

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 7 February 2013
TRIBUNAL SITTING No. 119/ CASE 2
CASE REFERENCE: 11992

Level 2 provider: Sure To Win Limited
Type of service: Competition service
Level 1 provider: OpenMarket Limited and Sponge Limited
Network operator: All mobile Network operators

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

BACKGROUND

Since 5 October 2012, PhonepayPlus received 107 complaints from members of the public, regarding a subscription based competition services operated by the Level 2 provider Sure To Win Limited (“**the Service**”). The Service operated under two brand names, “Mobile Candy” and “Peachy Win”. The Service offered consumers the opportunity to answer questions, which gave them the chance to win an Apple product, such as an iPad, in the bi-annual prize draw, and the chance to win £100 cash each week in a second prize draw. Subscribers were also given six random numbers with the opportunity to win a £25,000 lottery draw each week. In addition, some consumers were sent a promotional text containing an introductory offer of 50 Lotto syndicate lines.

The Service was operated on the premium rate shortcode 66333 at a cost of £4 per week. The Service was promoted online (**Appendix A**).

Generally, complainants stated that they had incurred unsolicited charges. In addition, Executive monitoring of the Service led to concerns regarding the clarity of promotional material.

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 January 2013. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.3 – Charging without consent
- Rule 2.3.2 – Misleading

The Level 2 provider responded to the breach letter on 30 January 2013. On 7 February 2013, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.3

“Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”

1. The Executive submitted that the Service opt-in process was set up in such a way that some consumers incurred premium rate charges without giving their consent. Specifically, the Executive asserted that consumers who did not respond to the initial quiz question, sent in a free-to-receive message, but who did respond with a negative trigger word to a further promotional text, did not provide their consent for charges.

The Executive observed that the promotional material stated:

“Simply correctly answer the question we send to your mobile each week and you are in!”

“Simply correctly answer the question we send to your mobile phone about EastEnders to complete your web entry to be in our Fantastic, ‘Debt Busting’ £25,000 weekly draw...”

“By entering this competition and confirming with your mobile you will be subscribed...”

The Executive submitted that the promotional material clearly indicated that the website was the start of the opt-in process but that a further stage was required. In bold print within one promotion it was stated:

“Important- To verify your entry, please reply to the text message that you receive.”

When asked about the trigger of the subscription charges, the Level 2 provider confirmed in its response email dated 29 November 2012 that:

“[W]e can confirm absolutely that if the consumer does not send any MO to either the initial or secondary message, the web entry is not confirmed or validated and, therefore, the subscription service is incomplete and the user is not charged.”

The Executive submitted that the point at which consumers consented to charges was when they provided a positive response to a free message sent to them. The Executive asserted that the first messages sent to the consumer reaffirmed this position:

“FreeMsg from MobileCandy> Thanks for entering our iPad+£25k draw! Pls answer the next question correctly to confirm your web entry. Disregard if not requested.”

“Mobile Candy FreeMsg> Reply correctly to get you entry in the £25k draw and comp! What is the capital of Italy? Reply ROME or ATHENS now!”

The Executive noted that consumers were required to answer the question to enter. A wrong answer still opted the user into the Service, as one would reasonably expect; however, the terms and conditions were clear that only correct entries were put into the draws for the £100 cash prize and the bi-annual Apple product prize draw.

The Executive noted that the potential risk of a wrong number being entered on the website had been considered by the Level 2 provider, and the phrase “disregard if not requested” was included. The Executive asserted that this again supported the view that consent to charge was finally provided by a positive MO text message sent to the Service shortcode. If no message was sent, or the STOP command issued, the subscription charges were not triggered.

Negative trigger words in promotional texts

The Executive noted that where a consumer did not respond to the question, 24 - 48 hours after the first free messages were sent to the consumer, a further message was sent, which contained a further call to action. This message introduced a further bonus element to the Service:

“MobCandy FreeMsg> We’ve got your iPad & £25k web entry! Would u also like 50 FREE monthly Lotto Syndicate lines? Simply reply PLAY for yes or PASS for no lines!”

“MobCandy FreeMsg> We’ve got your iPad & £25k draw entry! Would u also like 50 FREE monthly Lotto Syndicate lines? Simply reply TWIST for yes or DROP for no!”

