YOU?', for which users were charged £4.50 per week and received three games and ten downloads for the first week; and thereafter charged £4.50 per week for ten downloads until the user sent 'STOP DUMB' to the shortcode 88878.

Following correspondence with the Information Provider and Ericsson IPX AB (the 'Service Provider'), the Executive noted that the shortcode 88878 was a shared shortcode. Although the two services looked different, both services entered users into the same subscription mechanism costing £4.50 per week for games and downloads.

'FIND OUT WHO HAS A CRUSH ON YOU!'

This service was launched on 6 January 2009 and the subscription element was triggered by users sending the key word 'CRUSH'. Screen shots of this promotional material were provided by the Service Provider and the Information Provider following a request from the Executive.

'IQ QUIZ'

This service was launched on 3 March 2009 and the subscription element was triggered by users sending the key word 'DUMB'.

Nature of complaints

By 17 April 2009, the Executive had received two complaints from members of the public for shortcode 88878:

Complainant 1

This complainant reported receiving a text message which read '*Your free game download now //3"x 3 "Get your Iq in markets largest and best content 10 top free and cool downloads music games etc @ http://wap.yuuzoo.com/uk @ 450p/wk till stop.*'. The complainant stated to have completed a quiz on Facebook which was sent from a friend and required a mobile phone number to be entered onto the website. The complainant was unaware that by entering a mobile number, he or she would be entered into a subscription service incurring a weekly charge of £4.50.

Complainant 2

This complainant said that their 11-year-old son received a message which read 'Text CRUSH to 88878' only. The complainant said the message received was unsolicited.

The Information Provider provided the Executive with message logs for the above complainant. In addition to the message logs, the Information Provider was also able to provide the user name entered onto the website. The Executive contacted the mother of the 11-year-old to confirm the name of her son. The complainant provided the same name as that given by the Information Provider.

Complaint Investigation

Standard Procedure

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the Code.

A breach letter dated 28 April 2009 was sent by the Executive to the Service Provider. A formal response was received from the Information Provider on 12 May 2009 on behalf of the Service Provider.

The Executive was made aware of the 'Crush-O-meter' service in the Service Provider's response to the breach letter, however the Executive only raised breaches in relation to the 'IQ Quiz' service.

The Tribunal made a decision on the breaches raised by the Executive on 28 May 2009 having heard informal representations from the Service Provider and the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

FAIRNESS- MISLEADING (Paragraph 5.4.1a)

Services and promotional material must not:

(a) mislead, or be likely to mislead in any way

1. The Executive submitted that the promotion was misleading as users were under the impression that they were completing an online 'IQ Quiz' and had clearly not differentiated between the quiz and the subscription service.

The Executive submitted that the user was initially misled into taking part in the 'IQ Quiz' by being informed on Facebook that two of their specifically named friends had already completed the 'IQ Quiz' and that those friends wished to challenge the user to also complete the 'IQ Quiz' in order to establish which friend was 'smarter'. The Executive submitted that it was of the opinion that because the two friends were specific 'Facebook friends', users were more likely to complete the test and were more likely to trustingly enter their mobile phone number in order to obtain the results or their completed 'IQ Quiz'.

The Executive submitted that on the screen where users entered their mobile phone number, users would be misled into believing that they had to enter their number within a short time period due to the presence of an arrow with a countdown clock which read '*YOU HAVE 28 sec TO ENTER YOUR DETAILS*'. As a result a user was likely to have promptly entered his or her mobile phone number. The Executive submitted that the user's belief that he or she only had limited time in which to enter their mobile phone number meant that they may not have scrolled down and subsequently not read the terms and conditions explaining the subscription element of the service. The Executive submitted that it had monitored the service, allowing the 28 second countdown to expire and noted that after 28 seconds, the countdown would restart afresh at 28 second. In light of this fact, the Executive was of the view that there had been no genuine time limit to enter a mobile phone number and users were misled into entering their mobile phone number without realising the type of service they were entering into.

