

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 13 October 2011
TRIBUNAL SITTING No. 87 / CASE 3
CASE REFERENCE: 01931**

Network Operator: All Mobile Network Operators
Service Provider: Daotec Ltd
Information Providers: Tapjoy Incorporated and Zynga Incorporated

**THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER
UNDER PARAGRAPH 8.5 OF THE 11th CODE**

BACKGROUND

On 22 March 2011, the Executive received a complaint from an internet safety for children watchdog which had been contacted by a concerned parent of a 13-year-old who had been ‘gambling’ on the online game Texas Hold’em Poker (now called “**Zynga Poker**”). Forwarding the parent’s complaint to PhonepayPlus, the complainant raised its own concerns in relation to children accessing this game, the service content and the ability to purchase credits by a fixed-line premium rate payment mechanism with relative ease.

1. How the service operated according to the Executive

Game play

Zynga Poker was a social game developed by Zynga Incorporated (“**Zynga**”) as an application for the social networking website Facebook (operated by Facebook Incorporated, hereafter referred to as “**Facebook**”), as well as for Android, iPhone, MySpace, Tagged and Yahoo!. The game allowed players to simulate playing poker in a social gaming environment, whereby users entered a casino lobby and could play at any table or join friends for a game, with their chip ranking displayed on a leaderboard (Appendix A).

Purchase of Zynga Poker chips

Zynga Poker was initially ‘free to play’ as new players were provided with a supply of free in-game chips. Once the free chips had been used, users who played Zynga Poker within Facebook had the ability to purchase additional chips using one of a number of premium rate and non-premium rate payment options. The premium rate options included one fixed-line payment option through a 0911 number, which was operated by the Service Provider. Additional chips could not be purchased on any of the other social network websites which hosted the Zynga Poker game.

Until 1 July 2011, users who chose to pay for additional chips using the Service Provider’s payment mechanism could either purchase chips via:

- Tapjoy Incorporated (“**Tapjoy**”) – a third party that provided Zynga with access to payment options for the direct purchase of in-game chips (the “**Tapjoy Method**”) (Appendix B); or

- Facebook – by purchasing virtual currency credits which could be converted into chips for the Zynga Poker game or used for other Facebook games (the “**Virtual Currency Method**”) (Appendix C).

From 1 July 2011, the Tapjoy Method ceased to be available, with the result that additional Zynga Poker chips could only be purchased using the Virtual Currency Method.

The Executive noted that, in-game, Zynga Poker chips were expressed as a monetary value in US\$. For example, a user with US\$2,000.00 worth of chips would have no knowledge of the number of chips this would be worth. However, when purchasing additional chips using the Virtual Currency Method, users would be required to purchase Facebook credits (in GBP), which were then converted into chips (expressed as US\$) for the Zynga Poker game. In order to purchase additional chips using the Service Provider’s payment system, users would carry out the following steps:

- Decide upon the number of Facebook credits or chips they wished to purchase;
- Call the 0911 number;
- Follow the voice prompts to select the payment amount (to reflect the number of Facebook credits or chips they wished to purchase);
- Stay connected until the product had been paid for; and
- Obtain a unique order number.

Purchase of in-game virtual gifts

In addition to playing the Zynga Poker game itself, users were able to purchase various virtual gifts from the ‘Gift Shop’, which included items, such as cigarettes, drugs (‘maui wowie’), cheap dates and go-go dancers, or take up team challenges, such as ‘Gun Slingers’ (Appendix D).

The Executive’s overall observations

The Executive noted that the type of content as demonstrated by the in-game virtual gifts, together with the overall nature of the game as a form of virtual gambling and the ability to purchase additional chips using the Service Provider’s payment method, appeared to suggest that this service ought to have been primarily aimed at, and attractive to, an adult audience.

Contrary to this, the Executive noted that full access to the service was given to anyone aged 13 or over. Zynga’s Terms of Service stated:

“If you are between the ages of 13 and 17, you represent that your legal guardian has reviewed and agreed to these terms”.

The Facebook terms and conditions stipulated that all account holders had to be 13+. This allowed exposure of this service to those users under 16 years of age, which the Executive asserted would fall within the definition of ‘children’ under paragraph 7.5.1 of the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) (the “**11th Code**”)

2. How the service operated according to the Service Provider

The Service Provider provided the following description of the service in its email to the Executive dated 22 September 2011, together with another email containing supplementary information and clarifications dated 5 October 2011.

The Service Provider asserted that the option to buy chips via Tapjoy and the option to acquire chips via Facebook credits never existed simultaneously with respect to the payment system offered by Service Provider. Until 8 April 2011 (when PhonepayPlus instructed Invomo Limited (the provider of the 0911 number) to block access to the Service Provider's 0911 number pending the Executive's investigation), the Service Provider had only provided its payment system via the Tapjoy Method. From 22 July 2011, the Service Provider commenced its participation as a payment system within the Virtual Currency Method. Between 8 April 2011 and 22 July 2011, the Service Provider's payment system was not, therefore, available to users in the UK as this was a period of transition from the Tapjoy Method to the Virtual Currency Method.

The Service Provider further commented that Facebook credits were a virtual currency which could be used to play games and buy virtual goods on the Facebook platform. Facebook credits could be purchased using a credit card, PayPal, reverse-SMS mobile billing and many other alternative payment methods. As of 1 July 2011, all Facebook game developers were required to process payments using the Virtual Currency Method.

The Zynga Poker service

The Service Provider asserted that it was not the provider of the Zynga Poker game and it could not therefore confirm any details provided about this service. The Service Provider asserted that, until 8 April 2011, it provided only a payment service to Tapjoy who in turn provided a multi-payment solution to Zynga. The Service Provider stated that it therefore had no control over or involvement in Tapjoy's relationships with third parties. The Service Provider further argued that it therefore had no influence over the promotion, eligibility criteria or other terms of the services provided by Tapjoy's clients.

The Service Provider confirmed that, with regard to whether Zynga was offering a form of "online gambling", the Executive had since confirmed, following its discussions with the Gambling Commission, that the service was not a form of gambling. The Service Provider therefore asserted that the Zynga Poker game was a social game modelled on the format of a poker game, but with the fundamental difference that it was not possible for users to cash-out their winnings.

The Service Provider's payment system

The Service Provider stated that it offered a simple, patented method of payment via a "*Pay By Phone*" payment system. The system was used by online merchants offering music, online games, software downloads, online newspapers and other internet services. Users of such sites had the option to pay for virtual products provided by merchants by calling a premium rate number and staying connected until the chosen product/service had been paid for. The products/services purchased were then charged to the user's phone bill.

The Service Provider further stated that merchants who wished to offer the Service Provider's payment system as a payment option would first have to enter into an agreement with the Service Provider. The merchant would then offer the Service Provider's payment system either; (i) by creating a link on the merchant's ordering website to the Service

Provider's payment page; or (ii) by integrating the payment function into the merchant's website or software using the programming interface offered by the Service Provider.

The Service Provider defined its role as follows:

- It provided only technical access to payment services;
- It had nothing to do with the content/service of the merchant;
- It did not accomplish the promotion of the content/service;
- It did not accomplish the operation of the content/service; and
- It was a subcontractor of the merchant for payment purposes only.

The Service Provider defined its role in general in connection with payment platform providers as follows:

- It offered one of the payment options made available by a payment service provider (the "**PSP**").
- It was integrated into the technical platform of the PSP;
- It did not have any contractual relationship with clients of the PSP;
- It had nothing to do with the content/service;
- It received from the PSP the price information and provided the premium rate number (the "**PRN**");
- It provided the cost announcement/cost information (for the payment service);
- After payment was made, it would notify the PSP and the user would be redirected from the PSP to the merchant to receive technical access to the content/product;
- It did not accomplish any promotion or operation of the content. Where a PSP was involved, the Service Provider (mostly) did not know anything about the content at all as it considered itself to be the provider of a, "payment service" only; and
- It was a subcontractor of the PSP and supplied only a payment option.