“PeachyWin FreeMsg> We’ve got you iPad & £25k draw entry! Would you also like 50 FREE monthly Lotto Syndicate lines? Simply reply FIFTY for yes or NOFIFTY for no!”

Where a consumer sent either of the two listed responses, for example “Play” or “Pass”, the consumer was subscribed to the Service and billed £4 per week. A consumer could avoid any charges by sending STOP, or not sending any MO text message at all.

In light of the above, the Executive submitted that the nature of the promotion of the bonus feature of the Service, relating to the 50 Lotto syndicate lines, and the provision of two possible responses to the call to action, was likely to have misled consumers into sending an MO message, even where the recipient had no interest in the Service at that stage and/or had sent a negative trigger word. The Executive asserted that this was supported by the complainants’ accounts:

“Service description: Hi, they are always sending me texts which I don’t want and I have to pay all the incomes for 4 pounds each, I need to stop this.”

“Summary of complaint: the amount to pay is 16 pounds, when my contract is only a 15 pounds, so total is more than 30 pounds which I don’t have to pay”

“Complainant sent ‘NOFIFTY’ and ‘STOP’ as shown in message logs...Service Description: Sending texts saying to win cash answer following questions. Summary of complaint: I didn’t enter into any agreement to have these texts, I have replied “STOP” twice with a message both times say “Thanks, you have been successfully unsubscribed” but still getting these messages, which should be illegal if I had not entered into an agreement with them in the first place.”

“Complainant sent “NOFIFTY”, “STOP” and “STOP ALL” as shown in message logs.”

The Executive submitted that the complainant statements were supported by the message logs. The complainants indicated that they did not want the Service, or had not entered into an agreement. The logs showed that no positive answer had been given to the quiz question. The response that was sent by consumers was a negative one, which the Executive asserted clearly showed consumers did not intend to consent to charges.

Charges issued to consumers without their consent

The Executive referred to the complainant’s message logs as evidence that some consumers were sent premium rate service charges after they had ignored or not responded to the quiz question, and then provided a negative response to the second

promotional text. The Executive submitted that the interaction the consumers had with the Service did not constitute informed consent to charge. The Executive submitted that for such consumers, the charges were imposed without the consent of the consumer and in breach of rule 2.3.3 of the Code. Accordingly the Executive submitted that there had been a breach of rule 2.3.3

2. The Level 2 provider strongly denied that it had imposed any charges without obtaining consumer's consent.

Consent to charge

The Level 2 provider asserted that consumers consented to charges during the initial web opt-in on the Service landing pages. In relation to the different landing pages, the Level 2 provider stated that:

- i. In one web promotion it was made absolutely clear that, by populating the eight data entry boxes, the subscriber, "will be subscribed to Mobile Candy for £4 per week." In addition the user had to tick a "Yes" box.
- ii. In a second web promotion there was a box for the user to enter their mobile number which was immediately followed by the wording, "By entering this competition you will be subscribed to Mobile Candy for £4 a week."
- iii. In a third promotion, it was expressly stated that, "By entering and clicking Yes, you're agreeing to be bound in by our Terms and Conditions."
- iv. In the final web promotion, consumers were required to tick the "yes" box to confirm that, "By entering and clicking Yes, you're agreeing to be bound in by our Terms and Conditions."

The Level 2 provider submitted that the web entry was the moment that the consumer decided to participate in the Service, having seen the web promotion, with all the relevant information presented before them in order to make an informed decision to enter. At this point, they were presented with the terms and conditions, to which they had to provide their agreement by clicking 'Yes'. At that point, they were bound by the terms of the Service and, therefore, consented for the subscription charge to be made. The web entry was the consent to charge and the MO was just the confirmation/validation of that entry. The Level 2 provider submitted that the clicking 'yes' or entering data as a demonstration of active consent is in line with all the Guidance on 'consent'. The request for users to actively enter a mobile phone number was not there for any other purpose than to enable users to request the Service. The Level 2 provider stated that if this was not the case, this would lead to a ludicrous interpretation of a user's intentions.

The Level 2 provider added that, it was true that an MO response from the consumer was required to validate the web entry, however, the process was solely that – a confirmation and validation of the web entry, the implementation of which was to prevent fraud or to prevent third parties from entering other people's mobile numbers. The customer was informed that they would have to respond to a text message in order to verify the agreement reached.

The Level 2 provider asserted that there is a clear analogy in card verification systems used in online purchases: it is clear that the contract as between the customer and the consumer crystallises at the moment the customer places the item into the shopping trolley, and completes the 'check out' process, inputting card details and agreeing to the terms and conditions. Simply because a card verification system is in place does not, as a matter of law, nullify the agreement already reached (although that might be the practical effect if the consumer changes their mind and refuses to input the required verification code).

In addition, the Level 2 provider stated that it was important to note that it did not actively 'push' the web promotions out to people. It was completely down to the

consumer to register themselves with promotional partner sites and then seek out the offer and enter it in accordance with the terms.

The Level 2 provider noted that the Executive also stated that, “the potential risk of a wrong number being entered on the website has been considered by the Level 2 provider, and the phrase, “disregard if not requested,” was included.” However, the Executive went on to state that, “This again supports the view that the consent to charge is finally provided by a positive MO text message sent to the service shortcode.” The Level 2 provider stated that, whilst it was pleased that the Executive acknowledged that it featured the phrase, “disregard if not requested”, in the first free to user messages, it failed to see how this supported the view that the consent to charge for the Service was via the MO text message. The Level 2 provider asserted that it was asked by PhonepayPlus to add the intimation behind, “disregard if not requested”, to mitigate against the mis-keying of a number and not to support the inference that the MO was the consent to charge.

The Level 2 provider submitted that the Executive’s attempt to rely on its compliance with this requirement to establish a breach seemed both unfair and unreasonable. The verification process was there to protect the consumer from error and from fraud; the Executive interpreted that process as a means for the consumer to back out of the deal already entered. Whilst that may be the practical effect of the verification process (if no response is received), the Level 2 provider submitted that the Executive ought not to use this to support the suggestion that consumers had not consented to the charges made, when clearly they had.

The Level 2 provider noted that the Executive stated that an incorrect response to the initial question still opted the user into the Service, “as one would reasonably expect”. The Level 2 provider stated that it is widely accepted (and demanded by certain sectors) in the industry that any Web to Mobile service (that features a chargeable premium element) must obtain a valid MO confirmation to validate any web entry. To reiterate the Level 2 provider stated that the MO was a validation and confirmation of the consumer’s web entry. Thus, the web entry was the catalyst of their desire to participate in the Service and, therefore, the consent to charge as per the terms of the Service, formal guidance and industry practice.

Negative trigger words in promotional texts

The first point that the Level 2 provider disputed was the message being labelled by the Executive as ‘promotional’. It was advanced that the messages were simply verification requests (as the consumer was informed at the point of web sign-up), rather than promotional texts, and were solicited by the user as a direct result of their web entry and simply sought to confirm and validate that entry via an MO response.

The Level 2 provider noted that the Executive submitted that:

“[T]he nature of the promotion of the bonus feature of the service, relating to the 50 free Lotto syndicate lines, and the provision of two possible responses to the call to action, is likely to mislead consumers into sending an MO message, even where the recipient has no interest in the service at that stage and sends a negative trigger word.”

The Executive also submitted that:

“[T]he complainants statements are supported by the message logs. The complainants indicate they do not want the service, or have not entered into an agreement, and the logs show no positive answer has been given to the quiz question. The response that is sent is a negative one, which the consumer does not send with the intention of consenting to the subscription charges.”

The Level 2 provider did not accept that the bonus feature of the Service featuring two possible permutations of response was misleading, as the terms of the Service in section D7 quite clearly stated:

“D.7 For security reasons, if you do not reply to the first message we may send you a supplementary message that will confirm receipt of your entry and may offer additional promotions. If you have not yet replied to your initial message then you need to reply to the supplementary message to validate your web entry for the chance to win cash and prizes.”

As a result of the web entry and submission of a MSISDN therein, the Level 2 provider asserted that the user was accepting the terms and, as such, accepted that a reply, of either permutation to the ‘bonus feature’, would indeed validate their entry and solicit the chargeable nature of the Service. As confirmed above, no charge was incurred before the mobile number is validated.

The Level 2 provider stated that it did not, albeit as a point of contractual law it understood it was entitled to, charge users on receipt of the web consent. Therefore, in every case, charges were only incurred by users after receipt of consent, and validation of the mobile number. The Level 2 provider stated that it was content to (and had already) altered its services to ensure that only ‘positive’ MOs can be sent. However, it did not accept that it had contravened the Code.

Charges issued to consumers without their consent

The Level 2 provider noted that the Executive relied upon various examples of message logs where, in its opinion, the users had subscribed to the Service via a ‘negative trigger word’ and had, therefore, not consented to the charges. The Level 2 provider submitted that, as per the reasons already explained above, it refuted the claim and argued that no charges were ever issued to consumers without their consent.

Additional factors

In addition, the Level 2 provider requested that the Tribunal consider the following factors.

- i. PhoneyPayPlus told the Level 2 provider that the Service could remain as it was in correspondence in March 2012. The Level 2 provider asserted that this was evidence that PhoneyPayPlus did not view the Service as being in breach at all. The Level 2 provider noted that the associated correspondence clearly show that there was communication in relation to the keyword ‘PASS’ and its potential misleading connotations. During this correspondence, the Level 2 provider explicitly stated that:

“The MO from the handset is merely confirmation and verification of the validity of the handset and confirmation to join the service. How would it be if the message read "reply PLAY for lines or PASS for no lines" thus making it more obvious that it relates to the Lotto?”

- ii. The Level 2 provider questioned why, given previous correspondence, was the investigation escalated to a Track 2 procedure. It was asserted that, in reality, the alleged non compliance could have been resolved easily and quickly had the Level 2 provider been told that it had to change the Service. The Level 2 provider stated that it felt very strongly about this particular point and felt that it had been allowed to continue running the Service in the format that was considered and was told by PhoneyPayPlus that it was allowable to do

- so, only to have the very consideration used against it during the Track 2 investigation by the Executive.
- iii. The Level 2 provider noted that the Executive only alleged a breach of rule 2.3.3 in relation to consumers who entered the Service after an alleged 'negative' response to the messages. It was submitted that this accounted for approximately 10-15% of subscribers to the Service.
 - iv. The Level 2 provider requested that the Tribunal take account of the fact that on 18 October 2012, the wording of the messages in question was amended, so as not to feature an alleged 'negative' permutation and all were replaced with a secondary 'quiz' question, not related to any 'bonus Lotto lines'. In additions, all subscribers that were 'active' in the Service after the issuance of an alleged 'negative' keyword were removed. Furthermore, it was confirmed that all subscribers who were 'active' in the Service after the issuance of a 'positive' response to the 'bonus Lotto lines' message, were also removed at the same time as the above.

The Level 2 provider reiterated that it must also be considered that, as part of the overall 'completed' Service entries (by definition, a consumer that entered/consented to the Service via the web and confirmed/validated with an MO) the alleged 'negative' keyword confirmed entries represented less than 10% of the total of confirmed entries and, in certain cases, approximately 2-4% of all completed entries.

3. The Tribunal considered the evidence, including the detailed submissions and evidence provided by the Level 2 provider. Having regard to the outcome that, "The consumers of premium rate services are treated fairly and equitably," the Tribunal held that, for the purposes of rule 2.3.3, consent means *informed* consent. This means that consumers must be fully aware and informed of all relevant information in order to give consent for the purposes of rule 2.3.3. The Tribunal did not consider that users of the Service had been able to give informed consent in all cases due to the following factors:
 - Some of the promotional material was misleading about how the subscription to the Service worked – in particular, some of the promotional material suggested that the user needed to enter the competition online *and* confirm their mobile number in order to be subscribed to the Service, whereas the terms and conditions of the Service suggested that entering the competition online was sufficient to subscribe to the Service (and this was what the Level 2 provider had asserted amounted to consent to be charged);
 - In relation to the consumers who incurred premium rate charges after responding to the messages regarding the "LOTTO syndicate" with a "negative" keyword, it was not clear to consumers that charges would follow their response. Further, the Tribunal commented that had this group of consumers realised that they had already agreed to subscribe to the Service and incur charges, it defied common sense that they would text a negative keyword response to opt-out of an additional "free" element of the Service which gave them additional chances of winning a prize. This suggested that those consumers did not think they were subscribed to a Service and their negative keyword indicated they did not wish to take part in the Service; and

In relation to the majority of consumers who had sent a message from their phones to answer a question (and had therefore not received the "LOTTO syndicate" offer), the Tribunal was satisfied that consent had been given. However, this left a significant number of consumers who had not given consent but had still been charged. Accordingly, the Tribunal upheld a breach of rule 2.3.3 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO
Rule 2.3.2

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

1. The Executive acknowledged that the Level 2 provider disputed the Executive’s assessment of when consent to charge was given by consumers. Although the Executive’s primary submission was that a breach of rule 2.3.3 had occurred, in the alternative, if the Tribunal decided that consent to charge was given at the time consumers entered their phone number and any MO message, regardless of content, was confirmation of an earlier agreement to be charged by the Service, the Executive submitted that the promotional text that contains both a positive and negative trigger word was misleading to consumers.

The Executive submitted that the message misled consumers into thinking a response was necessary to confirm a lack of interest in the promotion, and therefore consumers were misled into sending the MO message that completed the sign-up process and triggered the premium rate charges.

The potentially misleading promotional texts

The Executive noted that where a consumer had received a free-to-receive message including a quiz question, but had not responded to it, the Service sent out a further promotional text message stating:

“MobCandy FreeMsg> We’ve got your iPad & £25k web entry! Would u also like 50 FREE monthly Lotto Syndicate lines? Simply reply PLAY for yes or PASS for no lines!”

“MobCandy FreeMsg> We’ve got your iPad & £25k draw entry! Would u also like 50 FREE monthly Lotto Syndicate lines? Simply reply TWIST for yes or DROP for no!”

“PeachyWin FreeMsg> We’ve got you iPad & £25k draw entry! Would you also like 50 FREE monthly Lotto Syndicate lines? Simply reply FIFTY for yes or NOFIFTY for no!”

The Executive stated that the consumer, having ignored, or not responded to, the initial free messages, at this stage had a choice to make in line with the promotion: do they express an interest in the 50 free monthly Lotto syndicate line or not? The Executive submitted that the messages, regardless of the trigger words given, did not explain that the issuance of any MO text message at this stage would “validate” the subscription to the Service. Furthermore, due to the wording used, the provision of two trigger words and the call to action regardless of the decision by the consumer, the consumer was likely to be more compelled to respond than to ignore the message.

The Executive submitted that the affected consumers were likely to have been misled into responding to the call to action in one way or another, thereby unintentionally completing the sign up process. The Executive submits this was a breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied that the Service was in breach of rule 2.3.2 of the Code.

Consent to Charge

The Level 2 provider repeated the arguments it raised in relation to rule 2.3.3 and reiterated that it disputed the Executive’s assessment of when consent to charge was given by the consumer.

The Level 2 provider submitted that it was clear that consent to charge was given via the web entry. It explained that this was because it was entirely the consumer's decision to enter the promotion by entering their phone number, having been given all the necessary information to decide whether or not to make their entry.

As a result, the Level 2 provider asserted that the statement by the Executive that customers, "are misled into issuing the MO message that completes the sign-up process and triggers the premium rate charges", was incorrect. The sign-up process had already been completed and this was absolutely clear from the website terms. The issuing of the MO message was purely for means of verification, and as such was there solely for the purpose of security. The Level 2 provider stated that it had been advised that the contractual agreement, as between itself and the customer, was concluded at an earlier stage. In addition, the Level 2 provider stated that consumers participated in the Service voluntarily and also having found the offer after using its promotional partner site.

The Level 2 provider noted that the terms of the Service stated that, after web entry, the consumer must reply to the text messages received (either initial or supplementary). The Level 2 provider asserted that the relevant sections of the terms were:

"D.3 Upon submitting and entering your mobile number into the cash competition you will be sent two free messages to your mobile phone. YOU MUST REPLY to validate your web entry for the chance to win cash and prizes (a standard network charge will apply to your reply)."

"D.7 For security reasons, if you do not reply to the first message we may send you a supplementary message that will confirm receipt of your entry and may offer additional promotions. If you have not yet replied to your initial message then you need to reply to the supplementary message to validate your web entry for the chance to win cash and prizes."

The Level 2 provider stated that since the web terms are clear in imposing an obligation on the consumer to respond to the verification texts ("YOU MUST REPLY to validate your web entry") any failure by the consumer to reply to these text messages would allow it to pursue a claim in breach of contract, although obviously this is not something which it does, nor did it suggest that it should. To reiterate, the MO was confirmation and validation of the web entry, not the consent to charge, and a reminder of the consumer's obligations to verify the web entry.

As detailed in the response to the breach of rule 2.3.3, the Level 2 provider disputed that the potentially misleading "promotional" texts were "promotional".

Further, the Level 2 provider asserted that the content of messages sent to consumers upon validation supported its arguments regarding the point at which consumers consented to charges. Examples of such messages are as follows:

"Mobile Candy FreeMsg>Thanks 4 joining our ipad2 & £25k draw. £25k draw is 12pm each Friday. Your numbers for each draw are 1, 2, 3, 4, 5, 6"

"MobCandyFreeMsg>Thx 4 joining. You are playing 4 guaranteed cash&prizes + chance 4 MacBook & £25000 for £4 per week. Txt STOP to 66333 to end. Help 08445445438."

The Level 2 provider disputed that the keywords in question were 'misleading' as the terms clearly stated the process that would occur after a web entry and the solicited free to user messages supported this position.

Further, the Level 2 provider stated that it appeared to it that the Executive was seeking to hold it to account for failing to make it clear to the consumers that if they did not respond to the verification text message, then in practice no charge would be made. It submitted that it did not have this obligation: the consumer had already signed up to the terms and had already agreed to respond to the verification MO.

The Level 2 provider repeated the mitigation outlined in relation to its response to rule 2.3.3.

3. The Tribunal considered the evidence, including the submissions of the Level 2 provider. The Tribunal noted that the issues raised by the Executive were, to some extent, covered by the breach of rule 2.3.3 and that the Executive had raised the breach of rule 2.3.2 in the alternative. The Tribunal considered that, for the reasons advanced by the Executive, the messages in question were misleading and stated that, had the facts of the breach not overlapped with the facts of the breach of rule 2.3.3 (and had the breach of rule 2.3.2 not been raised in the alternative), it would have upheld a separate breach of rule 2.3.2 of the Code. However, given the fact that the breach had been raised in the alternative, and it had already upheld a breach of rule 2.3.3, the Tribunal did not adjudicate on the breach of rule 2.3.2 of the Code.

Decision: NOT ADJUDICATED

SANCTIONS

Initial Overall Assessment

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

Rule 2.3.3 – Consent to charge

The initial assessment of rule 2.3.3 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The nature of the breach means that the Service would have damaged consumer confidence in premium rate services.
- The Service generated higher revenue as a result of the breach.

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

Final Overall Assessment

The Tribunal found that there were no aggravating factors for it to take into account. However, the Tribunal noted the following in relation to the aggravating factors relied upon by the Executive:

- PhonepayPlus had given compliance advice in relation to the Service on a number of occasions in 2011 and 2012. The Executive asserted that the compliance advice had not been fully implemented. However, in light of the protracted correspondence and the Level 2 provider's co-operation with the investigation, the Tribunal did not consider this to be an aggravating factor.
- Whilst the Level 2 provider had no direct breach history. A provider, who operated a very similar service and shared personnel with the Level 2 provider, was the subject of an investigation and adjudication in 2011. This ultimately resulted in an adjudication by consent (case reference 790143, 30 June 2011). The Tribunal noted this but did not take it into account as an aggravating factor.

In determining the final overall assessment for the case, the Tribunal took into account the following three mitigating factors:

- During the investigation, the Level 2 provider took steps to end the breach by the removal of “negative” keywords and removing active subscribers who had entered the Service as a result of the lotto promotion in October 2012. The Level 2 provider had also suspended the recruitment of new subscribers in November 2012.
- The Level 2 provider stated that it operated a “no quibble” refund policy.
- The Level 2 provider provided thorough and proactive responses to PhonepayPlus’ enquiries. As a result, the Executive was assisted in the preparation of the case.

The Level 2 provider’s revenue was in the range of Band 2 (£250,000- £500,000).

Having taken into account all the circumstances of the case the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions Imposed

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A formal reprimand;
- A fine of £60,000; 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.

Appendix

Appendix A: Screenshots of promotional material for the Service:

Yes No

Your chance to WIN £25,000

Imagine what you could do with all that cash! Join Mobile Candy today for your chance to WIN £25,000. Simply correctly answer the question we send to your mobile each week and you are in! Simple as that!

IMPORTANT - To verify your entry, please reply to the text message that you receive. [Terms and Conditions](#)

Title:*

First Name:*

Last Name:*

Date of Birth:*

Address:*

Postal Code:*

E-mail Address:*

Phone:*

By entering this competition you will be subscribed to Mobile Candy for £4 per week. This is for 18+ only. You can end your chances of winning by sending stop to 66333. Each correct reply could also win you £100 cash, which is weekly and guaranteed. Also every member staying in the competition will be automatically included in the £25,000 weekly draw! After confirming your web entry we will send you 6 numbers and if those 6 numbers match the 6 winning numbers you will win the £25,000. Until further notice the draw will happen every Friday at midday for the £100 cash and the £25,000. 1 x iPad to be won on 31st May 2012 and 30th November 2012. Until further notice, one draw prize every 6 months thereafter. By entering you're agreeing to be bound in by our Terms & Conditions available by clicking on the link below. Mobile Candy is a brand of the promoter Sure to Win Ltd. Help Centre to contact us 08445 445 438. This is a third party offer and not linked or associated with this website.

[Continue »](#)

YOUR CHANCE TO WIN!



apple iPad 3

plus £25,000 Weekly Draw

Simply correctly answer the question we send to your mobile phone about East Enders to complete your web entry to be in our Fantastic, 'Debt Busting' £25,000 weekly draw.

For your chance to win cash and prizes, just enter your mobile number below & reply to the free message that you receive. **Good Luck!**

Mobile Number: [Please ensure this is your correct number. Terms and Conditions](#)

By entering this competition you will be subscribed to Mobile Candy for £4 per week. This is for 18+ only. You can end your chances of winning by sending stop to 66333. Each correct reply could also win you £100 cash, which is weekly and guaranteed. Also every member staying in the competition will be automatically included in the £25,000 weekly draw! After confirming your web entry we will send you 6 numbers and if those 6 numbers match the 6 winning numbers you will win the £25,000. Until further notice the draw will happen every Friday at midday for the £100 cash and the £25,000. One iPad3 16GB to be won on 31st May 2012 and 30th November 2012. One draw prize every 6 months thereafter. By entering you're agreeing to be bound in by our Terms & Conditions available by clicking on the link. Mobile Candy is a brand of the Promoter SuretoWin Ltd. Help Centre to contact us 08445 445 438.

CLICK TO ENTER PRIZE DRAW

Enter today for your chance to WIN an IPAD2 Plus entry into this weeks £25,000 draw!



Enter today for your chance to WIN an IPAD2 Plus entry into this weeks £25,000 draw! Correctly answer the question we send your mobile each week and you are in. Simple as that!

By entering this competition and confirming with your mobile you will be subscribed to PeachyWin for £4 per week. 18+ only. To end your chances of winning, send stop to 66333. Each correct reply could win you £100 cash, every Friday at Middy.

After web entry confirmation we'll send 6 numbers for the £25,000 draw. 1 x iPad2 16GB to be won on 30/11/12, every 6 months thereafter. PeachyWin is a brand of promoter SuretoWin Ltd. Help Centre 08445 445 438. This 3rd party offer is not linked or associated with this website. By entering and clicking Yes, you're agreeing to be bound in by our [Terms & Conditions](#).

Enter today for your chance to WIN an IPAD2 Plus £25,000



Join PeachyWin today for your chance to WIN!

- Yes
 No

Correctly answer the question we send your mobile each week and you are in... simple as that!

By entering this competition and confirming with your mobile you will be subscribed to PeachyWin for £4 per week. 18+ only. To end your chances of winning, send stop to 66333. Each correct reply could win you £100 cash, every Friday at Middy. After web entry confirmation we'll send 6 numbers for the 25k draw. 1 x iPad2 16GB to be won on 30/11/12, every 6 months thereafter. PeachyWin is a brand of promoter SuretoWin Ltd. Help Centre 08445 445 438. This 3rd party offer is not linked or associated with this website. By entering and clicking Yes, you're agreeing to be bound in by our [Terms & Conditions](#)