Tribunal meeting number 143 / Case 1

Case reference: **16168**
Level 2 provider: **Nobinet Ltd**
Type of Service: **Competition**
Level 1 provider: **TxtNation 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 7 January 2013 and 10 July 2013, PhonepayPlus received 8 complaints from consumers in relation to a subscription games and competition service, which operated under the brand names "Playneto" and "Gameztour" (the "**Service**"). The Service was operated by the Level 2 provider Nobinet Ltd on the premium rate shortcode 60999. Consumers were charged £4.50 per week for the Playneto Service and £3.00 per week for the Gameztour Service. The Level 1 provider was TxtNation Limited. The Playneto Service began operation in November 2012. The Gameztour Service commenced operation in approximately May 2012. The Service was voluntarily suspended by the Level 1 provider in February 2013.

The Service was promoted online using affiliate marketing. Consumers subscribed to the Service, using mobile originating ("**MO**") opt-in and were given the opportunity to play a "Pac Man" style game in order to be entered into a competition to win prizes, such as an iPhone or iPad.

The majority of complainants stated that the text messages they received were unsolicited and that they had not engaged with the Service but had been charged. Two complaints were made by parents on behalf of a 13 and 17 year old respectively.

The investigation

The Executive conducted this matter as a Track 2 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 23 December 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.5 – Pricing prominence and proximity
- Rule 2.2.2 – Written information material to the decision to purchase

The Level 2 provider responded on 22 January 2013. On 6 February 2014, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
Rule 2.3.2
"Premium rate services must not mislead or be likely to mislead in any way."

1. The Executive submitted that the Service was in breach of rule 2.3.2 of the Code because consumers were (or were likely to have been) misled as a result of the following:

   i. Fictitious incentives contained in the affiliate marketing promotions for the Service.
   ii. A countdown clock on the Service webpages, which created a false sense of urgency.
   iii. The Service webpages stated that consumers could play the Pac Man game an unlimited amount of times (when the number of games was limited to 40).

   The Executive relied on the content of PhonepayPlus Guidance on "Promotions and promotional material" (the "**Guidance**"). The Guidance states:

   Paragraph 3.2
   "PhonepayPlus expects that all promotions must be prepared with a due sense of responsibility to consumers, and promotions should not make any factual claims that cannot be supported with evidence, if later requested by PhonepayPlus to do so."

   Paragraph 3.11
   "No promotion, with particular emphasis on SMS- or MMS-based promotion, should imply that the consumer will be making a one-off purchase, when they will, in fact, be entered into a subscription, or mislead the consumer as to the service they are being invited to purchase."

   Paragraph 3.12
   "An example of this would be a service that advertised itself as an 'IQ test' or 'love match', where the consumer was then invited to text or click to obtain more in-depth results, only to find that these results carry a further charge, or enter the consumer into an unwanted subscription."

   Monitoring

   Monitoring of the Service was conducted by the PhonepayPlus Research and Market Intelligence team (the "**RMIT**") on 9 October 2012, 8 January 2013 and 28 January 2013.

   0n 9 October 2012, the RMIT became aware of a potentially misleading promotion on the social networking website "Tumblr". An application called, "See Who's Stalking your Profile, My Top Profile Stalkers," appeared to offer users the opportunity to discover who had been viewing their profile pages (**Appendix A**).

   The RMIT clicked on a button marked "Find Your Stalkers" and was directed to a webpage which contained a box asking the RMIT to, "Grant the application read and write access to your Tumblr account?" The RMIT selected "Allow" and was directed to a webpage that contained a pop-up (**Appendix B**). Behind the pop-up was a greyed out webpage which contained a list entitled, "Your Top Followers Have Been Found!" The content of the list could not be viewed as it was obscured by a pop-up. The pop-up invited the RMIT to complete a "free 30 second survey" and displayed four opportunities to win a prize. At the bottom of the pop-up it stated, "Once completed your Stalkers will be revealed."

   Subsequently, the RMIT clicked on a second "survey", "Win An iPad Playing Pac Man!" and was taken to the Gameztour Service landing page which offered the RMIT the opportunity to play a game called "Pac Man" and select a potential prize from a list (**Appendix C**).The RMIT selected the laptop prize and was directed to a Gameztour Service webpage, which required the RMIT to fill in an email address and mobile number. After entering the

requested information, the RMIT received a text message containing the word "Now". At the same time on screen, the RMIT was directed to a further webpage which requested that the RMIT send the keyword "Boom" to the shortcode 60999 (**Appendix D**). The RMIT followed the instructions and subscribed to the Service.

The RMIT tested the "Pac Man" game and verified that it was genuine. The RMIT returned to the Tumblr website to access, "My Top Profile Stalkers," and was presented with a redacted list of "Top Followers". The RMIT clicked on "Unlock Names", at the bottom of the webpage, but it appeared to be inactive.

