THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday 02 August 2012
TRIBUNAL SITTING No. 105 / CASE 2
CASE REFERENCE: 06716

Level 2 provider:	Mobegen Limited
Type of service:	Brain Buster (Quiz service)
Level 1 provider:	TxtNation Limited and Text2Pay
Network operator:	All mobile Network operators

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

BACKGROUND

Between 24 February 2012 and 30 April 2012, the Executive received 14 complaints regarding the free-to-download Brain Buster application (the "**App**") and quiz game alerts subscription service (the "**Service**"). The Service operated on shortcodes 68899, 80556, 84383, 84459, 80199 and 81686. The Service was charged at £4 per week. Additional quizzes cost £5 per quiz (although consumers were charged for two additional quizzes at any one time at a cost of £10).

The App and related Service were promoted via notifications, which stated, "Free Brain Buster App! Chance for $1000 for you!" On clicking on the notification, consumers were led to a landing page, which contained promotional material for the Service and offered consumers the opportunity to download the App (**Appendix A**). After installing the App, consumers were presented with a lengthy "license agreement" (the "**Agreement**"), which had buttons marked "Play Game" and "No Thanks" at the bottom (**Appendix B**). In order to play the game for free a consumer was required to select "No Thanks". If a consumer selected "Play Game", s/he would be entered into the paid for subscription Service.

In order to win a prize, consumers were required to correctly answer timed quiz questions. It was stated that the player who achieved the highest score, on either a daily or monthly basis depending on the competition, would win the prize on offer.

Complainants reported that they were not aware of entering into a subscription service and/or that they would incur charges by playing the quiz/zes.

Executive monitoring of the Service, including promotional material, highlighted a number of additional concerns relating to the clarity of the terms and conditions, the content of quiz questions (**Appendix B**) and the mechanics of winning and claiming a prize.

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 9 July 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading
- Rule 2.2.5- Pricing- proximity
- Rule 2.2.2- Transparency- clear written information
- Rule 2.3.1- Fair and equitable treatment.

The Level 2 provider responded on 24 July 2012. On 2 August 2012, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE
Rule 2.3.2

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

1. The Executive submitted that the App and related Service were misleading and that the Level 2 provider had breached rule 2.3.2 for the three reasons set out below.

Reason one: Use of the word 'free'

The Executive noted that the promotional material stated, "Free Brain Buster App! Chance for $1000 for you!" However, on installing the App, consumers were presented with the lengthy Agreement, which had buttons marked "Play Game" and "No Thanks" at the bottom (Appendix B). In order to play the game for free a consumer was required to select "No Thanks". If a consumer selected "Play Game", s/he would be entered into the paid-for subscription Service.

The Executive asserted that no indication was given to consumers at the time of downloading the App that premium charges could be incurred. Therefore consumers thought the App and opportunity to win a prize was free. The Executive noted that unclear pricing information was included in the dense Agreement, however the promotional material coupled with the design of the landing page misled consumers regarding the cost of the Service.

Reason two: "Open to all ages"

The Executive noted that the download page stated, "Brain Buster is a Cash Prize Quiz Contest. Its open to all ages and pays a cash prize to the daily highest score". However, the Agreement later stated, "this contest is open to residents of the UK who 18+ years or older. Void where prohibited". The Executive asserted that the condition was "buried" in the dense terms and conditions and unlikely to be viewed by consumers.

The Executive submitted that, given the two contradictory statements, it was not clear who was eligible to enter the competition and therefore consumers were likely to have been misled (especially given that at least one complainant was a minor).

Reason three: Misleading indication that the Service was open to UK residents only

The Executive noted that the Service stated that it was, "open to UK residents". However, in correspondence with the Executive on 24 May 2012, the Level 2

provider stated that the competition was global. Therefore the chance of a UK competitor winning a prize was reduced.

Consequently, the Executive asserted that the Service was misleading by omission on the grounds that consumers were deprived of important information that would have affected their decision to participate in the Service.

2. The Level 2 provider denied that it had misled consumers in relation to reason 1 and 3. The provider accepted it had misled consumers in relation to reason 2, although it stated that the breach was an oversight and not intentional.

Reason one: Use of the word 'free'

The Level 2 provider stated that the App was free-to-download, install and play once per day. It added that premium rate charges were optional. Further, it asserted that, "The APP can only be uploaded and hosted in free category sections of APP stores. A check of the Google Play and Handango App stores will confirm this. Industry standards apply a FREEMIUM category rating to this Application".

Reason three: Misleading indication that the Service was open to UK residents only

The Level 2 provider stated that it had not intentionally misled consumers and that it had not stated that the Service was open to UK residents "only". The provider commented that it, "[S]tated to consumers that the UK contest was open to UK residents which was true and correct".

3. The Tribunal considered the evidence and noted the Level 2 provider's submissions and admission. With regard to reason 1, the Tribunal found the use of the word "free" coupled with the design of promotional material and the App landing pages was misleading. Specifically, the Tribunal found the use of a button marked "No Thanks" to lead a consumer to the free quiz option was counterintuitive and designed to mislead. The Tribunal noted the Level 2 provider's admission in relation to reason 2, and found that consumers had been, or were likely to have been, misled regarding the age eligibility criteria. In relation to reason 3, the Tribunal found that the Service was misleading by omission for the reasons advanced by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO
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 commented that the first time consumers saw pricing information was in the lengthy and dense Agreement (**A sample of which is shown at Appendix B**). The Executive noted that, although some words were capitalised,

    i. There was one large block of text.
    ii. No specific paragraphs or words were highlighted.

iii. No words or sentences stood out against the grey background.
iv. Consumers had to scroll through nine pages of text to see the entirety of the terms and conditions.

The Executive submitted that pricing information for the Service was not prominent or clearly set out. Further, because of the length, and the colour and formatting of the text, consumers missed important pricing information that was likely to have influenced their decision to participate. The Executive therefore asserted that pricing information was neither proximate nor prominent in promotion material and consumers were not fully and clearly informed of cost before any purchase was made. As a result, the Executive asserted that rule 2.2.5 had been breached.

2. The Level 2 provider denied the breach and stated that, "Mobegen submitted a promotional storyboard to PhonepayPlus…on the 26th of January 2012 during an escalated complaint procedure. The Terms/pricing page has not varied greatly in layout since that submission. Only slight modifications were made over the course of the promotion to pricing and some wording. PPP did not state that there were any issues with the pricing prominence at that time. Mobegen took it to mean that the promotional layout was implicitly approved. If PPP had concerns we believe they should have been raised at that time instead of allowing the promotion to continue without further recommendations". The Level 2 provider added, "No scrolling was necessary to view pricing text relevant to the promotion. The scrollable text referred to by the executive was related to the general terms and conditions of the application and not the premium rate billing terms. Pricing was visible, written in plain English, of standard font size and proximate to the means of opting in and viewable without scrolling".

3. The Tribunal considered the evidence and noted the Level 2 provider's submissions. The Tribunal found that pricing information was neither prominent nor proximate to the call to action. Further, the Tribunal stated that it was not clear that by clicking "Play Game" a consumer would incur a charge. The Tribunal commented that pricing information should be set out prominently and separate from other terms and conditions. Accordingly, the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE
Rule 2.2.2

"All written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult….Spoken information must be easily audible and discernable".

1. The Executive noted the length and complexity of the Agreement (**A sample of which is shown at Appendix B**) and submitted that the convoluted nature of the text resulted in it being difficult to read and understand. Specifically, the Executive stated that the content of the terms and conditions was not set out in a clear manner and was potentially confusing to consumers.

   For example, firstly the terms stated, "Upgrade to Get every score entered into the WIN £1000 Monthly prize contest". Followed by a reference to a price point of £4 per week on 68899, to receive Quiz Games Alerts. Followed by a reference to, the "first daily quiz is free". Then, "Additional quizzes can be purchased and are charged at

premium rates". Finally, there was a reference to a second price point of, "Quiz game alerts are £5.00 per quiz on 68899".

The Executive submitted that the Agreement had to be read a number of times to understand the terms and the mechanics of the App and Service. Further, the structure of the information did not lead to a clear understanding of what services consumers were chargeable.

In addition, the Executive submitted that the use of the word "upgrade" suggested that by playing the quiz, consumers were only entered into the £100 daily prize contest, and that additional action was required in order to have their score entered into the £1000 monthly contest. The Executive noted that the Level 2 provider confirmed that this was not the case.

The Executive therefore submitted that, because of the lack of clarity, understanding the Agreement was difficult, and that consumers were not fully informed of costs and how the App and Service operated. As a result the Executive submitted that the Level 2 provider was in breach of rule 2.2.2.