2. The Information Provider stated that the marketing of the services was conducted by a partner company based in Sydney, Australia. The Information Provider stated that the partner had vast experience in the marketing of these services in several markets and that the marketing was achieved through a network of affiliates, who marketed the services online in each market. The Information Provider stated that the banner described in the Executive's submissions had been created by one of the partner's affiliates, and neither the partner nor the Information Provider had seen the banner until it was highlighted by the Service Provider. The Information Provider stated that even though all the information used in the banner was in the public domain, the partner did not endorse the use of personal Facebook profile information to attract users to the Information Provider's services. The Information Provider stated that when the banner came to the attention of the partner it ordered the affiliate to stop all traffic to the services. The partner's affiliate stated that using these types of banners was common practice on Facebook, and that it was not until now that the Executive had made it clear that it did not accept use of these banners.

The Information Provider stated that the subscription nature of the service was made clear on every single webpage the user went through when playing the 'IQ Quiz' and when making a decision to subscribe to the service. Before the user was asked whether he or she wanted to become a subscriber, the user went through a total of 13 webpages. The Information Provider stated that the fact that the service was a subscription service was highlighted both at the top and bottom of each of the 13 web pages which meant that the user was told 26 times that the service was a subscription service before being asked whether he wished to subscribe. The Information Provider stated that a user therefore could not have failed to notice at least one set of wording that provided information about the subscription nature of the service during the course of the 'IQ Quiz'.

The Information Provider stated that after a user had completed the 'IQ Quiz', he was prompted to enter his mobile phone number, the user then received a free text message, where he was again told that the service was a subscription service, and that he could download 10 ringtones, games, etc. for the weekly subscription fee of £4.50. The Information Provider stated that the same message was also displayed on the webpage, thus implying that the user was

informed 28 times that the service was a subscription service before he had to make any decision on whether he wanted to subscribe or not.

The Information Provider stated that only if the user (after all the notices) decided to send a message to the given number would he become a subscriber and that if he did not send the user message, he would not become a subscriber, would not be charged and would receive no more messages to his mobile phone.

3. The Tribunal considered the evidence and found that the web page had not clearly associated the subscription element of the service with the quiz element which was promoted and thereby misled users as to the nature of service they were entering. The Tribunal also concluded that the suggestion that friends of the user had taken the quiz when, in reality, they had not was clearly misleading. The Tribunal further found concluded that the artificial '28 seconds countdown' at the end of the 'IQ Quiz' was misleading as it created a sense of urgency to enter a user's details when there was no actual time limit and may have detracted from the user being able to make an informed decision. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO PRICING INFORMATION (PROMINENCE) (Paragraph 5.7.2)

'Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.'

1. The Executive submitted that when the 'IQ Quiz' promotion was viewed on a computer screen resolution of 1024X768, it was required to scroll down at every stage of the 'IQ Quiz' in order to view the pricing information. The Executive submitted that users could complete all stages of the 'IQ Quiz' and enter their mobile phone number without scrolling down and as such would not have been aware of the cost of the service; they would only have been alerted to it when they received the subscription initiation message.

The Executive made reference to the strap bar at the top of each webpage of the 'IQ Quiz' which provided the following information:

'Join the Dumb Test for £4.50 per week'

The Executive submitted that this text was in a small, white font on a green background and that although the details regarding the cost of the subscription service were at the top of the page, it was the opinion of the Executive that:

- i) users would not associate the 'IQ Quiz' with the subscription service at a cost of £4.50 per week;
- ii) the wording at the top of the page was not sufficiently prominent;

- iii) the wording at the top of the page should have clearly indicated that by completing the 'IQ Quiz', users would be entered into a subscription service at a cost of £4.50 per week. The Executive considered this to be especially important because users could complete all stages of the 'IQ Quiz' and enter their mobile phone number without ever having scrolled down and viewed the 'Summary terms'.
2. The Information Provider stated that the marketing of the subscription service was carried out by the Information Provider's partner company and that based on the Information Provider's research data, the most common (over 90% of internet users) used a screen resolution higher than 1024x768. The Information Provider stated that with the majority of screen resolutions used by internet users, the terms were clearly visible at the bottom of the page without having to scroll down.

The Information Provider stated that a description of the nature of the service was highlighted not only at the top of the webpage but also in the summary terms at the bottom of the webpage which was visible on the majority of internet users' screen settings without the need to scroll down. The Information Provider stated that the summary terms explained that it was a subscription service and that this point was also highlighted on the webpage which displayed the opt-in instructions. Furthermore, the Information Provider stated that a statement appeared on every webpage as the user progressed through the quiz via a total of 13 pages, and appeared on the SMS text message which was sent free to the user.

