

Tribunal meeting number 292

Case reference:	157651
Merchant Provider:	Surestream Digital Limited
Type of service:	Alert and lifestyle service
Intermediary Providers:	Tap2Bill (until March 2021) and Dynamic Mobile Billing Limited (from May 2021)
Network operator:	Tap2Bill (until March 2021) and Dynamic Mobile Billing Limited (from May 2021)

This case was brought against Surestream Digital Limited (“**the Merchant**”) under Paragraph 5.4 of the 15th Edition of the Code of Practice (“**the Code**”).

Background and investigation

1. This case concerned a Lottery results alert service provided by the Merchant. The Service was registered and operated under the brand name “Lottery Results”.
2. The Service operates on a PIN opt-in flow and uses short code 82222 for Service terminations (the “Service”). The Service is a subscription service charging 25p per text message (“SMS”) which details the winning lottery numbers after each draw. The subscriber receives an SMS for each lottery draw. The Service is no longer promoting and is no longer obtaining new traffic, but is still billing existing subscribers.

Service operation and value chains

3. The Merchant has been registered with the Phone-paid Services Authority (the “PSA”) since 24 February 2015. The Intermediary provider for the Service was Tap2Bill Limited, from the commencement of the Service until March 2021. They have been registered with the PSA since 21 February 2015. From April 2021 the Intermediary provider for the Service has been Dynamic Mobile Billing Limited (“DMB”), who have been registered with the PSA since 26 May 2011.
4. DMB and Tap2Bill also operated as the network operators within the same respective timeframes that they also operated as the Intermediary providers.

Service promotion

5. The Merchant stated that the Service commenced on 7 November 2017. The Service was advertised through a website which could be accessed through the Google and Bing search engines, using keywords.

Previous relevant cases

6. The Merchant has not previously been the subject of a PSA Engagement or Enforcement case.

The investigation

7. The PSA received 198 complaints regarding the Service. The first complaint was received on 16 August 2018. The main complaint period was between October 2018 and September 2019. However, the most recent complaint was received on 15 January 2022.
8. The complainants alleged that they recall checking the lottery results but did not recall it being a subscription service or anything stating that there would be a charge. Complainants also stated that when they tried to contact the Merchant, the number just rang and no one answered their calls.

9. A sample of complainants have been provided below:

"I checked bill after being notified safety buffer being reached when I was within my bundle limits. Have noticed been getting charged for months for this premium rate SMS I have no knowledge of or able to stop."

"I believe they provide lottery results. I don't recall signing up for it. They seem to be charging Everytime there's lottery result, which I believe is a few times a week. I text 'cancel' and 'STOP' but the wasn't working so I blocked the number but it seems I'm still being charged an extortionate amounts. I've tried contacting them but I'm not getting anywhere. Every time I top up, my balance is drastically reduced because of the charges that I didn't authorise."

"I inadvertently signed up to receive text message alerts on my mobile phone regarding lottery results. I didn't want these messages so I sent a text saying 'STOP' to 82222. I received a text back saying I would not receive anymore texts from that number but they have kept coming at 25pence for each text. Please can you help."

"I have been charged for text notifications from 82222 which I did not ask for nor have I been receiving any. I was in the Vodafone shop yesterday and they advised me to contact you. I have been charged over a few months with the total in the region of potentially £68.75. How do I proceed with a refund? "

10. The PSA recorded the promotion and entry point into the Service through the web address, which was referred to in the complaints. The monitoring was captured via a desktop on 21 March 2019 when the Merchant was still promoting the Service. The PSA has not been able to acquire more recent monitoring evidence of the Service as it is no longer being promoted.

11. The PSA did however obtain a Visual Attention Software (“VAS”) report to accurately predict how web, print, and environmental designs are seen by consumers in the first 3-5 seconds of viewing the promotional material used for this Service

Apparent breaches of the Code

12. The PSA sent an Enforcement Notice to the Merchant on 4 October 2021. The Merchant supplied additional evidence which led to a revised Enforcement Notice being sent on 29 April 2021. The following breaches of the PSA’s Code were raised in the Enforcement notice:

- (1) Rule 2.2.7 – Pricing
- (2) Rule 2.3.2 – Misleading

Preliminary issues – Application to adjourn and oral hearing

13. On 14 July 2022, the Merchant wrote to the PSA requesting that the case was dealt with by way of an oral hearing. The PSA responded on the same day pointing out that application for an oral hearing was out of time in accordance with the mandatory limits provided for within paragraphs 5.4.5, 5.7.8 and 5.7.9 of the Code. On 15 July 2022, the Merchant responded to the PSA letter setting out detailed grounds to support the application for an oral hearing. The Merchant requested that the hearing that was scheduled to take place on the next working day (18th July 2022), be adjourned, and indicated that they would not be in attendance. The PSA responded on the same day and while noting that detailed grounds had now been provided, reiterated that the application for oral hearing was out time.
14. The PSA also informed the Merchant that they objected to the application to adjourn as the request failed to detail any grounds that would meet the exceptional test provided for within paragraph 352 of the Code 15 Procedures. Furthermore, the application was made in close proximity to the scheduled hearing and no benefit was to be achieved by adjourning the proceedings. The PSA sought to avoid further delay in progressing the case.
15. The application to adjourn the hearing was considered by the Chair of the Tribunal during the hearing on 18 July 2022. The Chair reviewed the correspondence, including the PSA’s objections. The application to adjourn was refused. The Chair refused the application on the grounds that delay in the proceedings was to be avoided in the interest of fairness to both parties as the matter needed to come to a conclusion. It was also noted that the Merchant had instructed solicitors since 18 October 2019 and that those solicitors have actively engaged with the PSA on behalf of the Merchant. No application for an adjournment was made until the afternoon before the day of the scheduled hearing. The Tribunal also noted that the Merchant and his solicitors

provided detailed representations and witness statements for the attention of the Tribunal.

16. The Tribunal was satisfied that service of the enforcement notice had been complied with.

Submissions and conclusions

Alleged breach 1

Rule 2.2.7

“In the course of any promotion of a PRS, 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”.

17. The PSA asserted that the Merchant had breached Rule 2.2.7 of the Code in two distinct ways. Firstly, the Merchant did not advertise the full cost of the Service before means of accessing the Service on the landing page. Secondly, the Merchant did not advertise the full cost of the Service in a prominent and proximate way before the call to action on the landing page and MSISDN entry page.
18. In support of its first argument, the PSA relied on monitoring evidence it had obtained on 21 March 2019. It was stated that this showed that on the Service landing page the Merchant had stated that the price for the Service was “25p per lottery results” before the means of access to the Service.
19. Additionally, below the means of access to the Service, additional information about the cost of the Service was provided which was not prominent, visible nor proximate to the means of access within the promotion. The information below the means of access indicated that the full cost of the Service was £1.75 per week.

What you'll get

- ✓ Instant number check
- ✓ Lottery draw SMS alert
- ✓ Choose the games you play

This text alert service is charged at 25p per lottery result received.

Subscribe

Service Info

Results are sent for each Lotto, Thunderball and/or Euromillions Draw result that you choose to receive, up to a maximum of 7 per week, charged at 25p each.

The charges for this alert service will be added to your mobile bill.

You can stop the text alerts at any time by texting the word STOP to 82222. Information supplied through the service can be obtained for free from the National Lottery. If you would like any more information about the service, please contact us on 01144 782802. Over 16s only.

Need Help

Visit our [help section](#) to get started.

20. In relation to the second limb of the breach the PSA argued that the monitoring evidence demonstrated that once you click on the emboldened subscribe button on the landing page consumers were taken to a page that gave them the option of what lottery draws they wanted to receive results for. The PSA's monitoring also showed that the above the box where the mobile number is inserted the cost of the Service is stated as being "25p per message received".
21. Furthermore within the information, below the means of access to the Service, additional information about the cost of the Service is provided which is not prominent, visible nor proximate to the means of access on the promotion. It is actually the information below the means of access to the Service indicates that the full cost of the Service is £1.75 per week.

Enter your mobile number:

Get text alerts for your chosen lottery games so you never miss a result.

To confirm the number is correct, we will send you a free PIN to your mobile phone via text message. By pressing "Subscribe" you agree to the charges.

The charges will be added to your mobile phone bill or deducted from your pre-pay balance.

Text messages are charged at 25p per message received, max seven per week.

Mobile number, 07...

Subscribe >

Subscribe >

Over 16s only. Get access to our lottery results alerts service, including the winning numbers after every lottery draw, so you never forget to check if you've won the lottery! You can choose which messages are received from within your account, up to a maximum of seven messages, one for each weekly draw. You can stop receiving the messages at any time by sending the word STOP to 82222.

You will be opted in to receive alerts for all three draw types (Lotto, Euromillions and Thunderball), regardless of the lottery numbers you enter in the form above. You can easily change these options at any time from within your account.

22. The PSA also relied upon Visual Attention Software ("VAS"). VAS indicates where a consumer's attention would be drawn to, on the promotional material and establishes whether a consumer is likely to see the pricing on the Merchant's promotion. A report is produced which demonstrates the content that is most likely to be seen by consumers using heatmaps. The VAS report in this case demonstrated a 98% probability that a consumer's attention was likely to be drawn to the information held above the means of access, with the focus being on the single charge of 25p per message received. There was less of a focus on the information about the maximum number of texts that could be received per week and the information below the means of access button. The heatmap demonstrated that the information containing the full cost of the Service had a 0% probability of being viewed by a consumer.
23. The PSA submitted that the evidence demonstrated that the Merchant breached Rule 2.2.7 by failing to provide the full cost of the Service in a way that is visible, clearly legible, and proximate to the means of access to the Service. The PSA stated that the Merchant chose to only make 25p, the cost of a single text message, more visible, proximate and above the means of access because it is a smaller and a more manageable price point than the actual price of the Service. This was done with the belief that a consumer is more likely to subscribe to a service that costs 25p than a service that costs £1.75, which is the actual full cost of the Service.
24. The PSA asserted that the Merchant strategically placed information regarding the full cost of the Service below the means of access, ensuring that it was not clear or easily legible, nor proximate to the means of access, compared to the placement of the 25p price point above the means of access.
25. The Merchant provided a response to the breach, stating that each consumer was provided, prior to subscription, with cost of each message (i.e. 25p) and the maximum number of messages each consumer would receive (i.e. seven). It was the Merchant's belief that this was sufficient and that each consumer, depending on the preferences they stated as to which alerts, they would receive, the consumer would be able to calculate their pricing using this information. Furthermore, the Merchant pointed out that they felt that the PSA had not provided specific feedback or requested any changes at the informal stage of the investigation. The first time they were aware of any

problems regards the pricing, was when the investigation had already progressed to the formal stage.

26. The Tribunal questioned the PSA during the hearing regarding the delay in progressing this case. The PSA unequivocally accepted that there had been delay in progressing the case against the Merchant. The PSA stated that the delay was in part, due to the application of the prioritisation criteria, and, that there was a lot of correspondence between the parties that also impacted the progress that was made, especially once solicitors were instructed on behalf of the Merchant. The PSA accepted that there had been delay particularly in 2020, but stated that it was caused by a number of factors relating to the prioritisation criteria, drafting and seeking internal legal advice in response to the legal issues raised by those representing the Merchant.
27. The PSA explained during the Hearing that there were additional breaches that were originally part of the case, but once additional evidence was provided by the Merchant, the additional breaches were no longer pursued. While consideration was given to alternative regulatory routes, the decision was taken that the enforcement action was still the suitable and proportionate response.
28. The PSA accepted that the Merchant had provided evidence of refunds and responses to consumers who had complained.
29. While the Tribunal noted the VAS evidence, they attached no weight to it when determining whether the breach was proven. The Tribunal found that the gravamen of the breach was that the actual cost of the Service (£1.75) was not displayed in a visible, clearly legible, and proximate to the means of access to the Service before any purchase was made. The Tribunal noted the Merchant's submissions, but found the actual price of the Service was not set out in a way that would have been clear to the consumers. The Tribunal reject the Merchant's submission that the consumers could calculate the cost of this Service and that the information provided by the Merchant in the promotional material was not sufficiently prominent, clear or visible to comply with the requirements of the Code.
30. Therefore, the Tribunal was satisfied on the balance of probabilities that a breach of rule 2.2.7 had occurred.

Decision: UPHOLD

Alleged breach 2

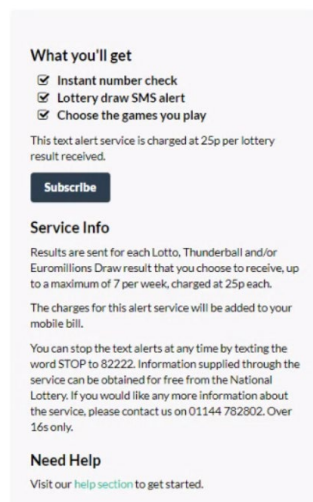
Rule 2.3.2

"PRS must not mislead or be likely to mislead in any way."

31. The PSA asserted that, firstly, within the promotion and landing page of the Service, the consumer was told that they can select the lottery results they would like to receive

alerts for, but later in the sign-up process the terms of the Service stated that the consumer will be opted into all three of the available lottery alerts regardless of the preferences they entered on subscribing to the Service.

32. Secondly, within the terms of the Service, the Merchant stated that the consumer would be able to alter their lottery alert preference, within the Service portal, at any time from within their account. However, the Merchant did not provide a means for consumers to access the Service portal once the subscription sign-up process was complete.
33. The PSA relied upon the monitoring evidence which it said showed that the Service's landing page stated that the consumers could choose to receive the results for the game(s) they played.



The screenshot shows a sign-up page for a lottery alert service. It features a section titled 'What you'll get' with three checked items: 'Instant number check', 'Lottery draw SMS alert', and 'Choose the games you play'. Below this, a note states 'This text alert service is charged at 25p per lottery result received.' and a 'Subscribe' button. A 'Service Info' section follows, detailing that results are sent for each Lotto, Thunderball, and/or Euromillions Draw result, up to a maximum of 7 per week, charged at 25p each. It also mentions that charges for the alert service will be added to the mobile bill. A paragraph explains how to stop text alerts by texting 'STOP' to 82222 and provides contact information for more details. Finally, a 'Need Help' section directs users to a 'help section' to get started.

What you'll get

- ☒ Instant number check
- ☒ Lottery draw SMS alert
- ☒ Choose the games you play

This text alert service is charged at 25p per lottery result received.

Subscribe

Service Info

Results are sent for each Lotto, Thunderball and/or Euromillions Draw result that you choose to receive, up to a maximum of 7 per week, charged at 25p each.

The charges for this alert service will be added to your mobile bill.

You can stop the text alerts at any time by texting the word STOP to 82222. Information supplied through the service can be obtained for free from the National Lottery. If you would like any more information about the service, please contact us on 01144 782802. Over 16s only.

Need Help

Visit our [help section](#) to get started.

34. However once consumers had signed up to the Service they were automatically opted into receiving the results pertaining to all three draws.

You will be opted in to receive alerts for all three draw types (Lotto, Euromillions and Thunderball), regardless of the lottery numbers you enter in the form above. You can easily change these options at any time from within your account.

35. During the hearing, the PSA stated that consumers were misled into believing that by clicking on the button they were choosing which draw alerts they would receive, but this was not the case. Secondly, the PSA's monitoring evidence demonstrated that consumers only had the ability to choose a particular draw alert if they chose to continue through to view their account within the service portal at the point of signing up to the Service.
36. During the hearing, the PSA explained further that not all consumers were provided the correct URL to enable them to log back into the Service to change their alert

preferences. Therefore, those consumers were prevented from reversing the automatic opt-in that occurs in respect of all the lottery draws upon sign-up. This was evidenced by the responses the PSA received to the Directions. Only 2 out of 12 consumers were provided the correct URL from the sample of MSIDNS provided in Direction 2 dated 3 August 2020 and only 2 out of 20 were provided with the correct URL from the sample contained within Direction 3 dated 14 October 2020.

37. In response, the Merchant stated the statement that the consumer could “Choose the games” it plays was accurate as many consumers used the ability to tailor the service they received. The Merchant accepted that the default position for each consumer was that they would be subscribed to alerts for all three lottery draws however, once subscribed, each consumer was able to alter their account preferences.
38. The Merchant asserted that it was important to note that an opportunity to alter the preferences was provided to each consumer prior to receiving their first chargeable message. This meant that where any consumer had intended to use the Service for alerts for one single and specific lottery, they would have been able to make the necessary changes at the outset and at no point would they be obliged to receive (and therefore be charged for) any unwanted messages.
39. When the fact that the Merchant did not make any accommodations for a consumer to regain access to their account after the entry process within its Service was highlighted to the Merchant, along with the fact that the Merchant advertised that a consumer would be able to amend their lottery alert preference “at any time” from within their account, the Merchant stated that *“The service was originally designed purely as an alerts service, with the core function of providing customers with the results of the lotteries they selected at sign up. It was not specifically designed to be interactive, with the option of changing preferences.”*
40. The Tribunal was of the view that when consumers selected their preferences, they were choosing which draws to receive results for, but this was not the case and this was misleading. The fact that their preferences were ignored upon sign-up lacks the clarity in a Service that consumers would expect.
41. The Tribunal also found that the fact that a number of consumers were not provided with the correct URL to alter their preferences was also misleading. The Tribunal regarded the statement by the Merchant that the Service was *“not specifically designed to be interactive, with the options of changing preferences”* as somewhat of a partial admission. The Tribunal also noted the absence of the correct information (i.e. the URLs) made it difficult for consumers to opt to leave the Service.
42. The Tribunal was satisfied for the reasons set out above that that a breach of Rule 2.3. 2 had occurred. Accordingly, the Tribunal upheld the breach.

Decision: UPHELD

Sanctions

Representations on sanctions made by the PSA

Assessment of breach severity

43. The Tribunal's initial assessment of the breaches of the Code was that they were, overall, **serious**. In making this assessment, the Tribunal found the following:

Rule 2.2.7

44. This breach was **serious**.
45. The Tribunal considered that the breach had a clear detrimental impact, directly or indirectly on consumers.
46. The Tribunal considered that the costs incurred by consumers may be high as a result of the breach.
47. The Tribunal considered that the breach has damaged consumer confidence in premium rate services.
48. The Tribunal also considered that the breach was likely to have generated higher revenues, as a result of the breach.

Rule 2.3.2

49. This breach was **serious**.
50. The Tribunal considered that the breach had a clear detrimental impact, directly or indirectly on consumers.
51. The Tribunal considered that the costs incurred by consumers may be high as a result of the breach.
52. The Tribunal considered that the breach was committed intentionally or recklessly.
53. The Tribunal considered that the breach was likely to have generated higher revenues, as a result of the breach.

Initial overall assessment

102. The PSA's initial assessment, before any potential uplift or downgrade in light of any aggravating or mitigating factors, was that the following sanctions were appropriate based on a preliminary assessment of the breaches as **very serious**:

- a formal reprimand
- a requirement that the Merchant remedy the breach by correcting the pricing issues and misleading aspects of the promotional material for the Service. In addition, the Merchant should inform all existing subscribers of the true cost of the Service, including the amount of alerts they receive and give them the option to select how many of the alerts they want to receive going forward or of unsubscribing entirely. Evidence should be provided to the satisfaction of the PSA to confirm that this has been done.
- a requirement that the Merchant seeks compliance advice from the PSA and implements it to the satisfaction of the PSA in relation to the operation and promotion of this alert Service and any future alert services, for a period of three years from the publication date.
- a requirement that the Merchant must refund all consumers who claim a refund for the full amount spent by them on the Service, within 30 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made
- a fine of £425,000 broken down as follows:
Breach 1 – Rule 2.2.7 - £175,000
Breach 2 – Rule 2.3.2 - £250, 000.

103. The Tribunal noted that the Merchant did not agree that the breaches had occurred, but the Merchant had stated that they “*would be content to reconfirm all existing subscribers.*” The Merchant also stated that the proposed fines were disproportionately high.

104. The Tribunal’s initial assessment, before any potential uplift or downgrade in light of any aggravating or mitigating factors, was that the following sanctions were appropriate based on a preliminary assessment of the breaches as **serious**:

- a formal reprimand
- a requirement that the Merchant remedy the breach by correcting the pricing issues and misleading aspects of the promotional material for the Service. In addition, the Merchant should inform all existing subscribers of the true cost of the Service, including the amount of alerts they receive and give them the option to select how many of the alerts they want to receive going forward or of unsubscribing entirely. Evidence should be provided to the satisfaction of the PSA to confirm that this has been done.
- a requirement that the Merchant seeks compliance advice from the PSA and implements it to the satisfaction of the PSA in relation to the operation and

promotion of this alert Service and any future alert Services, for a period of three years from the publication date.

- a requirement that the Merchant must refund all consumers who claim a refund for the full amount spent by them on the Service, within 30 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made
- a fine of £200,000 broken down as follows:

Breach 1 – Rule 2.2.7 - £100,000
Breach 2 – Rule 2.3.2 - £100,000.

105. The Tribunal noted that the Merchant did not agree that the breaches had occurred, but the Merchant had stated that they “*would be content to reconfirm all existing subscribers.*” The Merchant also stated that the proposed fines were disproportionately high.

Proportionality assessment

Assessment of mitigating and aggravating factors

Aggravation

106. The PSA submitted that the Merchant was notified of the concerns regarding the Service in November 2018 but did not stop promoting the Service until June 2019 and this was an aggravating feature.

107. The PSA also submitted that the Merchant failed to provide all the information when requested and this contributed to the delay in progressing the case.

108. The Tribunal was however of the view that there were no aggravating features in this case.

Mitigation

109. In June 2019 the Merchant stopped promoting the Service and the PSA accepted that this amounted to mitigation and the Tribunal agreed.

110. The Tribunal also agreed that the refunds given to some consumers amounted to mitigation, but the limited number of consumers that had indicated that they had received the refunds was noted.

111. The Tribunal also regarded the significant delay on the part of the PSA to progress the investigation as mitigation.

Financial benefit/Need for deterrence

102. The PSA stated that the relevant revenue generated from the Service for the Merchant was £5,414,306 and that all the revenue flowed from the breaches of Rule 2.2.7 and Rule 2.3.2. The PSA submitted that there was a need to remove as much of the financial benefit as possible and deter the Merchant, and the wider industry, from such misconduct in relation to alert and lifestyle services.
103. The Merchant stated that the fine and sanctions proposed were disproportionate and that they did not agree that the entire revenue flowed from the breaches.
102. The Tribunal agreed that the revenue from the Service flowed directly from the breaches but disagreed that there was a need to remove as much as the financial benefit as possible taking into account the conduct of the Merchant and the overall severity being found to be serious. The Tribunal considered that a satisfactory regulatory outcome had been achieved.

Sanctions adjustment

103. The PSA recommended an adjustment of £50,000 be applied to the fine sanction in recognition of the delay in progressing the case and the fact that one breach, that originally formed part of the investigation was not pursued, with the decision made in the latter stages of the investigation. The Merchant also maintained consistent communication with the PSA throughout the investigation.
104. The Merchant stated that they did not intend to recommence promotion of the Service and felt that that adjustment was inadequate in the circumstances.
105. The Tribunal noted the need for proportionality in light of the delay in bringing the case to a conclusion.

Final overall assessment

106. The Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions imposed

- a formal reprimand
- a requirement that the Merchant remedy the breach by correcting the pricing issues and misleading aspects of the promotional material for the Service. In addition, the Merchant should inform all existing subscribers of the true cost of the Service, including the amount of alerts they receive and give them the option to select how many of the alerts they want to receive going forward or of unsubscribing entirely.

Evidence should be provided to the satisfaction of PSA to confirm that this has been done.

- a requirement that the Merchant seeks compliance advice from the PSA and implements it to the satisfaction of the PSA in relation to the operation and promotion of this alert Service and any future alert services, for a period of three years from the publication date.
- a requirement that the Merchant must refund all consumers who claim a refund for the full amount spent by them on the Service, within 30 days of their claim, save where there is good cause to believe such claims are not valid, and provide evidence to the PSA that such refunds have been made.
- a fine of £160,000 broken down as follows:

Breach 1 – Rule 2.2.7 - £80,000

Breach 2 – Rule 2.3.2 - £80,000.

Administrative charge recommendation: 50%