

PHONEPAYPLUS LIMITED

Executive

and

NETSIZE UK LIMITED

Respondent

ORAL HEARING DECISION

Tribunal members: **Michelle Peters (Chair)**
 Ruth Sawtell
 David Jessel

DECISION

Upon an application for an oral hearing by Netsize UK Ltd (“Netsize”) under paragraph 3.1 of Annex 2 of the PhonepayPlus Code of Practice (12th edition) (“the Code”):

1. Netsize breached paragraph 3.1.3 of the Code in that it failed to assess the potential risks posed by M.E.Media Market Limited (“M.E.Media”) and Amazecell Limited (“Amazecell”) in respect of the promotion, marketing and content of the premium rate services which they provided, and failed to take and maintain reasonable continuing steps to control those risks.

2. The sanctions determined by the Oral Hearing Tribunal (“the Tribunal”) are:
 - 2.1. a formal reprimand;
 - 2.2. a fine of £50,000.

3. Under paragraph 4.10.1 of the Code, the Tribunal recommends that Netsize be required to pay 100% of the relevant administrative charge.

REASONS

1. The oral hearing relating to this case took place on 4 September 2013. At the hearing the PhonepayPlus Executive (“the Executive”) was represented by Mr Selman Ansari of Bates, Wells & Braithwaite. Netsize was represented by Mr Tom Richards of counsel. Mr Chris Bennett of the Executive and Mr Peter Garside of Netsize gave oral evidence. The clerk to the Tribunal was Mr Alexander Macpherson of counsel.

Description of the services and their promotion

2. The hearing related to premium rate services provided by two Level 2 providers: M.E.Media and Amazecell. These services have each previously been subject to investigations by the Executive resulting in the imposition of sanctions. For each service, Netsize was the Level 1 provider.
3. In the case of Amazecell a fine of £300,000 was imposed by a code compliance panel on 27 September 2012. The service operated by Amazecell was found not to be compliant with the Code in the following respects:
 - 3.1. The service misled or was likely to mislead;
 - 3.2. Consumers of the service were not treated fairly and equitably;
 - 3.3. Pricing information was not sufficiently prominent, legible, visible and proximate to the means of access to the service.
4. In the case of M.E.Media, a fine of £375,000 was imposed following an oral hearing of 6 June 2013. The service operated by M.E.Media was found not to be compliant with the Code in the following respects:
 - 4.1. The service misled or was likely to mislead;
 - 4.2. Consumers of the service were not treated fairly and equitably;
 - 4.3. The service did not comply with the requirement that written information 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.

5. Both the M.E.Media and Amazecell services constituted trivia competitions with an unusual charging mechanism. Each quiz competition consisted of six trivia questions with 'true' or 'false' answers. Questions were sent by means of a 'Mobile Terminating' text message ("MT text message") to the mobile phone of the consumer. The MT text message was charged at £5 for each message received. When the consumer responded to the text message received by responding 'true' or 'false', the next question was automatically sent by MT text message. Thus even if consumers did not attempt to answer a question received they would still be charged £5 for receiving it. If all six questions were received then the consumer would be charged a total of £30.
6. As well as producing some promotional material themselves, both M.E.Media and Amazecell used affiliate marketers for the promotion of their respective services. The affiliate marketers were incentivised by being paid on a cost-per-action basis: each consumer using the services as a result of the affiliate marketers promotional material would result in a payment being made to that marketer.
7. It was common ground between all parties that the methods which some of the affiliate marketers used to promote the services were thoroughly misleading. In one example monitored by the Executive, a promotion promised to provide to consumers a facility which would enable them to see who had been viewing their Facebook profile. Upon clicking on the relevant link, the consumer was required to grant various permissions to the affiliate marketer in order to progress. These permissions allowed the affiliate marketer to access and utilise the consumer's Facebook profile and data, enabling the affiliate marketer to post status updates promoting the service or its promotional material in the guise of personal endorsements from the consumer.
8. On having given these permissions, the consumer would then arrive at a further landing page, also produced by the affiliate marketer, which stated "*Please complete one survey to unlock this page*". Various links then advertised the service, and if consumers clicked on such a link, they were then redirected to the Level 2 provider's website and a landing page relating to the competition service.
9. Thus the promise of being able to see who had viewed the consumer's Facebook page was used solely as a means of directing the consumer to a landing page promoting a wholly

unrelated service. The promised facility never eventuated. Further examples monitored by the Executive involved promises of free Tesco or Asda shopping vouchers. Again, these vouchers were never provided, and the promise of them appears to have been intended solely to lure consumers towards the relevant service.

10. Reference should be made to the published adjudications in the M.E.Media and Amazecell cases for a fuller account of the relevant services and their circumstances.

Evidence considered by the Tribunal

11. From the information and documentary evidence provided by the Executive and Netsize, the following facts can be established in relation to the services in question.
12. In relation to the Amazecell service:
 - 12.1. Amazecell was a new customer to Netsize when a customer application form was completed in relation to it in July 2011. On this form the risk category of Amazecell (based upon the nature and track record of the customer as well as the nature of the services) was recorded as 'Low'.
 - 12.2. A further section of the form raised the issue as to whether the promotional material to the service was compliant, and, if it was not, whether this had been referred back to the account manager for resolution. This section of the form had not been completed by Netsize.
 - 12.3. By email of 3 August 2011, Sofiane Chouane of Netsize stated to Amazecell: *"In all cases, before launching your service, [PhonepayPlus] asks us to submit the Promo material (landing pages, banners) and work flow for approval ... Let me know when you are able to provide these elements"*.
 - 12.4. In December 2011, Amazecell submitted some proposed landing-pages to PhonepayPlus for comment. Mark Szemelka of PhonepayPlus responded by email of 16 December 2011 to state that *"There are many problems with the services I am afraid to say"*. When Amazecell proposed various changes, Mr Szemelka stated that *"I think we'd need to actually see the website for this to be able to give compliance advice. Whilst the description you've given seems OK, it often comes down to the way in which the key information is delivered in practice (i.e. in the web promotions), rather than just relying on a service description such as the one you've provided"*. Although further emails

referred to an intention to submit revised landing-pages to PhonepayPlus, there was no evidence that this was ever done.

12.5. The Amazecell service went into operation on 8 February 2012, and ran until the service was suspended on 19 July 2012.

12.6. Over the period 4 May 2012 to 18 July 2012, the Executive received 96 complaints about the service. Complainants routinely indicated that initial promotions for different services on Facebook had misled them into entering the service.

12.7. Netsize operated a helpdesk service on behalf of Amazecell and received 'contact requests' (variously categorised as dispute, information, unsubscription and refund requests) as follows:

February 2012	167
March 2012	708
April 2012	923
May 2012	1148
June 2012	1419

12.8. On 17 February 2012 Bruno Rossiter of Netsize raised an internal compliance alert in relation to the Amazecell service. He stated that he was aware of a number of complaints from consumers who were not aware that they were being charged £5.00 per question. He noted that a supposed approval of the service from PhonepayPlus did not in fact amount to approval of the service, and stated that *'overall I am not confident this customer is aware of their obligations under the code and also ensuring customer safety ... there are indications that Amazecell might be a little loose with their interpretations of Advertising Codes'*. On 12 March 2012, Gareth Stevens of PhonepayPlus also brought a complaint about the service to the attention of Netsize. The internal compliance alert was subsequently closed on the basis that Amazecell were dealing with PhonepayPlus directly.

12.9. On 10 April 2012 Sofiane Chouane emailed Amazecell to ask it to *"take into account the big amount of complaints in the UK"*, and to warn as to the potential sanctions which PhonepayPlus may impose.

12.10. On 19 June 2012, Sofiane Chouane of Netsize contacted Amazecell to note that the level of complaints had *'exploded'* in parallel with increased revenue. It was strongly recommended that Amazecell supervise the promotional methods and marketing materials used. Amazecell responded to state that it was in touch with the Executive in relation to the complaints and in relation to an issue with Facebook advertising.

12.11. On 18 July 2012 PhonepayPlus contacted Netsize requesting that it suspend the Amazecell service.

13. In relation to the M.E.Media service:

13.1. M.E.Media was a new customer to Netsize when a customer application form was completed in relation to it in January 2012. On this form the risk category of M.E.Media (based upon the nature and track record of the customer as well as the nature of the services) was recorded as 'Low'.

13.2. A further section of the form raised the issue as to whether the promotional material to the service was compliant, and, if it was not, whether this had been referred back to the account manager for resolution. This section of the form had not been completed.

13.3. The service went into operation on 8 April 2012, and ran until it was suspended on 8 August 2012.

13.4. Netsize operated a helpdesk service on behalf of M.E.Media and received 'contact requests' (variously categorised as dispute, information, unsubscription and refund requests) as follows:

April 2012	8
May 2012	216
June 2012	700
July 2012	1544

13.5. On 20 June 2012 Netsize carried out a compliance and service test on the M.E.Media service due to the growing number of contact requests. Netsize noted that *'The sort of service do not offer a value added service to end-users so it is likely that it will generate a large amount of complaints ... I would recommend that this service should be on dedicated shortcodes not a shared shortcode in the event that other clients are affected by suspension of a shortcode'*.

13.6. On 18 July 2012, in response to the problems with the Amazecell service, Netsize emailed M.E.Media to note that *"since your service is currently generating a lot of traffic ... it "could be" that some of your affiliates, without you knowing it, are using similar marketing methods"*. M.E.Media were asked to check this and remove any such affiliates.

13.7. On 8 August 2012 PhonepayPlus contacted Netsize requesting that it suspend the M.E.Media service.

14. Mr Sanusi provided the principal witness statement relied upon by Netsize. For unexplained reasons, Mr Sanusi was away on annual leave at the time of the oral hearing, but the Tribunal took into account the evidence contained in his written witness statement.
15. Mr Sanusi is Netsize's Manager of Operator Partnerships for the UK, Ireland and Africa. He stated that Netsize was a leading global provider of mobile operator micro-payment and messaging services. It connects with more than 1,000 companies and operates in 200 countries.
16. Mr Sanusi claimed that both Amazecell and M.E.Media had deliberately concealed their fraudulent promotional techniques from Netsize. He contended that the landing-pages provided to Netsize by Amazecell and M.E.Media were not evidently false or misleading, and because Netsize was not an expert in the field of service promotion it had no basis for suspecting that the Level 2 providers were adopting promotional techniques other than those disclosed. Mr Sanusi stated that Netsize believed the customer 'flow' started with the landing-pages and that it had no reason to suspect that this was not the case. Mr Sanusi also argued that Netsize was entitled to rely on Amazecell's dealings with PhonepayPlus when considering M.E.Media's service, because the services were similar.
17. Mr Sansusi stated that Netsize operated an internal compliance alert system which was triggered when the rate of end-user complaints exceeded 5% of transaction volume. However, in the case of the Amazecell and M.E.Media services, complaints never exceeded 3%. At all times Netsize considered that the increase in the number of 'contact requests' received was proportionate to the increase in traffic.
18. Mr Sanusi stated that gross revenue for Netsize across both services was £97,887, of which net profit after internal operating costs amounted to £52,100.
19. Since these services were suspended, Mr Sanusi stated that Netsize had adopted a robust system for measuring the service risk and for monitoring the services on an ongoing basis. Documentation in relation to this new system shows that Netsize now adopt a structured risk assessment process, with extra scrutiny being applied to clients who (for example) are new to premium rate services in the UK, are not UK legal entities, use affiliate marketers, or generate high numbers of complaints. New clients must be considered as high risk for the first month

of any new live service to allow for data collection. Netsize also now apparently analyses peaks in traffic which have no rational explanations, as well as monitoring the level of specific complaints.

20. The Tribunal heard oral evidence from Mr Bennett on behalf of the Executive and Mr Garside (sales director for UK, Ireland and Germany) on behalf of Netsize. Mr Garside only started working for Netsize in October 2012, but he was able to confirm the steps taken since the relevant services were suspended.
21. Netsize accepted in the course of the hearing that:
 - 21.1. There was no evidence that Netsize had ever asked Amazecell or M.E.Media specifically how they were promoting their services or whether they were using affiliate marketers;
 - 21.2. There was no evidence that Netsize ever asked for or saw any banners or other promotional material distinct from the website itself: all that were submitted were landing-pages from the Level 2 provider's own website.

Submissions of the parties

22. The Executive contended that it was important for Netsize to ascertain both what the services provided were, and how consumers were to access them. It argued that the landing-pages provided to Netsize were clearly not compliant with the letter or spirit of the Code, and further questions should have been asked. But in any event, it was impossible for consumers to get to the landing-pages unless they were led to them, and Netsize should have investigated what those preliminary steps were and how the service was promoted. There was no evidence this was done, and Netsize's own internal checklist was not completed.
23. The Executive also criticised Netsize for not responding to the level of complaints received earlier. It was hard to see why consumers would bother to make contact with Netsize other than for a negative reason, whether the contacts were formally classified as complaints by Netsize or not. Risk control is not merely an initial check, but should be an ongoing and responsive process of assessment.
24. The Executive contended that the level of culpability was extremely high, and characterised it as reckless.

25. Netsize contended that it was being unfairly judged with the benefit of hindsight. Risk assessments of the Level 2 providers were carried out and Netsize did take reasonable steps to control the risks. It was argued that the Tribunal should be careful not to introduce a strict vicarious liability for the actions of Level 2 providers by the back door. Netsize was a careful and responsible Level 1 provider.
26. Netsize contended that it had asked in good faith for the Level 2 providers to provide their promotional material, and the landing-pages were all that were received. The Level 2 providers never stated that they were using affiliate marketers, and Netsize did not know that this was the case. It couldn't be said that Netsize ought to have spotted the problems with the landing-pages as these weren't obvious and it appeared that PhonepayPlus had itself failed to spot them when asked to comment. The complaints received did not trigger Netsize's 5% threshold, but nevertheless the increase in complaints had been noted and appropriate action was taken in the light of the same.

Tribunal's decision as to breaches

27. The Tribunal finds that Netsize was in breach of paragraph 3.1.3 of the Code.
28. Netsize was correct to point out that it was not the entity directly responsible for providing the relevant services, and that its duties under the relevant provision of the Code were limited to those of risk assessment and control. The steps which a Level 1 provider could reasonably be expected to take in relation to a service provided by others will depend upon all the circumstances of the service and the Level 2 provider in question, and it is not possible to be prescriptive about this. However, on the facts of this case the Tribunal finds that Netsize could and should have done more to assess and control the risk of consumer harm.
29. The General Guidance Note produced by the Executive states that the steps to be taken should be proportionate to how much control the contracting party has over the operation, promotion and content of the services in question. Consideration should be given to the length of time a provider had been active in the UK premium rate services market. Specific reference is made to the advance review of draft promotional material and/or service content.

30. Both Amazecell and M.E.Media were new customers for Netsize with no proven track record of providing services in the UK regulatory environment. They were proposing to operate an expensive competition service which Netsize itself subsequently recognised ran the risk of attracting a high level of complaints. In the circumstances, the Tribunal considers it would be reasonable to expect Netsize to carry out more detailed investigation than would be required in relation to an established Level 2 provider with whom Netsize was familiar.
31. First of all, the Tribunal concludes that Netsize failed prior to the launch of the services to take reasonable steps to assess and control the risks in respect of the promotion of the same. In order to control these risks, Netsize needed to ascertain how the services were to be promoted and by whom, and then take reasonable steps to satisfy itself that such promotion was likely to be Code compliant.
32. There is no evidence that Netsize specifically asked either Amazecell or M.E.Media to explain how the service was to be promoted. Certainly it does not appear to have asked whether affiliate marketers were to be used. The Tribunal cannot accept the submission that it can be assumed that the Level 2 providers would have lied about the use of affiliate marketers if directly asked about this. In any event, the question should have been asked and the Level 2 provider's account as to its proposed promotional methods obtained.
33. The Tribunal finds that a company with the sophistication and knowhow of Netsize should have realised that the landing-pages received could not have been the sum total of the promotional material used. Consumers must have been led to the Amazecell and M.E.Media websites somehow in order for the services to be accessed. Even had Netsize wrongly assumed that promotional material would only emanate from the Level 2 providers, it in any event did not ensure that it obtained all the promotional material (such as banners) which they produced.
34. Netsize did take some steps to assess new customers, and it did have some processes in place. However, Netsize failed to complete its own internal documentation relating to consumer protection, and there was no evidence of a rigorous, coherent and structured assessment of the risks posed by the services and by the material used to promote them.

35. Secondly, the Tribunal considers that Netsize failed to take reasonable steps to satisfy itself that such material as it was provided with was Code compliant. Evidence has been provided that Netsize was aware that Amazecell was seeking approval of its landing-pages from PhonepayPlus, but there is no evidence that express approval of the landing-pages was ever received by Amazecell or by Netsize. These landing-pages were subsequently found to be in breach of the Code. Netsize deserves some credit for indicating that it expected Amazecell to obtain compliance advice before the service began, but this process was not followed through to a satisfactory conclusion. For M.E.Media, it does not appear that any pre-approval process was followed. The Tribunal does not accept that Netsize was entitled to assume that the M.E.Media service would be compliant because it was similar to that operated by Amazecell.
36. Thirdly, the Tribunal considers that Netsize should have acted with more vigour in response to the complaints and contact requests received from consumers. These rose sharply for each service at certain times. Netsize contends that it acted reasonably because the level of complaints never amounted to 5% of all consumers who used the service, which was the level at which Netsize's internal compliance mechanism would have been triggered. However, the Tribunal notes that contact by unsatisfied consumers may not have been formally classed as 'complaints' under the categorisation system deployed by Netsize. In any event, the Tribunal considers, based on its experience, that the 5% threshold referred to before intervention was considered justified was high: complaints may reasonably require action before as many as 1 in 20 of a service's users formally complain. Whether the contacts made by consumers were formally categorised as complaints or not, their level was such as should have raised significant concern with Netsize (which was operating a customer care service on behalf of its Level 2 providers) and should have led to effective action on its part.
37. To its credit, Netsize does appear to have been aware of the rises in the level of complaints and to have taken some action to contact the Level 2 providers. But even in light of these complaints, Netsize still apparently failed to ascertain the promotional methods being used by its Level 2 providers and in particular failed to ask whether affiliate marketers were being used and suitably controlled. If the initial risk assessment had not triggered this line of enquiry, then the further high level of complaints should have done so. Netsize also did not contact PhonepayPlus to inform it of the spikes in traffic and/or complaints, as referred to in paragraph 6.2 of the General Guidance Note.

38. In summary, while Netsize took some steps to assess and control the risks posed by the relevant services, it failed to reach a reasonable standard commensurate with its position in the value chain and its relationship with the relevant Level 2 providers.

Tribunal's decision as to sanctions

39. The Tribunal's initial assessment is that the breach of the Code should be categorised as serious. Although gross revenue for Netsize was only in the region of £100,000, the services in question had a severe detrimental impact on consumers, with gross revenues for each of the Level 2 providers being in excess of £500,000.
40. Further, the nature of the underlying breaches of the Code was such as was likely severely to damage confidence in premium rate services. Consumers were deliberately misled as to the services which they were accessing in order that high revenues could be generated. Had Netsize taken reasonable steps to assess and control the risks posed by the relevant services then this harm could have been avoided or reduced.
41. Netsize also failed to follow the guidance published by PhonepayPlus, which specifically pointed up the importance of assessing new customers more rigorously. Furthermore, Netsize should have been aware of the adjudications relating to affiliate marketing which had been published prior to the operation of the relevant services. Indeed, Netsize itself was the Level 1 provider for one of these adjudications in which sanctions were imposed on a Level 2 provider.
42. Nevertheless, it is recognised that Netsize did take some steps to try to assess and control the services of its Level 2 providers. Although it did not adequately meet its responsibilities and failed to take sufficient care, this is not a case of a Level 1 provider which deliberately or recklessly failed to carry out any assessment or risk control at all. The Tribunal do not find that Netsize was a Level 1 provider with a culture of ignoring Code compliance. It is clear that some of Netsize's employees were at different times alive to some of the problems which the relevant services raised. There was no coherent and rigorous system by means of which such concerns could be translated into methodical risk control, but the fact that Netsize did take some steps to assess and control risks amounts to some mitigation.
43. Netsize suspended the services voluntarily on request, and has cooperated adequately with the Executive's investigation. It further appears that an improved risk assessment and control

system has been instigated since the services in question were suspended. This amounts to some mitigation.

44. In all the circumstances, the Tribunal considers that the appropriate sanctions to be imposed are a formal reprimand and a fine of £50,000.
45. The Tribunal also recommends that Netsize should pay 100% of the administrative charge under section 4.10 of the Code.
46. The Tribunal would like to add that it was neither assisted nor impressed by the failure to attend the oral hearing of Mr Sanusi, Netsize's principal witness. Netsize was unable to offer any explanation for his absence on annual leave on the date of a hearing which had been communicated to Netsize in good time, and was unable to offer any assurance that Mr Sanusi would attend at any future date either. The Tribunal was concerned that the regulatory process may not have been given the priority which it deserved, for such an unfortunate error (at best) to have occurred.

Michelle Peters

(Chair of the Oral Hearing Tribunal)

Dated this 24th day of October 2013