

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

**Thursday 13 October 2011  
TRIBUNAL SITTING No. 87 / CASE 2  
CASE REFERENCE: 858979**

Network Operator: All Mobile Network Operators  
Service Provider: mBlox Limited  
Information Provider Paymo Incorporated

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER  
UNDER PARAGRAPH 8.7 OF THE CODE**

**BACKGROUND**

On 22 March 2011, the Executive received a complaint from the Internet Advisor for the Children’s Charities’ Coalition for Internet Safety (the “**CHIS**”), who 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 CHIS raised its own concerns in relation to children accessing this game, the service content and the ability to purchase credits by reversed-billed SMS 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 two reverse-billed SMS payment mechanisms, one of which was provided by the Information 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 Information 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 Information Provider's payment system, users would carry out the following steps:

- Select the number of Facebook credits or chips they wished to purchase;
- Enter their mobile number into the data capture field;
- Receive a mobile terminating ("MT") text message which asked users to text "Y" within a mobile originating message to confirm purchase; and
- Receive chargeable MT(s), the number being dependent on the amount of chips or credits purchased.

The Executive noted that the Information Provider was a wholly owned subsidiary of Boku Incorporated USA ("Boku").

### **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'.

### **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 Information Provider's payment system, 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 must be 13 or above. This allowed exposure of this service to users who were 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 (11<sup>th</sup> Edition, Amended April 2008) (the "**Code**").

## **2. How the service operated according to the Information Provider**

The Information Provider submitted that the Zynga Poker game was not gambling within the meaning of the UK Gambling Act 2005, as it was not possible to take cash out of the game. The Zynga Poker game was therefore merely a social game which was 'just for fun'.

The Information Provider further asserted that the vast majority of users (97-99%) played for free without buying additional chips after using up the supply provided within the game for free. In addition to receiving a number of free chips when becoming a new user, users could easily acquire more chips without payment by, for example, recommending friends or responding to communications from Zynga.

The Information Provider submitted that four companies were involved in the provision of this reverse-SMS payment system. These were:

- Zynga, who produced, maintained and promoted the game;
- Facebook, who provided a platform for playing the game;
- The Information Provider, who was one of a number of mobile, bank and credit payment providers on the Facebook platform; and
- mBlox, who facilitated the connection between the Information Provider and some UK carriers in order to process payments.

The Information Provider asserted that it did not provide the service of running the Zynga Poker game, nor did it promote it. The Information Provider's only role was to provide one of a number of competing payment facilities that allowed Facebook users to purchase Facebook credits. The Information Provider submitted that, of those competing payment facilities, the Information Provider represented one of a number of companies who offered billing via premium SMS or direct carrier billing on mobile phones.

The Information Provider further asserted that children without mainstream credit cards could also use one of a number of other available payment mechanisms, including the Wallie pre-payment card or an electron card, and that, as such, reverse-SMS payment options were not the only options open to children.

The Information Provider submitted that a person buying Facebook credits was able to use these for a wide range of different games and services on the Facebook platform, only one of which was the Zynga Poker game. Promotional material for Zynga Poker focused on encouraging people to try out the game, and not to purchase 'in game' credits or virtual goods with any 'winnings'. The Information Provider claimed that it did not promote the Zynga Poker game or the purchase of Facebook credits for conversion into chips. The Information Provider merely made available "a facility for making a payment for goods or services comprised in the relevant service" (Section 120 of the Electronic Communications Act 2003).

The Information Provider further confirmed that, from 1 July 2011, the Virtual Currency Method was the only method on which additional chips for the Zynga Poker game could be purchased via the Information Provider's payment mechanism. In addition, the conversion of Facebook credits into chips was controlled, not by the Information Provider, but by Facebook and/or Zynga. From 1 July 2011, the Tapjoy Method was no longer available on the Facebook platform.

The Information Provider submitted that the user would obtain full disclosure throughout the purchase flow, whereby, when a user purchased Facebook credits intending to use them to buy chips for the Zynga Poker game, the user was always able to see both the precise number of Facebook credits being purchased, as well as the precise value of the virtual chips that would be received for use in the Zynga Poker game following conversion of the Facebook credits purchased. The Information Provider therefore asserted that the statement by the Executive that a user, "*would have no knowledge of the number of chips this is worth*", was untrue.

The Information Provider conceded that a user with sufficient chips may purchase any of a range of virtual gifts, but these gifts were for entertainment, and while they had “spicy” titles, they were tame in the context of other material available over the internet, much of which was available for free and with no age requirement.

In summary, the Information Provider asserted that the Zynga Poker game:

- Was a general audience game that was not particularly attractive to children;
- Was not specifically marketed to children;
- Did not involve gambling or contain adult content or any other prohibited content; and
- Was played in such a way that the majority of its users played for free and never made a purchase to play.

### **3. How the service operated according to the Service Provider**

According to the Service Provider, the service operated in the following way:

*“Paymo [the Information Provider] offer a pay for product service, that product is virtual currency that can be purchased within games, banners and other advertising for the game should not be considered a call to action, given that they promote a game which according to the latest data is played for free by somewhere between 97-99% of those who play it. Of those who do purchase additional virtual currency, only a sub element utilise the Paymo flow. In our view, given such figures the call to action is from within the game where the player can click to purchase additional 'currency' - screen shots of the flow can be provided if it would be helpful, and this is not designed in a way as to be attractive to children”.*

In relation to the issue of gambling, the Service Provider stated the following:

*“[The Executive] made reference to a concern that playing the game encourages gambling by children. Numerous studies for the gambling industry have shown the difficulty of converting free chip players into depositing to play for real money - i.e. there is an extremely low conversion rate even on bona fide gambling sites from free players to those who actually progress to gambling. Additionally, the playing of a free card game no more encourages gambling than the playing of a car racing game encourages under age driving. With respect, I believe to say this encourages gambling is a wider social policy issue that is more properly dealt with by either Parliament or the Gambling Commission who have jurisdiction to enact rules on a national basis to protect children if they felt there was a need for such rules”.*

### **4. The Investigation**

On 22 March 2011, the Executive received one complaint from the Internet Advisor for the CHIS, who 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 virtual currency in increments of £2, £5, £10, £20 and a maximum of £30.

The Executive believed that this service contravened the PhonepayPlus Code of Practice (11<sup>th</sup> Edition, Amended April 2008) (the “**Code**”) and raised the following potential breaches:

- Paragraph 5.4.1(a) – Misleading; and

- Paragraph 5.12 – Inappropriate promotion.

## **5. Standard Procedure**

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 8.5 of the 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 Code. A response was submitted by the Service Provider on 28 April 2011.

On 1 August 2011, the Executive sent a breach letter to the Service Provider. On 12 August 2011, the Service Provider sent a formal response which contained an Information Provider pass-through request, in accordance with paragraph 8.7 of the Code. On 23 August 2011, the Executive granted the Service Provider's request for an Information Provider pass-through.

On 26 August 2011, the Executive sent a breach letter to the Information Provider. On 12 September 2011, the Information Provider sent a formal response.

## **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 Information Provider's payment method could do so by using either the Tapjoy Method (until 1 July 2011) or the Virtual Currency Method.

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 leader board.

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 a 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:

- 492,750 Chips for £2;
- 1,233,000 Chips for £5;
- 2,461,500 Chips for £10;
- 4,920,800 Chips for £20; and
- 7,382,300 Chips for £30.

The Executive noted that a consumer making a £2 purchase via Tapjoy would receive 492,750 chips; however, the same consumer making the equivalent £2 purchase via Facebook credits (3 x £1 purchases) would receive just 300,000 chips. Conversely, a consumer making a £10 purchase via Tapjoy would receive 2,461,500 chips; however, the same consumer making the equivalent £10 purchase via Facebook credits would receive 2,803,846 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 Code had occurred.

2. The Information Provider's response was that, from 1 July 2011, the Tapjoy Method was no longer available to users. Previously, a user could have purchased chips directly within the game via either the Tapjoy Method or the Virtual Currency Method. The Information Provider further asserted that users who opted for the Virtual Currency Method could convert their Facebook credits into Zynga Poker game chips either straight away, or in a month's time or longer. The Facebook credits were also available for use with other games on the Facebook platform.

The Information Provider further asserted that the two purchase methodologies were entirely separate and were not comparable. When making a purchase of Facebook credits via the Virtual Currency Method, outside of the Zynga Poker game users could purchase Facebook credits for use in any of the games made available on Facebook.

The Information Provider further commented that, even prior to 1 July 2011, when the Tapjoy Method was switched off, it did not believe that users would in any way have been misled since the user was always able to see the number of chips and/or Facebook credits they would receive prior to completing any payment.

The Information Provider further submitted that the Executive had provided no evidence of confusion on the part of the single complaint to PhonepayPlus, nor from any other users. The Information Provider also commented that the "conversion rate" from Facebook credits-to-chips for the Zynga Poker game could not be made known to consumers at the point of purchasing Facebook credits outside of the game, as the rate would depend on the "price" and on any special offers or promotions at the actual time of conversion, which would be unknown. The Information Provider asserted that it had absolutely no control over these matters.

To comply with paragraph 5.4.1(a), the Information Provider submitted that it could only reasonably be expected to ensure that, in providing its payment service to users, those users were fully informed as to the price and the nature of any purchased goods or services purchased at the time. In cases where a user bought Facebook credits, the number of credits bought was absolutely clear. In a case where a user bought Facebook credits for immediate conversion into chips for the Zynga Poker game, the number of Facebook credits and the value of chips received were both made absolutely clear.

The Information Provider submitted that it would be entirely unreasonable to expect payment intermediaries (e.g. MasterCard or Visa who were in an equivalent position to the Information Provider) to inform a customer purchasing, for example, a can of a soft drink that he might be able to buy the same can cheaper elsewhere, or that the price for the can could go up or down by a penny if the user were to defer the purchase.

The Information Provider further asserted that, at all relevant points in the process, the user had a clear indication of what was being purchased and the purchase price. The Information Provider's opinion was that pricing information that it had provided to users was and had at all times been both prominent and proximate in compliance with all relevant obligations under the Code. The Information Provider further asserted that this was also fully consistent with the PhonepayPlus Help Note on Pricing which stated, at page 3, that:

*"Our research showed that consumers believed that if the pricing information were directly underneath/beside the premium rate number or the 'call to action', it would help them make an informed decision and increase the likelihood of their trusting the service".*

In summary, the Information Provider submitted that there was no evidence in this case of users being "*misled*" or being "*likely to be misled*" in accordance with paragraph 5.4.1(a) of the Code. The Information Provider was resolute that both the Tapjoy Method and the Virtual Currency Method were entirely clear. It asserted that a user would know in advance of the purchase the exact nature of the purchase made (i.e. how many chips were bought if the purchase was made using the Tapjoy Method, or how many Facebook credits were bought if the purchase was made using the Virtual Currency Method) and the exact amount of the purchase price. The Information Provider further asserted that this would also be evident, had the Executive provided screenshots showing how users could attempt to use their Facebook credits to purchase chips. The Information Provider offered to provide these screenshots to the Executive.

3. The Tribunal considered the evidence and concluded 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 when using the Tapjoy Method and were, in turn, fully informed of the price of the Facebook credits when using the Virtual Currency Method.

In light of the above considerations, the Tribunal concluded that the only outstanding 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.

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 of 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 Information Provider's submissions contained in its response dated 12 September 2011.

In addition, there was no other evidence, by way of complaints or other information, that consumers were in fact misled.

Taking all of the circumstances into account, the Tribunal concluded that it was not satisfied that consumers were misled, or likely to be misled. The Tribunal accordingly concluded that the Information Provider was not in breach of Paragraph 5.4.1(a) of the 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 Advisor for the CHIS.

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 children.

Furthermore, this service also allowed the purchase of Facebook credits using the Virtual Currency Method, in increments of £2, £5, £10, £20 and £30. The Executive monitored the service and found that a 13-year-old Facebook account holder was easily able to purchase £10 worth of Facebook credits in one single purchase.

The Information Provider was, however, of the opinion that the Zynga Poker game was a general audience game, stating:

*“While Paymo [the Information Provider] has the capability to put additional control in place for a given merchant or game, we have not put controls in place for Zynga Poker and believe that none are necessary due to our conclusions that it does not target children or involve gambling”.*

The Executive asserted that, notwithstanding the above comment from the Information Provider, in consideration of the intended audience for the Zynga Poker game, which captured children aged 13-15, controls should have been put in place.

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 ‘Terms of Service’ was at the bottom of the web page and in small print.

In summary, the Executive asserted that allowing a service designed for an adult audience to be accessible to children was inappropriate. Although the Information Provider claimed it had the technical capability to put controls in place to prevent children from accessing the service, it did not do so. This suggested that the Service

Provider, who would also likely have the same technical capability to put controls in place to prevent children from accessing the service, 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 Code had occurred.

2. The Information Provider responded by submitting a full analysis of its interpretation of Paragraph 5.12 of the Code.

### **Analysis of the first sentence of Paragraph 5.12 of the Code**

The Information Provider submitted that the first sentence of paragraph 5.12 of the Code made it clear that three elements had to be present:

- Promotional material must be identified;
- Once identified, the material must (fairly) be considered by some as being offensive or harmful; and
- The Service Provider (or, in the case of a pass-through, the Information Provider) must have failed to use reasonable endeavours to ensure that the promotional material did not reach those people.

With respect to the **first element**, the Information Provider argued that the Executive had not identified the promotional material on which the case was founded and no evidence has been provided to show that the Information Provider promoted anything at all. The Information Provider submitted that it was in a position to control promotion of the payment processing system, but never had any role concerning the promotion of the Zynga Poker game.

The Information Provider asserted that it was merely one of a number of competing payment providers which did not promote the Zynga Poker game or the purchase of Facebook credits for conversion into chips. The Information Provider asserted that it understood from Zynga that promotions for the game were generic and included headlines, such as: *“The World’s largest poker room”* and *“Play against players all over the world”*.

The Information Provider further submitted that the vast majority of players attracted by these promotions would either not buy chips at all, or if they did, would not use mobile phones to pay for them. On this basis, the Information Provider respectfully questioned whether the Code should be applied to such a promotion of a service which may never become a premium rate service within the meaning of Section 120(7) of the Electronic Communications Act 2003.

With respect to the **second element**, the Information Provider argued that even if some promotional material was identified, the question arose as to whether that material was offensive or harmful.

The Information Provider referred to the Executive’s own Guidance Notes and stated that PhonepayPlus had declared that it would take a pragmatic approach when looking at promotional issues. The Information Provider therefore submitted that the Executive had to consider the nature of the Facebook website and the identity of its principal users before concluding that any material was offensive or harmful.

The Information Provider further asserted that, while children of between 13 and 16 could become Facebook users, Facebook was clearly a generalist platform and not

one primarily targeted at children. The Information Provider further asserted that PhonepayPlus' own Guidelines stated that, in considering this issue, it would take into account; data which indicated how many readers, viewers, or listeners of a publication, broadcast, or other media where the service is promoted, are children; and the style, content, and composition of the promotional material.

The Information Provider submitted that, on both of the above points, neither Facebook, nor any promotional material for the Zynga Poker game on Facebook, could be considered as targeted at children and that the strict standards which were rightly to be expected of a journal targeted at children should therefore not be applied to Facebook as a generalist social website.

The Information Provider asserted that those same strict standards were not applied to local or national newspapers or magazines, or to programmes that could be watched the following day before the 9pm watershed using a service like ITV Player, or to the promotional advertisements in them, despite the fact that they could rather easily be read or watched by a child of any age.

The Information Provider further asserted that any advertising for the Zynga Poker game by Zynga, or by Facebook, was focused on attracting users to the game itself. The Information Provider submitted that the Executive had submitted no evidence to show that promotions (if any) of the Zynga Poker game were or had in any way been made to encourage children to pay money.

The Information Provider stated that the Executive had suggested that parents would object to their children playing a poker game which contained references to, and allowed purchases of, virtual gifts, such as drugs, tobacco and go-go dancers, and suggested that this might be "inappropriate". In response to this allegation, the Information Provider stated that the Zynga Poker game was not gambling, but was entirely simulated as no user could take money out of the game. In relation to the range of virtual gifts that were made available within the Zynga Poker game, the Information Provider asserted that these were aimed at, and considered attractive to, a general audience. Further, while they may have had "spicy" titles, they were rather tame in the context of other material available over the internet.

The Information Provider commented that online games were regulated in a number of ways and, in most countries in Europe, the Pan European Game Information ("PEGI") scheme had been adopted. The Information Provider stated that this scheme, originally targeted at boxed games, had been extended under PEGI Online to digital games that need a live network connection in order to be played. The Information Provider further commented that, on 16 June 2009, the Department for Culture, Media and Sport announced that PEGI would become the sole and official online game rating system for the UK. The Information Provider further commented that PEGI provided for five age categories. While the Zynga Poker game had not been rated under PEGI, the PEGI website showed that over 40 other poker games had been classified as appropriate for the 12+ age group.

The Information Provider further commented that Google Android and Apple iTunes had also created classification systems for games on their respective platforms. Both platforms had rated the Zynga Poker game. On Google, the game was classified as "Medium Maturity".

Google did not provide a recommended age threshold, but the opinion of the Information Provider was that logic suggested that "High Maturity" would map to age 18+ and Medium Maturity would represent an age group of less than 18. The Information Provider further commented that Apple iTunes did contain an age rating

within its classification system for the Zynga Poker game, which deemed it suitable for the 12+ age group.

The Information Provider also mentioned that the British Board of Film Classification (the “**BBFC**”) also operated a voluntary scheme for classification of video works downloaded from or streamed over the Internet, and that the Association for UK Interactive Entertainment (the “**UKIE**”) classified games published in the UK according to the PEGI ratings system. The Information Provider submitted that neither of these organisations had raised any concerns over the Zynga Poker game.

The Information Provider further made the point that the Zynga Poker game was not just available on or via mobile phones, but it was also available on the Internet through PCs. The Information Provider was therefore of the view that the Zynga Poker game was a multi-platform game and respectfully suggested that, rather than speculate on what some parents (in this case just one) might object to, it would be safer and more appropriate for the Zynga Poker game to be rated under one of the systems established for this purpose, and in accordance with a fully developed framework of rules and measures.

The Information Provider further expressed the view that not all children were the same and not all parents would object to their teens playing the Zynga Poker game. Concerned parents could take charge and were explicitly recommended to do this on the PEGI website and on official websites such as Childnet. The Information Provider commented that many parental control tools were available, which allowed parents to monitor, control and report behaviour of their children’s activities on the internet. Most of these tools had functionality specific to social networks, including Net Nanny and WebWatcher, which allowed game level and/or URL level filtering.

With respect to the **third element**, the Information Provider submitted that there was no evidence to suggest that it had failed to use reasonable endeavours to ensure any relevant promotional material did not reach people who might regard material as being offensive.

The Service Provider reiterated its view that no promotional material had been identified and, even if some could be found, the Information Provider could not have prevented any promotion of the game by Zynga or Facebook. Had the Information Provider withdrawn its payment system, anyone with a Facebook account could still play the Zynga Poker game and have full access to all elements of the game about which PhonepayPlus had raised concerns.

### **Analysis of the second sentence of paragraph 5.12 of the Code**

In relation to the second sentence of Paragraph 5.12 of the Code, the Information Provider submitted that the Code did not prohibit absolutely, it only required reasonable endeavours and, once again, PhonepayPlus was under an obligation, under its Guidelines, to take a pragmatic approach.

The Information Provider stated that it had allowed its payment processing system to be used for the purchase of Facebook credits, not only in connection with the purchase of chips for the Zynga Poker game, but for any purpose. The Information Provider stated that it had not promoted the payment system to children for use in the purchase of chips and no evidence had been provided by the Executive to suggest that it had failed to use reasonable endeavours to prevent a promotion that should not have gone ahead.

In this context, the Information Provider stated that the Executive had asserted that, *“allowing a service designed for an adult audience to be accessible to children is*

*inappropriate*"; however, the Information Provider was of the view that the service that the Executive should have had in mind was not, in its view, the Information Provider's payment system, nor Facebook, but the Zynga Poker game service. In view of this, the Information Provider was of the view that paragraph 5.12 of the Code referred to promotions and promotional material, and not to "access" to a particular service.

The Information Provider submitted that the Executive's assertion did not reflect the language of the Code. The Information Provider was instead of the opinion that Paragraph 5.12 of the Code required the Service Provider to use "reasonable endeavours" to ensure that their services were not promoted in an inappropriate way, and it submitted that there was no breach of this requirement.

The Information Provider further asserted that, if the Executive were to rely on the fact that the Zynga Poker game had been promoted (by Facebook itself or by Zynga, but not by the Information Provider) in the UK, this promotion was to an audience of which the overwhelming majority (93%) were aged 16+.

The Information Provider again commented that the Zynga Poker game was primarily a free game with only a small minority (up to 3%) of players making any monetary purchases across all payment methods. Evidence collated by Boku's client development team suggested that approximately 20% of users making a purchase of virtual currency did so using reverse-charge SMS. Overall, therefore, the Information Provider argued that children who might potentially have made such purchases on a mobile phone would make up 0.04% of the potential audience, but the Information Provider emphasised that this was based on a doubtful assumption that children were as likely as adults to make "in-game" purchases via their mobile phones for such a game.

The Information Provider therefore submitted that a maximum 0.04% risk factor was below any threshold at which additional steps would reasonably be required in order to ensure that the standard of *"reasonable endeavours"* was met.

The Information Provider further asserted that this analysis was also reflected in the outcome of its own *"merchant onboarding"* process and Acceptable Use Policy, which assessed, both at the time the Information Provider signed up a merchant (i.e. in this case, Facebook) and through ongoing monitoring, whether additional measures were required to protect consumers from potential harm. The Information Provider asserted that this would include, for example, any undue risk that children could secure access to an inappropriate game, or whether a pattern of such access was actually occurring.

It was therefore the view of the Information Provider that, further and contrary to the suggestion made by the Executive, it did not have the capability to put in place technical controls to prevent children accessing the Zynga Poker game, as any Facebook user could access the game whatever the Information Provider did or did not do. The Information Provider further asserted that the point made by the Service Provider in relation to technical controls (which was wrongly relied on by the Executive) was that the Information Provider could theoretically put in place additional price-based controls, either in respect of a particular game or perhaps in respect of a particular merchant, for example by setting a lower daily limit on customer purchases.

However, the Information Provider stated that, in order to achieve this, and so prevent children from accessing the payment processing service for a particular game, the Information Provider would have to have both age- and game-related information, which was not in its possession. It asserted that only Facebook could provide that data, and it was unlikely to do so, either on grounds of commercial confidentiality or because of data protection rules.

The Information Provider was, therefore, of the view that any controls preventing children from accessing the payment processing service would, therefore, need to be introduced across the board in relation to all Facebook users who used the Information Provider's payment mechanism for any type of purchase. Currently, such controls could not be targeted at a certain age range and such controls would not stop children accessing the elements of the game that PhonepayPlus had raised concern over, since the majority of users played the game for free.

In summary, and for the reasons given above, the Information Provider submitted that the nature of the platform on which the game was played, the nature of the game itself, the ratings the game had received, the fact that it was targeted to a general audience, the limited role of the Information Provider and the lack of evidence of harm, meant that putting in technical controls of this nature across the board on all Facebook users was not a proportionate response in this case and submitted that the Executive had not shown a failure by the Information Provider to use "*reasonable endeavours*" under Paragraph 5.12.

3. The Tribunal considered the evidence and, having taken into account the Information Provider's arguments, the Tribunal made the following observations:

With respect to the first sentence of paragraph 5.12 of the Code, the definition of promotion under paragraph 11.3.27 of the 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 Information 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. For the avoidance of doubt, the Tribunal clarified that the service became a premium rate service once a charge was required to be paid to purchase items within the Zynga Poker game.

Having further regard to the first sentence of paragraph 5.12 of the Code, the Tribunal concluded that it was a matter for its own discretion to consider whether the service was potentially harmful to the younger age group and it was not bound by any assessments made outside the premium rate industry, whether by PEGI, BBFC, UKIE or any other body. Accordingly, 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 which were not suitable for children, including cigarettes, alcohol and other inappropriate items, the content of the service was clearly of an adult nature.

The Tribunal further concluded with respect to the first sentence of paragraph 5.12 of the Code that the Information Provider had taken no steps, and hence no reasonable endeavours had been made to prevent children from gaining access to material that promoted the premium rate element of the service.

With respect to the second sentence of paragraph 5.12 of the Code, the Tribunal concluded that the requirement to take reasonable endeavours to ensure that the

service was not promoted in an inappropriate way was not satisfied by a statistical analysis to determine the number of children that would be likely to enter the premium rate element of the Zynga Poker game. On the contrary, the Tribunal was of the view that any analysis which indicated that children, however small in number, could access a service that was adult in nature, ought to have alerted the Information Provider to the fact that reasonable endeavours to prevent inappropriate promotion were warranted. The Tribunal further clarified that the jurisdiction of PhonepayPlus was to regulate the premium rate element of the service and it did not, therefore, intend to direct the Information Provider to prevent children from accessing the game, “*across the board on all Facebook users*”, while it was free to play. Having regard to these considerations, the Tribunal concluded that, with respect to the premium rate element of the Zynga Poker game, the Information Provider would have had the technical capability to put in place age restriction measures with respect to the Information Provider’s payment system for either the Tapjoy Method or the Virtual Currency Method, but it had not done so. It followed that, the Information Provider had made no reasonable endeavours to ensure that its service had not been promoted in an inappropriate way.

The Tribunal concluded the Information Provider was in breach of paragraph 5.12 of the 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 Information Provider was reckless because it failed to put in place controls to prevent younger people from accessing the service. The Information 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 Information Provider co-operated with the Executive;
- The Information Provider offered refunds to users; and
- The nature of this case was unique, given that the Information Provider was not the provider of the Zynga Poker game, but merely facilitated the premium rate service element of the service, which formed only a very minor part of the wider social gaming experience.

The revenue in relation to the service fell within the mid range of Band 3 (£100,000.00 - £250,000.00)

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 Information Provider to remedy the breach by implementing an age restriction measure on the Information Provider's reverse-SMS payment system. The Tribunal further recommended that the Information Provider should communicate its obligations under paragraph 5.12 of the 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.

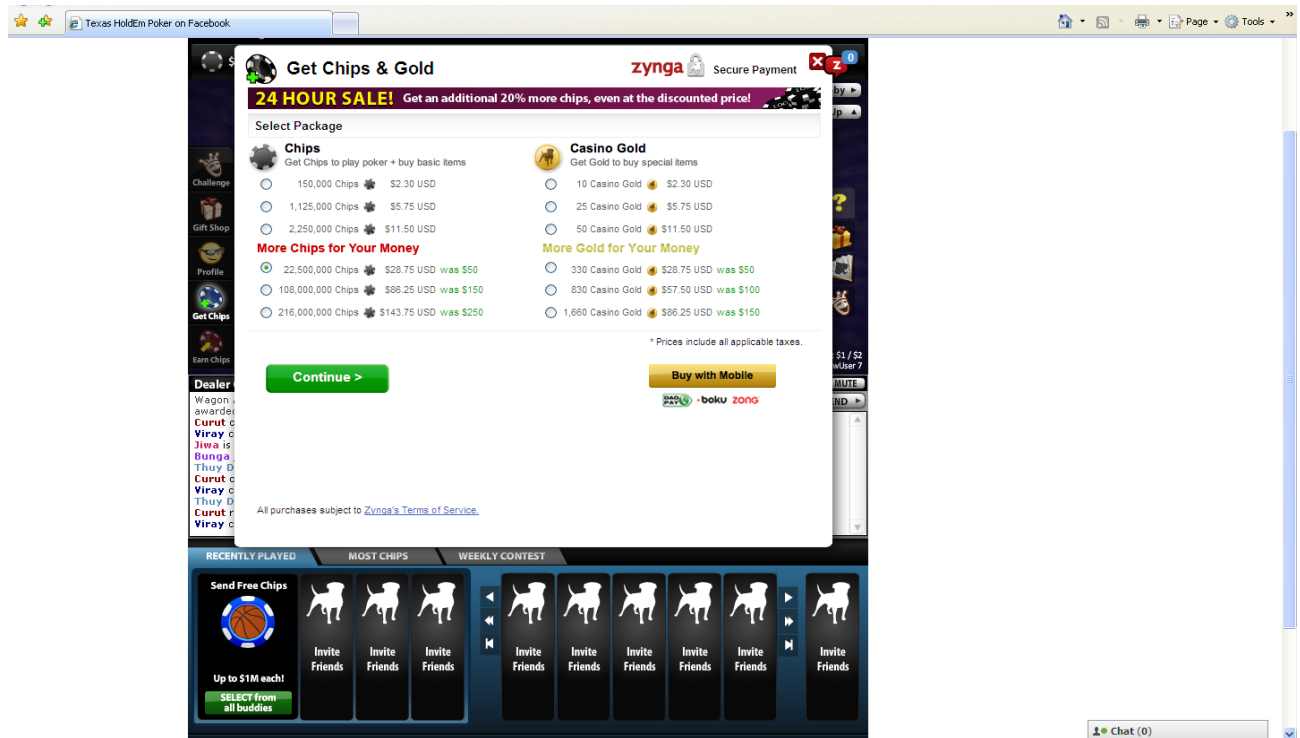


# Appendix A – Casino Table Screenshot

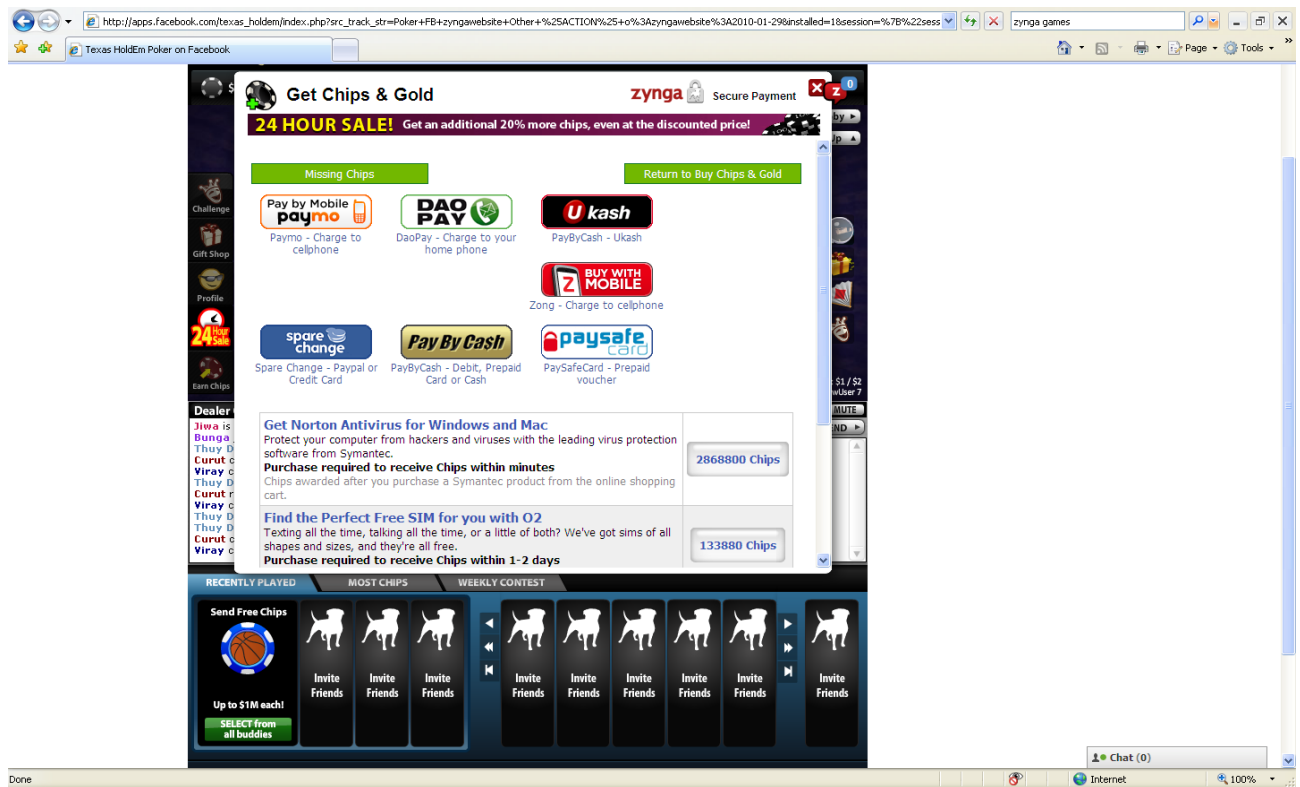


## Appendix B – Screenshots of the Tapjoy Method

### 1. After Clicking “Get Chips” – select “buy with mobile”:



### 2. Select “Pay by Mobile, Paymo”:



### 3. Select the number chips to purchase:



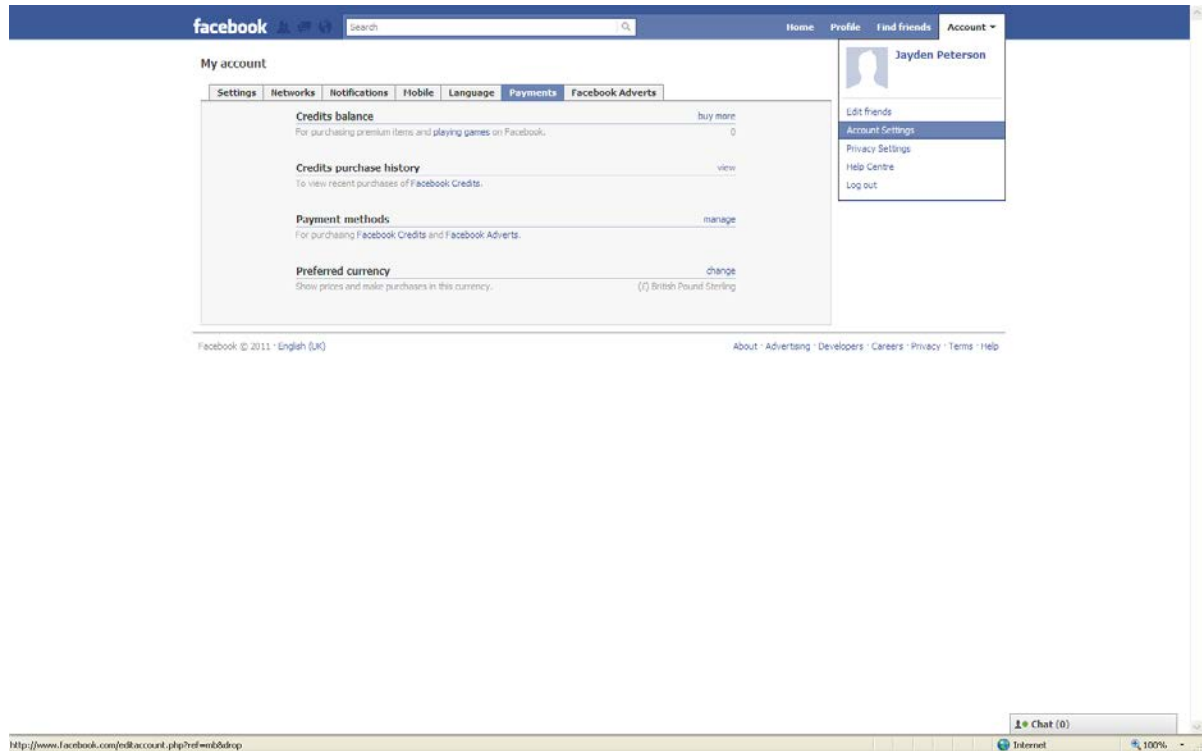
Use PayMo to buy Chips

- 486,000 Chips for £2.00
- 1,219,500 Chips for £5.00
- 2,434,500 Chips for £10.00
- 4,869,000 Chips for £20.00
- 7,303,500 Chips for £30.00

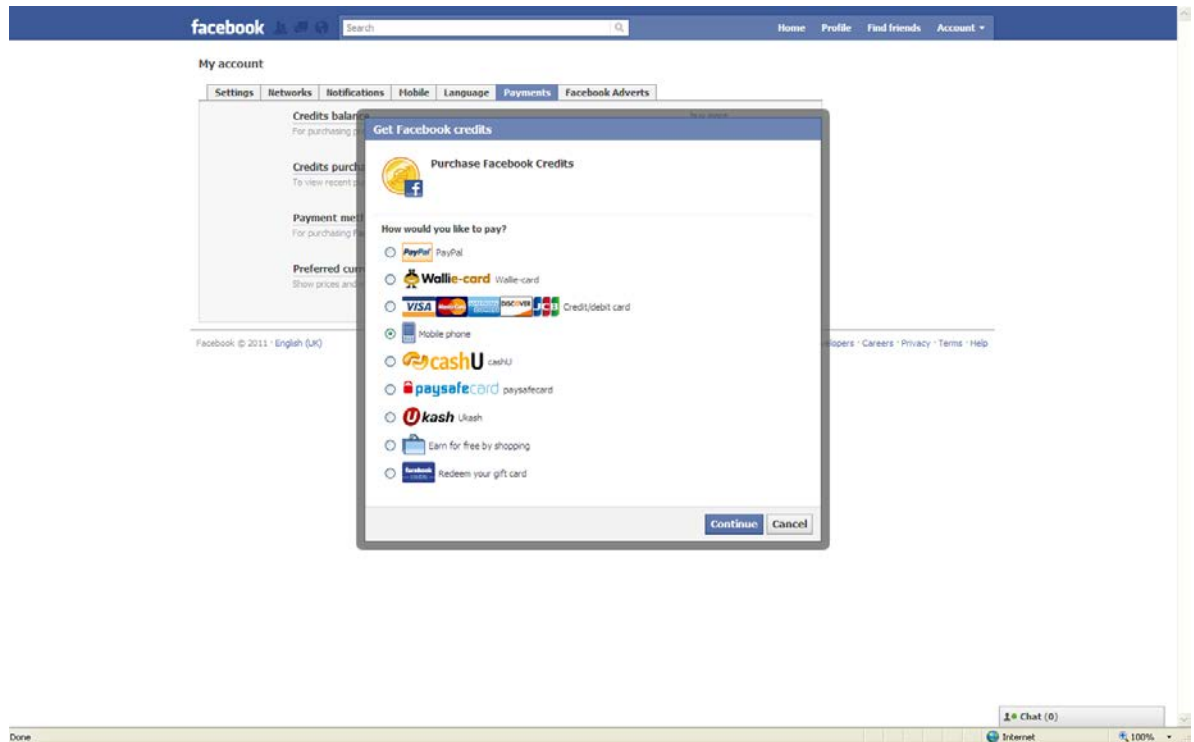
[Get Chips >](#)

## Appendix C – Screenshots of the Virtual Currency Method

### 1. Navigate to the Facebook Account:



### 2. Select “Mobile Phone”:



### 3. Select number of chips to purchase:

My account

- Settings
- Networks
- Notifications
- Mobile
- Language
- Payments
- Facebook Adverts

Credits balance

For purchasing p...

Credits purch...

To view recent p...

Payment meth...

For purchasing Fa...

Preferred cur...

Show prices and...

Get Facebook credits



Purchase Facebook Credits



How many credits would you like to add to your account?

- 16 Credits for £1.00 GBP
- 162 Credits for £10.00 GBP
- 244 Credits for £15.00 GBP

Paying with Mobile phone - Change

Continue Cancel