The Service Provider commented that, given the above, it followed that it was highly questionable whether the Service Provider was the correct target of regulation in this context, especially under the new regime adopted under the 12th Edition of the PhonepayPlus Code of Practice (the "**12th Code**"), as approved by Ofcom.

The Service Provider's comments in relation to the Payment Services Directive, 2007/64/EC

The Service Provider stated that it operated under the Payment Services Directive 2007/64/EC (the "**Directive**"). The Directive was passed in 2007 with the aim of enhancing efficiency, competition and innovation in the European payments market by integrating national payment markets.

The three principal components of the Directive were:

- A prudential authorisation regime for providers of payment services that are not banks or e-money issuers;

- Harmonised conduct of business rules which apply to all providers of payment services; and
- Provisions aimed at opening up access to payment systems throughout the EU and ensuring governing rules are non-discriminatory.

The Service Provider further stated that the Directive was a “maximum harmonisation” directive, which meant that Member States could not deviate from its terms other than where specifically provided for by the Directive. The Directive was implemented in the UK by the Payment Services Regulations 2009 (the “**Regulations**”), which came fully into force on 1 November 2009.

Under the Directive, providers who obtained authorisation in one EU Member State were able to “passport” their business and operate in other Member States without having to comply with further licensing requirements in other Member States.

The Service Provider’s sister company, Daotec Payment GmbH (an Austrian company), had already obtained a payment licence from the Austrian Financial Market Authority under Austria’s equivalent regulations, which it could, if needed, passport to other Member States.

The Service Provider confirmed that it understood that the matter of regulatory authority and responsibility for “micro-payment services” was yet to be fully determined in the UK and it had been observed within the premium rate service (the “**PRS**”) industry, that a number of micro-billing companies were increasingly using PRN(s) as a payment mechanism for digital content, and in particular, web-based content. Whilst PRN was the payment system provided by the Service Provider, the Service Provider asserted that the content purchased was not related traditionally to serve PRN content, i.e. the content was not served by the voice channel, but via a non-related channel, the internet.

The Service Provider further stated that, in most cases, there is a separation, both technically and commercially, between the provider of the PRN payment solution and the supplier of the content. The supplier of the content is a merchant and responsible for the advertising and delivery of the content paid for; the provider of the payment mechanism is the payment gateway and has no control over promotion and delivery of the content. This is similar to the position of a credit card payment gateway and its merchants.

The Service Provider further commented that, while it controlled its own payment pages and the content of them, it did not control the pages of the content service provider which linked to the Service Provider’s page. This unusual predicament had consequently given rise to uncertainty of regulation, and the Service Provider illustrated this point by quoting from a report by Analysys Mason Limited (December 2010, Section 4.3.2 at p 57):

“There is a lack of clarity as to which regulatory body or bodies are most appropriate to regulate micropayments and in particular virtual currencies, since both financial and communications regulators have an interest. Without clear guidance on who is the final authority in this area, businesses will need to invest time and money to explore regulation from multiple bodies, making compliance an expensive and potentially complex exercise”.

The Service Provider’s comments on responsibility for content

The Service Provider commented that it was clear that, under the legal framework in the UK, providers of payment services were not responsible for the content of the goods and services with which their payment service was used to make a purchase. The Service Provider further commented that providers of online micro-payment services were no more responsible than traditional payment providers for the goods and services purchased via their payment systems.

The Service Provider accepted full responsibility for the operation of the payment service itself, as governed by the Directive and the Regulations, but it argued that it should not be held accountable for problems with the actual goods/services, virtual or otherwise, or the promotion of the goods/services, as this would go against:

- The spirit of the Directive and the object of non-discrimination (as would be inconsistent with the treatment of other payment providers, such as credit card providers and PayPal);
- The spirit of the new regime applicable to PRS (under the 12th Code which came into force on 1 September 2011);
- Principles of good regulation which require action to be targeted at the offender and enforcement activity to be proportionate; and
- The accepted principles of law which exclude “mere conduits” (such as Information Service Providers and the like, from liability for unlawful third-party content).

In summary, the Service Provider argued that the service operated in the following way:

“In this very case, there's no direct contractual relationship between Zynga, the owner and provider of Texas Holdem Poker, and DaoPay, as Zynga makes use of TapJoy's payment services for which DaoPay is integrated as a phone payment option. A unique order number remains valid for 24 hours. If a user starts a payment and gets disconnected, the order number remains valid for 45 days. Within this period the user is able to complete the payment and transaction. As mentioned, Tapjoy has been advised to respond to the remaining questions directly to PhonepayPlus”.

The Executive noted that the Service Provider had been able to provide PhonepayPlus with only a partial response under paragraph 8.3.3 of the 11th Code. It stated that Zynga and Tapjoy would be supplying the remainder of the information. The Service Provider later informed the Executive that, despite numerous requests, Zynga was unable to provide any further information and Tapjoy had expressly stated that it would not be responding to the Executive's questions in relation to this service. Information was eventually provided to the Executive on the evening before the Tribunal hearing, on 12 October 2011.

3. The Investigation

On 22 March 2011, the Executive received one complaint from an internet safety for children watchdog which contacted PhonepayPlus requesting that it investigate the matter in further detail.

The Executive's initial concerns related to issues regarding the inadequate controls to prevent children from accessing and participating with an adult audience service in relation to the content, and the ease and ability to purchase credits (until 8 April 2011) or virtual currency (from 22 July 2011).

The Executive believed that this service contravened the 11th Code and raised the following potential breaches:

- Paragraph 5.4.1(a) – Misleading;
- Paragraph 5.12 – Inappropriate promotion; and
- Paragraph 3.2.2 – Provision of information.

4. Standard Procedure

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the 11th Code.

On 6 April 2011, the Executive sent a letter to the Service Provider asking for a series of questions and other corroborating information to be forwarded to substantiate the claims being made by the complainant, in accordance with paragraph 8.3.3 of the 11th Code. The deadline for provision of the information sought was 11 April 2011, but the Executive granted an extension at the request of the Service Provider until 13 April 2011. A response was submitted by the Service Provider on 13 April 2011, although the response did not contain all of the information requested. In its response, the Service Provider stated that the remainder of the information requested would be provided by their principle Information Provider, Tapjoy. Later on 14 July 2011, the Service Provider wrote to the Executive to confirm that it had redirected its request to Zynga.

On 29 July 2011, the Executive issued a second request for information to ascertain the reasons why Tapjoy and Zynga had failed to respond. The deadline for a response to this request was 1 August 2011, but the Executive granted an extension at the request of the Service Provider until 3 August 2011. On 3 August 2011, the Service Provider responded, but explained that it could not provide all of the information requested as Tapjoy had failed to respond and Zynga, while not unwilling to assist, was unable to provide the information requested.

Tapjoy did eventually provide a response via its legal advisors on the evening before the Tribunal hearing, on 12 October 2011. On the same day the Service Provider also provided the Executive with revenue statistics that had been obtained from Tapjoy.

On 1 September 2011, the 12th Code came into force. As the Executive had not sent the breach letter by 1 September 2011, it was therefore necessary for the Executive to consider whether to also investigate any facts and matters amounting to potential breaches that occurred after 1 September 2011 in accordance with the 12th Code, or whether it should continue the investigation solely under the 11th Code. The Executive considered the following transitional guidance provided in the PhonepayPlus, Notice to Industry, “*Publication and Implementation of the 12th Edition of the PhonepayPlus Code of Practice*”, dated 30 March 2011 (the “**Notice to Industry**”):

“...Where the facts and matters of complaints and/or monitoring occur both prior to and after 1 September in respect of the same service, then the facts and matters occurring after 1 September will be investigated by PhonepayPlus and adjudicated under the relevant definitions, processes and sanctions of the 12th Edition of the Code, unless PhonepayPlus determines that it is in all the circumstances more appropriate for the facts and matters occurring before 1 September to be investigated, in which case the investigation will continue under the 11th Code. In an appropriate case, PhonepayPlus may decide to investigate breaches of both the 11th Code and 12th Code in relation to facts and matters occurring before and after 1 September respectively. PhonepayPlus will publish, within the Tribunal

decision for the relevant case, its reasons for proceeding under either the 12th Code or the 11th Code, or both...”

