



Tribunal meeting number 154 / Case 1

**Case reference:** 34513  
**Level 2 provider:** Numbergrp Network Communications (Ireland) Limited  
**Type of service:** 118 Helpdesk  
**Level 1 provider:** N/A  
**Network operator:** Telecom 2 Limited (United Kingdom)

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

### BACKGROUND

Between 21 October 2013 and 9 June 2014, PhonepayPlus received 79 complaints from consumers in relation to a service called 118 Helpdesk, (the “**Service**”), which was operated by the Level 2 provider Numbergrp Network Communications (Ireland) Limited (the “**Level 2 provider**”). The Service operated on the premium rate numbers 118 820 and 118 472, which had been allocated to the Level 2 provider by the Network operator, Telecom 2 Limited. Consumers were charged £2.50 per call plus £2.50 per minute (plus Network charges) with respect to 118 820, and £3.98 per call plus £2.50 per minute (plus Network charges) with respect to 118 472. Consumers interacted with the service after their attempted calls to various businesses failed, and they were instead connected to an interactive voice recording (“**IVR**”) which prompted them to call the Service. The connection would occur when there was a fault with the business number that consumers were trying to dial. These business numbers were allocated by another company which shared a common director with the Level 2 provider. The Service commenced operation on both 118 numbers from September 2013 and continues to operate.

Transcripts of the IVRs, which were taken from recordings provided by the Level 2 provider, were as follows:

#### **For 118 820:**

“Please call 118 820

That’s 118 820

That number again is 118 820

Lines are open Monday to Friday 8am to 6pm and calls are charged at the call rate of DQ 130 which is £2.50 per call plus £2.50 per minute plus network extras.

This service is provided by numbergroup.com

For further information regarding 118 820 please visit our website.”

#### **For 118 472:**

“Please call 118 472

That’s 118 472

That number again is 118 472



The office is open Monday to Sunday 8am to 8pm and calls are charged at the call rate of DQ 136 which is £3.98 per call plus £2.99 per minute plus network extras.

This service is provided by numbergroup.com

For further information regarding 118 472 please visit our website.”

### Complaints

The majority of complaints were received between January 2014 and February 2014. Complainants consistently stated that they were unaware of the cost of the Service and experienced bill shock. Examples of the complaints can be found below:

#### Complainant 1

“I ordered some products from the internet. The company is called Bodybuilding Supermarket. My goods had not arrived so I called the number on their website which is 08444 101 100. When I dialled this number there was a message saying call 118 820. I dialled this number and a lady answered. I gave her my order number and she said she would have a look. I was put on hold, she came back to me and said there was a fault with the line, however it was now okay. I had a friend sitting next to me who said ask if you have been charged. I asked and was told yes it was £2.50 per minute (I was on the phone for nearly 10 minutes). I said to the lady you did not tell me this at the beginning of the call. She did not say anything and I put the phone down. She did not give me any information and I will be charged for it. The lady put me on hold on purpose, I understand she has nothing to do with the company I ordered the goods from.” [sic]

#### Complainant 2

“We dialled a normal 01434 number. Immediately a message came on the line telling us to telephone 118820. We assumed this was a central number for the estate agents we were attempting to telephone. A lady answered and immediately indicated that she would attempt to put us through to the number we have been trying to dial. She then said there was a fault and asked us to hold the line. She then came back on after some delay to say the fault was now cleared and we could now dial the number direct. We then did so without a problem. On receiving our bill we discovered to our horror that we had been charged £15 for a five minute ten second call. At no time was there any suggestion that we were dialling a premium rate number. Throughout we were only trying to speak to the number we had dialled and assumed that the number we been put through to was some sort of central office for them. We have spoken to the estate agents concerned and they are as horrified as we are. They say that they certainly had not made any arrangements with 118820 for their calls to be intercepted.” [sic]

#### Complainant 3

“I am complaining for three reasons: 1) I was not warned of the cost of the call 2) The 118 820 "service" is advertised as a result of a number not working. This is very wrong. The BT and the phone network should not be automatically directing customers to premium rate numbers like this. 3) The cost is excessive and the way calls are handled by putting people on hold is simply a way of racking up charges.”

