Tribunal meeting number 155 / Case 1

Case reference:	**30308**
Level 2 provider:	**Purely Creative Limited (UK)**
Type of service:	**Competition - scratchcard**
Level 1 provider:	**IMImobile Europe Limited (UK)**
Network operator:	**Vodafone UK Limited (for the fixed line numbers)** **All Mobile Network operators (for the shortcodes)**

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

BACKGROUND

Between 11 October 2012 and 17 June 2014, PhonepayPlus received 76 complaints from consumers in relation to a scratchcard prize draw service, (the "**Service**") operated by the Level 2 provider Purely Creative Limited (the "**Level 2 provider**") on the premium rate shortcodes 84228, 88222, 88810 and various premium rate 09 numbers. The Service was promoted by scratchcards that were inserted into various national publications, each insert contained a strip of three scratchcards; one scratchcard contained three matching symbols, another contained two matching symbols and another had no matching symbols. Consumers were invited to ascertain whether their scratchcard contained winning symbols by sending a keyword to a shortcode (in response consumers received six messages costing £1.50 per message) or calling a premium rate number (at a cost of £1.53 per minute from a BT Landline (with a minimum five minutes and 40 seconds charge) or writing to the Level 2 provider (a free route of entry). The Level 2 provider commenced operation of various competition services in 1986 but the exact date the Service commenced scratchcard promotions was unknown. The Service is currently operational.

Generally complainants stated that they had received unsolicited charges or they acknowledged interacting with the Service but stated it was misleading and/or the pricing information was not clear. A significant number of complaints were made on behalf of young people or otherwise vulnerable consumers.

The investigation

The Executive conducted this matter as a Track 2 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 14 July 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading
- Rule 2.4.1 – Privacy
- Rule 2.1.1 – Legality

The Level 2 provider responded on 29 July 2014. On 7 August 2014, and after hearing informal representations from the Level 2 provider and its legal representative, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts;

- The Executive's monitoring of the Service, including scratchcard promotions for the Service;
- Correspondence with the Level 2 provider (including requests for information and the Level 2 provider's responses);
- Scratchcards for a well-known lottery
- The Court of Justice of the European Union's (the "**CJEU**") judgment of 18 October 2012;
- The Court of Appeal's judgment of 19 March 2013;
- PhonepayPlus Guidance on "Promotions and promotional material";
- PhonepayPlus Guidance on "Competitions and other games with prizes";
- PhonepayPlus Guidance on "Privacy and consent to charge";
- Information Commissioner Office's (the "**ICO**") guidance on "Direct marketing";
- The breach letter of 14 July 2013; and
- The Level 2 provider's response to the breach letter dated 29 July 2014 including associated annexures.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1
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 of the Code as consumers were likely to have been misled as to the nature of the Service by scratchcard promotions.

   The Executive relied on the content of PhonepayPlus Guidance on "Promotions and promotional material" which states:

   Paragraph 3.1

   "If consumers are to have trust and confidence in using PRS, it is important that they have available all the key information about a service as part of their consideration of whether to make a purchase or not. For this reason, it is important that promotions do not mislead consumers by stating an untruth or half-truth. It is also important that promotions do not omit, or make insufficiently prominent, an important term or condition likely to affect their decision to use the service."

   The Executive also relied on the PhonepayPlus Guidance on "Competitions and other games with prizes" which states:

   Paragraph 2.1

   "Any promotional material in relation to competitions services must not:
   - Imply that items that can be claimed by all, or a substantial majority, of participants are prizes;
   - Exaggerate the chances of winning;
   - Suggest that winning is a certainty; or
   - Suggest or imply that consumers can only use a premium rate service in order to participate, where a free, or significantly cheaper, alternative entry route is available."

   Complainants' accounts

Generally, the Executive relied on the content of all the complainants' accounts but particularly noted the following:

"I got a scratch card and it said you might have won something because I had 3 same pics showing. so to find out what I won I had to txt to the number above. I txted only ONCE and then I was recieving several txts so every time I opened them I got charged several times showing in my bill as well [sic]."

"My partner got a scratch card in a local paper and called the number as he thought he had won a prize."

"Newspaper contained a scratchcard, on scratching the panels it revealed he was a winner"

"My 13-year-old son sent a text to this number because he uncovered three identical symbols on a scratchard form the [name of newspaper]. He did again when asked about which prize we wanted. He had no idea, and nor did I, how this con worked. It must be catching out countess numbers of people. In total they sent my son 48 messages to his 8 texts, at £1.50 a text. I only discovered this when I saw this month's bill of £99. I would like to make a strong complaint about these dishonest tactics."

"Consumer has been charged £38.00. He checked his bill and realised the charged. He did the competition service last tuesday - 3rd June 2014. Consumer also feel he has been over charged. The card said that a prize was guaranteed to everyone who sent them a message [sic]."

Monitoring

The Executive monitored the Service after locating scratchcard promotions inside various magazines, which were purchased in retail outlets in central London between January and February 2014.

On 16 January 2014, the Executive purchased a magazine which contained a "Will you be our next millionaire?" scratchcard (**Appendix A**). The Executive scratched off the panels of each scratchcard on the strip to reveal no matching symbols, two matching loaf symbols and three matching burger symbols (**Appendix B**). As a result of revealing three matching symbols, the Executive called the premium rate number displayed to ascertain if it had won a prize. Upon calling the premium rate number, the Executive listened to a pre-recorded message, which provided details of the three matching symbols that entitled consumers to a prize (three matching burgers symbols were not winning symbols). The message also invited consumers who had not won to claim a "mystery gift" by sending the scratchcard to the address provided. The call lasted 5 minutes and 56 seconds and cost £9.

On 16 April 2014 the Executive monitored the Service after locating a "£1 Million Cash Card" in a magazine. The Executive scratched off the panels of each scratchcard on the strip to reveal no matching symbols, two matching storm symbols and three matching skittle symbols. The Executive sent an SMS with the keyword "chick19" to shortcode 88810, in relation to the two matching storm symbols (**Appendix C**). The Executive was billed for six SMS messages and was informed that the storm symbols were not winning symbols.

Scratchcards

The Executive asserted that consumers had been and/or were likely to have been misled into believing that they had won a prize and/or their chance of winning was higher than it actually was, due to the inclusion of two or three matching symbols on every strip of scratchcards. This resulted in consumers being enticed into engaging with the Service and thereby incurring premium rate charges.

The Executive submitted that the inclusion of three or two matching symbols on every scratchcard impaired the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that s/he would not have otherwise taken.

The Executive noted that scratchcards for a well-known lottery required the player to match three of the same symbols or prize amounts in order to win a prize. The Executive asserted that matching three symbols to win a prize was a format consumers were likely to be familiar with and accordingly that by producing scratchcards with two and three winning symbols on every promotion, the Level 2 provider had sought to give consumers the impression that they had won a prize so that they would enter the Service and incur charges.

Furthermore, the Executive submitted that the inclusion of a scratchcard with no winning symbols on every promotion added to the impression that the consumer had been particularly fortunate in revealing two or three matching symbols on the other scratchcards. Accordingly, consumers were likely to be misled into believing that their chance of winning was higher than it was in reality.

The Executive noted the text contained in a box beneath the symbols which stated:

> "**The Game** - every card has a set of 3 matching symbols, 2 matching symbols and no matching symbols."

The Executive noted that the statement was located in a separate block of text below the information relating to how to claim. Therefore, it asserted that consumers were unlikely to read it. In summary, the Executive asserted that the statement did not do enough to sufficiently rebut the assumption that two or three matching symbols would entitle the consumer to one of the prizes listed in bold at the top of the box.

The Executive submitted that there was a heightened risk of consumers who were a member of a vulnerable group (for example, people who were much younger or people with mental health problems) and those who may be vulnerable because of their circumstances (for example those with low financial means) being misled as to the nature of the Service and the potential costs. The Executive noted this was supported by the 11 complaints which have been made on behalf of minors or otherwise vulnerable consumers. The Executive noted that in order to purchase a well-known lottery scratchcard there is a legal requirement for consumers to be over the age of 16, but there is no such legal requirement for the Service. Despite the scratchcards stating that the Service was only open to consumers aged 18 and over, the Executive submitted that there was a risk that the Service may be attractive to minors.

The Executive submitted that, for the reasons detailed above, the Service operated in breach of rule 2.3.2 of the Code.

2. The Level 2 provider denied that a breach of the Code had occurred and stated that the Service and in particular, the scratchcard promotions were not misleading. Generally, the Level 2 provider stated that it had worked hard to ensure that each promotion was fair, honest and enabled consumers to make informed decisions. It submitted that the average consumer would be aware of his/her odds of winning having matched two or three symbols and it disputed that this format was misleading.

By way of background, the Level 2 provider explained that it was founded in 1986 and was proud of the distinctive way it undertook its business throughout that time. It stated that the current Managing Director had been employed by the Level 2 provider since it commenced operation and had overall responsibility for the Service since 2001. The Level 2 provider stated that it passionately believed that the Service reflected the core principles of fairness, honesty and respect and that it provided consumers with real value, setting it apart from its competitors. The Level 2 provider submitted that it had put the interests of consumers at the heart of its business model and had rejected shortcuts to "get rich quick" unlike others operating in the premium rate industry (some of which had tarnished the industry's name). It explained that its responsible approach had enabled it to gain the trust and respect of its media partners and achieve longevity. The Level 2 provider listed the publications that distributed the Service scratchcards and stated that if the national publishers had concerns about the Service it would not jeopardise its brand and bring its reputation into disrepute. The Level 2 provider supplied quotations from six well-known publishers who commented highly of the Service and stated that the Service's scratchcards had received positive feedback from readers, the quality of the prizes were good and the Level 2 provider was a fair business to work with, which it hoped would continue in the future.

The Level 2 provider explained that consumers who had engaged with the Service were automatically made members of "Club Creative" and received free gifts, exclusive offers and access to members' publications. It stated that it operated a Facebook page which many members chose to contribute to. The Level 2 provider stated that it aimed to create a fun environment that consumers freely interacted with, as a result of enjoying the experience rather than being misled in any way. It stated that the popularity of the scratchcards was illustrated by its database records, which demonstrated that approximately 86% of consumers were regular participants. The Level 2 provider submitted that such a high percentage of repeat users of the Service indicated that participants had a positive experience and that the cost of the Service was worth it to them.

The Level 2 provider commented that a substantial proportion of its revenue had been spent on high quality prizes and gifts. It stated that this remained its priority in an effort to safeguard its reputation and retain the respect and loyalty of its valued consumers. It added that it did not compromise on the quality of its prizes despite incurring significant financial losses in the last financial year due to circumstances beyond its control (which it evidenced with a copy of its financial accounts).

In an effort to maintain a high level of customer service, the Level 2 provider stated that it treated its customer care function with the utmost importance, as it invested time in the recruitment process and provided extensive ongoing training to its staff. To this end, it stated that it had not outsourced its consumer facing function but had chosen to keep it in-house at the heart of its operation. Further, it monitored the consumer experience through the use of surveys and feedback. The Level 2 provider stated that it could provide a substantial volume of positive testimonies from consumers, which would put into context the relatively small number of complaints (many of which were from consumers who had

not actually interacted with the Service but had complained because of the reputation of the industry as a whole).

The Level 2 provider explained that it had an unconditional refund policy since 2001, which was in contrast to some large companies that chose not to make refunds under any circumstances.

Further, the Level 2 provider stated that it had an excellent compliance record. Since 2001 (the Level 2 provider did not have any records prior to this) the only PhonepayPlus adjudication upheld against it was in 2005, which resulted in a £2,000 fine. The Level 2 provider commented that given its excellent record and its responsible approach to business it was especially disappointed that the Executive had decided to launch a "super investigation" over a period exceeding six months without communicating its concerns. It added that a fair and even handed regulator seeking to resolve any perceived concerns would have taken a more practical approach rather than persisting in a prosecution of the Level 2 provider.

Complaints

The Level 2 provider specifically addressed the 77 complaints that had been made to PhonepayPlus and stated that there was very little connection between the number, the type of complaints and the Executive's case. The Level 2 provider stated that the 77 complaints had been collated over a 20 month period and they related to numerous different promotions for the Service.

In relation to the context of the complaints, the Level 2 provider referred to a research document entitled "Understanding Consumer Journeys" commissioned and published by PhonepayPlus on 10 February 2014. The Level 2 provider noted that the findings related to the same period as the Executive's investigation into the Service and the research document had stated that 1.07% of all premium rate service users complain to PhonepayPlus. From its own records it observed that between October 2012 and June 2014, consumers accessed the Service on 519,947 occasions. It applied the statistics in the research document to the Service and stated that PhonepayPlus would expect to receive 5,563 complaints for the Service for the relevant period (and that did not take into account the millions of others who had received a scratchcard but had decided not to engage with the Service or to do so by the postal entry route). The Level 2 provider highlighted that PhonepayPlus had only received 77 complaints and consequently PhonepayPlus would have expected to receive 72 times as many complaints about the Service.

The Level 2 provider stated that the figures were highly significant and demonstrated that the volume of complaints was considerably lower than would have been expected by a fair minded regulator and in light of this, it should have used its resources elsewhere.

Further, it stated that the research indicated that premium rate service consumers were generally not from a vulnerable social economic group, which indicated that, at the very least consumers were able to understand wording placed on promotions.

The Level 2 provider noted that the report made reference to the strong correlation between satisfaction and receipt of a refund. It noted that 7% of consumers who received a refund were satisfied with the manner in which their complaint had been dealt with. In this respect,

it stated that it was noteworthy that the Level 2 provider has made strenuous efforts to identify the complainants to administer refunds.

Specifically in relation to the content of the complaints, the Level 2 provider raised the following points and stated:

- A number of the complaints related to promotions for an older format of the Service, where everyone was entitled to a prize. The Level 2 provider submitted that the Service format had now changed substantially.

- There was no connection between the complaints and the allegations of breaches of the Code that had been raised by the Executive. It had only identified a few complaints, which arguably related to the alleged breach of rule 2.3.2 of the Code.

- There were no complaints relating to the alleged breaches of rule 2.1.1 and 2.4.1 of the Code. It submitted that only complaints relating specifically to the allegations of the breach should be relied upon by the Executive and to do otherwise would result in a wholly misleading picture, especially when adjudications are published.

- Of the complaints, 49 related to allegations that the Level 2 provider had sent the consumer unsolicited SMS messages or that no SMS messages have been received but charges had been incurred. In a number of cases, complainants believed that they were subject to a subscription service. The Level 2 provider asserted that often the reality was that a complainant's phone may have been used by another person without the complainant's knowledge. It stated that the Executive knew that the Service was not a subscription service and that there was likely to be a reasonable explanation for the misunderstanding. Further, it knew that there was a “no quibble” refund policy which would have adequately dealt with the consumer’s concern.

- The Executive appeared to have kept complaints open to assist in building a case against the Level 2 provider. Had consumer’s interests been the main focus the issues could have been resolved at a much earlier stage. It asserted that it appeared that the Executive had deliberately failed to resolve consumer complaints in an effort to criticise the Level 2 provider. The Level 2 provider referred to one complainant as an illustration of this point. The complainant had stated:

  "In my opinion this is a prime example of some extremely shady marketing and should be exposed as such".

  The Level 2 provider stated that during the investigation the complainant had made direct contact and a conversation assisted the complainant to understand that his phone had been used without his knowledge. Following this, the complainant stated that it had no concerns with the Level 2 provider and thanked it for dealing with his query so quickly and efficiently. Further, the complainant contacted the Executive to request that his complaint was closed.

  The Level 2 provider stated that it was concerned that the Executive had continued to rely on this complaint. It urged the Tribunal to consider the voracity of the complaints and in the interests of fairness, it invited the Tribunal to disregard them altogether. It stated that if the Tribunal did not find in the Level 2 provider’s favour, it

should only base its findings on the complaints that were relevant to the alleged breaches of the Code.

- The Level 2 provider addressed individual complaints referenced by the Executive and highlighted that many contained errors. For example, a complainant made reference to obtaining a scratchcard in a national newspaper and the Level 2 provider stated it did not use that publication to distribute its scratchcards.

- Contrary to the Executive's claim, it submitted that it had ample evidence that consumers understood the nature of the promotions and the Service and it provided email enquiries that had been received by the Service during the relevant period. An example included:

  "Hi, I want to find out if I have won anything. If so I wish to obtain the claim number. I have three matching symbols which is a cherry and two matching symbols that is a leaf. Thank you"

Alleged breach of rule 2.3.2 of the Code

The Level 2 provider suggested that the Tribunal consider the characteristics of a "consumer" and whether or not s/he would have been persuaded by a misleading assertion to enter into a transactional decision which s/he would not otherwise have taken. The Level 2 provider strongly asserted that such a standard should be taken from the Consumer Protection against Unfair Trading Regulations 2008 (the "**CPRs**"), in light of the all-encompassing legislation concerning misrepresentation by businesses to consumers. In addition, it noted that the language used by the Executive in its assertions appeared to mirror the CPRs and consequently, it submitted that it would be odd if the Executive approached regulation in a way which conflicted with the CPRs, especially given the Better Regulation principles with which it should comply.

The Level 2 provider stated that a closer inspection of the CPRs revealed that use of the phrases "average consumer" and "transactional decision" were repeatedly made. It made reference to regulation two, paragraph two, which states:

"In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumer's account shall be taken of the material characteristics of such an average consumer including his being reasonably informed, reasonably observant and circumspect".

The Level 2 provider also referred to the definition of a "transactional decision" defined by regulation 2(1), which states:

"Any decision taken by a consumer whether it is to act or to refrain from acting, concerning:-

a) Whether, how and what terms to purchase, make payment in whole or in part or retain or dispose of a product; or
b) Whether, how and on what terms to exercise a contractual right in relation to a product."

It referred to the definition of a misleading commercial practice at regulation 5 and the definition of a misleading omission at regulation 6, which states:

Regulation 5

"(a) If it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and
(b) It causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise".

Regulation 6

"(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) -
(a) The commercial practice omits material information
(b) The commercial practice hides material information,
(c) The commercial practice provides material information in the matter which is unclear, unintelligible ambiguous or untimely or
(d) The commercial practice fails to identify its commercial intent, unless this is already apparent from the context.
and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise".

The Level 2 provider submitted that, for there to be a breach of rule 2.3.2 of the Code, the Tribunal must be satisfied that the use of three identical symbols on a scratchcard;

- provided false information; or
- in its overall presentation it deceived or was likely to deceive the average consumer; or
- it omitted or hid material information; or
- provided material information in an unclear and unintelligible, ambiguous or untimely way; and
- as a result caused the average consumer to take a transactional decision s/he would not otherwise have taken.

The Level 2 provider stated that the average consumer was someone who was reasonably informed, observant and circumspect and this standard had been put in place, as occasionally consumers will make mistakes and get things wrong, but it should not be a route to an automatic finding of a breach under the CPRs.

Consequently, the Level 2 provider stated that upon an application of the definition of an "average consumer" it was clear that there had been no breach of the CPRs and no breach of the Code.

The Level 2 provider addressed the Executive's submission in relation to consumers' confusion with a well-known lottery, which required consumers to obtain three matching symbols on its scratchcards to win. The Level 2 provider strongly rejected this assertion and stated that it did not follow that one consumer, let alone a reasonably circumspect consumer, would believe that if one mode of operation applied to one promotion the same mode of operation would apply to a wholly separate promotion run by a completely different provider.

The Level 2 provider rejected the Executive's assertion that the inclusion of a scratchcard with no winning symbols on every promotion added to the impression that a consumer had been particularly fortunate to reveal three matching symbols and that this was likely to mislead consumers into believing that their chance of winning was higher than it was in reality. It stated that it was surprised that the Executive had failed to mention that at the bottom of each scratchcard was a prominently positioned statement in a bold font which stated:

"Three matching symbols equals one in three chance of a prize"

In addition, it stated that where there are two matching symbols, a statement in a bold font was present, which stated:

"Two matching symbols equals a one in three chance of winning a prize"

In addition to this, the statement was preceded with an asterisk which was referred to by the headline statement, "Two [or three] matching symbols". Notwithstanding this, the statement had been displayed on a part of the scratchcard that was only revealed after a consumer had scratched off the panel, and accordingly a consumer was more likely to read this information.

The Level 2 provider stated that, had the Executive been seeking to sell a product to a consumer the failure to refer to this would have been a material omission and in breach of the CPRs. As the statement was present and prominent in relation to all of the scratchcards, the Executive's assertion that consumers were misled or likely to be misled into believing that their chances of winning were higher than they were in reality was false. It asserted that there is no legislation that requires the Level 2 provider to set out the odds of winning, let alone to do so prominently, however it had taken the view that as a responsible business seeking to build consumer's trust in the brand, it should provide this information and accordingly had done so.

The Level 2 provider asserted that the scratchcards referred to by the Executive had not been clearly reproduced and as such supplied copies for the Tribunal, which it felt were more representative. The Level 2 provider drew the Tribunal's attention to the qualifying and explanatory statements included on the scratchcards, which stated as follows:

"Have you won a prize of up to £10,000?"
"Could win £5,000 cash …"
"Three (or two) matching symbols could win one of the prizes below"
"Every card has a set of three matching symbols, two matching symbols and no matching symbols".

The Level 2 provider highlighted that the statements did not convey the impression that three matching symbols would win a prize. Such statements were prominently made and it would be hard for the average consumer not to see and understand what those statements meant. The Level 2 provider stated that the Tribunal should bear in mind the limitation of the medium used to communicate the relevant commercial practice, including limitations of space and PhonepayPlus' rules that pricing information should be prioritised and shown separately from all other information. It submitted that in the circumstances, it believed that it had done a good job in communicating the nature of the Service to consumers.

The Level 2 provider stated that the Executive had downplayed the importance of the postal route of entry to the Service, which had been described as ancillary. It submitted that the postal route of entry had been used in over 35% of entries (taken from data between January and June 2014)

The Level 2 provider adamantly denied that there was a heightened risk of consumers who were members of a vulnerable group being misled as to the nature of the Service and it asserted that had there been any real concern that it had sought to take advantage of a vulnerable group or any vulnerability caused by consumers' personal circumstances, the Executive should have alleged a breach under rule 2.3.10 of the Code. In light of this, the Level 2 provider suggested that the Executive fully accepted that there had been no targeting of vulnerable consumers.

The Level 2 provider stated that promotions which had been disseminated to many thousands of people would inevitably be received by some vulnerable consumers but the relevant issue was the manner in which it had dealt with the issue once it had become aware. The Level 2 provider stated that in response to any complaint by or on behalf of a vulnerable consumer it would immediately remove that individual's details from its database, administer a refund for the cost incurred and offer advice in relation to premium rate call barring and registration with telephone and mail preference services. It added that it maintained a bespoke and extensive suppression list of addresses, comprising of words and phrases that could potentially increase the risk of mailing vulnerable consumers. Where the Level 2 provider believed there was a risk of minors accessing publications aimed at adults, it had sent its promotions in sealed envelopes to adult subscribers.

The Level 2 provider made clear that the promotions clearly stated that the Service was only open to those aged 18 and over and accordingly it was incorrect to assert that there was no minimum age requirement for the Service. The fact there were complaints from parents about young people accessing the Service did not mean that there was a high proportion of minors using the Service.

Conclusion

The Level 2 provider firmly maintained that no breaches of the Code had occurred however, it took the opportunity to address the Tribunal on any aggravating factors that it may be minded to impose if any breaches of the Code were upheld. However, it commented that it would have been fairer for the Tribunal to reach a finding on the breaches and once notified of the outcome the Level 2 provider could have been given an opportunity to address any alleged aggravating or mitigating factors before sanctions were imposed.

Notwithstanding this, the Level 2 provider submitted that it was not clear whether the Executive was asserting that failure to follow PhonepayPlus Guidance in this case was applicable but it set out detailed reasons why this aggravating factor was not relevant as it had compiled with the PhonepayPlus Guidance.

In relation to any suggestion that PhonepayPlus had notified industry of prior adjudications concerning relevant misleading marketing and consent to market, it requested that the Executive cite the precise relevant prior adjudications and provide the Level 2 provider with an opportunity to respond. It commented that it was not aware of any prior adjudications which applied to its circumstances.

During detailed informal representations, the Level 2 provider reiterated its written submissions. In addition, the Level 2 provider requested that the Tribunal review the overall appearance of the scratchcard and if this was done, it submitted that it would be clear that the average consumer had not been misled.

The Level 2 provider supplied further background information about the Service and stated that it genuinely believed that it was different to others in the sector, operating in a transparent and fair manner and taking its responsibilities to consumers very seriously. It stated that it had not always operated without problems and over the last year its financial accounts had been poor due to a commercial dispute but it had still continued to provide good quality prizes and offered consumer satisfaction. It stated that it was proud of the quality of the prizes and the free gifts it offered. Consumers had been offered free gifts from October 2012 although the issuing of free gifts continued on a larger scale in 2013. Many consumers had been surprised by the nature of the gifts and the feedback suggested that the gifts were extremely popular and had revived the existing format of the Service.

In relation to the distribution of prizes, the Level 2 provider stated that the £1,000,000 prize had only been won once in 2008, but it stressed that the scratchcard promotions had not been in operation since 1986 and the top prize was not always £1,000,000. While it seemed to be correct, the Level 2 provider stated it could not categorically confirm that one particular promotion contained a total prize fund of £2,500,000, that £1,700,000 of those prizes were bottles of fragrance or that less than 500 prizes cost over £15.

The Level 2 provider attempted to clarify the period that the Service had utilised scratchcard promotions. It stated that it had run competition services of some sort since 1986 but it was unable to state exactly when the Service commenced scratchcard promotions other than to say that the scratchcards which contained three, two and no matching symbols and gave a consumer an opportunity to win a prize commenced in October 2012. The format of giving a free gift was developed in light of the CJEU decision, as it seemed fair that consumers that had taken part in the Service were given a gift for doing so.

3. The Tribunal considered all the evidence before it, including the detailed written and oral submissions from the Level 2 provider.

The Tribunal considered the Level 2 provider's submissions regarding the relevance of the complaints received by the Executive. It commented that complaints were not always comprehensive but it was clear that there was evidence that demonstrated some consumers may have been misled or unaware of why they had incurred charges. This was one of the relevant factors that the Tribunal took into consideration. The Tribunal commented that while complainants' accounts are always a consideration at the forefront of its mind, its role was to make an assessment of the promotions in question by applying the Code and the Guidance.

In making its determinations, the Tribunal considered all the evidence before it including the content of the promotions provided by the Executive and the Level 2 provider. In relation to the reasons advanced by the Executive, the Tribunal found that the format of every consumer receiving no, two and three matching symbols on a scratchcard was likely to mislead consumers into believing that they had been particularly fortunate and their chance of winning was higher than it actually was, as such consumers had or were likely to have engaged with the Service and incur premium rate charges. The Tribunal concluded that the format of three symbols equaling a prize was a well-established format. Therefore, extra

care should have been taken to alert consumers to the meaning of the matching symbols and the true nature of the Service.

The Tribunal noted that the placement of key information under a panel that required scratching may remain disguised if a consumer failed to scratch the whole panel. It acknowledged that the scratchcard promotion contained text which explained the format of the Service and a consumer's chance of winning a prize. However, it commented that not enough had been done to rebut the assumption that was likely to follow upon a consumer receiving two or three matching symbols.

In conclusion, the Tribunal found that for the reasons detailed above and by the Executive, the scratchcard promotions for the Service had and/or were likely to have misled consumers regarding the nature of the Service and into incurring premium rate charges in breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH 2
Rule 2.4.1
"Level 2 providers must ensure that premium rate services do not cause the unreasonable invasion of consumers' privacy."

1. The Executive submitted that the Level 2 provider had breached rule 2.4.1 of the Code, as it collected consumers' details with the intention of sharing them with third parties (and shared the information with third parties who offered unconnected products). However, the statement that purportedly indicated consumers' consent was not sufficiently prominent or specific enough to enable consumers to give informed consent for their details to be passed on to the third parties. Accordingly, the Service unreasonably invaded consumers' privacy.

   The Executive relied on the content of PhonepayPlus Guidance on "Privacy and consent to charge", which states:

   Paragraph 4.1

   "Mobile phones can provide a personal connection to an individual (rather than to a household) – a connection that many individuals strongly feel should be protected from unwanted communications. Yet, it has never been easier to reach a high number of individuals with a simple database and a connection to a communications network. PhonepayPlus receives regular complaints from consumers about PRS marketing which they have not opted in to receive and, as such, feel intrudes upon their right to privacy."

   Paragraph 4.2

   "Consumers have a fundamental right to privacy – enshrined in law, through the Privacy and Electronic Communications Regulations 2003 ('**PECR**'). In the UK, the Information Commissioner's Office ('**ICO**') is the body charged directly with enforcing PECR. We work closely with the ICO in order to define what constitutes acceptable and auditable consent to marketing. We may refer cases to the ICO, when appropriate, but will also treat invasions of consumers' privacy through paragraph 2.4 of the PhonepayPlus Code of Practice."

The Executive noted that the application of PECR is limited to electronic communications and as such, does not apply to the Service. However, the ICO is also charged with enforcing the Data Protection Act 1998 (the "**DPA**"). The DPA applies to all personal information. There is significant overlap between the principles and rules prescribed by PECR and the DPA (which are concerned with safeguarding privacy). The definition of consent under both PECR and the DPA has been set out in detail by the ICO. In the absence of a definition of consent within the Code the Executive adopted the ICO's guidance on the meaning of consent for the purposes of the Code rules relating to privacy.

In summary, the Executive noted that a person's personal data should not be passed to a third party without specific and informed consent. Accordingly, any statement purporting to qualify as consent must be sufficiently specific about the purpose for which data is to be shared and who the data will be shared with. Any such statement should be brought to a consumer's attention. Consequently it must be prominent and not buried amongst other terms and conditions. Where consumer data is passed to a third party without the provision of specific and informed consent it is highly likely that there will have been an unreasonable invasion of privacy.

Consent

The Executive noted that to be valid, consent must be knowingly given, clear and specific. Whether consent is valid will depend on all the circumstances and can only be determined on a case by case basis. Consent is defined in European Directive 95/46/EC (the data protection directive on which the DPA is based) as:

> "[A]ny freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

The "processing" of data includes obtaining, recording and holding data. For consent to be valid, it must be:

i. Freely given
ii. Specific
iii. Informed
iv. An indication signifying agreement

The Executive noted the following guidance that is taken in part and/or paraphrased from the ICO's guidance on digital marketing:

> "The crucial consideration is that the individual must fully understand that their action will be taken as consent, and must fully understand exactly what they are consenting to. There must be a clear and prominent statement explaining that the action indicates consent to receive marketing messages. Text hidden in a dense privacy policy or in small print which is easy to miss is not sufficient. Organisations should also provide a simple method of refusing consent to ensure that the consent is freely given.
>
> "It is extremely unlikely that a consumer would intend to consent to unlimited future marketing from anyone, anywhere. Organisations should consider whether consumers are likely to reasonably expect them to use their personal data to offer them the particular products that the third party promotes. A list with general consent to third party marketing may be enough for mail marketing subject to an organisation being able to demonstrate that consent was knowingly given, clear and specific. If the nature of the promotion is

quite different from the context in which consent was originally obtained, consent is unlikely to be valid even if it was superficially expressed to cover third parties. If the consent is generic consent to marketing from any third party, it will be difficult to show specific enough consent for calls, texts or emails. At the very least, any promotion (for example by mail) must be consistent with the context in which consent was given – for example, aimed at a similar market.

"Organisations must act fairly and lawfully when selling a marketing list. If an organisation obtained details from individuals with the intention of selling them on, it must have made it clear that their details would be passed on to third parties for marketing purposes and obtained their consent for this. It is good practice to specifically name (or at least give a clear description of) the third parties to whom details may be sold."

The Level 2 provider collected consumers' details with the intention of sharing them with third parties (and shared the information with third parties who offered unconnected products). However, the statement that purportedly indicated consumers' consent was not sufficiently prominent or specific enough to enable consumers to give informed consent for their details to be passed on to the third parties.

The Executive noted the standardised terms and conditions which were displayed on all the Service scratchcard promotions (**Appendix D**). At the end of the terms and conditions on the reverse side of the scratchcard, it stated, "if you don't wish to receive info/offers from other reputable companies write to [XXX]".

The Executive submitted that the statement was not prominent as it was in a small font size and contained within other terms and conditions.

The Executive noted that the Level 2 provider collected consumer's details with the intention of sharing them with third parties. In response to a direction for information, the Level 2 provider stated that, "cleansed consumer data is sometimes provided to reputable companies or charity organisations for single mailing use only". Following a later direction for information, the Level 2 provider listed all the companies with which it had shared consumer data since October 2012, which included fifteen well-known registered charities.

The Executive submitted that, contrary to the ICO Guidance, the statement that purportedly allowed the Level 2 provider to pass on consumers' details to the third parties was not sufficiently specific, as it did not contain the name of the third party and/or the type of services offered. Further, the method of opt-out was cumbersome and may dissuade consumers from exercising their right to opt-out of third party marketing.

Consequently, in the circumstances of this case, the Executive asserted that consumers had not provided their informed consent as the statement purporting to provide consent was not sufficiently specific and/or prominent. Therefore, the Level 2 provider had not obtained and consequently did not have consumers' informed consent to pass their details to third parties. As a result consumers' privacy was unreasonably invaded in breach of rule 2.4.1 of the Code. As the Guidance states, "Consumers have a fundamental right to privacy – enshrined in law," and any contact without consent intrudes on this fundamental right. Accordingly, for this reason, the Executive asserted that the Service operated in breach of rule 2.4.1 of the Code.

2. The Level 2 provider denied that a breach of rule 2.4.1 of the Code had occurred and stated that the Executive's approach was disappointing and erroneous on three grounds:

1) At no stage during its investigation had the Executive requested information on the Level 2 provider's practice in relation to data protection. It stated:

> "If it had bothered to do so it would have learned that there is no breach of the Data Protection legislation and could have saved substantial time and costs both on the part of [PhonepayPlus] and [the Level 2 provider]."

2) In making these assertions, the Executive had overreached its area of competence and remit. If it truly had concerns these should have been referred to the Information Commissioner's Office. Further, the evidence relied upon by the Executive does not support its assertions and demonstrated that it does not have an understanding of the relevant law.

3) The Level 2 provider's practice in relation to data protection complies with the law in this area and goes significantly beyond what it believed it was required to do.

In relation to the first ground raised by the Level 2 provider, it stated that the Executive had been investigating for over six months and during that time it had made countless directions for information but at no point had an explanation been requested in relation to the Level 2 provider's compliance with the DPA. The Level 2 provider asserted that this approach appeared to be at odds with its Mission Statement, which makes a commitment to openness and fairness. It submitted that if this breach continued to be pursued by the Executive, the Tribunal should require the Executive to pay all costs incurred by the Level 2 provider in addressing this breach of the Code.

In relation to the second ground raised by the Level 2 provider, it stated that the Executive sought to support a breach of rule 2.4.1 of the Code with reference to the Guidance on "Privacy and consent to charge", yet it asserted that this does not apply to contact made by mail. It sought to make extremely clear that it does not engage in invasive marketing communication by electronic means and as such PECR is not relevant. In light of this, it submitted that the whole allegation was misconceived.

The Level 2 provider commented that the Executive appeared to appreciate the difficulties with relying on the guidance and had therefore sought to rely on the DPA. Any suggestion that the rules were the same whatever the means of contact, were clearly untrue. The Level 2 provider referred to the Information Commissioner's guidance on "Direct Marketing" (which had been produced in evidence by the Executive) and stated that this focused on electronic marketing, which it does not use. The Level 2 provider particularly noted the following extract from the guidance which stated:

> "The rules on calls, texts and emails are stricter than those on mail marketing and consent must be more specific.
>
> "Organisations should not take a "one size fits all" approach.
>
> "Although there is a well established trade in third party opt in lists for traditional forms of marketing, organisations need to be aware that indirect consent might not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages".

The Level 2 provider stated that the Executive had overlooked this crucial distinction and that wrongly relying on guidance for electronic marketing should mark the end of the allegation of the breach of rule 2.4.1 of the Code.

In relation to the third ground raised by the Level 2 provider, it stated that in case further reassurance was required by the Tribunal, it would explain its endeavours to comply with the DPA to ensure that there was no unreasonable invasion of privacy (and stated that this could have been provided earlier had it been requested). It set out the following DPA procedures:

- It screened potential recipients of mailings against the Mail Preference Service ("**MPS**") and the Bereavement Register the day before sending the mailing (even though the minimum requirement is to do so 28 days prior to the mailing).
- It screened against an extensive in-house "stop list" that was comprised of consumers that had stated that they did not wish to receive communication or if they had been identified as a potentially vulnerable consumer.
- The Level 2 provider's data protection processes were transparent and had been open to scrutiny by a number of other regulators, downstream competitors, legal and regulatory compliance departments of every major media distributor and those who specialised in data protection law. Its approach had not attracted criticism before.
- The Level 2 provider had not processed electronic personal data for marketing purposes or any reason other than the fulfilment of obligations to consumers at their request. It had not processed any sensitive personal data.

The Level 2 provider stated that the medium of communication that was used by it did not require a specific opt-out in the same way that communications by electronic means did. In addition, it stated that there was an issue with space on the promotional material, as only so many items can be distinguished from the main terms and conditions or placed at the top of the text.

The Level 2 provider noted that at some point in the future the legislature of the European Union will consider extending the law so that direct mailing may not be sent without an explicit opt-in. It asserted that this position is some way away as the proposal is understandably controversial. However, it asserted that the Executive, on its own, had put forward its interpretation of the DPA but it was not accurate.

The Level 2 provider noted that rule 2.4.1 of the Code included the word "unreasonable" before the words "invasion of consumer's privacy". It stated that it was understandable that such a word had been included and it implied that for there to be a breach of the Code there had to be something more than simply an invasion of consumer privacy. This provided further evidence that the Code was aimed at more invasive types of communication such as telephone and/or email.

The Level 2 provider took issue with the way the Executive had presented the back of the scratchcard, containing the terms and conditions and stated:

> "It is disappointing but by now unsurprising that [PhonepayPlus] seeks to support its allegation by reproducing the reverse side of a [the Level 2 provider] gamecard at just over 50% of its actual size, refers to the image misleadingly as 'an enlarged example' and then proceeds to criticise the size of the type shown."

The Level 2 provider supplied a copy, which it stated was a fairer representation of the scratchcard.

The Level 2 provider set out the manner in which it processed data and in summary stated:

- Consumers were notified of the following on the scratchcards:

  "If you don't wish to receive info/offers from other reputable companies write to "Dept ORO" at the address shown".

  Given the medium used to communicate with consumers, it submitted that this statement provided sufficient notice. However, the Level 2 provider did not rely on this statement to provide data to third parties. It stated that it could remove the statement altogether, but it had felt that there was no harm in providing the notification to consumers on more than one occasion.

- Consumers that completed and sent the form on the back of the scratchcard to the Level 2 provider were checked and verified. In approximately 96% of cases, the scratchcard would have been sent by a previous consumer. This left an average of 4% of consumers who were playing for the first time. Information from these consumers would be checked against internal suppression lists and external registers in the same way as all other records.

- The first time consumers were not sent a marketing insert but were sent a “welcome to Club Creative” flyer and a privacy notice with their entitlement (either a prize or free gift). The Level 2 provider supplied a copy of the privacy notice which included the following statement:

  "Not a joiner? Not a problem! We respect your privacy. If you provide Purely Creative with your electronic contact details (e.g. your mobile number or email address) we will never use these details or enable a third party to use these details to contact you for marketing purposes. We may send offers and invitations to you by post. If you would prefer not to receive postal communications from Purely Creative Limited or occasional marketing offers from charities or from selected reputable companies in sectors such as retail or financial services just let us know. Put your request in writing please, either to Department DRD at the postal address shown above or use the link on our website www.purelycreative.com to send an email with the subject heading "Department DRD". If you would like to receive postal offers but from Purely Creative only, please confirm this in your letter or email. We will carry out your request promptly and at the latest within 72 hours of receipt, but we advise that you allow up to six weeks for the change to be fully effective".

  The Level 2 provider stated that this statement had gone far beyond what the DPA required the Level 2 provider to do. It also made absolutely clear that electronic contact details will never be used for marketing purposes by the Level 2 provider or any third party for marketing purposes. Furthermore, specific reference had been made to the provision of data to charities.

- The Level 2 provider stated that the opt-out mechanism was real and a review of its database revealed that 240,147 consumers had opted-out of receiving third party promotions. In an effort to give consumers ample time to opt out, no marketing

mailing would be sent to consumers within three months of initial receipt of their data.

- Consumers that had made new claims for prizes were also sent privacy notices and if consumers did not respond to further mailings they were removed from the Level 2 provider's mailing list.

- Consumers on the third party mailing list would not receive more than three mailings within a twelve month period from the date of their inclusion and their data would not appear on any list supplied after twelve months.

In conclusion, the Level 2 provider submitted that its practices were wholly compliant with the relevant law and the Executive had overreached its remit and area of competence in seeking to deal with this matter.

During detailed informal representations, the Level 2 provider reiterated its written submissions and in addition provided further clarification on the process where consumers received a privacy notice. First time players (which represented less than 8% of all consumers) receive a privacy pack which included their gift or prize entitlement and the privacy notice. The Level 2 provider did not accept that it would be easier to include a requirement for consumers to opt-in to receive marketing, as it stated that not many consumers would ask to receive marketing, particularly from providers that utilise scratchcards.

The Level 2 provider stated that 86% of consumers were repeat consumers of the Service, according to its database figures. However, this figure was probably more like 96% to take account of consumers who had engaged with the Service repeatedly.

The Level 2 provider stated that the privacy notice made reference to charities and reputable third parties. However, it did not rely on the statement for reputable third parties. This had been added in the hope that an agreement could be reached for the sale of data with other companies but it had not materialised.

3. The Tribunal considered all of the evidence before it including the Level 2 provider's written and oral submissions. The Tribunal accepted that the PhonepayPlus Guidance on "Privacy and consent to charge" was centered on privacy requirements under PECR which, as accepted by both parties, did not have any application in this case. However, the Tribunal accepted the Executive's submission that the Level 2 provider was obliged to comply with the requirements of the DPA in relation to handling consumers' personal data.

While the Tribunal noted that there was now further evidence in the form of a privacy statement, supplied by the Level 2 provider with it response to the breach letter, the Tribunal took the view that collection of data with the intention of sharing it with third parties did not necessarily mean that there had been an unreasonable invasion of consumers' privacy. The Tribunal did not consider whether there had been a breach of the DPA and it did not determine whether the statement was sufficiently prominent or specific enough to enable consumers to give informed consent for their details to be passed on to third parties. Instead, the Tribunal considered whether there had been an unreasonable invasion of consumers' privacy. The Tribunal commented that the process of collecting and handling consumers' data was a matter that it thought should be dealt with by the ICO.