3. The Tribunal considered the evidence and concluded that the written pricing information on screen was not sufficiently prominent as the wording was in small, white font on a green background. The Tribunal further concluded that users would not have associated the pricing header ('Join the Dumb Test for £4.50 per week') with the IQ Quiz they were completing and that users would only have realised the link between the two on scrolling to the bottom of the webpage where the terms and conditions were displayed. The Tribunal therefore decided to uphold a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
SUBSCRIPTION- PROMOTIONAL MATERIAL (paragraph 7.12.3a)**

'Promotional material must:

- a) *Clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers.'*
1. The Executive submitted that once users had accepted the 'IQ Quiz' on Facebook, the 'IQ Quiz' webpage had wording in small, white font on a green background, situated at the top of the webpage that read as follows:

'Join Dumb Test for £4.50 per week'

The Executive submitted that if users scrolled down the screen, the first line within the 'Summary terms' read as follows:

'This is a subscription service. It will cost £4.50 per week until you send STOP to 88878. By signing up to this service you...'

The Executive submitted that it was of the opinion that:

(i) users would not associate the 'IQ Quiz' with the subscription service;

(ii) the wording at the top of the webpage was not sufficiently prominent;

(iii) the wording at the top of the page should have clearly indicated that by completing the 'IQ Quiz', users would be entered into a subscription service at a cost of £4.50 per week. The Executive considered this to be especially important because users could complete all stages of the 'IQ Quiz' and enter their mobile phone number without having scrolled down to view the summary terms.

2. The Information Provider stated that the Executive had made reference to an adjudication dated 5 February 2009, in which the Tribunal determined that services of a similar type were misleading.

The Information Provider stated that it strongly objected to the conclusion that the promotion was misleading on the basis that it failed to make the subscription nature of the service sufficiently clear. The Information Provider stated that the subscription nature of the service was made clear on every single webpage the user went through when playing the 'IQ Quiz' and when making a decision to subscribe to the service.

The Information Provider stated that before the user was asked whether he wanted to become a subscriber, the user went through a total of 13 web pages and that the fact that the service was a subscription service was highlighted both at the top and bottom of each webpage which meant that the user was informed 26 times that the service was a subscription service before being asked whether he wished to subscribe. The Information Provider stated that a user therefore could not have failed to notice the wording that provided information about the subscription nature of the service during the 'IQ Quiz'.

The Information Provider stated that after the user had completed the 'IQ Quiz', he was prompted to enter his mobile phone number, the user then received a free text message, where he was again told that the service was a subscription service, and that he could download 10 ringtones, games, etc. for the weekly subscription fee of £4.50. The Information Provider stated that the same message was also displayed on the webpage, thus implying that the user was informed 28 times that the service was a subscription service before he had to make any decision on whether he wanted to subscribe or not.

The Information Provider stated that only if the user (after all the notices) decided to send a user message to the given number would he become a subscriber, and

that if he did not send the message he would not become a subscriber, would not be charged and would receive no more messages to his mobile phone.

3. The Tribunal considered the evidence and concluded that the promotional material did not clearly indicate that the service was subscription-based. The Tribunal concluded that the information at the top of the webpage (*'Join the Dumb Test for £4.50 per week'*) was not sufficiently prominent as it was small and in white font on a green background. The Tribunal further concluded that this wording did not clearly indicate that on completing the 'IQ Quiz' users would be automatically entered into that subscription service and therefore users would not have associated the IQ quiz with that information until such time as they had scrolled down to see the terms and conditions displayed at the bottom of the webpage. The Tribunal therefore decided to uphold a breach of paragraph 7.12.3a of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The behaviour of the Information Provider was deliberate in allowing the service to be promoted in the manner carried out by the affiliate marketer;
- The service is a concealed subscription service and such services have been singled out for criticism by PhonepayPlus.
- The Service Provider failed to stop the service following an alert from the Executive on 26 March 2009; the service was not stopped until the 24 April 2009.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive when notified of the breaches.

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

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A total fine of £40,000 (comprising £30,000 in relation to the upheld breaches and £10,000 in respect of breach history);

The Tribunal noted that the service was no longer being promoted in this manner and commented that, based on the evidence it had seen, it doubted that promotions of this type could ever be compliant.