Having regard to the Notice to Industry, the Executive considered that it was appropriate in the circumstances of this case to continue the investigation under the 11th Code. The reasons provided by the Executive were as follows:

- With respect to the potential breach under paragraph 5.4.1(a) of the 11th Code, from 1 July 2011, the Tapjoy Method ceased to be available to users as a method of payment for the service and only the Virtual Currency Method remained. The Executive therefore determined that, as it was no longer possible to compare each method of payment for Zynga Poker chips, the issue of a potential breach under paragraph 5.4.1(a) of the 11th Code was not ongoing after 1 September 2011;
- With respect to the potential breach under paragraph 5.12 of the 11th Code, the Executive acknowledged that, while this breach may have been ongoing after 1 September 2011, the Executive's records for this case clearly showed that the bulk of the user experience, and potentially the consumer harm, had all occurred prior to 1 September 2011. The Executive further confirmed that it had received no complaints and no monitoring of the service had been conducted after 1 September 2011. In light of these circumstances, the Executive considered that it was not appropriate to raise the breach under the 12th Code, either exclusively or in addition to the breach under the 11th Code; and
- With respect to the potential breach under paragraph 3.2.2 of the 11th Code, the Executive considered the alleged breach to have crystallised on the Service Provider's failure to respond to the paragraph 8.3.3 requests for information under the 11th Code by the deadlines set by the Executive. None of the deadlines set by the Executive were after 1 September 2011.

Having determined that it would proceed with the investigation solely under the 11th Code, the Executive, on 6 September 2011, sent a breach letter to the Service Provider. On 22 September 2011, the Service Provider sent a formal response to the Executive via its legal representatives.

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 Zynga Poker game was played using chips which were represented in the game as US\$. This meant that a player with 1,000 chips would have US\$1,000.00. Users wishing to purchase additional chips by using the Service Provider's payment system could do so by using either the Tapjoy Method (until 8 April 2011) or the Virtual Currency Method (from 22 July 2011).

The Executive noted that, when purchasing additional chips using the Virtual Currency Method, consumers had no idea as to how many chips they would receive at the time

of their purchase of Facebook credits. This was demonstrated in the screenshots captured by the Executive during monitoring which showed that, while the GBP to credits ratio was fully transparent, there was no simultaneous display of the equivalent number of chips that would be made available once the Facebook credits had been purchased.

The Executive submitted that the only way to determine the number of chips obtained via the Virtual Currency Method was to re-enter the Zynga Poker game following purchase of Facebook credits. The Zynga Poker game would then automatically display a newly updated total for chips on the leaderboard.

The Executive further submitted that there was a conversion rate for the Facebook credits which was not disclosed to consumers at any point. The conversion rate also varied from time to time and was dependent upon on the type of promotion carried out by the game developer, Zynga. In the letter dated 14 April 2011 from Zong S.A. (the Service Provider in case ref: 01932, which concerned the same service and was also heard by the Tribunal on 13 October 2011), Zong S.A. disclosed the conversion rate of Facebook credits-to-chips that was applicable at that time.

The Executive analysed this conversion rate and compared it with the cost of chips when using the Tapjoy Method. The Executive submitted that it had identified significant differences in the number of chips a user would receive when purchasing between the two methods. The conversion ratios and comparisons between the two payment methods were as described below:

The Virtual Currency Method

The cost of Facebook credits was as follows:

- 16 credits for £1;
- 162 credits for £10; and
- 244 credits for £15.

Following the conversion from credits to chips, the consumer would receive the following number of chips directly to their Zynga Poker account:

- 100,000 chips for 16 credits;
- 2,803,846 chips for 162 credits; and
- 4,223,076 chips for 244 credits.

The Tapjoy Method

Consumers purchasing chips using the Tapjoy Method could do so in the following values:

- 383,880 Chips for £1.50;
- 1,279,600 Chips for £5; and
- 5,118,600 Chips for £20.

The Executive noted that a consumer making a £3 purchase via Tapjoy (2 x £1.50 purchases) would receive 767,760 chips; however, the same consumer making the equivalent £3 purchase via Facebook credits (3 x £1 purchases) would receive just 300,000 chips. Conversely, a consumer making a £20 purchase via Tapjoy would receive 5,118,600 chips; however, the same user making the equivalent £20 purchase via Facebook credits (2 x £10 purchases) would receive 5,607,692 chips.

The Executive asserted that, as consumers were not presented with the different Facebook credits-to-chips conversion rates when purchasing chips using the Virtual Currency Method, users were, depending on the source and date of promotion, and the amount spent by each user, at a significant disadvantage to those who purchased credits using the Tapjoy Method. The Executive submitted that this was inherently misleading for those consumers who chose to use the Virtual Currency Method, and was likely to mislead other users who did not have visibility of the Tapjoy Method.

In light of the above, the Executive submitted that a breach of paragraph 5.4.1(a) of the 11th Code had occurred.

2. The Service Provider's response was that these two options were not provided simultaneously. Until 8 April 2011, the Service Provider's payment system was only available via the Tapjoy Method. Zynga used the Tapjoy Method to offer users the ability to pay for chips directly via a number of payment options.

From 22 July 2011, the Service Provider stated that its payment system was made available on the "Playspan" platform. Playspan offered Zynga users the ability to purchase *Facebook credits* only, which could then be converted into chips.

The Service Provider's responses in relation to the Tapjoy Method

The Service Provider submitted that the Executive suggested that, in comparing "*the 'Facebook credits' to 'chip' ratio, to the number of 'chips' that can be purchased directly through the Daopay method...*", there were significant differences in the number of chips received through these two methods. The Service Provider asserted that, as these options were not provided simultaneously, this analysis was flawed. Users were not therefore able to gain more chips (nor were they at risk of being deprived of chips) by virtue of whether they chose to use the Tapjoy Method or the Virtual Currency Method.

The Service Provider stated that the only option to purchase chips using its payment system was, until 8 April 2011, via the Tapjoy Method and, before 22 July 2011, there was no option to use the Service Provider's system to purchase Facebook credits. The Service Provider therefore asserted that the values listed by the Executive were available to all users of its payment system at this time:

- 383,880 Chips for £1.50;
- 1,279,600 Chips for £5; and
- 5,118,600 Chips for £20.

The Service Provider was therefore of the opinion that there was no question of "misleading" consumers, or failing to provide comparative pricing information. The Service Provider further observed that, during the time that users were able to purchase chips directly through the Tapjoy Method, it appeared that consumers had

access to the best conversion rates available to date. The Service Provider did, however, emphasise that, for the avoidance of doubt, such rates were not set by the Service Provider, and the chips were Zynga's chips and not the Service Provider's chips.

Likewise, the Service Provider stated that the rates set under the Virtual Currency Method had nothing to do with the Service Provider. At the point of purchase, the "product" was Facebook credits, and the Service Provider had no say, knowledge or control over what the user then chose to purchase with such credits. The activities undertaken after use of the Service Provider's payment system were too remote for its output.

The Service Provider's responses in relation to the Virtual Currency Method

The Service Provider asserted that the Executive claimed that, when purchasing Facebook credits, users had no idea as to how many chips they would receive in exchange for their credits at the time of their purchase.

The Service Provider stated that it was quite simply unable to comment on this aspect of the Zynga service and Facebook's conversion system. In particular, the Executive's suggestion that *"the conversion ratio is not disclosed to consumers at any point, and can vary depending on the type of promotion carried out by the game developer..."* was a matter of Facebook policy and its terms of business with game developers. The Service Provider asserted that its role was far removed from such considerations, and it had no control over Facebook's strategy and chosen system of virtual currency.

3. The Tribunal considered the evidence and concluded that, for the purposes of considering a breach of paragraph 5.4.1(a) of the 11th Code, it was not relevant to consider whether the Tapjoy Method and the Virtual Currency Method were running simultaneously.

The Tribunal considered that, although there were, from time to time, changes to the conversion rate for Facebook chips-to-credits which were dependent upon the promotion used by Zynga and the payment option selected by the user, this was not relevant for the purposes of determining whether users had been misled. The Tribunal concluded that changing prices were a common aspect of commercial activity, to which consumers were accustomed. The Tribunal further concluded that, based on the evidence provided by the Executive, consumers were fully informed of the price of the chips during purchase using the Tapjoy Method and were, in turn, fully informed of the price of the Facebook credits during purchase using the Virtual Currency Method.

In light of the above considerations, the Tribunal concluded that the only relevant question as to whether consumers were misled or likely to be misled was whether there was subsequently any lack of transparency concerning the onward rate of conversion for Facebook credits-to-chips when using the Virtual Currency Method.

Notwithstanding the Service Provider's argument that it was not in control of this element of the service, the Tribunal noted the wording of paragraph 3.1.1 of the 11th Code which stated that:

“Service Providers are responsible for ensuring that the content and promotion of all of their premium rate services (whether produced by themselves, information providers or others) comply with all relevant provisions of this Code”.

The Tribunal therefore considered the available evidence and noted that, while the Tribunal had been presented with screenshots that fully illustrated the process of purchasing Facebook credits using the Virtual Currency Method, the Tribunal did not have sight of screenshots which fully illustrated the Executive’s experience of converting Facebook credits into Zynga Poker chips. In absence of such evidence, the Tribunal was unable to follow the Executive’s submission that consumers would have no idea as to how many chips they would receive at the time of their purchase. The Tribunal was further unable to concur with the Executive’s view that users who purchased Zynga Poker chips via the Virtual Currency Method were in any way disadvantaged over users who purchased the same chips via the Tapjoy Method. The Tribunal concluded that there was, therefore, insufficient evidence to dispute the Service Provider’s submissions.

In addition, there was no other evidence, by way of complaints or other information that consumers were in fact misled. Taking all of these circumstances into account, the Tribunal was not satisfied that consumers were misled, or likely to be misled. The Tribunal accordingly concluded that the Service Provider was not in breach of Paragraph 5.4.1(a) of the 11th Code.

Decision: NOT UPHELD

ALLEGED BREACH TWO INAPPROPRIATE PROMOTION (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way”.

1. The Executive submitted that the nature and content of the Zynga Poker game was aimed at, and would be particularly attractive, to an adult audience. However, it was accessible to Facebook users where it could be accessed by its entire audience, which included anyone from the age of 13, without controls in place to prevent children from using the service.

The Executive was of the opinion that some parents would object to their children being exposed to an online poker game. This was the same view expressed by both the parent of the 13-year-old who was caught ‘gambling’ while playing the Zynga Poker game and the internet safety for children watchdog that contacted PhonepayPlus.

The Executive believed that parents would further object to their children playing a poker game which contained references to, and allowed the purchase of, virtual gifts, such as drugs, tobacco, and go-go dancers. This was clearly content of a nature that would likely be deemed by parents as offensive or harmful at the most, or inappropriate at the least, for 13-15 year olds.

Furthermore, this service also allowed the purchase of Facebook credits using the Virtual Currency Method, in increments of £1.50, £5 and £20. The Executive monitored

the service and found that a 13-year-old Facebook account holder was easily able to purchase £20 worth of Facebook credits in one single purchase.

Furthermore, Zynga's own Terms of Service required those aged between 13 and 17 years of age to "*represent*" that their legal guardian had reviewed and agreed to the terms and conditions. The Executive submitted that this was wording which could be deemed to be unclear to some of that age group. The Executive believed that this was aggravated by the fact that locating the terms and conditions of Zynga required the consumer to accept the game, scroll down to the 'Terms of Service', locate 'Term 1.5' and read to the end of the first paragraph. The Executive further submitted that the initial link to the Zynga Inc 'Terms of Service' was at the bottom of the web page and in small print.

The Executive asserted that allowing a service designed for an adult audience to be accessible to children was inappropriate. The Executive further asserted that the Service Provider was likely to have had technical capability to put controls in place to prevent children from accessing the service, but none were implemented. On this basis, the Executive submitted that the Service Provider did not use all reasonable endeavours to ensure that the service was not promoted in an inappropriate way.

In light of the above, the Executive submitted that a breach of paragraph 5.12 of the 11th Code had occurred.

2. The Service Provider's response was that Zynga Poker was not provided by the Service Provider, which was purely a subcontractor of Tapjoy. The Service Provider asserted that it had no control over or involvement in Tapjoy's relationships with third parties. In particular, it had no influence over the promotion, eligibility criteria or other terms of the services provided by Tapjoy's clients.

The Service Provider further pointed out that the contract terms between the Service Provider and Tapjoy imposed an obligation on Tapjoy to comply with all applicable laws, and an express limitation on the Service Provider's licence in connection with, "*adult content and/or services*".

As to whether Zynga was offering a form of, "*online gambling*", the Service Provider commented that the Executive had confirmed, following its discussions with the Gambling Commission, that the service was not a form of gambling. The Service Provider therefore asserted that the Zynga Poker game was a social game modelled on the format of a poker game, but with the fundamental difference that there was no "*payout*" option in the Zynga Poker game. Users were not therefore paying a stake to play a game for the chance of winning a *prize* (as required for gambling).

The Service Provider stated that, under the Gambling Act 2005, a prize in relation to gaming means money or money's worth. The Service Provider stated that it was therefore for this reason, it would seem, that the Gambling Commission had determined that the service was not gambling. The Service Provider further asserted that, since such social games were widely available on Facebook and other social media sites, it was highly unlikely that the Gambling Commission would not have acted before now, should such services have fallen foul of the UK's strict gambling laws.

The Service Provider further commented that [online] gambling is not permitted in the US, and Zynga and Facebook would have been in severe difficulties in profiting from such services, had they been considered as such.

With regard to whether the service was suitable for children aged between 13 and 16 (purely as a social game), the Service Provider stated that it must defer to the opinion of the appropriate authorities.

The Service Provider stated that it was, however, of the opinion that it would be extremely unreasonable to enter formal findings on this basis without the regulator having first issued a *“Notice to Industry”*, or other communication, to confirm its interpretation of the 11th Code and its requirements in respect of such services.

In the context of this investigation, the Service Provider was of the view that, as it had played a limited role (as a provider of a payment service) and had no control over the mechanics, criteria or terms of the Zynga Poker game, it would seem all the more unreasonable and unfair to find it in breach of paragraph 5.12 of the 11th Code.

The Service Provider noted in particular, the following observations of the Executive:

“Furthermore, Zynga’s own Terms of Service requires those aged between 13 and 17 years of age to “represent” that their legal guardian has reviewed and agreed to their terms, wording which the Executive believes could be deemed as unclear to some of that age group. The Executive believes that this is aggravated by the fact that locating this term requires the consumer to accept the game, scroll down to the ‘Terms of Service’ (a link at the bottom of the page in small print), scroll down to ‘Term 1.5’ and then read the end of the first paragraph”.

Based on the above extract, the Service Provider submitted that the issue of a potential breach under paragraph 5.12 of the 11th Code was clearly an issue for Zynga, and not the Service Provider. The Service Provider argued that it had absolutely no control over Zynga’s service, its terms of use or eligibility criteria.

The Service Provider asserted that it was purely a subcontractor of a payment platform provider of services to Zynga (under the Tapjoy Method until 8 April 2011 and under the Virtual Currency Method from 22 July 2011). In this context, the Service Provider stated that Zynga was a provider of premium rate services to its users.

The Service Provider commented on the Executive’s submission that, *“...allowing a service designed for an adult audience to be easily reached by, and made accessible to, children is inappropriate.”* In response, the Service Provider stated that it could not confirm that the service was *“designed for an adult audience”*, and only Zynga could confirm its intentions.