The Tribunal found that the Level 2 provider actions of collecting and handling data had not caused the unreasonable invasion of consumers' privacy. Accordingly, the Tribunal did not uphold a breach of rule 2.4.1 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH 3
Rule 2.1.1
"Premium rate services must comply with the law."

1. The Executive submitted that the Level 2 provider had breached rule 2.1.1 of the Code since March 2013, as consumers claiming their prize were required to incur postage costs contrary to the requirements of the CPRs that consumers must not incur any costs whatsoever (irrespective of them being de minimis) when claiming a prize. Further, it submitted that it was not sufficient that such costs were later refunded.

   The CPRs came into force on 26 May 2008. The CPRs introduced a general duty not to trade unfairly but to seek to ensure that traders act honestly and fairly towards their customers. They apply primarily to business to consumer practices.

   Schedule 1 of the CPRs outlines a series of practices which are deemed "unfair" and prohibited pursuant to Article 3(1) of the Regulations. Paragraph 31 of Schedule 1 of the Regulations states:

   "Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either—
   (a) there is no prize or other equivalent benefit, or
   (b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost." [Emphasis added]

   It was accepted by the Executive that some ambiguity surrounded the interpretation of paragraph 31 prior to March 2013. However, in a preliminary question asked by the Court of Appeal in a case involving the then Office of Fair Trading (the "**OFT**") and a number of premium rate service providers (including the Level 2 provider), the CJEU made the following ruling regarding the correct interpretation of paragraph 31:

   "– paragraph 31, second indent, of Annex I to the Directive on Unfair Commercial Practices Directive must be interpreted as prohibiting aggressive practices by which traders give the false impression that the consumer has already won a prize, while the taking of any action in relation to claiming that prize, be it requesting information concerning the nature of that prize or taking possession of it, is subject to an obligation on the consumer to pay money or to incur any cost whatsoever;

   "– it is irrelevant that the cost imposed on the consumer, such as the cost of a stamp, is de minimis compared with the value of the prize or that it does not procure the trader any benefit."

   The Executive asserted that following the CJEU's ruling the meaning of paragraph 31 was clear. In a Court of Appeal undertaking (Penal notice, order & undertakings (the "**Undertaking**") dated 19 March 2013, the parties, including the Level 2 provider, undertook the following:

"Each Appellant/ Respondent will not…. Continue or repeat the conduct described in paragraph 4-8 below;

…4. Create the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact taking any action recommended by the Appellant/Respondent in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring any cost whatsoever. Prohibited costs include costs relating to any of the following relevant benefits: requesting information concerning the nature of that prize or equivalent benefit or taking possession of it whether or not:

a) the cost is de minimis compared to the value of the prize or equivalent benefit;
b) the cost passes to the Appellant/Respondent or to any other person;
c) the Appellant/Respondent also offers the consumer any other route to obtain the relevant benefit which is free."

As a result of the above, the Executive submitted that, when following action recommended by the Level 2 provider, there is an absolute prohibition on consumers incurring costs to claim a prize.

It is of note that a paragraph of the Undertaking referred specifically to one of the Level 2 provider's promotions. It set out that where the Level 2 provider could prove that the promotion was distributed prior to October 2012, the Court of Appeal allowed a limited concession to the above absolute prohibition in that it permitted the promotion to continue on the basis that all costs incurred by consumers to claim a prize would be refunded. However, this concession was to allow retrospective refunds in relation to current promotions and therefore had no application to promotions issued after October 2012.

The Executive relied on PhonepayPlus Guidance on "Competition and other games with prizes", which was amended following the clarification to the meaning of paragraph 31 detailed above and states:

Paragraph 4.5

"Consumers should not be subject to any costs in order to claim prizes once draws have been made. For example, those services which require consumers to pay telephone or postal costs to claim prizes are likely to contravene the law. This remains the case whether or not the consumer has made an earlier separate payment to enter the competition. An example would be where consumers are required to pay to enter a prize draw, promoted as a competition service offering a chance to win, and are subsequently required to call a non-free telephone number or send a stamped addressed envelope to claim the prize they are said to have won."

Paragraph 4.6

"The Unfair Commercial Practices Directive (as transposed into UK national law through the Consumer Protection against Unfair Trading Regulations 2008) provides that where promotional material creates a "false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact … taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost", this constitutes a banned practice. The European Court of Justice has now confirmed that traders cannot require consumers to

bear any cost in order to claim a prize, including where the cost is de minimis compared with the value of the prize or where such cost does not financially benefit the provider, such as a stamp. Consequently, we would strongly suggest that providers seek legal advice before running PRS prize claim competitions."

Paragraph 4.7

"Where it appears to PhonepayPlus that the law has been contravened in relation to PRS services and promotional material it will consider whether this issue can be appropriately dealt with as part of the enforcement of its Code of Practice, or should be referred to the Office of Fair Trading (or successor body). If PhonepayPlus decides to enforce its Code of Practice in respect of this issue, it is likely that it will conduct a Track 2 procedure investigation and raise a breach of the Outcome of Legality (paragraph 2.1) in addition to other potential breaches of the Code."

The Executive noted that where consumers have a winning scratchcard, in order to claim their prize, consumers are required to send their completed claim form to a UK non-freepost address. Currently, the cost of a second class stamp is 53 pence. Further, it was stated that claims over £500 "must be sent by Special Delivery", which would cause consumers to incur further costs.

In correspondence, the Level 2 provider stated that consumers who claim a prize would be provided with "a cheque to cover any costs incurred from the point at which the consumer was made aware that a prize had been won". However, as set out above, the Executive asserted that the limited concession provided in the Undertaking to allow retrospective refunds had no application to promotions issued after October 2012.

The Executive submitted that it was illegal for consumers to incur any charges as a result of following any action recommended by the Level 2 provider (even if they are de minimis) when claiming a prize. There was no provision to remedy the illegality with the provision of a refund. Accordingly, requiring consumers to incur the cost of postage to claim their prize was contrary to the law. Therefore, the Executive asserted that a breach of rule 2.1.1 of the Code occurred from 19 March 2013.

2. The Level 2 provider accepted that the CJEU had ruled on the issue of consumers incurring costs when claiming a prize and it stated that it had followed the spirit of the judgment but following it to the letter was practically impossible, as claiming a prize required consumers to incur a cost of some sort.

The Level 2 provider explained the history of its dealings with the OFT and stated that in 2005 the OFT launched a sector-wide investigation which targeted ten separate providers who operated premium rate prize draw services via promotional letters or scratchcards. This culminated in the decision of the CJEU. The Level 2 provider asserted that it was one of the few providers who had sought to comply with the decision that was being breached throughout Europe, despite the relevant regulators being aware.

The Level 2 provider stated that the OFT had criticised the Level 2 provider for its attempts to achieve compliance while other organisations had continued to operate by flagrantly breaching the judgment, yet the OFT had not taken any action. It asserted that it was clear that as a result of its inaction the OFT could not launch an investigation against the Level 2 provider for an alleged breach, given that other organisations were ignoring the decision. In the circumstances, it was extremely surprised that it had received notification from the

Executive that stated it was instigating an investigation. It believed that the timing and method in which the Executive had initiated the investigation was no coincidence. In addition, it asserted that the Executive had not explained its concerns to the Level 2 provider, avoided all informal meaningful discussions, allowed practices which it deemed non-compliant to operate for six months and served a breach letter which was pejorative and exaggerated. For example, the Level 2 provider had stated that consumers were required to send two first class stamps to the Level 2 provider to claim a prize when that was simply not true.

The Level 2 provider specifically addressed the allegation of a breach of rule 2.1.1 of the Code and submitted that the Executive's argument did not serve the public interest and revealed unfair and inconsistent treatment towards the Level 2 provider.

The Level 2 provider referred extensively to the CJEU decision and stated that prior to this decision the High Court had made it very clear that there was not a breach of the law if the claim costs were minimal in relation to the value of the prize to be claimed. It stated that there was an issue with the practical application of this formula and the OFT argued that no cost whatsoever could be incurred when claiming a prize. It submitted that the decision of the CJEU that no cost whatsoever including de minimis costs could be incurred in the claiming of a prize was surprising. The reality, as the CJEU appeared to accept at the oral hearing was that it is impossible to claim a prize without incurring a cost of some sort. By way of example, the Level 2 provider stated that even using a computer to claim a prize by email involved some expenditure in terms of electricity and if one walks to claim a prize this involves use of shoe leather. The Level 2 provider asserted that the extremity of the decision meant that if the law was to be enforced, no business, charity or lottery could run a promotion to win prizes and this it asserted was clearly nonsensical.

The Level 2 provider gave an overview of how the CPRs had been interpreted in other EU countries and stated that it was in direct conflict with the CJEU decision. In addition, the Level 2 provider referred to another large company offering prizes, which required a consumer to incur a cost in almost all cases and no refunds of the costs incurred in making a claim are offered. The Level 2 provider stated that it sought to address the effect of the CJEU ruling by introducing a policy whereby it automatically refunded the cost of claiming a prize. In doing so, it believed it was upholding the spirit and the purpose of the CJEU ruling.

The Level 2 provider stated that it had ensured that consumers had not permanently incurred costs as a result of claiming their prize by paying refunds for the cost of a stamp and the envelope. In light of its efforts, it believed that the Executive should not be pursuing the allegation, as its actions were inconsistent considering that many providers did not even provide a refund. Instead of criticising the Level 2 provider, it believed that its efforts should be recognised.

The Level 2 provider asserted that the Executive had departed from the PhonepayPlus Mission Statement which is concerned with openness, fairness, even handedness, impartiality and consistency.

The Level 2 provider urged the Tribunal to consider the significance of a finding of breach of rule 2.1.1 of the Code against the Level 2 provider. It relied on good working relationships with publishers and any finding of illegality (however nonsensical) was likely to represent an end to those relationships, due to a strong desire to protect their brand. Without the publishers, the Level 2 provider would not be able to continue and this would

certainly mean the loss of employment for its 19 employees. Such a finding would leave it with no choice but to seek further clarification of the issue from the Courts.

In light of the overriding objective of the CPRs, the Level 2 provider asserted that the only sensible interpretation of paragraph 31 of Schedule 1 of the CPRs is that consumers' interests are not harmed by a provider informing a consumer they have won a prize but in reality requiring the consumer to pay for it or make a significant contribution towards claiming a prize. Consequently, it stated that it does not make sense that where there is a small cost involved in claiming a prize, which is later refunded, there is a breach of the regulations. Further, at the time of claiming the prize the consumer would already have the benefit of the Level 2 provider's promise. It submitted that the Executive's interpretation was highly dogmatic but it urged the Tribunal to recognise that it had sought to apply the meaning and spirit of the CJEU's decision. A consumer would not be "out of pocket" and the verb "to incur" could only sensibly be applied at the end of the transaction by looking back and asking "Is the consumer out of pocket"? By artificially severing the transaction, the Executive had sought to apply the verb to the partial or temporary predicament, which created a nonsensical outcome.

The Level 2 provider submitted that it did not think that this issue was PhonepayPlus' "fight" but clearly an adverse decision would mean that PhonepayPlus had decided to take the matter on, despite it not being in the public interest. It believed that the Executive should refer the matter to the OFT's successor, where it could be decided whether to pursue it through the Courts.

Notwithstanding this, the Level 2 provider submitted that, should the Tribunal wish to deal with this matter, it noted that the Executive had failed to accurately describe the Level 2 provider's process, as consumers were only required to incur the cost of a stamp, any further cost of stamps was not accurate. For prizes over £500, the Level 2 provider accepted that special delivery was required but stated the cost of this and the envelope was refunded to consumers. It was clearly in consumers' best interests to ensure safe delivery.

The Level 2 provider gave detailed oral submissions which confirmed its written submissions.

3. The Tribunal considered all the evidence before it, including the Level 2 provider's extensive written and oral submissions. The Tribunal noted that the wording of rule 2.1.1 required it to consider whether the Service had compiled with the law and in this case whether there had been non-compliance with the CPRs. The Tribunal found that the CJEU had been clear in its interpretation of paragraph 31 of the CPRs and accordingly, the Tribunal took the view that it was bound to follow the judgment of the CJEU in relation to the interpretation of paragraph 31 of the CPRs. The Tribunal noted that the CJEU had expressly ruled that paragraph 31 of the CPRs meant that consumers must not incur any costs whatsoever, irrespective of them being de minimis, when claiming a prize. As a result of this, and in light of the Court of Appeal Undertaking which expressly stated that an exception to this rule would only be granted for a promotion issued prior to October 2012, the Tribunal determined that refunding costs at a later date was not sufficient. In light of all these reasons, the Tribunal determined that the Service had not complied with the law.

The Tribunal noted that the costs incurred by consumers to claim their prize in this instance were limited to the cost of a stamp and therefore the breach of rule 2.1.1 and the consumer harm was limited. However, the Tribunal found that the Level 2 provider had acted in breach of rule 2.1.1 of the Code.

Decision: 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 **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Significant cases are likely to have had a material impact, directly or indirectly, on consumers and show potential for substantial harm to consumers.
- The nature of the breach was likely to have caused, or had the potential to cause, a drop in consumer confidence in premium rate services.
- The Service was promoted in such a way as to impair the consumer's ability to make an informed transactional decision.

Rule 2.1.1 – Legality

The initial assessment of rule 2.1.1 of the Code was **minor**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The cost incurred by consumers was minimal and the breach had the potential to generate limited revenue streams.

The Tribunal's initial assessment was that, overall, the breaches of the Code were **significant**.

Final overall assessment

The Tribunal did not find any aggravating factors

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

- The Level 2 provider stated that it had proactively refunded complainants in an effort to relieve any purported consumer harm.
- The Level 2 provider had policies and procedures in place to attempt to prevent young people and/or vulnerable consumers interacting with the Service.

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

Having taken into account the mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

Sanctions imposed

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

- a requirement that the Level 2 provider remedy the breach of rule 2.3.2 of the Code for all future promotions;
- a formal reprimand;
- a fine of £25,000; 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.

Administrative cost recommendation: 78% Investigation costs and 100% Tribunal costs

The Tribunal determined that as a breach of the Code had not been upheld, it was appropriate to recommend a reduction in the administrative costs.

Appendices

Appendix A – An example of a "Will you be our next millionaire?" scratchcard (not the actual size):

Appendix B – An example of a "Will you be our next millionaire?" scratchcard, after the panels had been revealed (not the actual size):

Appendix C – An example of a scratched "£1 Million Cash Card" scratchcard, after the panels had been revealed (not the actual size):

Appendix D – The reverse side of a scratchcard including the Service terms and conditions (not the actual size):