#### Complainant 4



“My complaint is that no statement was made as to what 118820 was or what the charge would be. I have been charged £5.48 for two minutes and want my money back. I believe I am entitled to this as I was not provided with information about the cost of this service.”

It was of note that when conducting a search on PhonepayPlus' Numberchecker for either 118820 or 118472, the result provided the following message in addition to the identity of the Level 2 provider:

“Unhappy with the service received ? We're very sorry, Please CONTACT US directly to obtain a REFUND [sic].”

The Executive confirmed that the above message was added by the Level 2 provider and not by PhonepayPlus.

### The investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the Code.

The Executive sent a breach letter to the Level 2 provider on 16 June 2014. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.2.5 – Pricing prominence
- Rule 2.2.1(a) – Provision of information regarding a non-premium rate telephone number

The Level 2 provider responded on 30 June 2014. On 31 July 2014, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- An audio file of the promotional IVR for the Service;
- An audio file of the Executive's monitoring of the Service;
- The complainants' accounts;
- Correspondence with the Level 2 provider (including directions/requests for information and the Level 2 provider's responses);
- PhonepayPlus Guidance on “Promotions and promotional material”;
- The breach letter dated 16 June 2014; and
- The Level 2 provider's response to the breach letter dated 30 June 2014, together with associated annexures.

### PRELIMINARY MATTER CONSIDERED BY THE TRIBUNAL

During informal representations the Level 2 provider stated that in its view the case fell within the ambit of the E-Commerce Directive (2000/31/EC) (the “**Directive**”) and therefore should have been referred to the Irish authorities in accordance with the Directive. The Level 2 provider's argument that the Service was covered by the Directive was based on its assertion that the Service fell within the definition of an information society service (an “**ISS**”) and did not fall within the 'voice telephony' exemption under the Directive as it was delivered using voice-over-internet-protocol (“**VOIP**”) technology. The Tribunal noted that the Executive disputed this and that there had been considerable correspondence between the parties regarding this issue. The Tribunal considered



the parties' submissions as evidenced by the aforesaid correspondence and the further oral submission made by the Level 2 provider, and concluded that the Directive had no applicability to the Level 2 provider's Service. The Tribunal made this determination on the basis that, notwithstanding the Level 2 provider's arguments to the contrary, it seemed clear that the consumers' calls to the Service originated from a public switched telephone network (a "PSTN") and not VOIP, and consumers appeared to have been charged for use of the Service through the same PSTN based calls. This, in the Tribunal's view, meant that the Service was not an ISS, but was a voice telephony Service which fell within the voice telephony exclusion at paragraph 2 of Annex V.

### **SUBMISSIONS AND CONCLUSIONS ALLEGED BREACH 1**

#### **Rule 2.3.1**

"Consumers of premium rate services must be treated fairly and equitably."

1. The Executive asserted that the Level 2 provider acted in breach of rule 2.3.1 of the Code as consumers were not treated fairly and equitably as they obtained little or no value from calling the Service.

The Executive asserted that the combination of the following three factors demonstrated that the Service had little or no value to consumers, but was merely a revenue generator for the Level 2 provider.

- the lack of information provided in the IVR (i.e. that the number attempted was out of order);
- the time taken for the Service operators to provide an alternative number; and
- the financial relationship between the Level 2 provider and the company which provided the business numbers that consumers were trying to contact.

#### **Complainant accounts**

The Executive relied on the complainant accounts, a sample of which is outlined in the above background section of this decision.

The Executive noted that consumers were invited to engage with the Service after dialing a faulty or non-operational business number. An IVR would be played on the line inviting the consumer to call the Service. During correspondence, the Level 2 provider stated that the IVR promotional message was only played on numbers that were unable to connect for various reasons.

The Executive noted that the majority of complainants were unaware that there was a problem with the number they were initially trying to call and that the Service was in place to provide an alternative number. The Executive asserted that this was likely to be due to the lack of information provided in the IVR promotion heard by all complainants. The Executive submitted that the IVR should have contained information clearly stating that the number the caller was attempting to reach was out of service, and then provide details of the Service number should the caller wish to interact with the Service rather than carry out their own search for an alternative number.



The Executive referred to its monitoring calls and noted that upon connection the operator put the caller on hold to purportedly test the line and ascertain whether there was a fault and, once confirmed that there was a fault, placed the caller on hold again to locate an alternative number. The Executive asserted that this action by the operator was designed to intentionally keep the caller on the line for a longer period than necessary, as the operator should have been fully aware there was a fault with the line and the first and only action should have been to provide an alternative number.

The Level 2 provider confirmed that the numbers on which the Service was promoted were managed by a separate company. The Executive noted from the PhonepayPlus registration database and the Credit safe reports generated for this company on 28 April 2014 that the responsible person and director for this organisation was the same person as the responsible person and director for the Level 2 provider. The Executive asserted that this demonstrated a close relationship between the two organisations and further that the responsible party and director for both organisations had a financial interest in the Service provided by the Level 2 provider.

During the investigation, the Level 2 provider provided the Executive with a list of reasons that explained why the number called by complainants was out of service and further confirmed that no action was taken to rectify this when identified. The Level 2 provider stated:

“We do not fix any faults. Where possible we identify an alternative telephone number.”

Accordingly, for all the reasons detailed above the Executive submitted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code, and outcome 2.3 had not been achieved.

2. The Level 2 provider denied that it was in breach of rule 2.3.1 of the Code for the following reasons:

The Level 2 provider claimed that there was no reference in the Code as to what constituted “value” to a consumer. In addition, it stated that PhonepayPlus had never previously requested that the IVR:

“...should contain information clearly stating that the number the caller is attempting to reach is out of service and then provide details of the Service number should callers wish to interact with the Service rather than carry out their own search for an alternative number”.

In support of its assertions that the Service did offer value to consumers, the Level 2 provider submitted approximately 7000 hard copy operator call notes and commented that it had completed around 90,000 search enquiries and requests for assistance from consumers. The Level 2 provider accordingly argued that the number of complaints received by PhonepayPlus (79) represented a tiny percentage of the total calls made to the Service. In any case, some of these complaints had already been resolved by the Level 2 provider who had contacted the complainants prior to the Tribunal hearing. The Level 2 provider submitted records of these contacts which demonstrated that some refunds had been administered. The Level 2 provider asserted that 12 of the complainants who had been contacted remembered making calls to the Service and subsequently accepted that they had properly incurred costs for accessing it.



In relation to the Executive's comments concerning the Level 2 provider's close relationship with another organisation with which it shared a common director, it argued that there was no reference in the Code to inter-company relationships or shared directors being cited as a reason for a potential breach of rule 2.3.1 of the Code. Accordingly, it could not amount to unfair and inequitable treatment of consumers.

The Level 2 provider further commented on the Executive's assertion that operators purportedly tested the line and stated that the test calls were genuine and further evidence could be provided to PhonepayPlus if requested. In addition, the Level 2 provider stated that every caller was required to give permission to be placed on hold before test calls were carried out. Where permission was not given, the operator would terminate the call, carry out the investigation offline, and ring the consumer back to seek further information until the caller's issue was resolved. The Level 2 provider asserted that, without the test call, the operator would not be able to provide accurate information and the caller's problem would not be resolved.

The Level 2 provider clarified the Executive's understanding that the Service did "not fix faults" by stating that the operator's role was to ensure that the caller was connected with the business s/he was trying to reach. It further argued that callers did not care about the nature of the fault, and it would be expensive for them to be placed on hold while such faults were being resolved. In any case, it was not within the remit of the operator's expertise to attempt to fix technical faults.

The Level 2 provider made detailed oral submissions and confirmed its written submissions by stating that it did not seek to prolong calls, as call durations on a lower cost 0871 number used to access the Service (which did not form part of the Executive's case) were longer, and it was not therefore logical to conclude that the shorter calls to the 118 numbers were artificially prolonged.

The Level 2 provider summed up within its written submissions that the alleged breach of rule 2.3.1 of the Code could not be upheld on the basis that the reasons provided by the Executive were not referenced in the Code and that, moreover, the Executive's personal and subjective comments could not be considered as factual, logical or definitive supporting evidence to its claim.

3. The Tribunal considered the Code, Guidance and all the evidence, including the written and oral submissions made by the Level 2 provider. The Tribunal commented that, as a result of the informal representations made by the Level 2 provider, it had obtained a better understanding of how the Service was intended to operate.

The Tribunal noted in particular that many of the complainants that had contacted PhonepayPlus had engaged with the Service in the mistaken belief that the 118 number recited on the IVR was an alternative contact number for the business they had originally intended to call. The Tribunal further noted that, rather compellingly, the same confusion was evident within the consumer call recordings provided by the Level 2 provider. Having considered this evidence the Tribunal agreed with the Executive's submission that the Service treated consumers unfairly due to the lack of information contained within the IVR. The Tribunal further considered the Level 2 provider's submissions regarding consumer complaints that had already been resolved prior to the Tribunal hearing. The Tribunal noted with respect to these resolutions that, while some refunds had been paid, and while a number of complainants may have remembered and accepted the costs of their calls,





consumers were still treated unfairly as a result of the lack of information contained within the IVR.

The Tribunal also concluded that, notwithstanding the Level 2 provider's arguments regarding the genuine nature of the Service, the time taken to provide an alternative number to consumers as demonstrated within the Executive's monitoring and the call recordings submitted by the Level 2 provider nevertheless seemed overly prolonged. The Tribunal accordingly concluded that operators should have become quickly aware of the nature of faults and not placed consumers on hold for longer than necessary.

The Tribunal determined that, for the reasons set out above, a breach of rule 2.3.1 of the Code was made out, and it was accordingly unnecessary to consider whether the Service offered little value to consumers, or make any determination with respect to the close business relationship between the Level 2 provider and the company that provided the business numbers on which faults had occurred.

Accordingly, for the reasons advanced by the Executive, the Tribunal upheld a breach of rule 2.3.1 of the Code.

### **Decision: UPHELD**

### **ALLEGED BREACH 2**

#### **Rule 2.2.5**

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

1. The Executive submitted that the Level 2 provider had acted in breach of rule 2.2.5 of the Code as promotions did not fully and clearly inform consumers of the cost of accessing the Service. Pricing information provided on the IVR promotion was not sufficiently proximate to the premium rate number.

The Executive relied on the content of PhonepayPlus Guidance on promotions and promotional material. The Guidance stated:

#### 2. Pricing information

##### Paragraph 2.1

Pricing information is one of the fundamental pieces of information that promotional material for PRS must display. This is to ensure that consumers are fully and clearly informed of how much the premium rate service is likely to cost them, before they commit to purchase. The principle rule around transparency of pricing in the PhonepayPlus Code of Practice is Rule 2.2.5, which states the following:

##### 2.2.5

**In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be**



**prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.** [emphasis added by the Executive]...

...Prominent and proximate

Paragraph 2.8

**Pricing information where consumers are unlikely to see it, or where it is hard to find, is unlikely to be judged as ‘prominent’, or ‘proximate’, by a PhonepayPlus Code Compliance Panel Tribunal** (‘PhonepayPlus Tribunal’). [emphasis added by the Executive]

Paragraph 2.9

‘Proximate’ is a new term within this edition of the PhonepayPlus Code of Practice, and can be defined as being next to, or very near, the means of consumer access to a service. **The most common example of information not being proximate is providing pricing information which is too far from the call to action** (i.e. the telephone number, shortcode or other access code or means of payment for the service) within the promotion. [emphasis added by the Executive]

Paragraph 2.10

**Lack of prominence, or proximity, most often takes place online** (both web and mobile web), **where the price is provided in small print elsewhere on the page from the call to action.** We have sometimes seen pricing information in the middle of the terms and conditions of a service, promotion or product, **rather than as clear and correct ‘standalone’ information**; the price is sometimes provided **separate from the page with the call to action, or lower down on the page in such a way as to make the consumer have to scroll down to see the price. Any of these practices are unlikely to be viewed as compliant with PhonepayPlus’ Code of Practice by a PhonepayPlus Tribunal.** [emphasis added]”

### Complainant accounts

The Executive relied on the complainant accounts, a sample of which is outlined in the above background section of this decision.

The Executive noted that the majority of complainants stated they did not hear any pricing information when they were directed to call the Service. As a result, complainants stated they were not made aware of the cost of the Service and experienced bill shock.

### Compliance advice

The Executive stated that the Level 2 provider had been given the following compliance advice, in relation to the IVR promotion for the Service, by PhonepayPlus on 22 May 2013:

“In relation to the recording specifically, as a point of best practice, I would recommend that pricing information is stated after the call-to-action is stated, rather than state the PRN [premium rate number] three times and then relay call cost information. This will go





some way to ensuring that all users hear the required information, and mitigate the risk of a user terminating the call prior to hearing all required information which is material to them making an informed decision.”

The Executive further stated that the IVR promotions submitted by the Level 2 provider were both approximately 45 seconds long in total, but that pricing information was only provided between 25-35 seconds into the call. The Executive submitted that the pricing information contained within a promotion should be proximate to the call to action. Further, as previously set out in the above compliance advice, stating the premium rate number three times and then relaying pricing information was likely to result in a significant number of users ending the call before hearing the pricing information, which was material to them making an informed decision to use the Service and thereby incur premium rate charges. The Executive accordingly submitted that it was likely that the complainants of the Service did not hear the pricing information as they ended the call before it was stated.

The Executive submitted that, in light of the total length of the IVR and the timing of the pricing information, the pricing information was not proximate to the call to action.

Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.5 of the Code for the reason outlined above, and outcome 2.2 had not been achieved.

2. The Level 2 provider denied that there had been a breach of rule 2.2.5 of the Code.

The Level 2 provider regarded the Executive’s statement that it had relied, “...on all the complainant accounts...” when raising a breach of rule 2.2.5 of the Code, as confirmation that the Executive had taken the complainant’s accounts as “gospel truth”. In light of this interpretation of the Executive’s statement, the Level 2 provider argued that there was no other evidence to reinforce the complainants’ statements. The Level 2 provider further stated that an alleged breach could not be upheld purely on reliance of personal accounts with no evidence as this would be contrary to natural law and justice for which redress may have to be obtained through the courts.

In relation to the compliance advice provided by the Executive on 22 May 2013, the Level 2 provider argued that the advice given related to “best practice” and did not have to be followed in order to be compliant with the Code. The Level 2 provider did not in any case agree with the compliance advice and argued that every radio advert for 118 services repeated the premium rate number between three and twenty-two times before mentioning pricing information. In addition the Level 2 provider stated that PhonepayPlus had at no point mentioned that its advice was mandatory to achieve compliance with the Code and, as a result, the Level 2 provider simply assumed that the Service was compliant as presented and continued to operate it without making changes.

The Level 2 provider further argued that it did not agree that it could be held responsible for complainants’ missing pricing information in the event that they terminated the call before the end of the IVR. The Level 2 provider further argued that there could not be a breach where consumers had ended the call early as there would have been no consumer harm given that they would not have incurred charges. In addition, the Level 2 provider emphasized that every caller who felt they did not receive value for money when using the Service, and raised a complaint, received a full refund or withdrew their claim once the query was investigated by its call centre manager. The Level 2 provider further argued that the Executive’s use of the phrase “experienced bill shock” was often used to “increase the level of seriousness”. In any case, the number of complaints raised represented a tiny



percentage of total calls, and that consequently, over 99.99993% of all callers received no bill shock, did not raise a complaint and did not seek a refund.

The Level 2 provider submitted that PhonepayPlus' compliance advice from 22 May 2013 was not specific as to the size of prominence of any pricing that would have been required to comply with the Code. The Level 2 provider argued that, had such advice been provided, it would have been taken account of in its promotional material. The Level 2 provider further argued that the issue of pricing prominence and the statement "sufficiently proximate" was a subjective view, and no formal guidance had been provided by PhonepayPlus as to what "sufficiently proximate" would constitute. Without such guidance, there could be no breach of the Code.

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider's written submissions and informal representations. The Tribunal particularly took note of the Level 2 provider's arguments with respect to the compliance advice submitted by PhonepayPlus on 22 May 2013, but concluded that the advice had been taken out of context by the Level 2 provider. This was highlighted by the fact that earlier correspondence from PhonepayPlus had advised the Level 2 provider not to promote the Service in the manner proposed.

The Tribunal concluded that, notwithstanding the Level 2 provider's other arguments, it was clear that the Executive had not relied exclusively on complainants' accounts when it had raised the alleged breach of rule 2.2.5 of the Code, but it had also relied on the IVR recording provided by the Level 2 provider. The Tribunal was satisfied that the recording and its transcript clearly demonstrated that pricing information was only provided 25-35 seconds into the IVR. The Tribunal also noted that, in addition to the complaints cited by the Executive, some of the call recordings submitted by the Level 2 provider demonstrated that complainants did not appear to be aware of the cost of calling the Service. This, in the Tribunal's view, gave weight to the Executive's argument that consumers were likely to hang up the call before the end of the IVR, and crucially, before hearing pricing information.

Having considered this evidence, the Tribunal concluded that pricing should have been recited at the very start of the IVR.

The Tribunal determined for the above reasons that pricing information was not sufficiently proximate to the premium rate 118 number and accordingly it upheld the breach of rule 2.2.5 of the Code.

### **Decision: UPHELD**

### **ALLEGED BREACH 3**

#### **Rule 2.2.1(a)**

"Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made. (a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious."



1. The Executive submitted that the Level 2 provider acted in breach of rule 2.2.1(a) of the Code as the promotional material provided by the Level 2 provider did not contain a non-premium rate UK contact telephone number.

### **Compliance advice**

The Executive submitted that it had been made clear to the Level 2 provider within the compliance advice dated 22 May 2013, that it should clearly state its contact details in any promotional material for the Service:

“...in most cases, where a service is promoted along with all information required by the Code, including price, provider identity and contact information, there would be no issue as long as this information is clear, prominent and easy for every user to understand.”  
[Emphasis added by PhonepayPlus]

The Executive asserted that the IVR promotions for the Service did not contain a non-premium rate UK contact telephone number for the Level 2 provider. Therefore, those consumers who wished to contact the Level 2 provider (i.e. to claim a refund and/or submit a complaint) would have been required to call the premium rate number and incur further premium rate charges for doing so.

Accordingly, the Executive submitted that the Level 2 provider had acted in breach of rule 2.2.1(a) of the Code, and outcome 2.2 had not been achieved.

2. The Level 2 provider denied that the Service was in breach of rule 2.2.1(a) of the Code and argued that PhonepayPlus had previously approved the advertisements used to promote the Service in an email dated 4 November 2013 in which PhonepayPlus had stated that the Service was compliant:

“...After assessing the information you provided in response to our request, I can confirm that based on the evidence received, PhonepayPlus is satisfied the Service is operating compliantly at this time and that no further action will be taken in relation to this matter...”

3. The Tribunal considered the Code, Guidance and all the evidence before it, including the Level 2 provider’s written submissions and informal representations. It particularly took note of the advice provided on 4 November 2013 and confirmed that it would provide substantial mitigation, not only with respect to the breach of rule 2.2.1(a) of the Code, but to all breaches raised in this case. However, notwithstanding this determination, the Tribunal concluded that the advice was incapable of fully exonerating the Level 2 provider from this or any of the breaches raised. The Tribunal accordingly considered the Executive’s evidence and concluded that the IVR clearly did not recite a non-premium rate UK contact telephone number and as such, the breach of rule 2.2.1(a) of the Code should be upheld.

**Decision: UPHELD**

### **SANCTIONS**

#### **Initial overall assessment**

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

#### **Rule 2.3.1 – Fair and equitable treatment**

The initial assessment of rule 2.3.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Serious cases have had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact or potential impact on consumers.
- The nature of the breach meant the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers may be higher and the Service had the potential to generate higher revenues as a result of the breach.

#### Rule 2.2.5 – Pricing prominence

The initial assessment of rule 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- Serious cases have had a clear detrimental impact, directly or indirectly, on consumers and the breaches had a clear and damaging impact or potential impact on consumers.
- The nature of breach meant the Service would have damaged consumer confidence in premium rate services.
- The cost incurred by consumers may be higher and the Service had the potential to generate higher revenues, as a result of the breach.
- The issue of pricing information being insufficiently proximate to the means of access to the Service was a matter that ought to be regarded as serious.

#### Rule 2.2.1(a) – Provision of information

The initial assessment of rule 2.2.1(a) 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 Tribunal's initial assessment was that, overall, the breaches of the Code were **serious**.

The Level 2 provider's revenue in relation to the Service was in the range of Band 3 (£250,000-£499,999).

#### Final overall assessment

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

- The Level 2 provider asserted that it had received no direction as to what constituted prominence or proximity in relation to the provision of pricing information, but the Tribunal determined that these assertions were unfounded as, prior to the breaches occurring,



PhonepayPlus had given relevant notice to industry in the form of numerous prior adjudications relating both to pricing and unfair and inequitable treatment.

- The breaches continued after the Level 2 provider had become aware of them as, notwithstanding assertions that changes were promptly made to the Service upon receipt of notice of the breaches, no changes were made to the IVR. The problems with the IVR were at the heart of this adjudication.

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

- The Level 2 provider had taken steps to end the breaches within three hours of receipt of notification of breaches by PhonepayPlus. The Tribunal particularly noted the Level 2 provider's intention to cap call lengths to three minutes and accepted that this was a mitigating factor but noted that, as there had been no changes to the IVR, the steps taken only reduced, and did not eradicate, the consumer harm.
- The Level 2 provider had provided evidence that it had proactively refunded consumers in an effort to relieve consumer harm caused.
- The Level 2 provider produced evidence to show that it had taken action to ensure that the risks of any breaches reoccurring were minimised, and any detriment was remedied. This was demonstrated within the Level 2 provider's records of consumer resolutions which had been provided as part of its response to the breach letter.
- The Level 2 provider had previously been informed in an email from PhonepayPlus dated 4 November 2013 that the Service was compliant with the Code. The Tribunal noted that this email constituted substantial mitigation for all breaches of the Code.

The Tribunal further noted the Level 2 provider's assertion that there had been a significant delay to the investigation between monitoring of the Service in February and March 2014, and receipt of the breach letter on 16 June 2014. The Tribunal noted these assertions but, having taken into account the issues raised in this case, it did not consider that there had been a substantial delay to the investigation.

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that, while the severity of the case should still be regarded overall as **serious** the level of mitigation would substantially impact the level of the sanctions imposed.

### Sanctions imposed

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

- a formal reprimand;
- a requirement that the Level 2 provider remedy the breaches by amending the IVR to ensure that (i) consumers are made aware there is a fault on the number they are trying to reach, and that they may call 118xxx to obtain an alternative number, (ii) pricing is given immediately after recital of the premium rate number, and (iii) a non-premium rate contact number is included;
- a requirement that the Level 2 provider seek compliance advice for the Service within two weeks of the date of publication of this decision and thereafter implement that advice within



two weeks (subject to any extension of time agreed with PhonepayPlus) to the satisfaction of PhonepayPlus;

- a fine of £60,000 (reduced from £100,000 due to mitigation, and in particular taking account of the procedural history of the case); 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 charge recommendation:**

100%