2. The Level 2 provider denied the breach and stated that it did not agree that consumers missed important information due to the long terms and conditions. Further, it stated that, "All the information included in the terms are important. Leaving out important information due to the small screen would be more detrimental to the consumer as they would not be fully informed. Mobegen made no attempt to hide important information and believes that consumers also have a responsibility to read full terms and conditions". In relation to pricing, the Level 2 provider submitted that pricing was clearly displayed on the pop-up that appeared before a consumer participated in additional quizzes. Further, the Level 2 provider reiterated that it believed that PhonepayPlus should have raised any issues with the screens in January 2012 during the informal compliance procedure.

3. The Tribunal considered the evidence and the Level 2 provider's submissions and found, on the basis of the Executive's submissions, that there had been a breach of the Code. The Tribunal commented that it did not understand the section of the terms highlighted by the Executive. Accordingly, the Tribunal upheld a breach of rule 2.2.2 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR
Rule 2.3.1

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

1. The Executive submitted that the Level 2 provider had breached rule 2.3.1 for four reasons.

Reason one: Prize winning notification

In correspondence dated 24 May 2012, the Level 2 provider stated that there had been 39 UK prize winners between December 2011 and May 2012, none of whom had claimed their prize. The Level 2 provider stated that it had made repeated attempts to contact prize winners, including sending a "notification" to 39 winners. The Executive had however noted that only five of these winners received additional communications in the form of a text message and a voicemail. On 12 June 2012, the

Level 2 provider stated that it did not have a mobile telephone number in relation to the other 34 winners. The Level 2 provider stated in relation to one of these winners that he/she:

"…did not text in the short code and was a free contestant..ie. didn't purchase or subscribe to the upgrade and used the standard version of the app".

The Level 2 provider's only other explanation for failing to obtain the mobile telephone numbers of these 34 winners was:

"Also, it can be due to technical difficulties in reading the cell number directly from the device".

The "notification" sent to the 34 winners was an in-app alert.

The Level 2 provider later sent a copy of the "notification" log to the Executive. Significantly, it did not match the list of winners provided on 24 May 2012.

In addition the Executive noted that a bank statement provided by the Level 2 provider on 31 May 2012 showed that prize money was held in the provider's business account and not separated from day-to-day cash flow.

The Executive made the following submissions.

i. The failure of the Level 2 provider to award any prizes whatsoever to a UK resident winners indicated that efforts to notify winners was insufficient.

ii. It was not clear whether winners were required to open the App to receive the winning "notification". Therefore, if a user had not provided a contact phone number and did not open the App s/he would not have received notification of their win. Further, the Executive noted that the Agreement stated that winners would be notified by telephone or email and must respond within 24 hours to claim the prize. The Executive submitted that the requirement of responding within 24 hours was wholly inadequate, especially given that a consumer may not see the "notification" for a variety of reasons. The Executive further asserted that the provider purposefully prevented winners from being able to claim their prize.

iii. The Executive noted that the Level 2 provider stated that it did not have a contact telephone number for 34 of the winners due to either it not requesting that data or "technical" problems. The Executive submitted, that on the balance of probabilities, the majority of winners ought to have been subscribers to the subscription Service as they would have paid to have more chances to win. Therefore, a large percentage of the 34 winners were likely to be subscribers and on the Level 2 provider's case must have not been contactable due to "technical" problems. The Executive noted that the 34 consumers were winners over a six month time period, yet there appeared to have been no attempt made by the provider to rectify the "technical" problems. The Executive submitted that subscribers who won a prize should have been contactable as the Level 2 provider would have had the winner's MSISDN from when billing messages were sent and ought therefore to have been able to notify all winners who were subject to "technical" difficulties.

In light of the above, the Executive submitted that, on a balance of probabilities, consumers were not treated fairly, as there was not a robust system for advising people that they had won a prize. Further, the deficient notification system coupled with the short period to claim the prize resulted in winners not being able to obtain their prize.

Reason two: Claiming prizes

The Executive noted that the Agreement stated that after receiving a notification by mobile telephone or email, winners must respond within 24 hours, and must also complete, sign and return an, "affidavit of eligibility and liability and publicity release", within three days of prize notification. If these provisions were not complied with, prizes were forfeited. The Executive further submitted that the terms were buried in the Agreement and not easily visible to consumers.

The Executive stated that the above provisions were too onerous and therefore submitted that that consumers were not treated fairly and equitably.

Reason three: Additional chargeable messages

The Executive noted that one consumer had been charged twice for the Service on the same MSISDN. The Level 2 provider potentially attributed this to, "a user installing the application on two separate devices using the same SIM for both transactions".

The Executive noted that pursuant to the Agreement, an entrant was considered to be the, "authorized subscriber of the mobile phone account used to play". Further, the "authorized account subscriber" was defined as the natural person who was assigned the mobile phone by the network carrier or other organisation responsible for assigning numbers. This rationale suggests that the provider viewed a subscription as being attached to an individual MSISDN, rather than a handset.

The Executive submitted that consumers are not treated fairly and equitably where they are entered into a subscription service twice, and therefore charged twice, under the same MSISDN.

Reason four: Repeated quiz game alerts

The Executive noted that a number of consumers were sent the same chargeable quiz questions repeatedly. The Executive submitted that consumers were not treated fairly and equitably where they were charged for duplicate messages.

2. The Level 2 provider denied the breach.

In relation to reasons 1 and 2, it stated that the 24 hour notification period was not unreasonable as it believed that, "[P]articipants who had a high score would be interested to know whether they won at the end of the daily contest and would pro-actively check their phones for notifications. Also, studies have shown that most users use their phone on a daily basis". The provider commented that it had made repeated attempts to call UK winners, had records of the receipt of winning "notifications" and conducted ongoing testing of "notifications" and found no technical errors. Further, it stated that it had records of winners who had successfully claimed prizes in other jurisdictions but this was not requested by the Executive. In addition, the provider submitted that, "Not all versions of brainbuster were monetized via premium SMS. Free versions with push notification monetization were also promoted.

These users accounted for a large proportion of users globally and explain the many winners where no cell number is recorded. These users were able to play up to 10 games per day". With regard to the discrepancy in the information provided, the Level 2 provider stated that an ex-employee had provided the information and, "no further technical explanation can be sourced from this developer".

In regard to reason 3, the Level 2 provider stated that, "This user made two separate purchases on two separate handsets using the same SIM".

In relation to reason 4, the provider submitted that, "This technical issue was resolved when detected. We believe the impact was minimal as users were also receiving the additional quiz games and additional benefits of contest entry".

3. The Tribunal considered the evidence and the Level 2 provider's submissions and found that consumers had not been treated fairly and equitably for the four reasons advanced by the Executive. The Tribunal found, on the balance of probabilities, that there was no robust system for advising consumers that they had won a prize over a sustained time period and that it was unfair to allow consumers to participate when there was no reasonable chance of them being able to claim a prize. Further, the terms and conditions relating to how to claim a prize were onerous, buried in the lengthy Agreement and therefore unreasonable. In relation to reason 3, the Tribunal found that charging a consumer twice when using the same SIM was technically unfair, however it afforded little weight to this breach overall on the basis it was unlikely to have had a significant impact on users of the Service. In relation to reason 4, the Tribunal noted the admission made by the provider that there was a technical fault and concluded that sending multiple chargeable messages which had the same content was in breach of rule 2.3.1. Accordingly, the Tribunal upheld a breach of rule 2.3.1 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.2- Misleading

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

- The Service was designed with the intention to not provide consumers with adequate knowledge of the Service or the costs associated with it.

Rule 2.2.5- Pricing- proximity

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

- The Service was purposely or recklessly designed in such a way as to impair the consumer's ability to make a free and informed transactional decision.

Rule 2.2.2- Transparency- clear written information

The initial assessment of rule 2.2.2 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service was purposely or recklessly designed in such a way as to impair the consumer's ability to make a free and informed transactional decision.

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:

- On the balance of probabilities, the Tribunal found that it was very difficult to win and claim a prize. Therefore the Service had little or no value.
- The Level 2 provider deliberately promoted a game where consumers playing for "free" did not have a reasonable prospect of claiming a prize if they won, as by the provider's own admission those playing for "free" could not be contacted by telephone or email.

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

Final Overall Assessment

In determining the final overall assessment for the case, there were no aggravating factors.

The Tribunal took into account the following mitigating factors:

- The Level 2 provider stated that Mobegen ended all subscriptions after receiving the preliminary investigation letter.
- The Level 2 provider stated that it had paid some refunds.
- The Tribunal noted the Level 2 provider's assertion that it had taken action to improve compliance in the future.

The revenue in relation to the Service was within the range of Band 4 (£50,000- 100,000).

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

Sanctions Imposed

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

- A formal reprimand;
- A fine of £70,000
- A requirement for the Level 2 provider to submit all existing and future premium rate services and promotional material to PhonepayPlus for prior permission for a period of 12 months;
- 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- Screenshot of the App download page:

Appendix B- Sample of Screenshot of the “License Agreement”: