

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

REMOTE GAMES LIMITED

Respondent

ADJUDICATION BY CONSENT (“CONSENT ORDER”)

Introduction

1. This Consent Order shall relate to the matter under PhonepayPlus case reference 18639, and the oral hearing listed for 20 January 2015, requested by the Respondent.
2. This Consent Order is made following admissions of liability by the Respondent for the breaches set out in the schedule to this Consent Order, with the Respondent for commercial reasons preferring to settle the case by way of agreement rather than protracted adversarial proceedings.
3. This Consent Order further sets out the agreement of the parties in respect of the sanctions to be imposed on the Respondent and the administrative charges to be paid. The agreed sanctions and administrative charges have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the PhonepayPlus Code of Practice (twelfth edition) (“the Code”).

Agreed sanctions

4. The sanctions hereby agreed by the parties are:
 - a. a fine in the sum of £70,000;
 - b. a formal reprimand; and
 - c. a requirement that the Respondent refund all consumers who claim a refund, for the full amount spent by them for the relevant services, 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.

Administrative charges

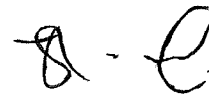
5. The Respondent shall pay the legal and administrative charges incurred by PhonepayPlus in relation to this case in the sum of £15,000.

Payment of fine

6. The fine and administrative charges are to be paid within 28 days of the date of this Consent Order, subject to any alternative payment arrangements which may be agreed between the parties.

Oral hearing date

7. The Oral hearing date of 20 January 2015 shall be vacated.



Julian Weinberg (Chair)
On behalf of the Oral Hearing Tribunal
19 January 2015

Schedule

IN THE PHONEPAYPLUS TRIBUNAL

CASE REF:18639

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

REMOTE GAMES LIMITED

Respondent

SUMMARY OF SERVICE AND ADMITTED BREACHES OF THE CODE

The Service

1. The service is a skill-based prize draw subscription competition service operating on shortcodes 82344 and 88222 with a number of prizes(including 'Win an iPad' and 'Win an iPhone', the "Service"). The Service was promoted and accessed by promotions appearing on smartphones. The Service was operated by the Respondent.
2. The Service was the subject of 482 complaints between 7 March 2012 and 2 May 2014.
3. The Service was the subject of a number of requests for further information which, amongst other things, attempted to determine the method of operation and promotion of the Service. Monitoring by the Research & Market Intelligence Team ("RMIT"), following the receipt of the complaints, resulted in the discovery by the Executive of a misleading tweet which led to a third party website and then linked to the Service, of which the Respondent was not aware.
4. The Executive subsequently conducted further monitoring and found what it deemed to be misleading banner advertising in Windows and Android applications, and a typosquatting website run by an affiliate used to promote a co-registration website, on which the Service was promoted.

5. As a result of monitoring and complaints, the following types of potentially misleading promotion were found: (i) a “Zuckerberg” tweet, (ii) banner advertisements in a Windows phone app, (iii) banner advertisements in various Android apps, and, (iv) a “Faceblok” promotion. These are dealt with briefly in turn.
6. **Zuckerberg tweet:** This promotion comprised a twitter message that appeared to come from Mark Zuckerberg, the founder of Facebook. The tweet stated:

“Why work for hours on your #farmville farm, when you could get free #facebook credits download instead. Gotgamecheats.net/file/OM7tc”
7. **The banner advertisements in a Windows phone app;** These promotions appeared when the RMIT accessed a free application from Windows Phone marketplace which provides updates for various windows phone powered devices, amongst other properties found whilst browsing the web on a smartphone. The promotions took the form of banners that appeared at the bottom of the screen and read “1 New Message”. These words were accompanied by the image of a sealed envelope along with a red circle containing the number “1”, which in the assessment of RMIT implied that the user had an unread message to read.
8. **Banner advertisements in various Android apps;** These promotions were almost identical to those used in the Windows phone app promotion in that a banner appeared in an unconnected app (in the case brought before the Executive as a complaint, during a Word Search game, downloaded from the Google Play store) which in the assessment of RMIT told the consumer that a message had been received and was waiting for them to open.
9. **Faceblok promotion;** Monitoring in January 2014 had also found the Faceblok site, essentially a typosquatting website which relied on traffic by means of consumers mistyping “Facebook” and landing on the Faceblok site which followed a similar format to the genuine “Facebook” site. In the colours used on Facebook the message on the first page stated:

“Congratulations!

You’ve been selected from the Broxbourne region to take part in our annual visitor survey.”
10. After answering a number of questions and selecting one of a number of prizes offered, the RMIT were taken to the landing page of prizes.co.uk. This landing page stated,

amongst other things, "Choose Your FREE Apple Prize!" and presented boxes with the same products as had been presented on the last page of the Faceblok promotion. The RMIT were taken to a number of other pages that required it to answer questions or complete a puzzle until the RMIT arrived at a page that contained a promotion for the Service. The page contained a multiple choice question and a box to provide the consumer's mobile number.

11. In each of the above cases, upon clicking on the links provided, the RMIT eventually arrived at the Service via various third party Affiliate pages which falsely offered the chance to win various prizes, but of which the Respondent maintained it had no knowledge. It is important to note that none of the complaints specifically cited either the Zuckerberg tweet or the Faceblok promotion; as such it cannot be known how widespread such activity was, if at all.
12. At the Service landing page arrived at from the Zuckerberg tweet (this landing page was similar to the landing pages arrived at through the other promotions) RMIT were presented with a page which stated "Your chance to **Win** an iPhone 5", (**emphasis** from the original, the "Win Promotion page") along with the question "What are One Direction?". At the bottom of the page were links to "About us", "Terms", "Winners" and "More Games". Three choices were provided as possible answers to the question. After clicking on the correct choice, the RMIT was sent to a further webpage.
13. The further webpage stated "**Correct Well done**" and the same words in smaller font along with the words "Enter your mobile number for your chance to win!" There was then a box to do so, along with some further text. Below (and outside of) the box with the text, and where the consumer would enter their mobile number, were the words:

"Subscribe to "Win an iPhone 5" for £4.50 per week"

This was the sole pricing information prior to entering a phone number.

14. Upon entering a phone number, the RMIT received the following message on its phone:

"New message from 88222

Free Message. To confirm your entry to the iPhone5 simply reply IPHONE to 88222.

Please ignore if not requested."

15. If a consumer responded to this text with the word "IPHONE" (or any other dedicated keyword as applicable in each case, the keyword being the aspect of the Service that varied), the consumer would be subscribed to the Service, and charged a weekly charge for receiving quiz questions (successfully answering which would allow the consumer to be entered into a prize draw) until they texted "STOP" to a shortcode. At the same time, a text is sent (the "Confirmation Text" confirming the initial prize draw entry on the web page) which stated (for example):

"FreeMsg:U have joined iPhone4 Quiz U can WIN iPhone4S+more FREE plays at <http://freequiz.prizes2win.co.uk> £2.50/week until u send stop to 82344 Care 02087980032"

The RMIT clicked an "About us" link at the bottom of the page. That led to a description of "77 Games", a brand name of the Respondent. No mention was made of the Respondent's registered name.

The Admitted Breaches

16. Breaches of Rules 2.3.2, 2.2.1, 2.2.5 and 3.1.3 are admitted by the Respondent in respect of the Service.

Outcome 2.3 provides:

"Fairness

That consumers of premium rate services are treated fairly and equitably."

Rule 2.3.2 of the Code provides:

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

17. In the light of the Affiliate activity of which the Respondent maintained it was not aware and its interplay with the co-registration website, it is accepted by the Respondent that how the competition operated could have been confusing for consumers because of the paucity of information regarding anything other than the prize available and the cryptic and obscure manner of the presentation of the pricing and charging (i.e. the frequency of the price being charged) information. Consumers were misled (thus contravening rule 2.3.2 and aggravated by the contravention of the provisions of the explanatory Guidance) by the affiliate Zuckerberg tweet. The Executive stated that

consumers would also be misled by banner adverts which led to a website where pricing information was not clearly stated, (however the Respondent did not accept that this occurred in this instance).

18. The Respondent maintained that it had no knowledge of such Affiliate activity. Further the respondent is contributing to the current industry-wide consultation on co-registration websites.

19. The Service is also misleading for two further reasons.

Firstly, it is a reasonable inference that once a consumer has been enticed on one basis (for example, and without limitation, the Zuckerberg tweet, which promised Farmville credits) many will seek to get to what has been initially promised by complying with instructions given that progress the consumer's journey through the pages presented and to do so as quickly as possible in order to get to what attracted them to the journey in the first place. In other words, it is implausible that most consumers who have entered a promotion for one reason, will be attracted to the object of a wholly different promotion which they have been baited to switch to (such as a premium rate quiz subscription service) enough to complete the entire promotional mechanic to obtain the new promotional object.

Further, due to the interplay with the Affiliate pages, the pages comprising the Service (i.e. not the Affiliate promotional pages), are not clear as to how the competition operates, all the information that is likely to affect a consumer's decision to participate, and, that charges are to be incurred.

Outcome 2.2 provides:

“Transparency and Pricing

That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”

Rule 2.2.1 of the Code provides

“[...]

(a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious.”

Rule 2.2.5 of the Code provides

“In the course of any promotion of a premium rate service, written or spoken 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.”

20. The Respondent did not provide its name on the Service. Instead it used an unconnected name of “77Games”, which appeared to be a trading name.
21. Having been presented with pricing information online, considered inadequate in the context of the affiliate promotion flow, the full information including detailed subscription information was received, by way of the Confirmation Text once the keyword was typed in and returned. The sending of the keyword to verify ownership of the mobile number entered completed the full process to access the Service but nowhere in the promotion of the Service was it stated clearly or at all that this action would commit the consumer to the charges. At the stage that the Confirmation Text was received, the consumer had already committed to the subscription charges on the entry form.
22. The words at the entering of the mobile number stage, were considered inadequate to describe the charges to be incurred. Further, insofar they were placed outside of the box which contains a box where the consumer was asked to enter their mobile phone number. The description of the price to enter into the competition was also unclear.

Rule 3.1.3 of the Code provides

“All Network operators, Level 1 and Level 2 providers must:

3.1.3 assess the potential risks posed by any party with which they contract in respect of:

(a) the provision of premium rate services, and

(b) the promotion, marketing and content of the premium rate services which they provide or facilitate,

and take and maintain reasonable continuing steps to control those risks; .”

23. The Executive noted that the Respondent maintained that at the time of the complaints it did not have knowledge of nor control over all of those promoting its Service. This led to serious breaches of the Code by the use of the Zuckerberg tweet, the banner advertising in the context of the consumer journeys outlined herein, and the prizes.co.uk co-registration path, as outlined above.
24. On such basis, in relation to the parties the Respondent shared a contractual nexus with, there did not appear to be sufficiently effective due diligence, at the time of investigation (which the Respondent maintains has since been corrected), as required by the Code and guided by the Guidance.

Aggravating Factor

25. The Executive noted the following aggravating factors which are accepted by the Respondent: PhonepayPlus has issued Guidance relevant to the agreed breaches of Rules 2.3.2, 2.2.5 and 3.1.3 of the Code relating to the use of affiliate marketing, the clear presentation of the key terms of a Service, and, risk assessment of third parties (specifically the PhonepayPlus Guidance on Competitions and other games with prizes, the Guidance on Promotions and promotional material, and, the Guidance on Due diligence and risk assessment); and PhonepayPlus has also issued a number of relevant adjudications relating to non-compliant affiliate marketing.
26. The Executive and the Respondent noted that the role of co-registration websites, and how they are to be treated for the purpose of the Code, is currently subject to industry-wide consultation.

Seriousness

27. It appeared to the Executive that the case was overall to be regarded as serious and that appropriate sanctions should be imposed accordingly.