The RMIT had set up the Tumblr account that was used to monitor the Service a few minutes prior to commencing the monitoring session. Accordingly, the statements made in the "Top Followers" list, such as, "_____ has interacted your Tumblr **177** times this month!" were not possible.

On 8 January 2013, the RMIT conducted monitoring of a similar offer to access data regarding who had viewed social media pages that appeared to be operating on the social networking websites Twitter and Facebook. The RMIT selected one of the links entitled "my total profile views" and was taken to Facebook. The RMIT clicked on an icon marked, "Go To App", and was directed to a webpage which contained a "Request for Permission" pop-up. The RMIT selected "Allow" and it was taken to a webpage which contained a pop-up inviting the RMIT to complete an offer to continue. The RMIT noted the wording in the pop-up stated:

> "Please fill out one of the following surveys. You will not be allowed to continue until you have completed a survey."

In a similar manner to the monitoring conducted on 9 October 2012, the pop-up obscured a greyed out webpage which appeared to contain a list of names of individuals that had viewed the RMIT's Facebook profile. The RMIT selected the only "survey", which was "Win a new Ipad" and selected "Continue". The RMIT was directed to the Playneto Service landing page which contained the wording, "This new iPad can be yours" (**Appendix E**). The webpage contained fields for the RMIT to enter its email address and mobile number. The RMIT did not subscribe to the Service but returned to its Facebook profile page and found that the application had posted a message on its wall, which stated:

> "WoW!! I Cannot imagine that you can now see who is been [sic] stalking at your profile for real! You can easily check who is spying on you at-> http:apps.facebook.com/fbddjnl/"

The Executive noted that the message promoted the application on the RMIT's Facebook profile page, despite the fact the application had not provided the identities of the individuals who may have viewed the Facebook profile and had only led the RMIT to the Service landing page.

On 28 January 2013, the RMIT revisited the Playneto Service landing page and followed the online instructions to arrive at a webpage that contained the means of access to the Service (**Appendix F and G**).

Reason one: Fictitious incentives contained in the affiliate marketing promotions for the Service.

The Executive submitted that consumers were likely to have been misled into subscribing to the Service, as a result of false enticements to obtain applications that were allegedly capable of informing consumers of the identity of individuals viewing their Tumblr and Facebook profile pages. In addition, consumers were likely to have been misled into subscribing to the Service at a cost of either £3.00 or £4.50 per week as a result of being led to believe that the process of subscribing was merely a "survey".

Reason two: A countdown clock on the Service webpages, which created a false sense of urgency.

The Executive noted that during the monitoring conducted on 9 October 2012, a webpage, containing the mean of access to the Gameztour Service, displayed a 60 second countdown clock (**Appendix D**). The Executive asserted that, as the Service was a games competition charging £3.00 per week, the duration of the quiz would extend beyond 60 seconds.

Monitoring conducted on 28 January 2013 of the Playneto Service, revealed that the webpage containing the means of access also contained a 60 second countdown clock (**Appendix G**). The Executive noted that the terms and conditions stated that the competition end date was three days away.

Accordingly, the Executive asserted that the countdown clock had no purpose other than to create a false sense of urgency, which was likely to mislead consumers into thinking that there was a time pressure to subscribe to the Service.

Reason three: The Service webpages stated that consumers could play the Pac Man game an unlimited amount of times (when the number of games was limited to 40).

The Executive noted that a webpage for the Gameztour Service that invited the RMIT to provide its email address and mobile number also stated "Play Unlimited" (**Appendix C**). The Executive asserted that the phrase "Play Unlimited" was not an accurate reflection of the way the Service operated. During correspondence, the Level 2 provider stated, "Following subscription confirmation the subscriber can play 40 games per week". The Executive submitted that the use of the phrase "Play Unlimited" would give the impression to a consumer that there was no cap on the number of games that could be played each week. Accordingly, the Executive submitted that the use of the phrase "Play Unlimited" would mislead consumers about the number of times they could play the game.

As a result of the three reasons detailed above, the Executive submitted that the method and content of the promotions for the Service were likely to have misled consumers and, accordingly the Level 2 provider was breach of rule 2.3.2 of the Code.

2. The Level 2 provider generally denied that a breach of the Code had occurred and/or that it was responsible for a breach of rule 2.3.2 of the Code.

The Level 2 provider stated that the Tumblr and Facebook applications did not belong to it and it had not developed or operated the applications. Therefore, it asserted that it was unreasonable for the Executive to claim that it was responsible for the fictitious incentives offered on Tumblr and Facebook. The Level 2 provider asserted that it should only be held responsible for the Service's functions. In addition, it stated that it did not have access to the results produced by the applications therefore it was unable to test and determine whether the applications produced the results stated by the Executive. The Level 2 provider surmised that there may be other explanations for the results produced by the Executive's

monitoring such as a, "bug, technical error, communication problem and/or other technical reason that might cause to provide these apparently wrong and/or fictitious results." The Level 2 provider submitted that even if the applications were fictitious, it was a matter that was outside of its control.

During correspondence, the Level 2 provider confirmed that it used affiliate marketing to promote the Service. It stated that the affiliate marketers were required to comply with its "Marketing Guidelines and Instructions", which it provided a copy of to the Tribunal.

The Level 2 provider stated that it had done its best and used all reasonable efforts to control its affiliate marketers. Nonetheless, it stated that it was not always possible to prevent every action caused by the affiliate marketers. It believed that PhonepayPlus had acknowledged the difficulties with controlling affiliate marketers.

Specifically in relation to reason one advanced by the Executive concerning the Tumblr application, the Level 2 provider highlighted the Executive's submission that it had tested the Pac Man game and verified that it was genuine. The Level 2 provider stated that this was evidence that the Pac Man game and the competition to win an iPad were not misleading. The Level 2 provider stated that the only possibly misleading element was the application.

The Level 2 provider disputed that consumers were or were likely to have been misled into subscribing to the Service, as a result of being told that they were only completing a "survey". It stated that the RMIT had selected the link "Win an iPad Playing Pac Man!" and seen the Service webpages, where it was clear that the Service was a Pac Man game Service and not a "survey". It stated that the word "survey" was used in a general sense to explain that a consumer had different options that they could select.

The Level 2 provider stated that it appeared that the RMIT knew about the Tumblr application before it conducted a search online. It urged the Executive to disclose whether it had approached the social networking websites to request that the misleading and fictitious software be removed. It added that this would send a strong message to companies that chose to engage in this type of misleading activity.

Specifically in relation to the Facebook application, the Level 2 provider stated that a consumer would have had to select "Allow" before proceeding to the Service landing page. Therefore it was clear that the application had been given permission to access the RMIT's information and to post messages on the RMIT's Facebook page. The Level 2 provider stated that it was misleading of the Executive to suggest that the application was the Level 2 provider's responsibility, when the RMIT did not subscribe to the Playneto Service. Further, it asserted that this should "nullify" any alleged breach of the Code.

The Level 2 provider asserted that the wording used by the Executive, "The application was therefore promoting the misleading application by posting messages on social networks." indicated that the Executive appeared to accept that the misleading elements occurred as a result of the application. The Level 2 provider asserted that despite this indication throughout the breach letter the Executive had mistakenly complained about issues that related to the application. It reiterated that as the application did not belong to it, it could not be, "morally or legally responsible for these applications functionality and results".

The Level 2 provider stated that it was surprised to find out that the Executive had known about the Tumblr application on 9 October 2012, which was quite some time before the

commencement of the investigation at the end of January 2013. Further, any potential consumer harm would have been worsened by the unreasonable and unnecessary delay caused by the Executive. It alleged that the Executive had aggravated this matter.

In summary, the Level 2 provider stated that the Service operated prior to PhonepayPlus publishing any guidelines about affiliate marketing and accordingly it requested that the Tribunal disregard them in determining the outcome of the adjudication. The Level 2 provider asserted that it had formed the impression that the Executive was attempting to find justification for imposing responsibility on it for issues that were solely related to the application.

In relation to reason two outlined by the Executive, the Level 2 provider stated that it did not accept that the countdown clock on the Service landing pages was likely to have misled consumers.

The Level 2 provider submitted that the Executive had given an incorrect and unreasonable interpretation in order to substantiate a breach of rule 2.3.2 of the Code. It highlighted that below the means of access was the word "Waiting" and two rows below that was the countdown clock. The Level 2 provider stated:

> "The attempt to claim that average normal users will think from this clock that game longevity is only 60 seconds or that the competition deadline is also 60 seconds is unreasonable, if not to say ridiculous."

Further, the Level 2 provider stated that as far as it was aware the Code does not prohibit the use of a clock and therefore it did not believe that this was wrong, but had that been the case it would not have used it. Upon being made aware of the problem, it stated that it had removed the clock from its webpages as soon as possible.

Finally in relation to the use of the wording "Play Unlimited", the Level 2 provider stated that it did not accept that this was misleading. It had used the term generally and stated that the term means that a consumer could play for an unlimited period of time rather than an unlimited number of games. In any event, it stated that it was not unreasonable to state that a consumer can play "unlimited games" as 40 games every week would not make a significant difference. The Level 2 provider highlighted that from what it could see there were no complaints about this issue.

In conclusion, the Level 2 provider stated that it had not intentionally misled consumers by using the term "Play Unlimited" and that it had not occurred to it that a consumer may have been given the wrong interpretation.

3. The Tribunal considered all the evidence and submissions before it. The Tribunal noted that the Code and previous Tribunal adjudications had made it clear that Level 2 providers are responsible for the services that they operate and this includes how the services are promoted. The Tribunal did not accept the Level 2 provider's submission that the application promotions were outside of its control and that it was therefore not responsible for any non-compliance. Accordingly, the Tribunal found that the Level 2 provider was responsible for the affiliate marketing promotions for the Service. The Tribunal noted that the Level 2 provider had stated that it had imposed marketing guidelines and restrictions on its affiliate marketers, yet the Tribunal observed that the affiliate marketing contracts did not contain all the restrictions described.

The Tribunal considered the monitoring evidence and concluded that the enticements to see who had viewed profiles on the Tumblr and Facebook websites were false. The Tribunal noted that the promised feature had not materialised on Tumblr. The Tribunal also noted that the RMIT's profile on Tumblr had only been activated that day and would not have had 177 interactions (as viewed by the RMIT) with other users in the previous month. Although the RMIT had not subscribed to the Service via the Facebook promotion, there was no evidence to suggest that this functionality was possible on Facebook and the Tribunal concluded – on the balance of probabilities – that the promised enticement did not exist. The Tribunal concluded that consumers had been or were likely to have been misled into engaging with the Service as a result of the false enticements contained in some of the affiliate marketing promotions. The Tribunal found that the countdown clock contained on some of the Service webpages, when considered in the context of the affiliate marketing as a whole, served no purpose and created a false sense of urgency, which was likely to mislead consumers in to interacting with the Service. In addition, it found that as the phrase "Play Unlimited" was factually inaccurate and therefore may have misled consumers about the nature of the Service. Consequently, and for the three reasons outlined by the Executive, the Tribunal concluded that consumers were or were likely to have been misled into entering the Service. The Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
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 Level 2 provider had breached rule 2.2.5 of the Code as the cost of subscribing to the Service was not prominent, clearly legible or proximate to the means of access to the Service during the promotions for the Service.

   The Executive relied on the Guidance which states:

   Paragraph 2.1
   "Pricing information is one of the fundamental pieces of information that promotional material for PRS must display. This is to ensure that consumers are fully and clearly informed of how much the premium rate service is likely to cost them, before they commit to purchase. The principle rule around transparency of pricing in the PhonepayPlus Code of Practice is Rule 2.2.5, which states the following:

   Paragraph 2.2
   "As a starting point, pricing information will need to be easy to locate within a promotion(i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion)."

   Paragraph 2.8
   "Pricing information where consumers are unlikely to see it, or where it is hard to find, is unlikely to be judged as 'prominent', or 'proximate', by a PhonepayPlus Code Compliance Panel Tribunal ('PhonepayPlus Tribunal')."

   Paragraph 2.9

"'Proximate' is a new term within this edition of the PhonepayPlus Code of Practice, and can be defined as being next to, or very near, the means of consumer access to a service. The most common example of information not being proximate is providing pricing information which is too far from the call to action (i.e. the telephone number, shortcode or other access code or means of payment for the service) within the promotion.

Paragraph 2.15
"There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity."

During the monitoring sessions of the Gameztour Service on 9 October 2012 and the Playneto Service on 28 January 2013 (outlined above in the Executive's case in relation to the breach of rule 2.3.2 of the Code) the RMIT obtained screenshots containing the means of access to the Service (**Appendix D and G**).

The Executive submitted that the cost of the Service was not prominent, clearly legible, visible and proximate to the means of access to the Service for the following reasons:

(i) The font size of the pricing information was significantly smaller than the means of access to the Service, which was presented in a bright red colour in the centre of the screen.

(ii) The colour of the pricing information text was grey on a black background compared to the large and red font used to display the means of access to the Service.

(iii) The pricing information was not proximate to the means of access to the Service.

The Executive asserted that the pricing information for the Service was insufficiently prominent and proximate to the means of access on the Service webpages. Accordingly, the Executive submitted that the Level 2 provider has acted in breach of rule 2.2.5 of the Code.

2. The Level 2 provider denied the breach and submitted that it believed that the presentation of the pricing information compiled with the Code.

The Level 2 provider stated that it had serious concerns about the way the Executive had presented the screenshots of the Service webpages, as they were extremely small and did not accurately reflect consumers' view. Further, it felt that the Executive had not acted fairly due to its failure to show the Tribunal screenshots in their true size. It commented that this needed to be done to allow the Tribunal to assess the size, colour, prominence, clarity and proximity of the pricing information.

The Level 2 provider stated that the Code does not explicitly define what size, colour and boldness the pricing information should be, therefore, it believed it had followed the Code and presented the pricing information in a clear and legible manner, which could be read by a reader with average eyesight. It felt that any comparisons between the call to action and the pricing information were unfair and if one was larger or in a different colour than the other it would not necessarily mean that the pricing information was not clear or legible. Further, it stated that it did not make sense for the call to action to be in the same font size and boldness as the pricing and Service information because it would look "ridiculous". It

had not seen this on any other webpages for similar services in the market. In relation to the colour of the text, the Level 2 provider submitted that the Code does not explicitly state which combinations of colour are prohibited. In relation to the position of the pricing information the Level 2 provider asserted that it was not necessary to scroll down the page to view the pricing information and it was not hard to find.

The Level 2 provider referred to screenshots (**Appendix F and G)** and stated that these demonstrated that the Executive's claim in relation to the proximity of the pricing information was unfounded. As it asserted that the cost of the Service was extremely close to the call to action. The Level 2 provider repeated its assertion that it believed the Executive was attempting to find a justification for a breach.

3. The Tribunal considered the evidence and submissions before it. The Tribunal viewed the screenshots of the Service webpages on a laptop computer, which were expanded to fill the screen. The Tribunal found that the pricing information was not prominent and clearly legible due to the size and colour of the text on both of the Service webpages containing the means of access to the Service. In relation to the Gameztour Service webpage, the Tribunal also found that the pricing information was not proximate to the means of access to the Service. The Tribunal commented that the colour combination of grey text on a black background was particularly unclear. Accordingly, the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH 3
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 submitted that the Level 2 provider had breached rule 2.2.2 of the Code as consumers were not fully and clearly informed of all the key terms of the Service before they subscribed, as they were located below the fold on some of the Service webpages and were not clearly legible.

The Executive relied on the content of the Guidance which states:

Paragraph 5.6
"Once on a webpage that promotes a PRS, consumers should not have to scroll down (or up) to view the key terms and conditions (especially, but not limited to, the price – see section 2 of this Guidance), or click on a link to another webpage. The PhonepayPlus Tribunal is likely to take the view that scrolling up or down to read key terms and conditions, or requiring the consumer to click on a link to view them, is in breach of Rule 2.2.5 of the PhonepayPlus Code of Practice."

Paragraph 5.7
"Level 2 providers should ensure that consumers do not have to scroll, regardless of screen resolution, to view the key terms and conditions of a service, or click on a link to view key terms and conditions. Key terms and conditions should be placed prominently on all website pages of the service that a consumer has to click through".

The Executive noted that, in respect of the Playneto Service, key terms were displayed below the fold (**Appendix F and G**). The following terms were presented above a button marked "Continue" button (**Appendix F**):

"This subscription service costs £3/week+standard network rates. To cancel you can send the word STOP to 60999 at any time. Support: support@gameztour.com or call: +44(0) 8708200069. Provided by Nobinet Ltd."

The Executive also noted that, following a large gap, the following terms were located below the fold of the webpage:

"This is an entertainment skilled games competitions service with fantastic prizes. This subscription services costs £3/week+standard network rates. You can cancel the service by sending STOP to 60999 or email with the mobile number to support@gameztour.com. Cancellation request without the mobile number will not be valid. By subscribing you acknowledge that you agree to the terms & conditions, you are a resident of the UK, you are 18 years or older and an authorised account holder and/or that you have the consent of the account holder, and you agree to receive marketing messages. Charges will be applied until you cancel the service. Void where prohibited. Provided by Nobinet Ltd, Strovolos Center, office 201, Nicosia, Cyprus".

The Executive noted that both paragraphs of key terms were presented in a very small grey font on a black background. The Executive asserted that the presentation of the key terms reduced the clarity of the information and the ease with which the information could be seen.

In relation to the Gameztour Service, the Executive noted that the key terms of the Service were also located below the fold in a very small grey font on a black background (**Appendix D**). The Executive submitted that the presentation of the key terms reduced the clarity of the information and the ease with which they could be seen.

The Executive submitted that consumers were not clearly and fully informed of all the key terms of the Service likely to influence the decision to purchase. Accordingly, the Executive submitted that the Level 2 provider was in breach of rule 2.2.2 of the Code.

2. The Level 2 provider denied the breach and submitted that it believed the key terms material to a consumer's decision to purchase were clearly legible, easily accessible and not difficult to understand. In addition, it stated that the alleged breach of rule 2.2.2 of the Code appeared to be in relation to the same facts as the breach of rule 2.2.5 of the Code. Therefore, it was of the opinion that the breaches should be considered as one breach of the Code.

The Level 2 provider stated that the submissions made in relation to the alleged breach of rule 2.2.5 of the Code (outlined above) also applied to this breach. The Level 2 provider reiterated its submissions about the size of the screenshots presented by the Executive and the size, colour and proximity of the Service information.

The Level 2 provider referred to the two paragraphs of key terms (one above the "continue" button and one below) (**Appendix F**). The Level 2 provider asserted that all the key terms were included in both sections of texts and were as follows:

- That the Service was a subscription service

- The cost of the Service
- The frequency of charges
- How to stop the Service
- The support email and contact phone number
- The name of the Level 2 provider

The Level 2 provider stated that the terms could be easily and clearly seen in both paragraphs and that the key terms were above the fold in at least one of the paragraphs. It stated that it had placed the key terms in both locations to prevent any claims that it had not made the key terms clear.

The Level 2 provider stated that different consumers use different size devices with different screen resolutions and toolbars installed, as such there is no way of ensuring that all of the text is fully visible above the fold for all consumers. The Level 2 provider submitted that when it viewed the webpages, the text was above the fold and this would be the case for many consumers. Despite this, is stated that because the key terms were in two places, consumers would see them.

Accordingly, the Level 2 provider submitted that it had not acted in bad faith and had given consideration to the placement of the key terms in an effort to ensure that consumers were fully informed and treated fairly.

3. The Tribunal considered the evidence and submissions before it. The Tribunal noted the Level 2 provider's comments about the potential breach of rule 2.2.2 of the Code being based on the same facts as the potential breach of rule 2.2.5 of the Code. The Tribunal concluded that the display of pricing information had been addressed in the breach of rule 2.2.5 of the Code. However, it noted that the breach of rule 2.2.2 of the Code related to the display of *all* written information that is material to a consumers decision to purchase. The Tribunal found that a key material term was the method of exit from the Service and, whilst it was included on the Services webpages, it was not clearly legible due to the size of the text and the colour scheme used on the webpage. Accordingly, a breach of rule 2.2.2 of the Code was upheld.

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 nature of the breach (particularly the fake incentives) meant that the Service would have damaged consumer confidence in premium rate services.

Rule 2.2.5 – Pricing prominence and proximity

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

- The Service had promotional material that had been designed with the intention to not provide consumers with adequate knowledge of the costs associated with the Service.

Rule 2.2.2- Written information material to the decision to purchase

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

- The cost incurred is more likely to be material to consumers, with the breach being capable of inflating revenue streams relating to the Service.

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

Final overall assessment

In determining the final overall assessment for the case, the Tribunal took into account the following aggravating factor:

- At the time the breaches occurred there had been a significant number of prior adjudications (approximately six) concerning affiliate marketing.

In determining the final overall assessment for the case, the Tribunal took into account the following two mitigating factors:

- The Level 2 provider stated that it had proactively refunded the complainants.
- The Level 2 provider stated that it had changed the Service webpages to address the concerns raised by the Executive and to remedy the alleged breaches of the Code.

The Tribunal noted that:

i) The Level 2 provider stated that it had measures in place to control the risks associated with affiliate marketing. The measures included selecting trustworthy affiliate networks and imposing restrictions on affiliate marketers who promoted the Service. However, the Tribunal noted that the affiliate marketing contracts (provided by the Level 2 provider) did not contain all the prohibitions the Level 2 provider stated that it had imposed on its affiliates marketers.
ii) The Level 2 provider had co-operated with the Executive during the course of the investigation but this had not gone beyond the level generally expected.
iii) The Level 2 provider's comments about the lengthy delays that occurred during the investigation and the fact that the Service had been suspended for a long period as a result. However, the Tribunal commented that the Service had been suspended as a result of the Level 1 provider's "red card" policy and not because of a PhonepayPlus direction. It did not consider this to be a mitigating factor.

The Level 2 provider's revenue in relation to the Service was in the range of Band 4 (£50,000 - £100,000).

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

Sanctions imposed

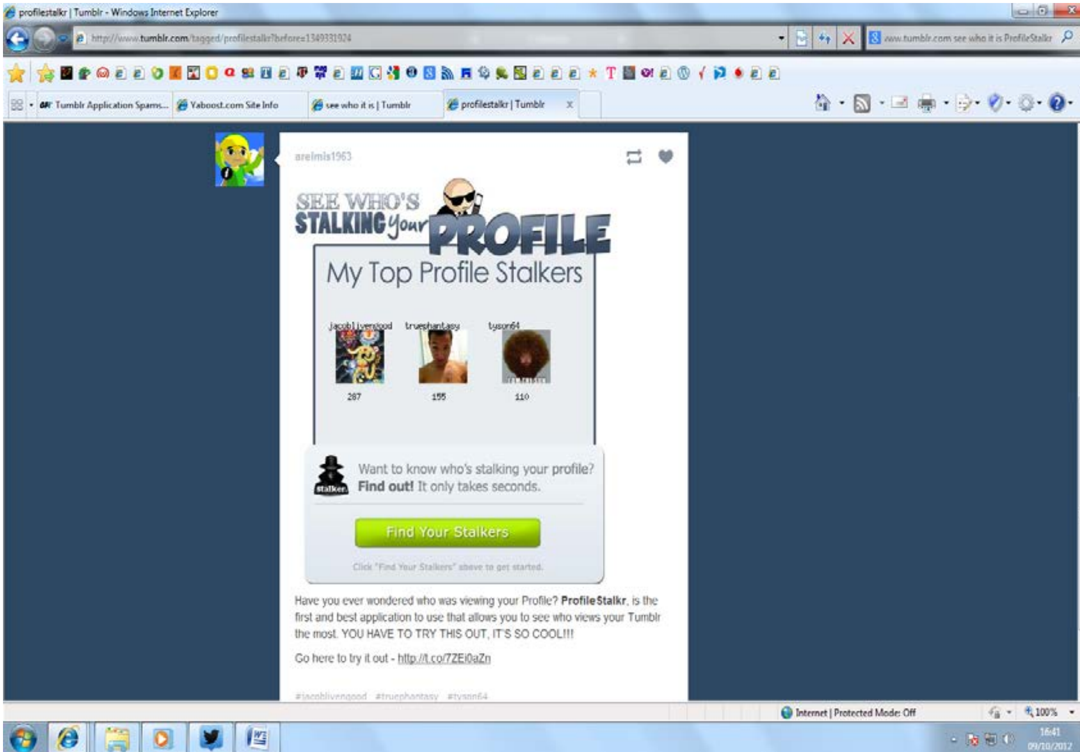
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £45,000 ;and
- a requirement that the Level 2 provider must refund all consumers 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.

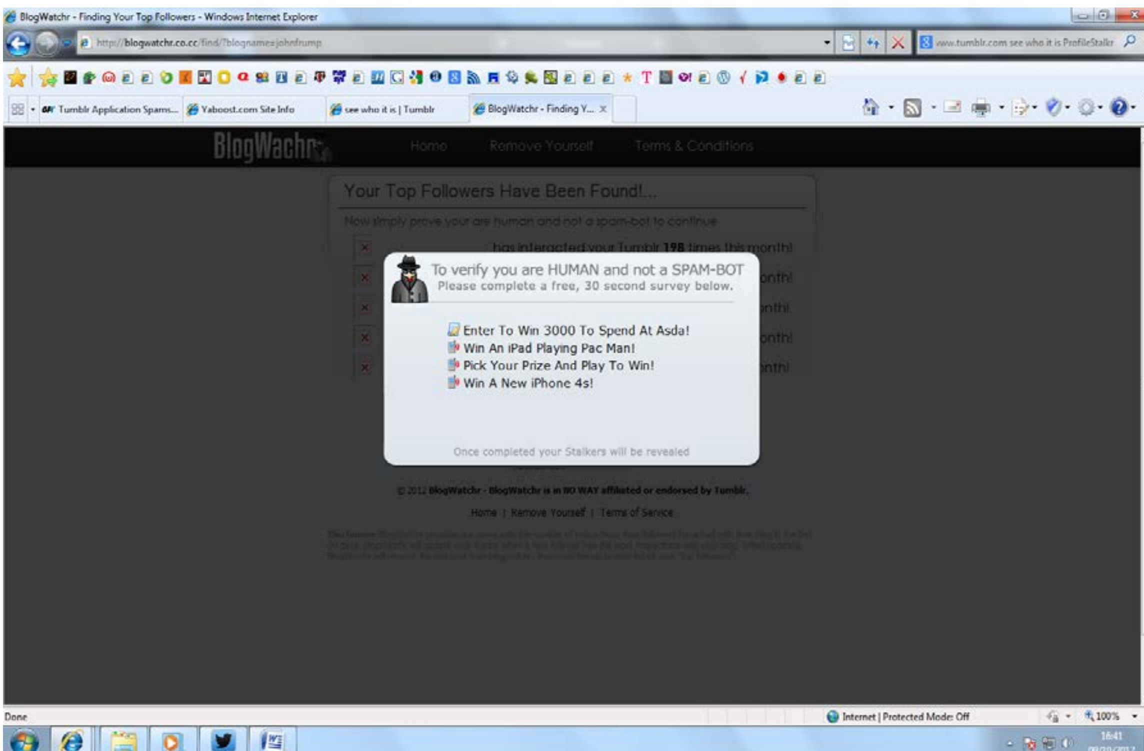
The Tribunal stated that if the Level 2 provider intended to recommence the operation of the Service it hoped that it would seek compliance advice from PhonepayPlus.

Appendices

Appendix A: A screenshot of the "See Who's Stalking your Profile, My Top Profile Stalkers" application webpage on Tumblr:



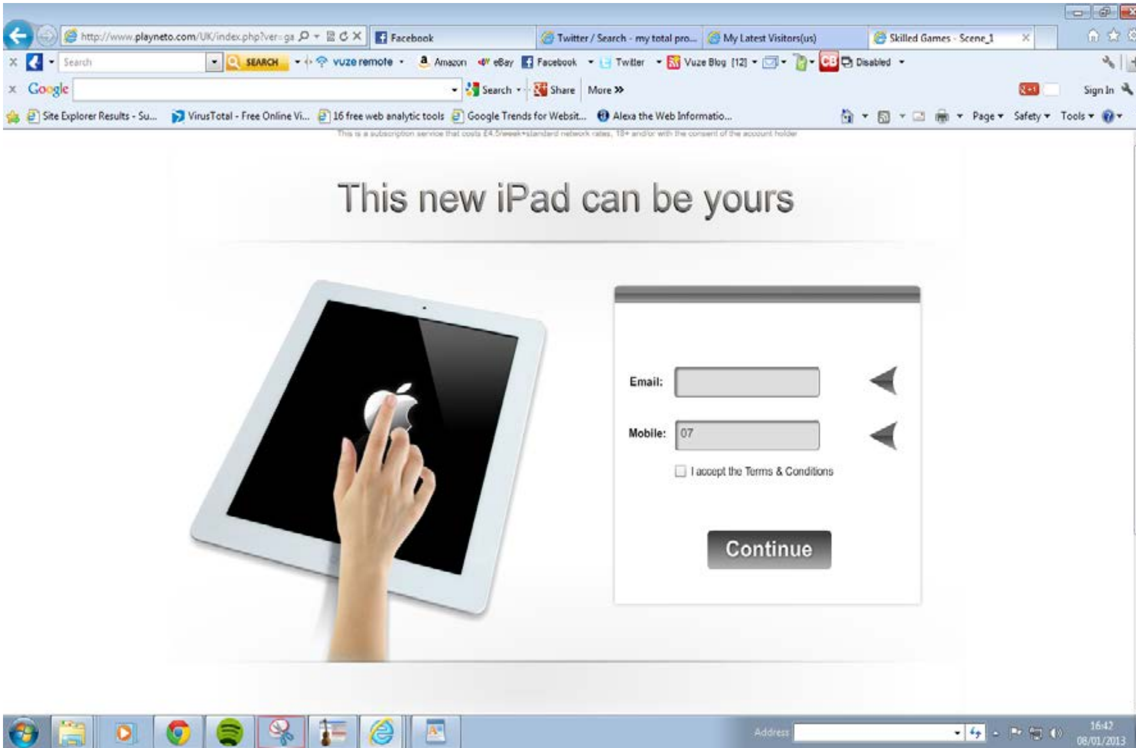
Appendix B: A screenshot of a "survey":



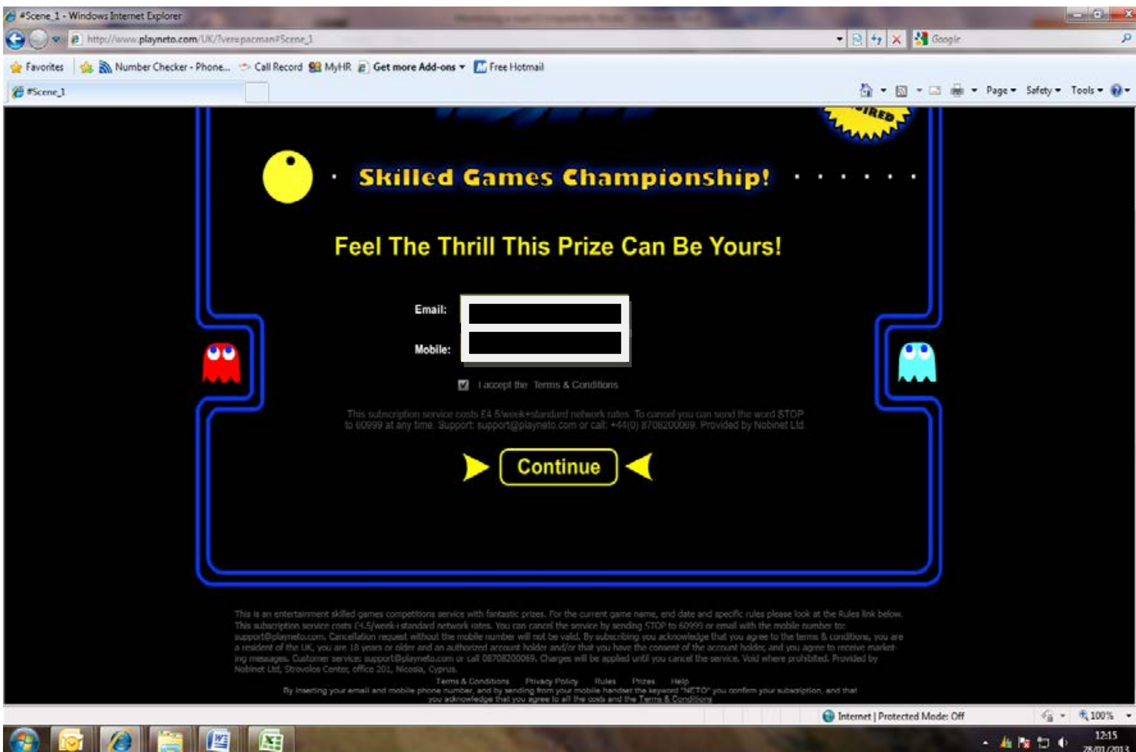
Appendix C: A screenshot of a Service landing page for Gameztour":

Appendix D: A screenshot of a webpage containing the means of access to the Gameztour Service:

Appendix E: A screenshot of a Playneto Service landing page:



Appendix F: A screenshot of a Playneto Service webpage:



Appendix G: A screenshot of a Playneto Service webpage containing the "means of access" to the Service: