

Tribunal meeting number 146 / Case 1

Case reference: 27840
Level 2 provider: The Number UK Limited (UK)
Type of Service: Directory enquiries – “DQ”
Level 1 provider: N/A
Network operator: The Number UK Limited (UK)

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

BACKGROUND

Between 21 May 2013 and 20 February 2014, PhonepayPlus received 26 complaints from consumers in relation to a directory enquiries service’s pricing, (the “**Service**”) operated by The Number UK Limited on the premium rate number 118118. Consumers are charged a connection charge of £1.59 and £1.99 per minute (with a minimum one minute charge). After one minute, consumers are charged by the second at the same rate. The Service commenced operation in December 2002 and continues to operate.

The majority of complainants stated that they were unaware of the cost of the Service and experienced bill shock.

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 24 February 2014. Within the breach letter the Executive raised the following breach of the Code:

- Rule 2.2.5 – Pricing prominence and proximity

The Level 2 provider responded on 12 March 2014. On 20 March 2014, and after hearing informal representations made by the Level 2 provider, the Tribunal reached a decision on the breach raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

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 breached rule 2.2.5 of the Code for the following reasons:
 - i) Pricing information on promotions for the Service during the course of a campaign on London buses was not sufficiently prominent to the premium rate number.

- ii) Pricing information on the Level 2 provider's website was not sufficiently prominent or proximate to the means of access to the Service.

Guidance

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

Paragraph 2.2

"As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion)."

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."

Paragraph 2.13

"Pricing information should be presented in a horizontal format and be easily legible in context with the media used. It should be presented in a font size that would not require close examination by a reader with average eyesight. In this context, 'close examination' will differ for the medium, whether on a static webpage, a fleeting TV promotion, in a publication, or on a billboard where you may be at a distance or travelling past at speed."

Paragraph 2.15

"There are a number of instances when the combination of colours used in promotional material reduces the clarity of information and the ease with which it can be seen. Providers should take care to ensure that the colour combinations (including black on white) used for the presentation of the price do not adversely affect the clarity."

Complaints

Generally, the Executive noted the nature of the complainants' accounts that stated that consumers were not aware of the cost of the Service. The Executive noted that while many of the complainants did not expressly state from where they had obtained the Service premium rate number (and they were not asked the question), the complainants' accounts indicated that consumers had engaged with the Service without being fully aware of the cost implications.

Reason One - Pricing information on the promotions for the Service during the course of a campaign on London buses was not sufficiently prominent.

During January and February 2014, the Executive noted that a number of London buses displayed promotions for the Service. The Executive obtained photographs of the buses (**Appendix A and B**) and contacted the Level 2 provider for information. The Level 2 provider provided samples of the bus promotions (**Appendix C**). During correspondence, the Level 2 provider confirmed that the promotions were phased in and out between 27 January 2014 and 13 February 2014 and at the peak of the campaign the promotions were simultaneously featured on 1,220 buses (23% of all London buses).

The Executive noted that information from the Transport for London website indicated that approximately six million people use the buses in London every day. Therefore, at the peak of the campaign approximately 1,380,000 people would have used a bus featuring the Service promotion. In addition, the Executive asserted that the campaign would have been visible to pedestrians and motorists in London. As a result, the Executive submitted that the bus campaign had a very wide reach.

The Executive noted that each promotion prominently displayed the premium rate number for the Service. The cost of the Service was included in a small font size on the far left of each promotion underneath the promotional slogan. The Executive submitted that as a result, although the premium rate number was easily visible from a distance, the cost of the Service was only readable when a consumer was standing very close to the bus. In light of the fact that the promotions were designed to be featured on the side of buses, the Executive submitted that pricing information should have been presented in a font size that was visible from a distance, or when the bus was moving.

During correspondence, the Level 2 provider informed the Executive that the marketing material had been finalised without receiving compliance advice. In light of this admission, the Executive asserted that the lack of internal compliance processes for a large promotional campaign demonstrated systematic failings in the Level 2 provider's compliance procedures.

Accordingly the Executive submitted that the Level 2 provider was in breach of rule 2.2.5 of the Code.

Reason Two - Pricing on the Level 2 provider's website was not sufficiently prominent or proximate to the means of access to the Service.

On 18 February 2014, the Executive captured screenshots of the Service website (**Appendix D and E**). The Executive noted that pricing information for the Service was not present on the landing page but was present below the fold, meaning that consumers were required to scroll down the webpage to view the information. Further, the Executive noted:

- i) The font size of the pricing information was significantly smaller and therefore less prominent than the premium rate number displayed at the top of the page.
- ii) The light grey text on a dark grey background made the pricing information difficult to read.

Accordingly, the Executive submitted that pricing information was not proximate to the call to action (the premium rate number) nor clearly legible

The Executive noted that although 118118 is a brand name for The Number UK Ltd, it is also a call to action for the Service as it is a direct means of access to it. Accordingly, the Executive submitted that it is necessary for pricing information to be visible wherever the premium rate number is featured.

For both reasons outlined above, the Executive asserted that the Level 2 provider had acted in breach of rule 2.2.5 of the Code.

2. The Level 2 provider accepted that it had breached rule 2.2.5 of the Code for the

first reason outlined by the Executive. However, it denied a breach of the Code for the second reason; as it disputed that the website was a promotion for the Service.

The Level 2 provider raised concerns about the manner in which the Executive had presented the case and took issue with the Executive's assertion that the breach of the Code was widespread and systematic. It submitted that this was unfair and untrue. It stated that concerns about the Service's pricing was partly as a result, "of well-recognised industry flaws in the charging structure for non-geographic calls," rather than any action or inaction on the part of the Level 2 provider.

It asserted that it had been operating in the UK premium rate service market for over 11 years, during which time it had handled hundreds of millions of calls and spent a significant amount on many advertising campaigns. Throughout this time, it asserted it had maintained a good compliance record.

Further, the Level 2 provider stated that 118118 was one of the most well-known telephone numbers in the UK. As a result, it asserted that it does not solely rely on promotions to generate calls to the Service. It added that in these circumstances, consumers may call the premium rate number without knowing the cost of the Service which was always regrettable but unavoidable.

The Level 2 provider stated that the promotions that had been the focus of the Executive's case were not the only or the largest promotions for the Service.

Complaints

The Level 2 provider specifically addressed the complainants' accounts noted by the Executive. It acknowledged the importance of any complaints about the Service made to the Executive and stated that they were of concern and regret. It noted that one of the 27 complaints outlined by the Executive had been duplicated. It urged the Tribunal to consider the number of complaints within the context of the vast number of calls that it had handled during 2013. It believed the Executive was attempting to forge a link between the complaints received and the alleged breaches of the Code. Having analysed the complaints, it strongly disputed that this was the case and stated the following:

- i) None of the complainants had referred to viewing the bus promotion or calling the Service as a result of the bus promotions.
- ii) None of the complainants had a London geographic telephone number despite the campaign being restricted to London.
- iii) None of the complainants had referred to the website or calling the Service as a result of viewing the premium rate number on the website.
- iv) The only promotion mentioned in the complaints was the television advertisement, which it stated had previously been approved by the Executive.
- v) One complainant had hinted that s/he had not understood the pricing information however the wording of this complaint was open to interpretation.
- vi) Seven of the complainants stated that the call had not been made from a BT landline and other complainants did not state the network the call had been made from. Therefore, the charges would have been inflated by network charges which the Level 2 provider had no control over.
- vii) Many of the complaints were non-specific with no or little detail about the precise nature of the complaint or the cost incurred.

- viii) Some complaints referred to issues which were not relevant to the alleged breach raised. For example, the call had been made by someone with a disability.

In summary, the Level 2 provider stated that the Executive had not established a “causal link” between the complaints and the alleged breach of the Code raised. Accordingly, it invited the Tribunal to disregard the complaints when reaching a decision.

In cases of genuine bill shock, the Level 2 provider highlighted that it has a flexible and generous approach to refunds. Consumers are offered a 100% refund even where there is no fault on the behalf of the Level 2 provider. The refund is increased if it is established that the consumer was vulnerable or in distress. This will often result in the Level 2 provider making a loss as it cannot recover the proportion of the cost taken by the Network operator. The Level 2 provider had refunded all complainants that it had been able to contact. It stated that this demonstrated a significant degree of goodwill and good practice in customer service.

The Level 2 provider referred extensively to Ofcom’s review of “Simplifying Non-Geographic Numbers” which is stated highlighted that Ofcom recognised that there was a need to simplify and clarify non-geographic call charges. The Level 2 provider believed that many complaints received by the Executive were as a result of consumers being unaware of the structure of non-geographic charges and the industry wording, “other networks may vary,” did not adequately inform consumers of the charges imposed by the Network operators. The Level 2 provider stated that Ofcom had recognised that this was an unfortunate and unavoidable consequence of the charging structure, which was not the fault of the Level 2 provider. It stated that it had been one of the strongest advocates for changing the charging system and evidenced this with its recent response to PhonepayPlus’ “Code of Practice (12th Edition) Review – A PhonepayPlus Call for inputs” where it highlighted its concern regarding the issue. The Level 2 provider stated that it was pleased that Ofcom were introducing “unbundling call costs” from June 2015 which it felt would go some way to address the type of complaints that the Executive had received. Generally, the Level 2 provider stated that it hoped the Tribunal would not penalise it for problems that were as a result of the charging system.

Reason One - Pricing information on the promotions for the Service during the course of a campaign on London buses was not sufficiently prominent.

The Level 2 provider asserted that the bus promotions amounted to a technical breach of rule 2.2.5 of the Code, as the complaints revealed there was no consumer harm (save for arguably one exception). Nonetheless, the Level 2 provider stated that it regretted the breach (as a result of reason one) and that it was keen to work with the Executive to ensure this was not repeated.

The Level 2 provider accepted that the font size used for the pricing information was too small for the bus promotion. However, the Level 2 provider added the following as explanation and mitigation:

- The advertising campaign was limited in geographic reach and time. It was only fully operational for a period of 11 days.
- Correct pricing information was included on the promotion and as soon as it was notified of the Executive’s concern, it assessed the promotion in situ and took the view that the cost of the Service would be visible when a

consumer was standing on the pavement next to the bus. It took issue with the number of people, asserted by the Executive, who may have viewed the promotion.

- The promotions were designed to be viewed on a large scale and the images produced by the Executive did not accurately represent the promotions.
- The photographs taken by the Executive were (it presumed) on a mobile phone which would have had a low resolution and accordingly the pricing information would appear less clear and legible than in reality.

In conclusion, the Level 2 provider stated that the bus promotional campaign was a one-off short term campaign, which was only operational for 11 days. As such it was not subject to the same type of rigorous internal regulatory review processes that would normally occur.

Reason Two - Pricing on the Service's website was not sufficiently prominent or proximate to the means of access to the Service.

The Level 2 provider detailed a call that it had received from the Executive on 21 February 2014, when the Executive had noted that the Level 2 provider had made changes to the Service website. The Level 2 provider was disappointed that the Executive had failed to acknowledge, in the breach letter, that changes had been made to the website, as this may have misrepresented the position to the Tribunal. Furthermore, it stated that it understood that the pricing information was acceptable as it had previously had discussions about the inclusion and display of pricing information on the website with the Executive.

Despite this, the Level 2 provider stated that it had reviewed a recent PhonepayPlus adjudication against another directory enquiry service. It noted the Tribunal's finding that, "the pricing information was not proximate and prominent to the call to action on the Service website, which promoted the Service". Having considered the matter, it stated that it took the view that its website was not a promotion for the Service but had nevertheless amended two aspects of the website as a consequence:

- The headline banner on the website had been amended from 118118 to 118118.com; and
- Pricing information had been removed from the front page (albeit beneath the fold) and now only appears in the "About" section of the website.

These amendments took place between the publication of the other directory enquiry service adjudication and receipt of the Executive's breach letter.

The Level 2 provider made several overarching points regarding reason two. It stated:

- i) The pricing information had been included on the website purely to aid consumers and to spare any consumers, who were looking for the cost of the Service, from referring to the relevant product webpage.
- ii) The colour of the pricing information was readable and that the colour was much clearer when viewed on a computer. Other commercially oriented and revenue generating information was in exactly the same colour text.

The Level 2 provider's central submission was that the website was not a promotion for the DQ Service and as such pricing information was not required by the Code. It

assumed that the Executive's position was that wherever a premium rate number appears it automatically amounted to a promotion for the service. The Level 2 provider rejected this assertion and stated that if that was the case, every time it presents its brand name "118118" on its headed notepaper, business cards and email signatures it would be required to include pricing information for the Service – this was not logical or feasible and could not be the intention behind the Code.

The Level 2 provider urged the Tribunal to consider where the line is drawn between what does and does not amount to a promotion of a premium rate service and asked it to consider a "purposive" approach. For example, it stated that the purpose of a 118118 business card was not to promote or encourage calls to the premium rate number and likewise nor was the 118118 branded website. The website contains a search box below the 118118 number which provides free access to some of the same information that can be obtained by calling the premium rate number. Accordingly, it stated that it was not plausible to suggest that the website promotes or encourage calls to the premium rate number whilst containing (as its central feature) an alternative free method.

The Level 2 provider drew attention to other features on the website such as promotional banners for its non-premium rate services, such as "118118 Money" and "118118 Beauty". Generally, it stated that the webpage contained a lot of information and most of the features were not related to the Service. As such it would be illogical to conclude that the website is a promotion for the Service.

The Level 2 provider made detailed submissions aimed at distinguishing its Service from the other directory enquiry service that was recently the subject of an adjudication. Primarily, it stated that the 118118 brand had a distinct identity and was a brand in its own right. Further, the website was a standalone entity which encompassed the multiple 118118 businesses, almost all of which have no connection to the DQ Service. The meta description for the website refers to 118118.com rather than to the premium rate number.

In conclusion, the Level 2 provider stated that it has always viewed the website and Service as distinct. It submitted that it had been proactive in taking steps to make the distinction on the website even clearer.

During lengthy and detailed informal representations, the Level 2 provider reiterated its written submissions. In addition, the Level 2 provider described the company structure. The Level 2 provider is an incorporated company that operates call products, financial services and beauty products amongst others under the brand name 118118. The Level 2 provider has under 100 members of staff serving the UK. The Level 2 provider stated that approximately 80% of its recent business was associated with the Service, although its plan for the future was to grow its other offerings under the 118118 brand and expand into other markets including digital products. It has handled hundreds of millions of calls and spent hundreds of millions of pounds on marketing since 2002. It stated that to put matters into context it utilised, "a different scale of investment to anything [the Tribunal] would deal with normally". While revenue over the last seven years had remained stable it was a mature sector where volumes of calls were declining year on year. The vast majority of the brand's revenue was from the Service but the Level 2 provider expected this to change in the future as it continued to develop the 118118 brand.

In relation to reason one, outlined by the Executive, the Level 2 provider accepted the breach and that it should have put the pricing information in a larger font on the

bus promotion. However, it maintained that it was a one-off mistake as it always attempted to adhere to the Code. The Level 2 provider asserted that it has to take compliance seriously because it invests in the 118118 brand and needs to protect it by not taking risks. It highlighted that there were no peaks in traffic to the Service during the period that the bus promotional campaign was in operation.

In relation to reason two, advanced by the Executive, the Level 2 provider reiterated its submission that this matter was primarily concerned with the question, “what is a promotion?” It argued that the mere display of a premium rate number is not necessarily a call to action. It asserted that what is of fundamental importance is the context of where the number appears. Whilst, it accepted that it is not a straightforward matter and it believed it was far from ideal to be “ironing out” this type of issue in a Tribunal hearing setting, it strongly maintained that the website was not a promotion for the Service.

The Level 2 provider confirmed that the search box on the website only enables a user to look up businesses, not individuals. However, it asserted that the percentage of consumers requesting personal numbers was very small. As the 118118 brand continues to grow into other business areas, the Level 2 provider stated that if it was always required to provide pricing next to the brand it had concerns about how this would work. It stated that it would be confusing for the cost of the Service to be included for a promotion for “118118 money” when it would not be possible to contact “118118 money” on the premium rate number.

The Level 2 provider stated that it was unable to confirm the exact number of consumers who visited the website and then used the Service. However it stated that logic would suggest that it would not happen very often. It was not able to confirm how long the website had been in the form viewed by the Executive (**Appendix D and E**) other than to say it had been like that for a long time. In addition, it stated that it carried out many promotional campaigns and overall the traffic from the website would be miniscule.

The Level 2 provider clarified that the cost of the Service was £3.58 for the first minute, thereafter £1.99 per minute (charged by the second rather than minute). No pricing information was included at the beginning of the call in an effort to keep the call quick and convenient but it added that in any event this was not required by the Code.

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

The Tribunal noted that the Level 2 provider had admitted that a breach of rule 2.2.5 of the Code had occurred in respect of the promotions for the Service on London buses. The Tribunal found that, although pricing information was present, it was not clearly visible from a distance, unlike the premium rate number. It added that this was not a borderline case and that the lack of prominence of the pricing information was clear from both the photographs provided by the Executive and the sample promotions provided by the Level 2 provider. Therefore, the Tribunal found that the cost of the Service was not prominent nor clearly legible to all persons who saw the promotion and accordingly a breach of rule 2.2.5 of the Code had occurred.

The Tribunal considered the wide definition of a promotion at paragraph 5.3.29 of the Code and concluded that the Level 2 provider’s website came within the definition of a promotion, as the effect was to directly or indirectly encourage the use

of the Service. The Tribunal accepted that not all material containing a premium rate number (such as a business card or headed notepaper) will have the effect of encouraging use of a premium rate number. It considered that the specific context must be taken into account and each case considered on its own facts. On the facts of this case, an extremely well known premium rate number appears on the front page of the Level 2 provider's website. The Tribunal found that, at the time of this alleged breach at least, the general perception of 118118 is as a directory enquiry number and the direct or indirect effect of using the number in the way it is displayed on the main page of the Level 2 provider's website is to encourage the use of a premium rate service. The Tribunal accepted that it may have been the intention of the Level 2 provider to create a brand website but concluded that the context of the current website is such that it falls within the broad definition of a promotion in the Code. As a result, the Tribunal found that the pricing information, which appeared beneath the fold, was not sufficiently proximate and prominent to the premium rate number.

Accordingly, for both reasons detailed by the Executive, the Tribunal upheld a breach of rule 2.2.5 of the Code

Decision: UPHELD

SANCTIONS

Initial overall assessment

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

Rule 2.2.5 – Pricing prominence and proximity

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 a clear detrimental impact, directly or indirectly, on consumers and the breach has a clear and damaging potential impact on consumers.
- 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 Service was operated in such a way that demonstrates a degree of negligent non-compliance with the Code.

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

Final overall assessment

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

- The Level 2 provider failed to follow Guidance on "Promotions and promotional material" in relation to the London bus promotions for the Service.

In determining the final overall assessment for the case, the Tribunal took into account

the following mitigating factor:

- The Level 2 provider took steps to attempt to remedy the breach, even though it was unable to remove the London bus promotions for the Service until the campaign period had run its course.

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

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

Sanctions imposed

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

- a formal reprimand;
- a fine of £80,000;
- a requirement that the Level 2 provider seeks compliance advice for the Service's website promotions 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; and
- a requirement that the Level 2 provider must refund all complainants who have made a complaint by the date of publication of this decision and who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendices

Appendix A – A photograph of a London bus promotion for the Service:



Appendix B – A photograph of a London bus promotion for the Service:



Appendix C – Samples of the promotional material for the London bus campaign for the Service supplied by the Level 2 provider:

WHY TRAWWL? JUST CALL  **GOT YOUR BACK**

DON'T WAIT, CALL 118118  **GOT YOUR BACK**

BE SMART. PHONE  **GOT YOUR BACK**

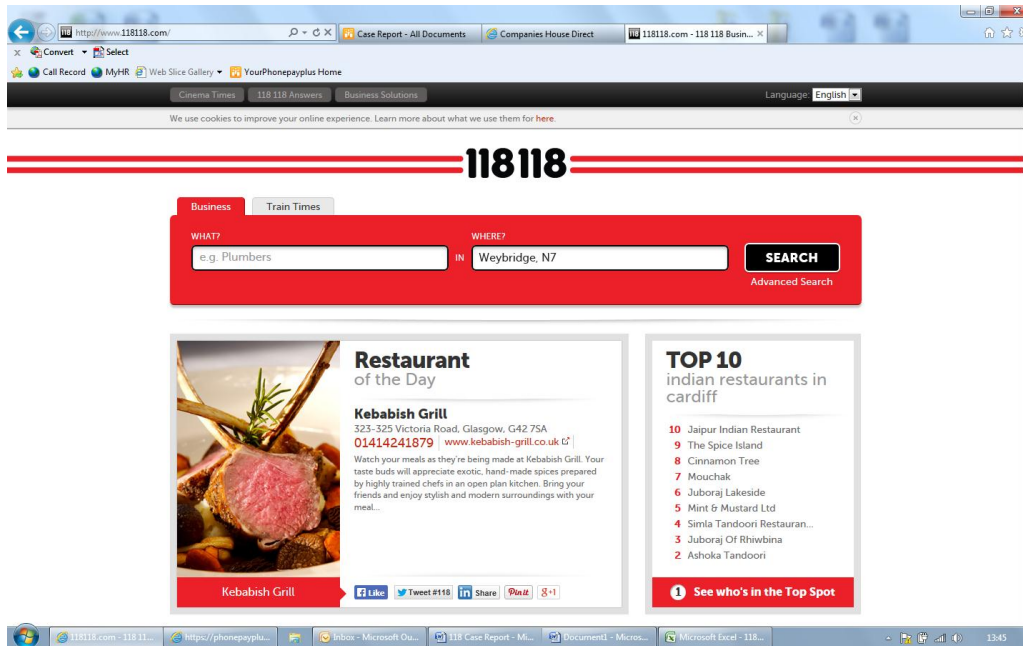
WWW WHY WWWAIT FOR THE WWWEB?

 **GOT YOUR BACK**

YOU CAN'T CALL THE WEB

 **GOT YOUR BACK**

Appendix D - A screenshot of the Level 2 provider’s front webpage “above the fold”:



Appendix E: A screenshot of the Level 2 provider’s front webpage “below the fold”:

