

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 27 September 2012
TRIBUNAL SITTING No. 109 / CASE 1
CASE REFERENCE: 08341

Level 2 provider: Amazecell Limited (Israel)
Type of service: Amazecell Trivia (competition service)
Level 1 provider: Netsize UK Limited
Network operator: All mobile network operators

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

BACKGROUND

Between 4 May and 23 August 2012, PhonepayPlus received 127 complaints in relation to the Amazecell Trivia service (the “**Service**”), which operated on the premium rate shortcode 60092. The Service commenced operation on 8 February 2012 and was voluntarily suspended by the Level 2 provider on 19 July 2012.

The Service was a quiz style competition, which consisted of a maximum of six trivia questions. Consumers were charged £5 per question sent to them (via mobile terminating message). Consumers were not charged for answering the questions; however each answer automatically triggered a further mobile terminating text message containing a further question at a cost of £5 (until £30 had been spent).

The Service operated eight separate games concurrently. Each game had a different landing page on the ip.amazecell.com website and offered the chance to win one prize such as an “iPhone4s” or “The new ipad”. The draws were scheduled to occur shortly after 31 December 2012.

The majority of complainants stated that they were confused as to why they had been charged or they had been misled into using the Service. A large number of the complainants stated that they had been directed to the Service landing pages by misleading promotions on websites such as facebook.com. In some cases misleading content was automatically posted onto consumers’ Facebook “walls” without their knowledge. In other cases, to participate in the promotion the consumer was required to “share” the promotion on their Facebook “wall”. Examples of some of the promotions included consumers being induced to complete surveys with the promise of a free £175 Tesco voucher, the opportunity to win theme park tickets, the opportunity to see who had viewed their Facebook profile or see a video clip (**Appendix A**). However, on completing the survey or other promotions consumers appeared to have unintentionally entered the Service, thereby incurring premium rate charges.

Following a number of complaints, the Level 2 provider was the subject of a Fast Track Complaint Resolution procedure in early 2012. Following advice from the Executive, the Level 2 provider made a number of changes to the Service.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 3 September 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.2.5 - Pricing
- Rule 2.3.1 - Fair and equitable treatment
- Rule 2.3.2 - Misleading

The Level 2 provider responded on 10 September 2012. On 27 September 2012, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.2.5

“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.”

1. The Executive submitted that the pricing information contained in promotional material for the Service was not compliant with rule 2.2.5 for two reasons.

Reason 1: Landing page pricing

The Executive noted that the Guidance on, “Promotions and promotional material (including pricing information),” (the “**Guidance**”) states:

“2.13 – ‘Pricing information... should be presented in a font size that would not require close examination by a reader with average eyesight....’

“2.15 – ‘Providers should take care to ensure that the colour combinations...used for the presentation of the price do not adversely affect the clarity.’”

The Executive noted that the Service was promoted using a number of different landing pages on the Level 2 provider’s website (**Appendix B and C**). The Executive submitted that the pricing information on a number of the landing pages was not prominent or clearly legible due to the very small font size and the grey colour used (**Appendix C**). Accordingly, the Executive submitted that the pricing information was not compliant with rule 2.2.5.

Reason 2: “I-Frame” landing page

One complainant highlighted a promotion for the Service that used an “Inline Frame” (“**I-Frame**”) to intentionally obscure the view of the landing page. Executive monitoring of the particular page highlighted that the I-Framed page contained no

pricing information whatsoever. As a result, any consumer who entered the Service through the page would not have been alerted to the fact that they were entering the premium rate service.

2. The Level 2 provider accepted that some pricing information contained on some of its landing pages was not compliant with rule 2.2.5 and the Guidance for the reasons outlined by the Executive. The Level 2 provider stated that this was due to a failure of its cross-checking procedure, which had since been addressed to ensure future compliance. The Level 2 provider commented that the vast majority of its traffic came through landing pages that contained compliant pricing information.

The Level 2 provider accepted that the use of I-Framed pages was contrary to rule 2.2.5 and stated that the use of I-Framing was against its own terms and conditions, “wrong” and “completely fraudulent”. The Level 2 provider accepted that it was responsible for the breach as the page was generated by one of its affiliate marketers. The provider noted that on becoming aware of the page, it immediately identified the affiliate and found that it had generated 28 “sales”. The provider immediately barred the affiliate marketer from its system and undertook to refund all consumers who entered the Service through the page.

3. The Tribunal considered the evidence, including the admissions made by the Level 2 provider. The Tribunal found that the use of a small font and/or colouring which makes pricing information difficult to see was clearly in breach of rule 2.2.5. The Tribunal was satisfied that the pricing information was difficult to see clearly because of the colouring and font size used. The Tribunal was particularly concerned by the use of I-Frame technology which obscured the pricing information completely. Accordingly, the Tribunal upheld a breach of rule 2.2.5 for the two reasons advanced by the Executive.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.3.1

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

1. The Executive noted that the Service landing pages stated, “Costs £5 per question. This is NOT A SUBSCRIPTION SERVICE. Every correct answer gives you one entry for the chance to win. Min age 18”.

The Executive submitted that the wording above suggested that a consumer could choose to answer one question only at a cost of £5. However, in reality the minimum possible charge was £10 as the service mechanic meant that the consumer’s response to the first question automatically triggered a further question at a cost of £5.

The Executive submitted that consumers were not treated fairly and equitably as although the cost was £5 per question, the minimum charge was £10. The Executive noted that in correspondence the Level 2 provider had stated that 89,401 consumers entered the Service once by answering only one question. The Executive inferred that these consumers were “overcharged” by £5 each.

The Executive noted that the Level 2 provider had received compliance advice from the Executive in March 2012. However, the Executive submitted that it had merely provided suggestions in relation to pricing information and ensuring that each correct

answer resulted in an entry to the draw. The Executive maintained that it had not provided advice in relation to the pricing mechanic or at what point charges were incurred for further questions.

In light of the above, the Executive submitted that rule 2.3.1 of the Code had been breached.

2. The Level 2 provider stated that it recognised the issues with the pricing mechanism and had instructed its legal counsel in May 2012 to consider retroactive steps to remedy any unfairness. However, the Level 2 provider stated that the pricing mechanism had been proposed to it by the Executive in March 2012 and that it had been implemented as a result. The Level 2 provider asserted, “At no point in time have we attempted to create a pricing mechanism which could be regarded as confusing or misleading to consumers”.
3. The Tribunal considered the evidence, including the Level 2 provider’s response that it had received and acted upon compliance advice issued by the Executive, but found that consumers were not treated fairly and equitably for the reason given by the Executive. The Tribunal was particularly concerned by the large number of consumers who appeared to have been “overcharged”. It was evident to the Tribunal that it was not possible to enter the competition for only £5 and this was not made clear to consumers. The Tribunal accepted the Executive’s submission that compliance advice had been provided in relation to the price per question and not the pricing mechanism. Accordingly, the Tribunal upheld a breach of rule 2.3.1.

Decision: UPHELD

ALLEGED BREACH THREE

Rule 2.3.2

“Premium rate services must not mislead or be likely to mislead in any way.”

1. The Executive submitted that the Level 2 provider was in breach of rule 2.3.2 for two reasons.

Reason 1: Facebook promotions

From the complainant accounts, the Executive identified that the Service was heavily promoted via Facebook and that promotional material on Facebook had misled consumers into entering the Service. The Executive noted that a number of complainants saw promotions on Facebook from the Level 2 provider’s affiliate marketers that, for example, offered free products or entry to competitions (**Appendix A**). In some cases consumers were directed to “share” the promotion on their “wall”, or with their “friends list”, and then complete a survey in order to claim the offer. Having clicked on the survey, consumers were taken to one of the Level 2 provider’s landing pages and asked to enter their mobile number. There was no further mention of the initial offer. Consumers then appeared to have interacted with the Service inadvertently with the expectation that they would obtain the initial offer.

Reason 2: Misleading landing page

One complainant highlighted a promotion for the Service that used an I-Frame to intentionally obscure the view of the actual landing page. Executive monitoring of the page highlighted that the following changes to the Level 2 provider’s landing page had been made as a result of the I-Frame:

- Information relating to what the Level 2 provider offered had been changed from “Win the New iPhone 4S” to “Test & Keep The iPhone 4S”;
- The terms and conditions of the promotion had been blanked out;
- The “enter your mobile number field” had been changed to remove pricing information; and
- An additional box had been added to authenticate the, “Test and Keep The iPhone 4S” offer, which stated, “Simply use your iPhone everyday then provide us with feedback about our service!”

The Executive submitted that for the two reasons detailed above consumers had been misled, or were likely to have been misled and therefore rule 2.3.2 had been breached.

2. The Level 2 provider accepted that it was responsible for the promotional activities of its affiliate marketers, including those on Facebook. The provider agreed that the promotions on Facebook were misleading and contrary to its internal terms and conditions. The provider stated that it proactively approached PhonepayPlus when it saw an increase in complaints in June 2012 and that it identified and removed all misleading affiliate marketing activity on discovery of the problem. Further, the provider issued further warnings and guidelines to all its affiliate marketers regarding the seriousness of this type of misleading activity.

In relation to the I-Framed page, the Level 2 provider accepted that it was misleading, “wrong” and contrary to its own terms and conditions. The provider noted that on becoming aware of the page, it had immediately identified the affiliate and found that it had generated 28 “sales”. The provider immediately barred the affiliate marketer from its system and undertook to refund all consumers who entered the Service through the page.

3. The Tribunal considered the evidence and the Level 2 provider’s admissions and comments regarding its internal procedures in relation to affiliate marketers. The Tribunal found that the Facebook promotions were clearly misleading in the absence of any evidence that the “offers” existed. The Tribunal was particularly concerned by the use of I-Frame technology, which resulted in an intentionally misleading landing page. Accordingly, the Tribunal upheld a breach of rule 2.3.2 for the two reasons advanced by the Executive.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.2.5 - Pricing

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

- The Service had a clear and highly detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.

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

Rule 2.3.1 - Fair and equitable treatment

The initial assessment of rule 2.3.1 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service had a clear and highly detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.
- The nature of the breach and the scale of harm caused to consumers were likely to have severely damage consumer confidence in premium rate services.

Rule 2.3.2 - Misleading

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

- The Service had a clear and highly detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.
- The nature of the breach and the scale of harm caused to consumers were likely to have severely damage consumer confidence in premium rate services.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating factors; however, the Tribunal commented that the use of affiliate marketers gives rise to a particularly high risk of non-compliant activity. The Tribunal was concerned at the level of harm caused to consumers by this activity and reminds providers that, as stated in the Code and Guidance, they are responsible for the promotion of their premium rate numbers, including the actions of their affiliate marketers.

The Tribunal took into consideration the following three mitigating factors:

- The Level 2 provider stated that it had taken a number of reasonable steps to control the activities of its affiliate marketers.
- The Level 2 provider voluntarily suspended the Service when advised to do so by the Executive.
- The Level 2 provider engaged with PhonepayPlus and provided detailed and useful information in relation to its interaction with affiliate marketers.

The Tribunal noted that the Level 2 provider stated that it had made a number of refunds. However, the Tribunal noted that the level of refunds appeared to be low and consequently did not reduce the level of consumer harm sufficiently to be regarded as a mitigating factor.

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

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

Sanctions Imposed

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

- A formal reprimand;
- A direction to remedy the breaches;
- A fine of £300,000; and
- A requirement that the Level 2 provider must refund all complainants who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

Appendix A - Screenshots of examples of enticements offered by affiliate marketers on Facebook:



TESCO

Free £175 Gift Voucher From Tesco

HOW TO CLAIM YOUR FREE VOUCHER!

1) You must share this page: [Share](#)

2) Type "Thanks Tesco" below then click Add a comment.

After you post your comment you will be redirected automatically to claim your voucher

6 comments ▾ [Add a comment](#)



SEE WHO VIEWED YOUR PROFILE!!

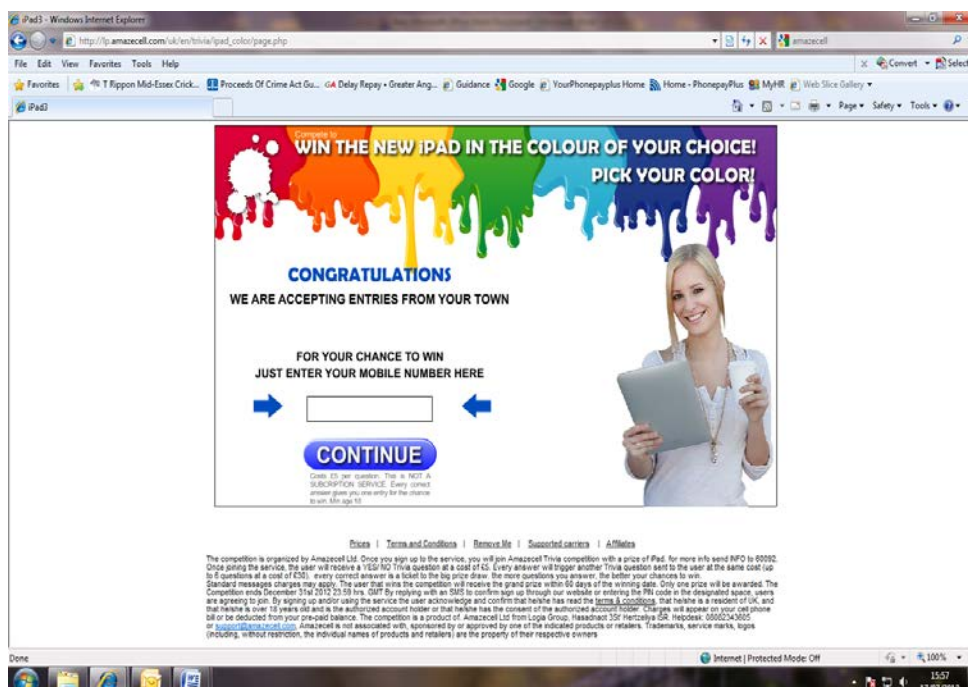
Findout Who views your profile

likes [ASTOUNDING!!] At 17 years, and she does it publicly in high school always! Outrageous? and [ASTOUNDING!!] At 17 years, and she does it publicly in high school always! Outrageous?

[ASTOUNDING!!] At 17 years, and she does it publicly in high school always! Outrageous?
ca. trisukses.sch.id
VIDEO FOOTAGE- why she did it EVERY day! PUBLICLY!!

Share · Tuesday at 7:40pm

Appendix B – Screenshot of one of the Level 2 provider's landing pages:



WIN THE NEW IPAD IN THE COLOUR OF YOUR CHOICE!
PICK YOUR COLOR!

CONGRATULATIONS
WE ARE ACCEPTING ENTRIES FROM YOUR TOWN

FOR YOUR CHANCE TO WIN
JUST ENTER YOUR MOBILE NUMBER HERE

CONTINUE

Case 13 per question. This is NOT A SUBSCRIPTION SERVICE. Every correct answer gives you one entry for the chance to win. Min. age 18

Terms and Conditions | Privacy Policy | Suggested questions | Affiliates

The competition is organized by AmazeCell Ltd. Once you sign up to the service, you will join AmazeCell Trivia competition with a prize of iPad. For more info send INFO to 09000. Once joining the service, the user will receive a YES/NO Trivia question at a cost of 45p. Every answer will trigger another Trivia question sent to the user at the same cost (up to 8 questions at a cost of £3.60). Every correct answer is a ticket to the top prize draw. The more questions you answer, the better your chance to win. Standard messages charges may apply. The user that wins the competition will receive the grand prize within 60 days of the winning date. Only one prize will be awarded. The Competition ends December 31st 2012 23:59:59. By signing up with an SMS to confirm sign up through our website or entering the PIN code in the designated space, users are agreeing to join. By signing up and/or using the service the user acknowledge and confirm that he/she has read the terms & conditions, that he/she is a resident of UK, and that he/she is over 18 years old and is the authorized account holder or that he/she has the consent of the authorized account holder. Cash prizes will appear on your telephone bill or be deducted from your pre-paid balance. The competition is a product of AmazeCell Ltd from Logia Group. Haaabhaat 35r Hertzajya 5R. Hebdosa. 0500243005. [http://www.amaze-cell.com](#). AmazeCell is not associated with, sponsored by or approved by one of the indicated products or retailers. Trademarks, service marks, logos (including, without restriction, the individual names of products and retailers) are the property of their respective owners.

Appendix C – Screenshot of pricing information on one of the Level 2 provider’s landing pages:

2:45
The 3 May

TO SEND YOUR ANSWER AND BE IN WITH A CHANCE
OF WINNING A BRAND NEW iPhone 4s or Galaxy 3

FILL IN YOUR DETAILS BELOW

First name

Mobile number

CONTINUE

galaxy 3

Costs £3 per question. This is NOT A SUBSCRIPTION SERVICE. Every correct answer gives you one entry for the chance to win. Min age 18