

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 4 December 2008 TRIBUNAL SITTING No. 17 / CASE 1

CASE REFERENCE: 768617/DM

Information provider & area:	Marketing Craze Limited, London
Service provider & area:	Wireless Information Network Limited, London
Type of service:	Mobile SMS
Service title:	Lotto by Text
Service number:	85200 & 88222
Cost:	85200 - £4.50 per week 88222 - £1.50 per week
Network operator:	All Mobile Networks
Number of complainants:	142

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

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 142 consumer complaints in respect of a lottery subscription service, called ‘LottobyText’. This was an SMS text alert service which provided subscribers with updates in respect of each of the tri-weekly national lottery draws (Saturday/Wednesday Lotto and Friday Euromillions). The service was promoted via direct text marketing, print advertising, search engines and pay-per-click campaigns. As part of the service’s promotion, consumers were encouraged to try out the service by participating in a ‘free’ trial offer

Some complainants reported to have received unsolicited chargeable SMS messages in respect of the service. Other complainants reported that they were unaware of the subscription element of the service. PhonepayPlus also received complaints in respect of the ‘STOP’ command failing to function.

Consumers were charged a standard fee of £1.50 per text alert, with the first draw in which they participated being free of charge. The total weekly charges ranged from £1.50 (one text alert per week) to £4.50 (three text alerts per week).

Subscribers were grouped into syndicates of 49 players (though the total numbers for each syndicate varied) with each syndicate receiving the same set of numbers. If a particular ticket won a prize, the winnings were distributed amongst the members of the syndicate, unless each participant’s share amounted to less than £10 (in which case the participant would be offered a single additional free entry into the next draw). It appeared that only syndicate members who had successfully paid the £1.50 fee, and who claimed their prize, would receive a share of the winnings, split amongst each of the members forming part of a designated syndicate. The service continued until the user sent the STOP command message, in order to terminate subscription.

The day to day running of the service ('LottobyText') was conducted by Marketing Craze Limited ('the information provider') which was contracted to the service provider. The syndicate service was provided by one company, Txtlotto Limited ("Txtlotto") who handled the running of the lottery syndicate and distribution of winnings, whilst the information provider operated the website (and all other associated promotional material) providing text alerts to users of the results for each draw.

In November 2007 the Executive became aware of certain issues regarding the service. The Executive proceeded to conduct an investigation under the standard procedure (under case reference 716873). The Executive thereafter issued two separate breach letters dated 28 January 2008 and 6 May 2008 subsequent to which no case was actually brought to the Tribunal for determination. Due to some confusion surrounding the number of potential breaches being raised in that case and the protracted time frame from when the investigation was first brought, the Executive concluded that it would not be appropriate to continue with the investigation in the form in which it had been conducted. As such, the Executive decided to conduct a fresh investigation under case reference (768617).

The Executive monitored the service on 29 July 2008 in response to an increasing number of complaints regarding the service, and thereby conducted a standard procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive made a request for information from the service provider, under paragraph 8.3.3 of the PhonepayPlus Code Practice 11th Edition (amended April 2008) ("the Code"), on 12 August 2008. The Executive granted the service provider an extension of time in which to respond, until 2 September 2008. A formal response was received from the information provider on behalf of the service provider, on 3 September 2008.

In a letter dated 6 October 2008, the Executive raised potential breaches of paragraphs 3.3.3, 5.2, 5.4.1a, 5.7.1, 5.8, 5.14, 7.6.3a, 7.12.3a-c, 7.12.4a, c, e and f and 7.12.5 of the Code. Upon receipt of the appropriate undertaking forms, the Executive agreed to proceed with the matter as an information provider case. The information provider responded to the breach letter on 15 October 2008.

The Tribunal made a decision on the breaches raised by the Executive on 18 December 2008.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

ADEQUATE TECHNICAL QUALITY (Paragraph 3.3.3)

"Service providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality."

1. The Executive received an admission from the information provider that a number of technical issues had arisen during the operation of the service (from February 2006). The Executive had particular concerns in respect of the admitted problems relating to consumer registration, via the website

www.lottobytext.co.uk. The information provider accepted that the method adopted in this instance, of sending the PIN activation code via e-mail was fundamentally flawed, in that no validation could be provided in order to establish whether consumers had knowingly opted-in to the service.

The result, as conceded by the information provider, was that there was a possibility that individuals' mobile details could be registered by a third party, thereby leaving consumers inadvertently subscribed into a service they had never consented to join. Following its own investigations into the problems, the information provider terminated this route of entry in July 2008. Other technical issues difficulties included those affecting Paypal customers and problems regarding an 'Acceptance Browser Bug', which appeared to have enabled subscribers to 'by-pass' and avoid the mobile originating ("MO") activation, by 'back-clicking' from the PayPal site. Other problems related to the information provider's delay in dealing with 'STOP' requests sent by consumers, or the command failing entirely.

The Executive welcomed the admissions made by the information provider, and noted the proactive and remedial steps it had taken, in dealing with the technical problems identified and brought to the Executive's attention.

2. The information provider commented that it had nothing further to add, but stated that the issues in question had been resolved through policy and system changes. These improvements had resulted in the number of complainants, falling substantially after each service change, and the fact that it presently received few complaints in respect of the service. The information provider recognised the serious nature of the above failures and that its customers, albeit a small number, were affected. The information provider emphasised that it accepted the serious nature of the fact that consumers might have been unknowingly entered into its service.

The information provider explained that during a period of rapid growth and its provision of the service to a fast growing customer base, it had omitted to place sufficient resources on assuring the technical infrastructure of the application. It had since trebled its investment in technical development, debugging and testing. Any technical capacity concerns had been addressed with the original single server now split to three servers dedicated to purpose: syndicate management and website handling, message delivery (inbound and outbound) and developing and testing/research and development. Furthermore, it had created a new customer service resource with 24/7 telephone support and an online email helpdesk. It had also improved its 'FAQ' sections, which were shortly due to go live on its main website.

3. The Tribunal considered the evidence and noted the information provider's admission of the technical problems at hand. The Tribunal upheld a breach of paragraph 3.3.3 of the Code, although it noted the information provider's cooperation with the Executive and the extensive remedial steps it had taken.

Decision: UPHELD

ALLEGED BREACH TWO

LEGALITY (Paragraph 5.2)

“Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.”

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions. This is sometimes called ‘a hard opt in’, or (2) the recipient’s details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication. This is sometimes called a ‘soft opt-in’.

1. The Executive considered that the information provider had failed to obtain the appropriate consumer consents, for the following reasons:

Reason 1

The Executive considered it clear from the call log entries supplied by the information provider, that the information provider had carried out direct marketing activity. It noted that of 74 in total, 55 numbers appeared to have received promotional text messages, for example:

‘FreeTrial: 5 FREE Lottery lines by LottobyText.co.uk/After trial get Lotto results to ur mobile/Reply stop to 85200 to end. After trial, srvc chgd 1.50p p/draw.’

The Executive noted that of the 74 call logs provided, only one call log for a sole mobile number showed the existence of MO text messages having been sent. The Executive noted the evidence supplied by aggrieved consumers, who denied having either subscribed into or seeing any information about the service.

Reason 2

The Executive also noted that sixteen of the call logs failed to demonstrate how the original opt-in was obtained for each of the numbers concerned. The Executive considered that the failure to include this information was corroborating evidence, for those numbers at least, that no contextual evidence existed of consumers having ever opted into the service in question.

2. The information provider responded to the Executive’s assertions as follows:

Reason 1

The information provider stated that on closer inspection, the logs provided for the 112 numbers requested were incomplete but not inaccurate. It took responsibility for not having checked them thoroughly enough, prior to release. The information provider commented that the logs were incomplete not only in terms of missing numbers, but also missing entries which should have included

demonstrable MO registrations. It accepted that this omission had led the Executive to quite reasonably make certain inaccurate assumptions.

The information provider asserted that the initial messages were not marketing messages, but were registration messages sent to the consumer after registering to the service. The information provider apologised for the omission and supplied updated complete versions of the logs. It noted that all seven of the cited mobile numbers in did in fact have corresponding acceptance MOs and that all 16 numbers listed in reason two, also had corresponding acceptance MOs.

