

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 6 December 2012
TRIBUNAL SITTING No. 115
CASE REFERENCE: 10867**

Level 2 provider: Marketing Craze Limited
Level 1 provider: IMImobile Europe Limited
Type of service: Subscription based competition service
Network operator: Mobile Network operators

**THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER
UNDER PARAGRAPH 4.4 OF THE CODE**

BACKGROUND

Between 3 October 2011 and 28 November 2012, the Executive received 267 complaints in relation to a subscription-based competition service (the “**Service**”) operated by the Level 2 provider, Marketing Craze Limited. The Service operated on shortcodes 85200, 87770 and 82526. For £4.50 per week subscribers to the Service received five entries in each of three weekly lottery draws, namely the Wednesday and Saturday National Lottery “Lotto” draws and either the Tuesday or Friday “Euromillions” lottery draw. Subscribers were entered into the lottery draws as part of a syndicate containing up to 48 other subscribers. Subscribers were also provided with the results from the lottery draws via SMS text message.

As an inducement to enter into the Service, potential subscribers were offered five “free” entries into one of the lottery draws (“**the Offer**”). The Offer, and the Service, were promoted using the Level 2 provider’s own website, third party websites and telesales calls.

Complainants generally stated that they had not consented to be charged, or that they had been misled into entering the Service and did not appreciate that they would incur premium rate charges.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 16 November 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.2.5 – Pricing information

The Level 2 provider responded on 30 November 2012. On 6 December 2012, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.2

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

1. The Executive submitted that the Level 2 provider had breached rule 2.3.2 in that consumers were misled or likely to have been misled by the promotion of the Service.

The Executive alleged this breach for three reasons.

Reason 1: the telesales calls

The Executive noted that the Offer was promoted during telesales calls, as well as through website advertising. The Level 2 provider made available six recordings of such telesales calls. The Executive noted that the Offer was presented during these telesales calls as a reward to the consumer, for example, for participating in a survey. The Executive submitted that consumers perceived that they were being offered a free reward, and by accepting the reward would receive five free entries to a lottery draw, thereby without incurring any charges. The Executive asserted that in reality, by accepting the Offer consumers were subscribed to the charged Service. In addition, the Executive relied on the complainant accounts, which it believed evidenced that consumers had been misled into incurring premium rate charges.

Reason 2: the syndicate

The Executive observed that the promotion of the Service via third party affiliate websites (**Appendix B**) and telesales calls (**Appendix C**) did not mention that subscribers to the Service were entered into the lottery draws as part of a syndicate.

The Executive noted that subscribers to the Service were entered into lottery draws as part of a syndicate containing up to 49 members, and that any winnings that the syndicate earned would be shared equally between the members of the syndicate, and not won solely by the individual subscriber. The Executive submitted that this information had a significant impact on the value of the Service to consumers, and on the perceived value of the Offer but had not been made clear to consumers before entering the subscription and/or acceptance of the Offer, and that such omission was therefore misleading.

Reason 3: use of the phrase “free trial”

The Executive submitted that the presentation of the Offer was misleading in that it stated that the first draw was part of a free trial period. The Executive submitted that in fact the Service mechanism was such that consumers either incurred a premium rate charge before the lottery draw in which they were to be entered for “free” took place, or incurred a charge for the message containing the results of the “free” lottery draw.

The Executive further submitted that the reasonable consumer would expect the free trial period to be clearly defined and to have a clear end point. However it was not made clear to consumers at what point or when they would first start incurring charges. The Executive also submitted that, given the promotion of the Service, the reasonable consumer would expect the free trial period to include the provision of five free lottery draw entries and free notification of the results for the relevant draw. The

Executive submitted that as the free trial period did not meet these reasonable expectations the promotion of the Service was misleading to consumers.

The Executive further noted that the terms and conditions for the Service available on the Level 2 provider's website stated that any winnings earned in the free lottery draw could not be claimed unless the consumer subscribes to the charged Service.

For the above three reasons, the Executive submitted that consumers were misled, or were likely to have been misled, and as a result the Service was in breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied the breach. It pointed out that the interpretation of promotional material can differ between consumers. It also emphasised that regardless of how the Service was first promoted to consumers, in every case consumers were provided with information that complied with the Code prior to and following subscription to the Service.

Reason 1: the telesales calls

In relation to Reason 1, the Level 2 provider pointed out that only a small proportion (approximately 8%) of its customers were introduced to the Service through telesales calls, that such calls contained key terms and that the subsequent promotional text messages sent to those who had given their permission to be promoted to had contained all key terms.

The Level 2 provider also disputed the accuracy of complainant evidence regarding the telesales calls. It submitted that the Executive had failed to consider the full relevant content of the recordings of the telesales calls; in particular, the fact that the subscription nature of the Service had been made clear to consumers. The Level 2 provider further submitted that the Executive's characterisation of the Offer as a reward was misplaced, and that the Offer could equally well be characterised as an introductory promotion. The Level 2 provider emphasised that the telesales calls could not result in consumers being subscribed to the Service, but could only obtain consumers' agreement to being sent promotional text messages regarding the Service, the content of which complied with the Code.

Reason 2: the syndicate

The Level 2 provider emphasised the fact that the Service had two distinct elements, in that it provided both a lottery results service and a lottery entry service.

The Level 2 provider observed that the Service had functioned on a syndicate basis for several years, and that the Executive had been aware of that fact as a result of proactive communications by the Level 2 provider. The Level 2 provider pointed out that no complainants had complained about the syndicate aspect of the Service.

The Level 2 provider submitted that the syndicate aspect of the Service was not a key part of the Service, and that the concept of syndicate entry into lottery draws was generally well understood by consumers. It added that 55% of customers registered via its website where the term 'syndicate' was ubiquitous and clear.

In relation to the impact that the syndicate aspect of the Service had on the value of the Service to consumers, the Level 2 provider submitted that the Executive had misunderstood how consumers value the Service. The Level 2 provider explained that although the maximum syndicate size was 49 persons, this reduced over time as members of the syndicate stopped subscribing to the Service. The Level 2 provider

stated that on average after 30 days a syndicate reduced to only 11 members, and on average this reduced further to eight members after three months.

The Level 2 provider stated that although it did not consider that it had breached the Code in this regard, it had nevertheless implemented changes to its promotional material, including its telesales scripts, so that the syndicate aspect of the Service was brought to consumers' attention.

Reason 3: use of the phrase "free trial"

The Level 2 provider submitted that the Executive had misunderstood the nature of the free trial promotion. The free trial included access to the member area of the Level 2 provider's website, and five free entries into a lottery draw.

The Level 2 provider submitted that it was clear to consumers when the trial period would end as this was stated in welcome text messages, and further that consumers were provided with sufficient time to consider whether they wished to remain subscribed to the Service before they received any charged messages. The Level 2 provider also stated that over 40% of consumers had benefitted from the free trial by unsubscribing from the Service before receiving any charged messages.

The Level 2 provider stated that users of the Service could still claim any winnings earned on their free lottery draw entries even if they had unsubscribed from the Service before receiving any charged messages. The Level 2 provider emphasised the fact that all consumers were provided with a unique claim reference, which was all they required to claim any winnings from the free lottery draws.

In summary, the Level 2 provider stated that it had not misled consumers in its promotion of the Service.

3. The Tribunal considered the evidence, including the written and oral submissions made by the Level 2 provider. The Tribunal considered each of the three reasons submitted by the Executive.

In relation to Reason 1, the Tribunal considered the call recordings and the context in which the offer of five free lottery entries was promoted to consumers. The Tribunal noted that emphasis was placed on encouraging consumers to accept the free trial before any pricing information had been provided. In addition, the Tribunal found that complainant evidence together with instructions contained in an order confirmation receipt from a telesales company showed that the free trial had been promoted as a reward for taking part in the survey. The Tribunal considered that consumers had therefore accepted the Offer on that basis.

In respect of Reason 2, The Tribunal noted that the telesales calls, third party website advertisements and promotional text messages did not inform consumers that they would be entered into lottery draws as part of a syndicate. The Tribunal noted that the value of an entry in a lottery draw as part of a syndicate was significantly less than the value of an entering on an individual basis. The Tribunal noted that complainants had not complained about the syndicate aspect of the Service, but considered that this was likely to be because complainants were simply not aware of this aspect of the Service and were not therefore aware that they had been misled in this regard. The Tribunal noted that the Level 2 provider's website also did not inform consumers about being part of a syndicate on every landing page.

In relation to Reason 3, the Tribunal noted the Level 2 provider's acknowledgement during the informal representations that it was not possible for consumers to receive the lottery results of the free trial without incurring a charge relating to the subscription element of the Service. The Tribunal considered that consumers were likely to have expected to receive the results of the draw they were entered into as part of the free trial without being charged or having further interaction with the Service. The Tribunal further observed that the free trial period was not clearly defined or described and it was, in particular, not clear to consumers when the free trial period began and ended. In light of the above the Tribunal concluded that the Service was misleading and/or likely to mislead consumers and accordingly upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.2.5

"In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service."

1. The Executive accepted that promotional material on the Level 2 provider's website (**Appendices A and B**) and the example telesales calls (**Appendices C**) contained pricing information. However, the Executive submitted that in some cases the pricing information was not sufficiently prominent. The Executive submitted that the emphasis placed on the introduction of the Offer during telesales calls and the placement of the pricing information within the marketing scripts failed to make the pricing information sufficiently prominent or clearly audible. In relation to the website, the Executive noted the contrast between the prominence of information about the Offer compared to the inadequate prominence afforded to the pricing information. The Executive also noted the complainants' evidence that they had not fully appreciated the cost of the Service.

The Executive submitted that pricing information was not prominent and that the Service was therefore in breach of rule 2.2.5 of the Code.

2. The Level 2 provider denied the breach of rule 2.2.5. The Level 2 provider asserted that both the telesales calls and the Executive's screenshots of third party web promotions were, to some extent, abridged, and needed to be assessed in their full form. The Level 2 provider further emphasised that in the case of both the telesales calls and third party affiliate website advertisements, the consumer was simply being asked for their agreement to receive further promotional material from the Level 2 provider, and was not at those points subscribed to the Service. The Level 2 provider submitted that the further promotional material sent in text messages always contained the necessary pricing information in compliance with the Code.

The Level 2 provider stated that it had sought to follow industry best practice in its placing of pricing information; for example, by locating pricing information close to the box where consumers were asked to enter their mobile phone number in website advertisements. In relation to the complainant evidence, the Level 2 provider pointed out that the number of consumers using the Service had significantly increased, and that over one third of the complaint evidence provided by the Executive related to consumers who had not been charged. The Level 2 provider further asserted that the Executive had been aware of examples of its promotional material for some time, and

questioned why it had not raised the issue of the insufficient prominence of pricing information at an earlier date.

3. The Tribunal considered the evidence, including the written and oral submissions made by the Level 2 provider. The Tribunal found that the pricing information was compliant with the Code in terms of presence and proximity. However, the Tribunal expressed some concerns about the unclear context in which the pricing information was presented, and the effect this had on consumers. The Tribunal took into account the complainants' evidence that they had not been aware of the cost of the Service, but the Tribunal considered that this was because the complainants had been misled as to the existence of any charge for accepting the Offer. Accordingly the Tribunal did not uphold a breach of rule 2.2.5 of the Code.

Decision: NOT UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of the breach of the Code was as follows:

Rule 2.3.2 – Misleading

The initial assessment of rule 2.3.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service had a clear and highly detrimental impact, directly or indirectly, on consumers.
- The Service had the sole purpose of generating high revenues and did so through intentional or recklessly misleading promotions.

The Tribunal's initial assessment was that, overall, the breach was **very serious**.

Final Overall Assessment

The Tribunal took into consideration the following aggravating factor:

- The Level 2 provider's breach history and, in particular, its failure to take into account comments made by a previous adjudication regarding the same Service.

The Tribunal took into consideration the following mitigating factors:

- The Level 2 provider took steps to engage with PhonepayPlus in advance of the investigation. The Tribunal expressed its disappointment that this engagement did not enable PhonepayPlus to sufficiently address the issues that were before the Tribunal.
- The Level 2 provider, when notified of potential breaches, took steps to remedy those potential breaches in advance of the Tribunal.

The Level 2 provider's revenue in relation to the Service was within the range of Band 1 (£500,000+).

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

Sanctions Imposed

Having regard to all the circumstances of the case including the level of consumer harm and the fact that consumers were misled on a large scale, the Tribunal decided to impose the following sanctions:

- A formal reprimand;
- A direction to remedy the breach
- A fine of £250,000; and
- A requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

Appendix A: Screenshot from the Level 2 provider's website:

The screenshot displays the LottoByText website interface. At the top, the logo 'LottoByText' is prominent, followed by the tagline 'THE SMART WAY TO PLAY THE NATIONAL LOTTERY'. A navigation bar includes links for Home, About us, How to play, FAQ, Contact us, Promotions, and a red 'Members Area' button.

The main promotional banner features the text: '5 FREE LINES + FREE ENTRY into our Monthly Lucky Draw'. Below this, a list of four steps guides the user through the subscription process. A central form prompts the user to 'Simply enter your mobile number, then +44 [input field] Accept T&Cs GO!'. To the right, a 'WIN £300 worth of prizes' graphic is shown, accompanied by images of prizes like an iPad2, Sainsbury's vouchers, and shopping vouchers.

Below the main banner, there are three result sections:

- EuroMillions Result:** Draw no: 469 - Tue 20 Mar '12. Shows winning numbers 15, 19, 28, 30, 46 and two stars. Includes a 'Previous Results' link.
- Lottery Result:** Draw no: 1665 - Wed 21 Mar '12. Shows winning numbers 10, 14, 21, 25, 39, 45, 40 and a Bonus number. Includes a 'Previous Results' link.
- EuroMillions Jackpot:** Next estimated Jackpot is: £22,000,000.
- Lottery Jackpot:** Next estimated Jackpot is: £4,200,000.

A central graphic features a hand pointing to a large '1 in 4' text, with the phrase 'You could be one of the 1 in 4 Jackpot winners' and the number '34'.

Appendix B: Screenshots of third party affiliates' website promotional material:

Active YOU Play Win Save

1 Order for FREE 2 Select YES 3 Win! YES

GET 5 FREE LINES

PLAY ON US TODAY
GET 5 FREE NATIONAL LOTTERY LINES ON YOUR MOBILE!

WIN £300 IN OUR MONTHLY SWEEPSTAKE!
SIMPLY STAY WITH US FOR 4 CONSECUTIVE WEEKS IN ANY CALENDAR MONTH AND YOU WILL AUTOMATICALLY BE ENTERED INTO THE DRAW.

To enter this offer reply YES to the text message to get your 5 FREE lines PLUS WIN £300 in our Monthly Sweepstake when you play with us for 4 consecutive weeks. Your mobile number is entry proof. After Free Trial - keep the same 5 Free Lines for every Wed, Fri & Sat draws & play for just £4.50 per week for the Lotto results. To end the subscription at anytime text STOP to 87770 or call 0207 081 0976.

LottoByText THE SMARTER WAY TO PLAY

Your Profile:

Title:

First Name:

Surname:

Date of Birth:

Email:

Telephone:

Postal Code:

Yes, I agreeing to be bound in by our [Terms & Conditions](#).

This offer is open to UK residents only. You must be at least 18 years of age or older to enter. By entering a competition or promotional offer you consent to receive information and promotions from digitalox, our Clients and our Partners. These promotions are selected and based on the details you

Guaranteed 5 FREE Lotto/Euromillion Lines in next draw + Win an IPAD 2 in our Sweep stake

Lottobytext are giving away 5 FREE lines in the next National Lottery/Euromillions draw + entry into IPAD 2 Sweepstake. Enter your mobile number & Reply YES to our SMS to get your 5 FREE lines on your mobile.

Get 5 FREE LINES
in the next EuroMillions/Lotto draw!

Win an eye watering
£27m
Tue 25/09/2012

Win an iPad2 or a **£300 Shopping Spree**

Automatic entry into Monthly Sweepstake

£300 Shopping Voucher

iPad2

[Read full terms](#)

SUBMIT YOUR MOBILE FOR YOUR FREE LINES AND ENTRY INTO OUR AMAZING PRIZE DRAW!*

Don't forget to reply YES to the text message sent to your mobile to get your 5 FREE lines + entry to our monthly sweepstake to win an IPAD 2

After free trial - keep the same 5 free lines for every Wed, Fri & Sat draws. That's 15 lines per week & Lotto results for just £4.50 pw. End subscription at anytime text stop to 87770 or call 0207 081 0976 [T&Cs](#)

Appendix C: Anonymised transcripts of telesales calls:

Caller - C: How are you today sir?

Recipient - R: How are you?

C: I'm fine sir, thank you for your concern. Actually sir, my name is <REDACTED> and I'm calling from <REDACTED>. Don't worry; I'm not trying to sell you anything, sir. I just need your valued opinion on some brands of United Kingdom and I promise I will be very quick. Is that ok to you sir?

R: OK

C: Thank you sir. Before I proceed further I can confirm some of your basic details sir.

Correct me if I am wrong. Here I have got your address as <REDACTED> – Am I correct?

R: Yes

C: And your first Name will be sir?

R: My first name? <REDACTEDED>

C: <REDACTED>, can you spell for me?

R: <REDACTED>

C: OK, and your last name will be?

R: <REDACTED>

C: Can you spell for me?

R: <REDACTED>

C: OK, that's wonderful. OK, here we go. So the companies will contact you with any interest that you have sir, is that OK?

R: Yes, that's fine.

C: So, would you like to receive five free lines in the next national or euromillions lottery draw sent directly to your mobile phone, would that be of interest?

R: Maybe, yes.

C: OK, to send you these five free lines can I have your mobile number?

R: <REDACTED>

C: [*Repeats sections while R provides the number and then*] OK sir I will repeat it:

<REDACTED>, am I correct?

R: Yes

C: As part of this deal you will receive five free lines which is absolutely free. After these five free lines if you want to continue with this service you will receive 15 lines sent to your mobile for just four pounds fifty pence per week after your free trial from LottobyText. And if you don't want to continue with this service you can unsubscribe at any time by sending STOP to the text, OK?

R: OK.