The Service Provider further commented on the Executive’s additional submission as follows:

“The Executive asserts that the Service Provider would have the technical capability to put controls in place to prevent children from accessing the premium rate service, and therefore did not use all reasonable endeavours to ensure that the service was not promoted in an inappropriate way.”

The Service Provider commented that it was integrated into the Virtual Currency Method and it could not change the access controls on a case-by-case basis. The Service Provider was of the view that eligibility controls were a matter for the payment platform provider and its clients. The Service Provider further asserted that access controls should be set by the merchant/payment aggregator and should apply to all payment options in line with the nature of the particular service provided by the merchant.

The Service Provider further commented that the system for capturing an end-customer's selection while using the Service Provider's payment system, and issuing an order number, was fully automated. Technically, the end-customer would be redirected to the Service Provider's payment screen with the following parameters:

- The merchant's website identifier (to assign a payment to the right merchant);
- End-customer location (IP or country code); and
- The price amount.

With this information, the Service Provider would generate an order number, allocate the correct premium rate number and calculate the necessary call duration for the payment-call.

3. Before considering this breach, the Tribunal gave specific consideration to the argument raised by the Service Provider in this case, that upholding a breach would be anti-competitive and in breach of the Directive. The Tribunal noted an email from the Executive to the Service Provider dated 28 September 2011, which set out the position of PhonepayPlus on this matter and stated that the 11th Code had been approved by the European Commission and, as such, it was not considered to be contrary to the principles of free movement of trade within the EC. Accordingly, no external consideration of the Directive was necessary as the 11th Code had been designed (and approved by Europe) so that any breaches upheld under it would not interfere with the Directive. The Tribunal also noted that, in this particular case, the effect of upholding the breach would not be anti-competitive, as it would not prevent the Service Provider from continuing to provide the premium rate service, only that it should do so on the same footing as a number of the other non-premium rate payment mechanism providers that already had age restrictions in place (such as, for example, credit cards, debit cards and paypal).

The Tribunal considered the evidence and, having taken into account the Service Provider's arguments, the Tribunal made the following findings:

The definition of promotion under paragraph 11.3.27 of the 11th Code was: "*...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.*" In light of this definition, the Tribunal found that the promotional material in this case was the screen that would appear to users when accessing the game on Facebook. This depicted a poker table, and included an invitation to purchase chips, as well as icons indicating the virtual in-game goods which were available for purchase. The Tribunal also considered that further promotions were contained within the payment mechanism screens online. The Tribunal acknowledged the Service Provider's argument that it was not in control of the promotional material for the Zynga Poker game, but this was not a relevant issue, given that the promotional material did

encourage use of the premium rate element of the service. The Tribunal also noted the Service Provider's argument that the contract terms between the Service Provider and Tapjoy imposed an obligation on Tapjoy to comply with all applicable laws, and an express limitation on the Service Provider's licence in connection with "*adult content and/or services*". The Tribunal concluded that, notwithstanding this contractual arrangement, these terms were inferior to the Service Provider's obligation under paragraph 3.1.1 of the 11th Code which stated that:

"Service Providers are responsible for ensuring that the content and promotion of all their premium rate services (whether produced by themselves, information providers or others) comply with all relevant provisions of this Code."

Having considered paragraph 3.1.1 of the 11th Code, the Tribunal concluded that the Service provider's lack of control of the promotional material, and the contractual liability agreed by Tapjoy, were both irrelevant to the consideration of a potential breach of paragraph 5.12 of the 11th Code.

The Tribunal concluded that the service was potentially harmful to the younger age group (13-15 year olds) who would have access to the Zynga Poker game through Facebook. The Tribunal's reasons were that, even though the Zynga Poker game was not 'gambling' (as it did not fall under the definitions of either 'gaming' or a 'game of chance' under section 6 of the Gambling Act 2005), it resembled gambling and had many of the features of gambling. In addition, having further regard to the in-game virtual goods, such as cigarettes, alcohol and other inappropriate items for children to purchase, the content of the service was clearly of an adult nature.

The Tribunal concluded that the Service Provider had taken no steps, and hence no reasonable endeavours had been undertaken to prevent children from gaining access to material that promoted the premium rate element of the service.

The Tribunal concluded that the requirement to undertake reasonable endeavours to ensure that the service was not promoted in an inappropriate way was not satisfied by a condition within the Service Provider's payment mechanism which stated:

"In order to use our services you must have the bill payer's permission..." (Appendix E).

This was because it was insufficient to prevent children from accessing the service. The Tribunal further concluded that, notwithstanding the Service Provider's arguments to the contrary, the Service Provider would have had the technical capability to put in place age restriction measures with respect to its payment system for either the Tapjoy Method or the Virtual Currency Method, but it had not done so. Accordingly, the Service Provider had not satisfied the Tribunal that it had undertaken reasonable endeavours to ensure that its service had not been promoted in an inappropriate way.

The Tribunal accordingly concluded the Service Provider was in breach of paragraph 5.12 of the 11th Code.

Decision: UPHELD

**ALLEGED BREACH THREE
PROVISION OF INFORMATION (Paragraph 3.2.2)**

"Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code which may include but is not limited to: a.

any number ranges (including dialling codes) or other connection arrangements allocated to it by Ofcom or any Network operator,
b. if the service requires or involves access to any website, the URL of the site,
c. the name, address, e-mail address, phone and fax number of the person representing the service provider who is nominated to receive all communications in connection with the application of the Code, enabling contact to be made with that person at all necessary times, and, if that person is not a director of the service provider, the name of the director with primary responsibility for premium rate services,
d. the name and home address of each of the directors and their phone and fax numbers and e-mail addresses.”

1. On 6 April 2011, the Executive issued a letter under paragraph 8.3.3 of the 11th Code to the Service Provider, requesting general service information, such as how the service operated, consumer spend, due diligence documentation and details of any compliance advice that had been sought. The deadline for provision of the information sought was 11 April 2011, but was later extended to 13 April 2011 at the request of the Service Provider.

On 13 April 2011, the Service Provider responded to the Executive, stating that they would fully co-operate with the Executive, and provided a brief overview of the service mechanic and stated that the remainder of the information requested would be provided by their principle Information Provider, Tapjoy.

Despite some time having elapsed, Tapjoy did not provide the requested information, and by an email dated 12 July 2011, the Executive contacted the Service Provider who replied on 14 July 2011 to confirm that it was unlikely that Tapjoy would provide a response on account of the imminent removal of the Tapjoy Method from all Zynga games within the next few days. In the same email, the Service Provider confirmed that it had redirected the Executive's information request to Zynga. Nothing further was heard until 22 July 2011 when the Service Provider confirmed that a response would be provided by Zynga. No such response was provided.

On 29 July 2011, and following the failure of both Zynga and Tapjoy to respond to the Service Provider's requests for information on behalf of PhonepayPlus, the Executive issued a request for further information to ascertain the reasons why these parties had failed to respond. The deadline for a response to this request was 1 August 2011 but following a request from the Service Provider the Executive granted an extension until 12pm on 3 August 2011. On 3 August 2011, the Service Provider responded, but stated that it could not provide all of the information requested as Tapjoy had failed to respond and Zynga, while not unwilling to assist, was unable to provide any further information.

Tapjoy did eventually provide a response on the evening before the Tribunal hearing, on 12 October 2011.

Due to the Zynga and Tapjoy's failures to respond to the Executive's request for information, a number of questions asked by the Executive in its request for information remained unanswered and, although it appeared that the Service Provider had been in negotiations with both Zynga and Tapjoy in order to provide a response, the Executive asserted that the Service Provider, being the party responsible for the provision of the requested information, had failed to provide the information to the Executive.

In light of the above, the Executive submitted that a breach of paragraph 3.2.2 of the 11th Code has occurred.

2. The Service Provider's response was that it had used its best endeavours to secure the co-operation of both Zynga and Tapjoy.