The information provider added that unfortunately, the vehemence of some customers' denials at having registered was something it occasionally experienced. In such situations, it usually gave the customer the benefit of the doubt and offered a full refund (on the assumption that the registration had been carried out by perhaps a family member or friend, or was a genuinely a forgotten registration). In certain circumstances, it took a more commercial view where it believed the customer was 'gaming', i.e. knowingly entering the service with a view to cancelling some time later and requesting their money back. The information provider commented that it had even experienced customers requesting refunds, after successfully claiming winnings.

3. The Tribunal considered the evidence and determined on the basis of the call logs in some instances, the information provider had been unable to demonstrate that there had been a valid opt-in to the service. Taken together with the complainants' evidence that they had received unsolicited messages, the Tribunal considered on a balance of probabilities that it was more likely than not that in some cases there was no valid opt-in. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

MISLEADING (Paragraph 5.4.1a)

"Services and promotional material must not:

a mislead, or be likely to mislead in any way..."

1. The Executive considered the service to be misleading for the following reasons:

Reason 1

The Executive raised concerns in respect of the promotion of the service. In particular, it considered the website www.lottobytext.co.uk, when looked at from the perspective of an unsuspecting consumer, could be viewed as inherently misleading. The Executive considered that the step-by-step instructions arguably failed to identify the necessary steps consumers would need to follow in order to opt-out, by failing to advertise the appropriate short code (85200) which consumers would need to activate in order to terminate the service.

The Executive also noted that the website failed to prominently state whether the service was in fact subscription based, the main reference to this being: '*This is a subscription service and will continue until you send STOP*', which was placed

toward the bottom of the page. This was exacerbated by the words 'free trial', which were relatively prominent and appeared to be a deliberate enticement to encourage consumers to register to the service.

The Executive also raised concerns that the use of colours (blue, white and red), the overall formatting and style of the website, together with the use of lottery balls (similar to those used on the official National Lottery website), gave the false impression that the service was affiliated to the National Lottery. The Executive considered that this could potentially mislead consumers into thinking that the services were in some way connected. The Executive noted that the disclaimer '*LottobyText provides FREE National Lottery syndicate lines for its members but is not affiliated to Camelot Grp plc*', was again situated toward the bottom of the page. As a subsidiary point, the Executive also noted that the content of some of the service messages, included reference to the National Lottery slogan '*IT COULD BE YOU*'.

Reason 2

The Executive raised concerns by the use of 'spoof texting' as a marketing tool. It appeared from the call logs that the name of the service '*LottobyText*' was stated, as opposed to the relevant originating shortcode. For example:

'Lottobytext: Free Trial: 5 FREE Lottery lines by LottobyText.co.uk/ After trial get Lotto results to ur mobile/Reply stop to 85200 to end. After trial, svc chgd 1.50p p/draw'

The content of the message referred the consumer to a designated short code (85200) in order to terminate the service, however the text alert service was sent from an entirely different short code (88222). The Executive considered that consumers could be misled into thinking that the services were entirely separate.

2. The information provider responded to the Executive's assertions as follows:

Reason 1

The information provider stated that it appeared that the Executive's objections were primarily centred on the prominence of the required disclaimers, 'STOP' and pricing information, and accepted the Executive's request to make these clear references, clearer still. It commented that a previous request for compliance advice had been refused; however, it intended to make changes to the website. These changes would include greater prominence of non-affiliation to the National Lottery Service, 'STOP' on a designated short code and further prominence of the subscription element.

The information provider explained that not all of its services were charged at £1.50 per message, which is why it quoted '£1.50 per draw'. Some of its offers sent out alerts on a weekly basis, whilst others were sent after each draw. The weekly messages were charged at £4.50 on the 85200 shortcode, whilst the per draw results messages were charged at £1.50 on the 88222 shortcode. The information provider explained that there was no difference in the total weekly charge to the consumer, merely fewer text messages being sent in respect of one service than the other.

The information provider noted the Executive's concerns in respect of its chosen colour schemes, although it reiterated that it considered its site was different in both 'look and feel'. It commented that some of the use of blue and red at the bottom of the page was purely coincidental, being dictated by the HTML settings required for search engine optimisation, and the H1 and H2 (header text settings) which designated the importance of information (for the purposes of spidering applications which trawled the web) being set to red and blue.

The information provider argued that the expression 'It could be you', was common enough in the English language and had been in use as a slogan since the 1950s. It had found no reference to this slogan on the National Lottery website, nor was it one of their registered trademarks. However, in view of the Executive's concerns, the tagline had been removed.

Reason 2

The information provider stated that the vast majority of its customers came via the web and that the brand it promoted was 'LottobyText', which summed up the nature of the service. It believed that consumers receiving text initial messages from its service should be able to clearly identify the sender, hence the inclusion of 'Lottobytext' in those messages.

The information provider stated that consumers could text the STOP command to any of the shortcodes, irrespective of the registration or billing shortcodes. The reason it chose to advertise 85200, was because it was a dedicated shortcode and provided a faster delivery than the other shared shortcode.

3. The Tribunal considered the evidence and determined that neither the colours nor the layout of the website, nor the slogan used suggested an inaccurate and misleading affiliation to the National Lottery. However, the Tribunal was pleased to note that the information provider had taken steps to point out to consumers that the site was not affiliated to the National Lottery for the avoidance of any future confusion. The Tribunal also did not consider the reference to 'Lottobytext' as opposed to shortcode 88222, to be misleading. However, the Tribunal did consider that the subscription element of the service had not been prominently stated and determined that the advertised use of a different shortcode in respect of the 'STOP' command, might have caused confusion to consumers. The Tribunal took the view that without the subscription element of the service being made clear to consumers, they may have been misled into thinking they were only signing up for free lottery tickets. The Tribunal were persuaded by the evidence of complainants that this was the case. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

PRICING INFORMATION (Paragraph 5.7.1)

"Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge."

1. The Executive considered that the promotional website and SMS messages sent to consumers, failed to state in the simplest and clearest of terms, the associated costs of using the service (i.e. that all text alerts cost the recipient £1.50 per SMS message received, or the fact that the service was subscription based).

In respect of the website, the Executive noted that far greater prominence was given to the availability of the *'Free and limited offer,'* which it considered an obvious enticement to encourage customers to register to the service. The word 'Free' was emboldened, centrally placed in a larger font size and subsequently referenced throughout the remainder of the promotional content. In comparison, the pricing information was relatively hidden; the text being displayed under the subheading entitled *'Try Now'*.

This was exacerbated by the absence of pricing information in any of the service or promotional text messages sent to consumers. Recipients only received information relating to each individual draw and the results for the syndicate they were registered to, for example:

'National Lottery results are 12/03/2008 Num=01 13 26 38 41 47 07[Your next Claim Ref for VERA388is/1303VZZT/IT COULD BE YOU'*

'Euromillions Lottery results for 29/02/2008 Num=12 37 40 47 49 02 09* [Your next Claim Ref for VERA388is/0103KNXW/IT COULD BE YOU'*

2. The information provider reiterated that the cost charged per draw, was a maximum of £1.50. It considered that the pricing information was placed in a prominent position, namely adjacent to the box where the users entered their mobile number (as directed by PhonepayPlus guidelines). Furthermore, the pricing information was legible and in the same size font as other key information regarding the service. The only difference was that it was not emboldened.

The information provider accepted that the limited nature of the offer did add to the enticement, but was by no means incorrect. It purchased thousands of lottery tickets each week, but could only assign these to as many customers as supported its syndicate size policy. If the size was exceeded, it would not process the request.

Notwithstanding any failures, the information provider asserted that the service did not operate as described. It disputed the Executive's assertion that pricing information was absent from text messages, despite the registration message quoted under paragraph 5.2: *'FreeTrial: 5 FREE Lottery lines by LottobyText.co.uk/ After trial get Lotto results to ur mobile/ Reply stop to 82500 to end. After trial, srvc chgd 1.50p/draw'* referencing the price and indirectly, the frequency. Although it concurred that pricing information was important at the registration stage, the information provider asserted that the further messages cited were 'results messages' and therefore did not require pricing information.

3. The Tribunal considered the evidence and determined that the lack of prominence in respect of pricing information was evident and potentially in breach of paragraph 5.7.2 of the Code although this provision was not before them for consideration. The Tribunal did note that the call logs demonstrated a

lack of pricing information in the SMS messages sent to consumers, contrary to the requirements of paragraph 5.7.1. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

CONTACT INFORMATION (Paragraph 5.8)

“For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user.”

1. The Executive noted that the call log entries indicated that some of the promotional messages sent to consumers, only made reference to the service’s brand name (LottobyText) and not the company responsible for the promotion and operation of the service, being the information provider Marketing Craze Limited. For example:

‘Free Trial: 5 FREE Lottery lines by LottobyText.co.uk/After trial get Lotto results to ur mobile/Reply stop to 85200 to end. After trial, srve chgd 1.50p p/draw’

The Executive considered that the use of the brand name or the advertised website, was insufficient to satisfy the requirements of paragraph 5.8, which required the inclusion of the company responsible for the service, together with a customer services telephone number.

2. The information provider explained that ‘Lottobytext’ was the service to which its customers were subscribed, and that the name explained the nature of the messages. Furthermore, the messages made reference to the lottobytext.co.uk, which stated the Lottobytext support number. The information provider raised concerns that replacing ‘Lottobytext’ with ‘Marketing Craze’, was likely to confuse users as to the identity of the sender and to which service the message related. Regardless of whether a consumer wanted to stop the service or make a claim, it believed that customers wanted one point of contact/reference.

The information provider stated that customers who called the existing helpline were greeted by a Lottobytext representative and that it was also possible for consumers to make contact via email, the telephone claim line, website contact form, a 24 hr support telephone line and via its postal address. It had found that of the 112 complainants cited, approximately 40 per cent had already been in contact and were offered full refunds. It surmised that the other 60 per cent either tried and failed to get a response in a timely fashion, or decided to escalate their concerns directly to PhonepayPlus.

3. The Tribunal observed that paragraph 5.8 of the Code specifically required the inclusion of the name of the service or information provider, and therefore a strict application of this paragraph would result in the finding of a breach. However,

the Tribunal considered that the information provider's reference to the service name (which in this instance was more recognisable to the consumer, than the name of the information provider itself) was likely to have assisted, as opposed to confused, consumers. The Tribunal did not uphold a breach of paragraph 5.8 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH SIX

STOP COMMAND (Paragraph 5.14)

"Where a 'STOP' command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of 'STOP' within any message to be sent by the user. When a 'STOP' command has been sent, the service provider must make no further charge to the user for the service."

1. The Executive received 16 complaints relating to issues regarding to the operation of the 'STOP' command. Consumers who initiated the 'STOP' request reported that they continued to receive chargeable text messages. The Executive noted the information provider's confirmation of technical problems, which coincided with a significant proportion of complaints (5 in total) alleging that the 'STOP' command was not working. The Executive noted that the call logs clearly showed that upon initiating the 'STOP' command, consumers received an automated message informing them that they had been successful in terminating the subscription service. For example:

'Lottobytext; freemsg>request confirmed. There are no active services for this Mobile number'

Regardless of the above message, these consumers continued to be charged for the service. Other complainants reported similar problems outside this time frame, some of which were confirmed by the call logs and others not (due to an absence of MO messages).

2. The information provider accepted responsibility for the failure to act upon the 'STOP' commands in a timely fashion and in some cases, failing to act at all. In mitigation, it stated that upon discovery of the issues it had sought to follow the right and proper course of action and contacted all affected customers and offered compensation for the charges. With regard to the second subset of numbers cited by the Executive, the information provider admitted that the numbers were subject to extended delays in the 'STOP' command being processed. The information provider had already addressed this unrelated issue. It had added a further control mechanism to ensure that its server which handled message delivery, did not process any pending messages once it had received a 'STOP' command for a given mobile number, regardless of whether or not the server where the application was hosted, had actually stopped the service. The information provider reiterated that it had requested its customer service team ensure that the affected customers were fully compensated.
3. The Tribunal considered the evidence and noted the information provider's admission that the 'STOP' command had been subject to delays and in some

instances, was not operational. The Tribunal upheld a breach of paragraph 5.14 of the Code.

Decision: UPHELD

ALLEGED BREACH SEVEN

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3a)

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

a any key terms and conditions, including any restrictions on the number of entries and prizes which may be won..”

1. The Executive considered that the number of subscribers per syndicate was a key piece of information, which should have been made known to the potential user, prior to registration. The service messages simply informed the user of the syndicate they had joined, and failed to inform the consumer of the total number of individuals registered in any one syndicate. The Executive considered that this information would clearly inform the consumer, or at the very least provide them with an indication and mathematical basis from which to decipher, how any future winning claim would be apportioned. The Executive considered that the failure to provide this information might have had some bearing on a consumers' decision to participate.
2. The information provider commented that whilst this paragraph of the Code addressed competition services, its service was in fact a lottery results alert service, which was what consumers were charged to receive. It stated that the syndicate tickets assigned to its customers (as part of their registration to the results alerts) were a value added benefit.

The information provider stated that it had sought legal advice on how to address the genuine issue of stated syndicate size, the conclusion being that there was a conflict between what it could legally declare as a cap on syndicate size (in the event of a legal challenge) and what it actually paid out to syndicate members. It considered the ever changing syndicate membership to be based on variables such 'STOP' commands, new registrants, the number of actual claimants and failed bills. The information provider stated that it reserved tickets for any consumers who entered mobile number into its website in the expectation that they would subsequently register by MO. However, in practice just one in three actually registered, meaning that of the 49 theoretical syndicate members, over 30 failed to complete the registration process. The information provider stated that in practice, it paid out an equivalent of 25 per cent plus of the total winnings to individual eligible claimants and agreed that this should be made clearer to consumers. It had obtained legal advice that it was entitled to publish the average share on its website, and proposed to make this amendment to its website, if approved.

3. The Tribunal considered that the information given to consumers about their potential winnings, was not necessarily accurate, nor was it prominent enough. The Tribunal noted that consumers would be signed up to a text alert as opposed to a lottery service, something which needed to be made clearer. The Tribunal

declined to endorse the amendments as suggested by the information provider, or to propose any suggestions of its own. The Tribunal advised the information provider to liaise with the Executive and take compliance advice on the issue. The Tribunal upheld a breach of paragraph 7.6.3a of the Code.

Decision: UPHELD

ALLEGED BREACH EIGHT

SUBSCRIPTION SERVICES (Paragraph 7.12.3a-c)

“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 noted that consumers, upon subscribing to the service, received an initial promotional message, which inferred that the service was subscription based. For example:

‘FreeTrial: 5 FREE Lotto rows by LottobyText.co.uk/ After trial, 5 rows & results for £1.50 per Lotto draw. Help: 0871 288 2680 to end subscription txt stop to 85200.’

However, the call log entries demonstrated in at least 11 log entries, the above information was not provided. In respect of these numbers, it appeared that no information was supplied to inform the recipient that the service was subscription based.

2. The information provider conceded that some messages in respect of certain offers did not contain the requisite information. In mitigation, it stated that consumers would have been made aware of the subscription nature, charges and frequency of charges at the time of registration, whether this be via website, WAP site or print. The information provider stated that it had already updated its messages to uniformly state subscription, frequency, charges and ‘STOP’ instructions.
3. The Tribunal considered the evidence and noted the admissions of the information provider, together with the content of the call logs, which demonstrated that some of the promotional SMS messages sent to consumers, failed to state that the service was subscription based. The Tribunal upheld a breach of paragraph 7.12.3a of the Code.

Decision: UPHELD

SUBSCRIPTION SERVICES (Paragraph 7.12.3b)

“Promotional material must:

- b ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible.*

1. The Executive cited a second category of numbers, to which a different promotional text message was sent:

'Free Trial: U will get 5 FREE National Lottery lines shortly/ After draw, we sent Lotto results to ur mobile/ NB We pick winning nos using mathematical formulae'

The Executive considered that this message alluded to the fact that further messages would be sent (*'After draw, we send Lotto results to ur mobile'*). The message also failed to specify the terms of use (i.e. in terms of the frequency of when these messages were to be sent), provide instructions regarding opt-out, or detail the subscription element of the service.

2. The information provider conceded that some messages set up for certain offers were not of an adequate standard. In mitigation, it reiterated that consumers would have been made aware of the subscription nature, charges and frequency of charges at the time of registration. The information provider again stated that it had already updated its messages to uniformly state subscription, frequency, charges and 'STOP' instructions.
3. The Tribunal noted the admissions of the information provider, together with the content of the call logs, which demonstrated that some of the promotional SMS messages sent to consumers, failed to clearly state the terms of use. The Tribunal upheld a breach of paragraph 7.12.3b of the Code.

Decision: UPHELD

SUBSCRIPTION SERVICES (Paragraph 7.12.3c)

"Promotional material must:

c advertise the availability of the 'STOP' command.

1. The Executive commented that the logs demonstrated three further consumers, where the type of promotional text messages sent, failed to include or advertise the availability of the 'STOP' command. One particular complainant received the following message:

'FreeMsg: Boost ur chances & add more rows. Just REPLY ADD for £1.50 per draw/ 2 Claim winnings goto LottobyText.co.uk/ keep UR tickets & ClaimRef as entry proof'

2. The information provider conceded that some messages set up for certain offers were not of an adequate standard. In mitigation, it reiterated that consumers would have been made aware of the subscription nature, charges and frequency of charges at the time of registration. The information provider stated that it had already updated its messages to uniformly state subscription, frequency, charges and 'STOP' instructions.
3. The Tribunal noted the admissions of the information provider, together with the content of the call logs, which demonstrated that some of the promotional SMS messages sent to consumers, failed to advertise the availability of the STOP command. The Tribunal upheld a breach of paragraph 7.12.3c of the Code.

Decision: UPHELD

ALLEGED BREACH NINE

SUBSCRIPTION INITIATION (Paragraph 7.12.4a, c, e and f)

“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

- a name of service,*
- c what the billing period is ... or, if there is no applicable billing period, the frequency of messages being sent*
- e how to leave the service,*
- f service provider contact details.”*

1. The Executive noted that the call logs demonstrated that on a total of 13 occasions, consumers were charged for messages, without having received an initial or free promotional message as required by paragraph 7.12.4 of the Code.
2. The information provider conceded that some messages set up for certain offers were not of an adequate standard. In mitigation, it reiterated that consumers would have been made aware of the subscription nature, charges and frequency of charges at the time of registration. The information provider stated that it had already updated its messages to uniformly state subscription, frequency, charges and ‘STOP’ instructions.
3. The Tribunal noted the admissions of the information provider, together with the content of the call logs, which demonstrated that some consumers had been charged for receipt of the service, without having previously received a free initial subscription message. The Tribunal upheld a breach of paragraph 7.12.4 a, c, e and f of the Code.

Decision: UPHELD

ALLEGED BREACH TEN

SUBSCRIPTION REMINDERS (Paragraph 7.12.5)

“Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers.”

1. The Executive noted that the call log entries for each of the 74 numbers provided, demonstrated that users were not sent any reminder messages during the term of their subscription.
2. The information provider conceded that it had not implemented this requirement as it had misinterpreted the Code. Its customers spent less than £20 a month and it had wrongly assumed that this meant it did not need to implement the reminder. The information provider stated that the following message would be sent to consumers in future:

‘FreeMsg: You are subscribed to LottobyText.co.uk Lotto alert service for £1.50 per Lotto result draw until you send STOP to 88222. Helpline 08712882680’

3. The Tribunal noted the admissions of the information provider, together with the content of the call logs, which demonstrated that some consumers had been not been sent the requisite reminder messages. The Tribunal upheld a breach of paragraph 7.12.5 of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **very serious**.

In determining the sanctions appropriate for the case there were no aggravating factors for the Tribunal to consider:

In mitigation, the Tribunal noted the following mitigating factors:

- The information provider had sought compliance advice when the issues were brought to their attention and met with the Executive on two separate occasions to discuss a range of policy issues and amendments, made in order to improve the service and make it compliant; and
- The information provider cooperated with the Executive when notified of the breaches, made various admissions and taken proactive steps and remedial action.

Taking into account the lack of aggravating factors and giving appropriate weight to the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand.
- A £25,000 fine.
- The Tribunal also ordered the information provider to seek compliance advice in respect of a wide range of issues in relation to the service, within 2 weeks from the date of this notice, to be implemented within 2 weeks of receipt.