

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 19 February 2009 TRIBUNAL SITTING No. 21 / CASE 2

CASE REFERENCE: 751131/AC

Information provider & area:	Abstract Games Limited t/a Mediaprom, Lancaster
Service provider & area:	2Ergo Limited, Manchester
Type of service:	Scratchcard Competition – subscription
Service title:	Fast Cash, Scratch and Match, Square Your Bills scratch card competitions and 'Quids In' subscription service
Service number:	84142, 87500, 80027, and 84241
Cost:	£9 entry fee and £2.00 or £2.50 per week subscription
Network operator:	Mobile Operators
Number of complainants:	132

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

The PhonepayPlus Executive ("the Executive") received complaints relating to four brands of scratch cards promoted by MediaProm, the information provider. These scratch cards were widely promoted as a result of being inserted into newspapers and magazines. Consumers were invited to scratch a panel on these scratch cards to see if they were able to claim an award. Once the consumer had scratched the panel and revealed the required matching symbols they were then invited to call or to text a premium rate number to claim their award. The consumer was charged £9 to discover the value of the cash award or the description of the non-cash award item and to receive a claim number. If the consumer responded by text, they were automatically entered into a subscription service and were required to positively opt out in order to stop being charged either £2 or £2.50 per week (depending on which service the consumer had been subscribed into).

Across the promotions, PhonepayPlus received 132 complaints from the public, 67 of which complained that they had received unsolicited charged texts and 37 of which complained that they had been misled. The first complaint was received by PhonepayPlus in November 2007 and an initial investigation commenced in January 2008. Due to changes within the Executive a new investigation commenced in May 2008.

The Executive's understanding of how the service operated

i) The Promotion

The Scratch cards were promoted as inserts in various national and local press publications, including The Times, and also in a number of magazines including Empire, Heat, News of the World, Bizarre and Elle Decoration. Reports indicated that the scratch cards appeared in parcels and letters delivered by Amazon.co.uk and from Sky (although the information provider denied this). The Executive became aware of the following different scratch card promotions:

- 3 promotions (Scratch and Match 25K, Fast Cash (over £40k already won) and £1MILLION Fast Cash) operated with a closing date of 31/5/2008.
- 1 promotion (£50K Scratch and Match) operated with a closing date of 31/8/08.
- 3 promotions (Square Your Bills, Fast Cash (Big Cash Jackpots) and Fast Cash (over £50k already won)) operated with closing dates of 21/12/08 or 31/12/08.

The scratch cards were supplied in blocks of 4 tickets and tickets appeared to stand a 50% chance of being a winning ticket (as stated in the Ts and Cs of the majority of promotions). It became apparent to the Executive through monitoring that it was usual for each strip of 4 tickets to contain 1 ticket with 3 matching **cash** symbols and 1 ticket with 3 matching **non-cash** symbols. Therefore each strip appeared to have two 'winning' tickets.

ii) The Service

Taking part in the initial service involved a 4 part process. A consumer would be required to:

1. Scratch the panel on the card to reveal the winning symbols
2. Obtain claim number by either:
 - a. Calling the 0906 number
 - b. Texting the keyword to the designated short code
 - c. Writing to the postal address enclosing the cost of postage
3. Following receipt of the claim number, enter the number onto the back of the 'winning' scratch card and return it to the address provided. The consumer would then receive a confirmation form.
4. Return the confirmation form. Once this was received, the consumer would be sent their award.

Premium Rate Entry

The consumer was required to scratch the panels on the scratch cards and reveal the matching symbols. They were then required to make a claim. This could be done by calling a fixed line 0906 number or by texting the keyword to the short code provided. If the consumer decided to call the 0906 number, their call would last for around 6 minutes at a cost of £1.50 per minute. During the call the consumer would be told the value of the cash award they were entitled to, or details of the non-cash award they had been allocated, which depended on the prize number revealed on the scratch card. Towards the end of the call the caller would be provided with a claim number.

If the consumer decided to make a claim by text they would text the requisite keyword to the short code provided and in return would receive 6 messages charged at £1.50 per message. The texts would be sent in quick succession and would indicate the value of the prize/award, depending on the prize number revealed on the scratch card. The texts also included the claim number.

If the consumer wished to claim their award they would need to write their claim number (as provided in the text or on the recorded message) on the scratch card itself and send it to the address provided. If the user had texted the keyword to the short code they would also be entered into a subscription service at a cost of £2.00 or £2.50 per week. The claim process (excluding postal claims – see below) would take a minimum of 56 days (depending on the promotion and on the time it took the consumers to respond) from the receipt of claim number to the final receipt of the award.

Postal Entry

The consumer also had the opportunity to claim their award by post. This process was similar to those above except that the user had to write to the address provided to receive their claim number rather than use the premium rate service. However for postal claims the period of time between the claim and the receipt of the award was longer from start to finish and differed across various promotions

Standard Procedure

Following the launch of a new investigation in May 2008, fresh complaints were received by the Executive as new promotions were instigated by the information provider.

The information provider sought compliance advice from PhonepayPlus, initially on 4th January 2008. Other requests were made between January and May 2008, all of which were provided by the Executive save where the advice requested related to services already under investigation by the Executive.

The Executive filed a request for information from the service provider in accordance with paragraph 8.3.3 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008) (“the Code”) on the 9th June 2008. A response was received from the information provider on the 18th June, via the service provider. A second paragraph 8.3.3 request was made on the 12th August, for a comprehensive list of services. A response to this request was received on the 12th August and further information on the 18th August, again from the information provider but via the service provider.

In a letter dated 15th September 2008 addressed to the service provider, the Executive raised potential breaches of paragraphs 5.4.1a, 7.6.3b, 7.6.6d and 7.12.3a of the Code. On the 18th September 2008 the service provider requested that PhonepayPlus should deal directly with the information provider which was accepted by the Executive following receipt of signed undertakings from both parties dated the 16th September 2008.

The breach letter sent to the service provider was withdrawn and a new breach letter issued to the information provider on the 19th September 2008. A response to the breach letter was received by post on the 30th September 2008

Although the investigation involved a range of different promotions, the Executive noted that there were comparable compliance issues with all of the promotions and therefore decided to deal with them in a single investigation. The last short code to be included in the investigation was 80027 which appeared in the last scratch card promotion. The information provider was informed of the addition of the short code to the investigation in an email dated the 25th November 2008. The information provider wrote to PhonepayPlus in a letter dated 4th December in which they provided additional information and expressed their concerns that the case had been dealt with disproportionately by the Executive.

The Tribunal made a decision on the breaches raised by the Executive on 19th February 2009. Prior to the Tribunal considering the breaches raised, it heard informal representations made in person by representatives of the information provider. In making a decision on the breaches the Tribunal treated all the promotions as elements of the essentially the same service.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

MISLEADING (Paragraph 5.4.1a)

*“Services and promotional material must not:
a mislead, or be likely to mislead in any way...”*

1. The Executive raised a breach of paragraph 5.4.1a of the Code for the following reasons:

Ground 1

The Executive asserted that consumers' expectation when viewing the promotion was that they would make a one off prize/award claim and that, when using the service, the consumer did so without expecting to be entered automatically into a paid subscription service.

The Executive asserted that the consumer was misled into understanding the service to be a one off payment service. In all but the “Square Your Bills” promotion, only if the consumer studied the back of the card did they become aware of the subscription element. In the “Square Your Bills” promotion there was mention of subscription on the front (facing) page. The Executive asserted that the service user would not be on notice to seek out subscription detail on the scratch card and that the cards were designed to fog over this element in favour of reinforcing the prominence of the one off prize/award claim.

The Executive indicated that complainants of the service had stated that they received unsolicited charged texts. It was the Executive's belief that the reason the complainants considered the texts to be unsolicited was because they were not aware that they had subscribed to a service, being under the impression that they were making a one off payment for a prize claim.

Ground 2

The Executive asserted that consumers were misled by the promotion into believing that they would be better off financially as a result of entering into the service. The Executive considered that use of the word, 'award' suggested this, along with the mention of 'prize' and 'win' on the cards.

The Executive noted that the cash award guaranteed to each card with 3 matching '£' symbols was £5. In order to claim the cash award of £5 (by any method other than the postal route) the consumer needed to spend £9 either by text or by 090 fixed line and would therefore have been £4 worse off by claiming the cash award. The Executive noted that in addition to this the consumer would also need to pay £1.05 for delivery of the award.

With regard to scratching off 3 matching symbols where a (non cash) award was claimable, the position appeared to be no different. Each consumer who scratched 3 symbols was guaranteed an award. Examples of these awards are; an MP3 player, a digital camera or a ladies and gents watch set. The Executive claimed that monetary 'value' of the non cash awards was less than the phone call to claim the award, as evidenced in the invoices supplied by the information provider. The same costs (£9) applied to claim by premium rate text or fixed line methods, however the delivery cost was higher at £3.85. The Executive therefore believed that the user would suffer a financial detriment as a result of claiming the award.

Ground 3 – Fast Cash promotions only

The scratch cards for two of the Fast Cash promotions stated in bold letters on the front that over £40,000 and £50,000 respectively had already been won. In the Executive's view this information was misleading and as a result the consumer would be further encouraged to enter the competition. The Executive argued that a consumer would have understood these statements to mean that the money already won was as a result of major prize payouts being made within that particular competition. As a result, consumers may have been satisfied that there were enough major winners to demonstrate a good chance of success and make it worth while for them to enter. However, the Executive noted that the scratch card promotions stated in the small print on the back that the monies 'won' is 'across a number of promotions' dating back some time. The Executive believed that the prominence of the statement at the front of the scratch cards was misleading. The Executive also believed that the information on the back of the card, which lacked in prominence, and which sought to clarify the statement at the front, was not sufficient.

The Executive stated that it was not clear whether the figures stated as to the amount "won" referred to major prizes being awarded or the combined value of all awards including low value cash and non-cash awards. The service provider had stated in a letter received on the 18th June 2008 that all winners on the Fast Cash service had 'so far' been low value winners.

For all these reasons it appeared that a breach of the paragraph had occurred.

2. In response to ground 1:

The information provider stated that the scratch card promotions were in no way

misleading and that all the relevant information as requested by the PhonepayPlus Code of Practice was applied on the promotional material. It confirmed that there was an initial subscription message on the scratch card which was worded in line with the Mobile Network's own Code of Practice - this stated: "*If you claim by text to XXXX you will get subscription to our quiz for £X a week. See below/rules for terms of use.*"

The information provider further stated that this message was usually in bold and featured either directly below or directly adjacent to the interactive voice response (IVR) and SMS numbers and was furthermore linked with a subscript symbol. It stated that this information was prominent, horizontal and did not require close examination to find. The information provider also stated that the scratch cards informed consumers that following the message above relating to subscription they should '*see below for the terms of use.*'

The information provider stated that a free subscription message was sent to the consumer before they were charged the first subscription message. The message stated: "*Freemsg> U have joined the xxxxx for £X per week until you send stop to xxxxx Helpline: 08448714500 - xxxxx.*"

In response to ground 2:

The information provider stated that the consumers could claim by post and thereby avoid any payment and they would therefore be £5 better off as a result of claiming their award. They also stated that the postal charge of £1.05 was an optional charge and the £3.85 charge was the actual cost of delivery.

The information provider stated that the cost of the MP3 players were circa £12 purchased in bulk and the cost of the camera and the watch sets were circa £6 purchased in bulk but that all these items would cost a lot more if purchased individually. The information provider supplied invoices which showed the cost of the items when bought in bulk.

The information provider stated that it had run a number of promotions past PhonepayPlus and its compliance team and had never been made aware of this point.

In response to ground 3:

The information provider relied on a subscript symbol to lead the consumer to the information on the back of the scratch card and supplied examples of how this method had been used in industry. The information provider further asserted that the fact that consumers had to read the back of the card to enter the competition meant that they would see the relevant information.

The information provider confirmed that the £40,000 referred to included other promotions not relating to Fast Cash and that this was brought to the attention of the consumer and included bigger prizes from the quiz games and other promotions.

The information provider further stated that the advertising of '£40,000' was not misleading as it merely advertised the value of prizes it had given away as a company and disagreed with the Executive's interpretation of the '*Over £40,000 has already been won*' statement. The statement was factually correct and the use of the

word 'over' indicated that the sum could be made up of any number of denominations of prizes. The information provider argued that the statement is neutral as to whether the sums were small or large.

The information provider stated that although it had stated that all winners so far had been low value winners, this referred to the Fast Cash winners only and that bigger prizes from the quiz games and other promotions had been won. The information provider supplied a list of all winners and the value of their awards.

3. In relation to ground 1, the Tribunal considered all the evidence, including the large number of complainants who said they had not knowingly entered into a subscription service, and concluded that the subscription information wording used (“*you will get subscription into...*”) was not sufficiently clear to ensure that consumers knew that sending a text would *automatically* subscribe them into the service. The Tribunal’s view was that the wording used may instead have implied that there was a subscription which was optional or available to the consumer at a later stage. The Tribunal therefore found that the scratch card promotion was likely to mislead the consumer into believing that the service only required a one off entry payment whereas consumers claiming by text were automatically entered into a subscription service.

With regard to the ground 2, the Tribunal found that, although the risk of being financially less well off as a result of claiming an award by phone or text was not made abundantly clear, there was no statement within the promotion that would mislead consumers into believing that they would be better off financially. The Tribunal did not therefore uphold a breach of paragraph 5.4.1a in relation to ground 2.

For ground 3, the Tribunal considered the evidence and found that the wording and presentation of the scratch cards were likely to mislead consumers. Whilst the Tribunal acknowledged that a subscript was used next to the statements that £40,000/£50,000 had “already been won”, it considered that this subscript was small and insufficient to draw attention to information which was buried within the terms and conditions on the reverse side. The Tribunal concluded that, as a result, it was likely that consumers would have been misled by the impression that prizes to the value stated had already been won in relation to that particular promotion. The Tribunal upheld a breach of paragraph 5.4.1a in relation to grounds 1 and 3.

Decision: UPHELD in relation to grounds 1 and 3 only

ALLEGED BREACH TWO

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3b)

“Promotional material must clearly state any information which is likely to affect a decision to participate, in particular:

- b an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restriction on their availability or use..”*

1. The Executive stated that (for all the scratch card promotions, other than “Square Your Bills”) the information provider had listed in the promotional material the quantity of each substantial prize available, i.e. 2x£10,000, 5x£1,000, 10x£500, 30x£250, 50x£100, 75x£50 and 100x£25, but had not provided the quantity of £5 awards available.

The promotions did not provide details of how many scratch cards there were in issue or how many of the guaranteed 'Watch sets' were available and therefore the consumer had no way of judging their chances of winning a major prize in relation to their chances of claiming a nominal prize (resulting in a financial detriment when claimed through the premium rate route). It was the Executive's belief that the lack of information regarding the number of lesser value awards directly affected the consumers' ability to judge their chances of winning a major prize.

The Executive believed that by not being made aware of the amount of guaranteed awards offered, the consumer may believe that they had been 'lucky' by scratching 3 winning symbols. If they were aware that all or the overwhelming majority of consumers who receive a strip of 4 cards will scratch a winning line they may not have believed their situation to be so fortunate and may not have entered the service.

2. The information provider stated that the rules within 7.6.3b state that the number of 'major prizes' must be declared, however it did not state that ALL prize quantities must be declared. The information provider asserted that no breach of this paragraph had occurred, as the information required had been provided.

The information provider confirmed that the scratch cards made clear that 'every card revealing 3 £ symbols is instantly guaranteed a cash award of £5 and could have won a further cash prize'.

3. The Tribunal first considered the wording of the paragraph 7.6.3 and found that it requires promotional material to state “*any information*’ which is likely to affect a decision to participate. The Tribunal noted further that sub-paragraph 7.6.3b contained important, but non-exhaustive, examples of information likely to affect a decision to participate. The Tribunal considered the evidence and found that because there was a very significant chance that consumers would be awarded a cash sum of £5, as opposed to any greater prize/award, this information was likely to affect a decision to participate in the competition and therefore should have been stated in the promotional material. The Tribunal upheld a breach under paragraph 7.6.3b of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.6c)

“Competition services and promotional material must not:

d suggest that consumers must use a premium rate service in order to participate if an alternative postal route is available.”

1. The Executive submitted that within the promotional material the prominence of the different competition entry routes were not equally weighted. It stated that the premium rate entry routes were more prominent than the postal entry route and argued that the promotional material suggested (by making the premium rate entry routes more prominent) that consumers should use the premium rate entry route even though a postal route was available.

The Executive also stated that the postal route was made confusing and unnecessarily complicated for consumers. It was the Executive's opinion that this also urged the consumer to use the premium rate route which was easier and more straightforward to navigate. The Executive asserted that the consumer was required to put effort into searching for the postal entry route when the premium rate entry route stood out clearly.

2. The information provider stated it readily advertised the free postal route with very clear instruction on how to claim by post and displayed the postal route always directly below the IVR and SMS numbers. The postal option stated '*See Game Rules for postal claims*'. The information provider stated that full postal details in the rules were contained within the first and second sentences so as not to be missed and were not buried in the centre of the terms and conditions. The information provider disagreed that the postal route was made confusing for consumers and stated that 50% of all cash prizes were claimed by claimants using the free postal route.
3. The Tribunal considered the terms and conditions on the scratch cards and noted that there was a postal entry route available. Whilst the Tribunal noted that the postal route appeared to be more onerous than the IVR or SMS entry routes, it did not find evidence of any actual suggestion that consumers must use the premium rate route in order to participate. The Tribunal did not uphold a breach of paragraph 7.6.6d of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION SERVICES (Paragraph 7.12.3a)

“Promotional material must:

- a clearly indicate that the service is subscription based. This information should be prominent and plainly visible and/or audible to consumers.”*

1. The Executive submitted that the subscription alert was not sufficiently prominent in the scratch card promotions. The subscription alert appeared on the back of the cards and was not highlighted as a substantial element of the whole service for each brand other than the “Square Your Bills” promotion where the alert existed on the front (facing) page but referred to the reverse side for terms of use.

The Executive stated that the subscription alert was worded “*If you claim by text to XXXX you will get subscription to our quiz for £X a week. See below/rules for terms of use.*” The Executive argued that the specific wording used here only alluded to the subscription rather than expressly stating that the service was a charged subscription.

2. The information provider responded that the first notification text was sent prior to any charge being incurred by the consumer, thus providing them with the opportunity to unsubscribe. It also stated the subscription information was highlighted prominently, usually in bold type, in a separate paragraph to other information and was either directly below or adjacent to the IVR and SMS numbers. The IP argued that either way this information was plainly visible, horizontal and did not require close examination to find. The message stated in brief: ‘*If you claim by text to XXXXX you will get subscription to our quiz for £X a week. See below/rules for terms of use.*’ The stated that it sent a free text message prior to the first quiz competition informing the consumer that: ‘Freemsg> U have joined the XXXXXXX for £X per week until you send stop to XXXXX helpline: 08448714500’. This gave consumers the option to unsubscribe from the competition prior to being charged.
3. The Tribunal considered all the evidence and concluded that the subscription information wording used (“*you will get subscription into...*”) was not sufficiently clear to consumers that the sending of a text would *automatically* subscribe the consumer into the service, as it may have instead been seen as a subscription which was optional or available to the consumer at a later stage. The Tribunal found that the scratch card promotions failed to *clearly* indicate that the service was subscription based and failed to provide such information in a prominent way. The Tribunal upheld a breach of 7.12.3a.

Decision: UPHELD

SANCTIONS

The Tribunal’s initial assessment was that, overall, the breaches taken together were **significant**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The service was operated in a manner which proved valueless to a substantial number of consumers who engaged with it as they were required to pay £9 in order to receive £5 award;
- The information provider’s behaviour was wilful in relation to the design of the service and manner of its promotion;
- There was material consumer harm as a result of the mass marketing strategy adopted by the information provider which meant the promotion reached a large number of consumers;
- The cost paid by individual consumers was high with consumers regularly charged in excess of £10 through the entry costs and subscription charges levied. Some complainants reported spending considerably more;

- Non-compliant subscription services have been singled out for criticism by PhonepayPlus;
- The information provider's breach history.

In mitigation, the Tribunal noted the following factors:

- The information provider supplied PhonepayPlus with all the information that was requested of them throughout the investigation; and
- The information provider stated that it had offered refunds to consumers who had approached MediaProm with a complaint, which had been confirmed by complainants.

The Tribunal acknowledged that the information provider had sought compliance advice from the Executive but noted that the advice sought was not in relation to all the promotions and that not all the advice given had been followed or implemented in a way that prevented breaches from arising.

Taking into account the mitigating and aggravating factors (and the number of complaints received), the Tribunal concluded that the seriousness of the case should be upgraded to **serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £100,000 fine;
- The Tribunal imposed a bar on the service and its promotion and all other scratch card based services (including scratch card based subscription services) and related promotions of the information provider, for a period of three months and thereafter until the information provider seeks and implements compliance advice to the satisfaction of the Executive (such bar not to apply to delivery of subscription services to existing subscribers).
- The Tribunal also ordered that claims for refunds are to be paid by the information provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.

The Tribunal commented that it was regrettable that this investigation had taken so long to be brought before it for consideration.