The Service Provider noted that it could only offer to pursue Tapjoy formally under its contract terms, should the Executive have required this. The Service Provider submitted that its hands were otherwise tied, as it was not the provider of the Zynga Poker game service or the Tapjoy Method, and could only provide detailed information about the companies and services that they controlled.

Further, the Service Provider argued that it was not privy to details of the relationship between Zynga and Tapjoy, nor could the Service Provider supply details of these parties' dealings with Facebook.

The Service Provider asserted that it would seem both unfair and unreasonable to find it in breach of paragraph 3.2.2 of the 11th Code in this context, in connection with services and third parties over which it had absolutely no control.

3. The Tribunal considered the evidence and, notwithstanding the Service Provider's compelling arguments concerning its lack of control over the ability to fulfil its obligation under paragraph 3.2.2 of the 11th Code, the Service Provider had failed to provide the requested information.

The Tribunal noted the specific wording of paragraph 3.2.2 of the 11th Code and had particular regard to the first part of the provision which stated that, "*Service providers must provide to PhonepayPlus without delay such information as it may require for any purpose relating to this Code...*"

The Tribunal concluded that the obligation under paragraph 3.2.2 was a matter of strict liability for the Service Provider. Further, based on the evidence provided by the Executive, there was one category of information that was within the Service Provider's control to provide which was revenue statistics, in particular the out payments from the Network to the Service Provider and out payments from the Service Provider to the Information Provider, but had not been submitted to the Executive within any of the deadlines specified throughout the investigation.

The Tribunal noted the difficulties with obtaining the information and noted that a belated response had now been received. The Tribunal accordingly concluded that the Service Provider was in technical breach of paragraph 3.2.2 of the 11th Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breach was **minor**.

The Tribunal considered the following aggravating factors:

- The behaviour of the Service Provider was reckless because it failed to put in place controls to prevent younger people from accessing the service. The Service Provider's commercial decision to allow access to such users was based on Facebook's own target audience; and
- Children were allowed unlimited access to a service designed for an adult audience and this was harmful to this particular age group.

The Tribunal considered the following mitigating factors:

- The Service Provider co-operated with the Executive;
- The Service Provider offered refunds to users; and
- The nature of this case was unique, given that the Service Provider was not the provider of the game, but merely facilitated the PRS element of the service, which formed only a very minor part of the wider social gaming experience.

There was no relevant breach history for the Tribunal to consider.

The revenue in relation to the service fell within the mid range of Band 4 (£50,000.00 - £100,000.00).

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

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

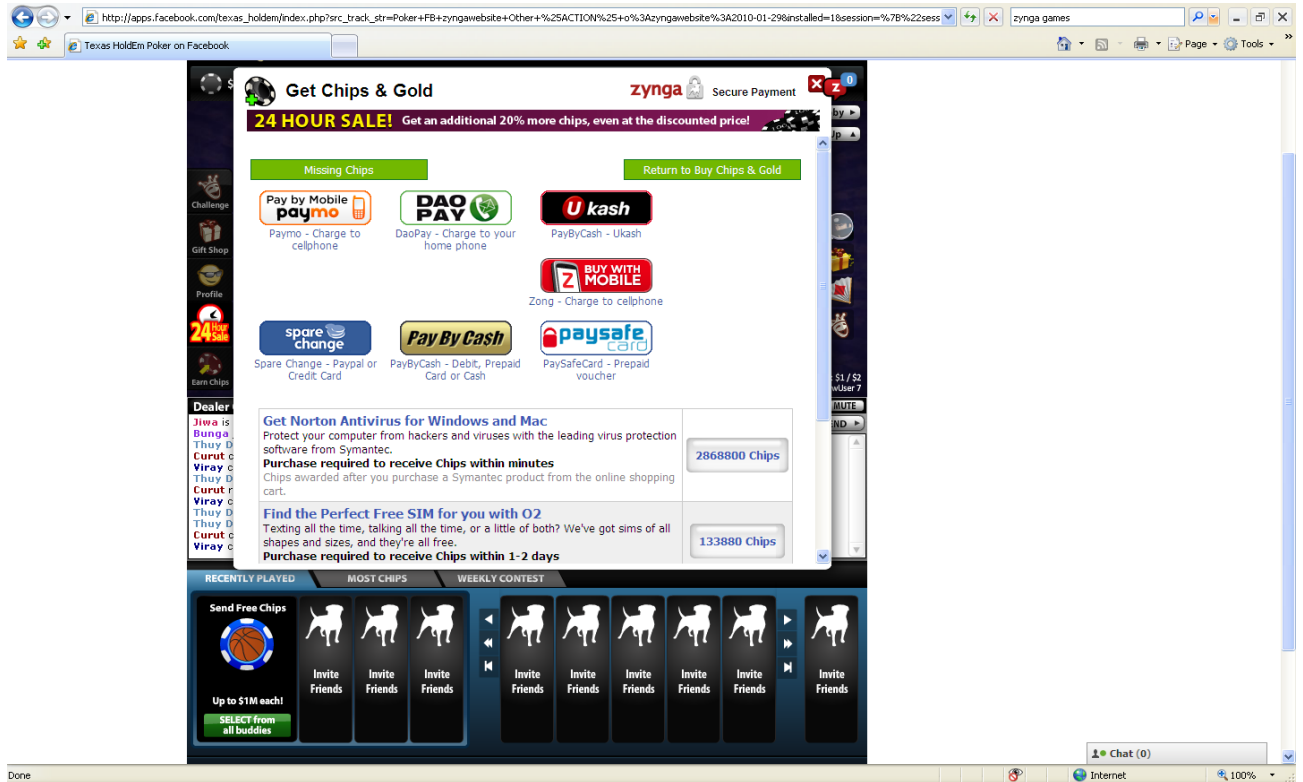
- A Formal Reprimand; and
- A direction to the Service Provider to remedy the breach by implementing an age restriction measure on the Service Provider's fixed-line premium rate payment mechanism. The Tribunal further recommended that the Service Provider should communicate its obligations under paragraph 5.12 of the 11th Code to all parties with whom it had a contractual relationship with respect to this service, with a view to discussing alternative ways of promoting the service.

Appendix A - Casino Table Screenshot

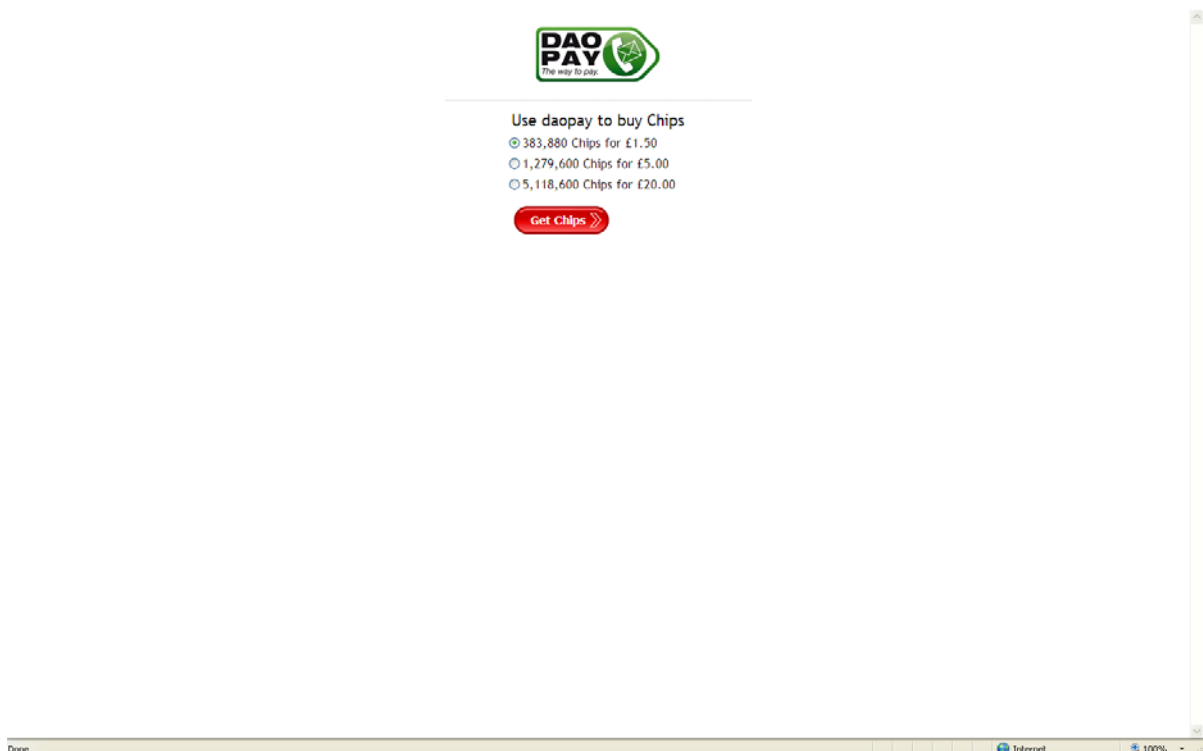


Appendix B – Screenshots of the Tapjoy Method

1. Select “Daopay”:

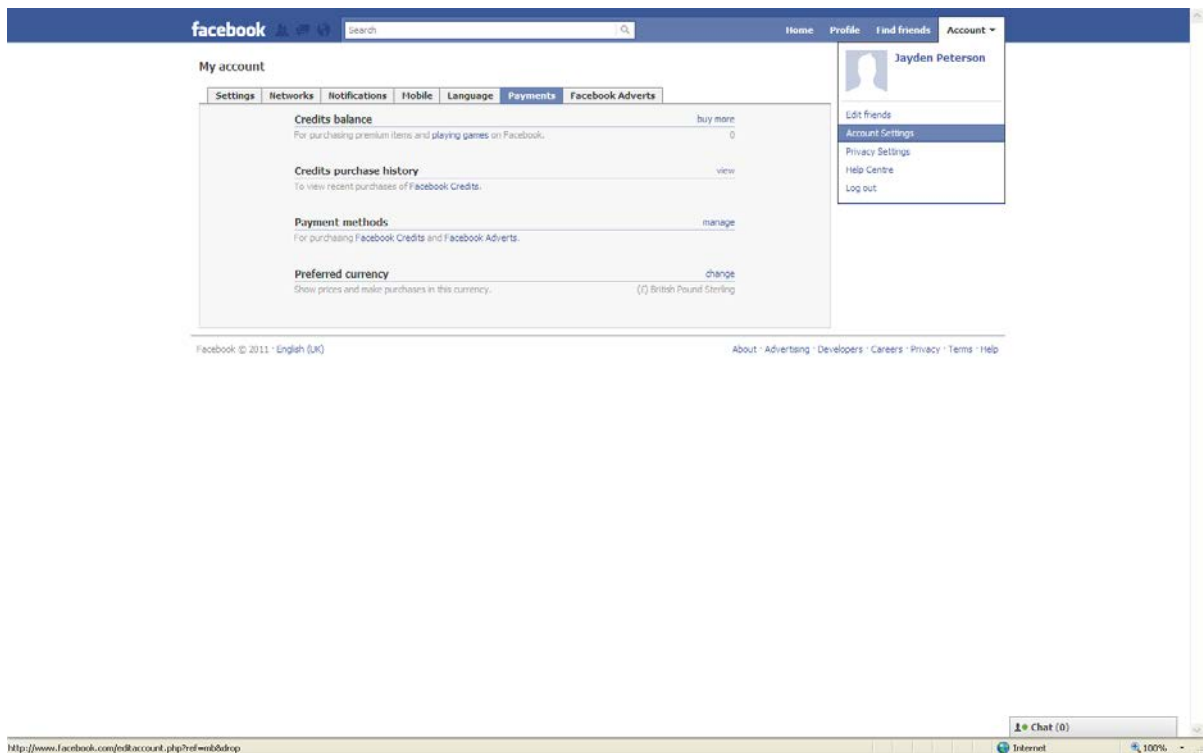


2. Select the number chips to purchase:

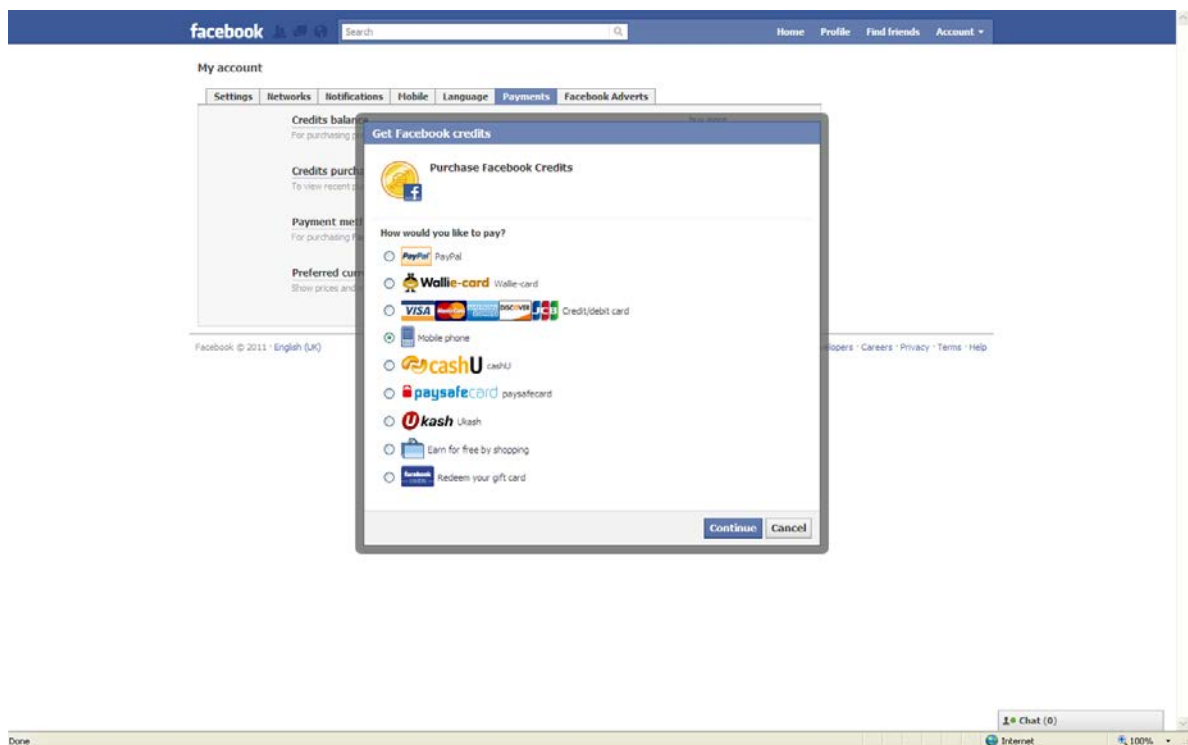


Appendix C – Screenshots of the Virtual Currency Method

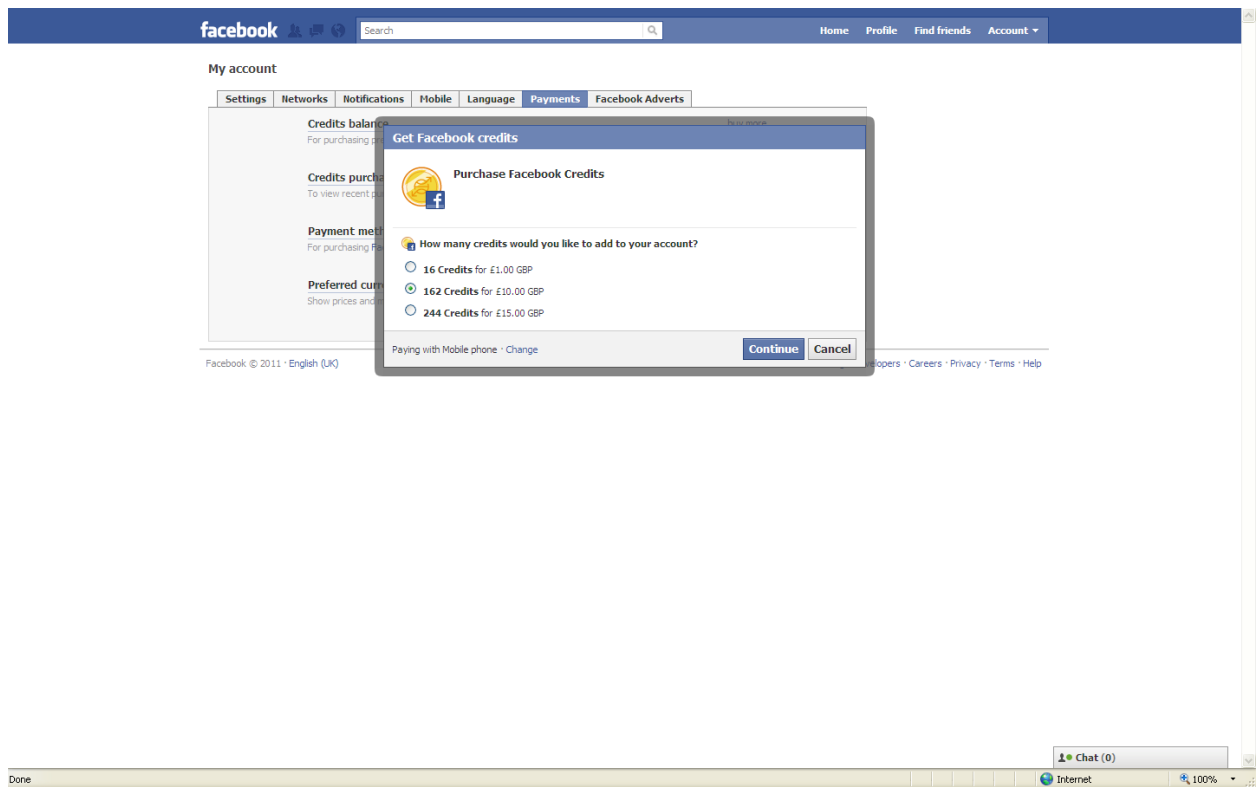
1. Navigate to the Facebook Account:



2. Select method of payment:

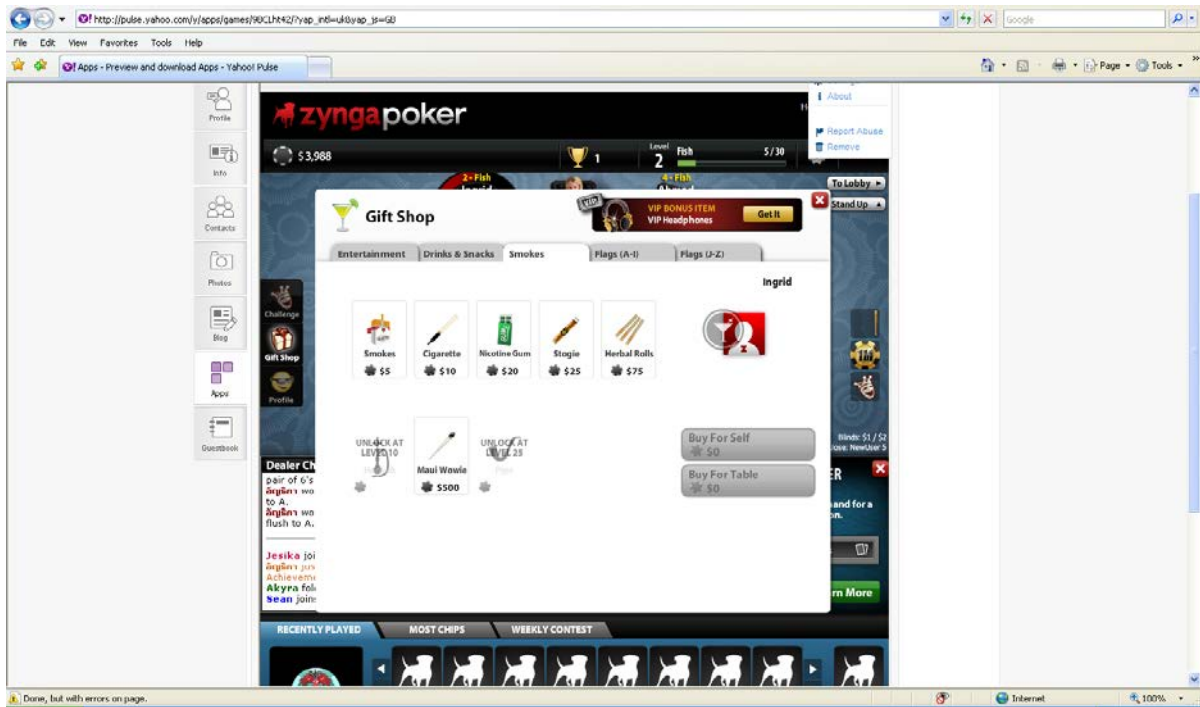


3. Select the Number of Chips to Purchase:



Appendix D – In-game Virtual Gifts

1. Cigarettes and Drugs:



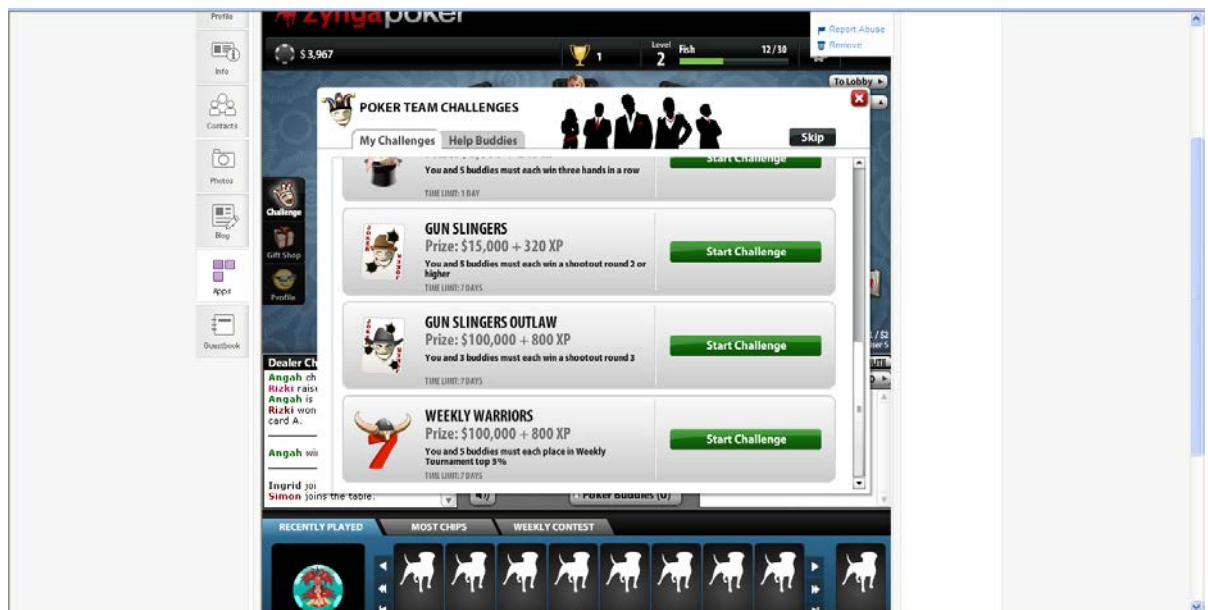
2. Cheap Date:



3. Go-go Dancers:



4. Gun Slings:



Appendix E

Appendix E - Screenshot of Service Provider's Condition:

