

Tribunal Meeting Number: 222

Case reference: 1 06260

Level 2 provider: Call the 118 113 Helpdesk Limited (Ireland)

Type of service: Directory Helpdesk Enquiries

Level 1 provider: N/A

Network operator: Telecom 2 Limited

This case was brought against the Level 2 provider under Paragraphs 2.2.7 (Code 13 and 14), 3.4.1 (Code 13) and 4.2.3 (Code 14)

Background

The case concerned a directory helpdesk enquiries service (“the Service”) operating on 118 820. The Service was operated by the Level 2 provider, Call the 118 113 Helpdesk Limited (“the Level 2 provider”). The Network operator for the Service is Telecom 2 (“the Network operator”).

On 17 October 2016, an Informal Enquiry was sent to Numbergrp Network Communications (Ireland) Ltd (“Numbergrp”), whom the Executive believed to be the Level 2 provider for the Service. The Executive had sent early informal correspondence to Numbergrp in error, as it was believed that it was operating the Service. This was because the sole director of the Level 2 provider of the Service was also the sole director of Numbergrp, Mr Jody Rhodes. Nevertheless, all formal directions and correspondence were sent to the correct Level 2 provider and the earlier, informal correspondence was replied to by the director of the two companies.

On 8 March 2017, the Executive sent a formal direction for information to the Level 2 provider asking several questions including:

“Please provide a summary of the way in which the service is intended to operate, including full details of any terms and conditions.”

On 15 March 2017, the Executive received the following response from the Level 2 provider:

“Following a meeting with legal council in Dublin on the 6th March 2017, Call The 118113 Helpdesk Ltd has elected to seek recourse against the PSA in the Irish High Court for breaches of EU Directives and for breaching the agreed terms of the consent order.

The PSA claiming that complying with the consent order by using the word "fault" within the IVR advert which you demanded could be in breach of the code, when you yourselves have

admitted you made a mistake in agreeing the consent order is not the actions of a fit and proper independent regulator.

As the level 2 provider of UK PRS Number 118820, on the 7th March 2017 we terminated the service and ceased all UK PRS business, withdrawing from your registration scheme, code and left the industry.

Unfortunately your request for Directions was issued after this date on the 8th March.

If you require any further information please forward your request and legal basis to obtain this in writing only, as this email address will no longer be used."

The Level 2 provider therefore did not supply details of how the Service was intended to operate.

Based on consumer complaints and its monitoring of the Service, the Executive asserted that consumers telephoned a geographic number which then plays an interactive voice response (IVR) promoting the Service. The Executive understood from consumer complaints that consumers called these geographic numbers either by mistake or believing that they were contacting an unrelated business such as their bank, insurance company or accountant. The Executive noted that the opening message for the IVR was either "sorry we've got a fault on this number" or that "this is a recorded message. Your call cannot be answered." Consumers were then asked to ring a helpdesk on 118-820 and that told: "if you call that number you will be able to speak to an operator to obtain an alternative number or they will put you through to the right person". From the monitoring conducted by the Executive, the IVR scripts were noted to be broadly identical, with the exception of a differing opening message as stated above. An example of the IVR heard by the Executive during their monitoring was as follows:

Call made on 5 July 2016

"Sorry we've got a fault on this number. Please call this telephone number. I will say it slowly the number is 1-1-8-8-2-0 if you call that number you will be able to speak to an operator to obtain an alternative number or they will put you through to the right person. Calls are charged at the call rate of service charge 72 which is £6.98 for the first minute including the connection charge and £3.49 per minute thereafter plus your access fee from your carrier. Calls to 118 820 are free for all Numbergroup customers lines are open Monday to Friday 9am to 8pm and 10am - 6pm on a Saturday. This information society service is provided by Call the 118 113 Helpdesk Limited an Irish company registered at the digital hub Dublin 8 Ireland regulated in accordance with EU directive 200/31/EC on electronic commerce by Comreg we provide a call transfer service as per EU regulations. For redress you may write to us or call 0035316972816 UK callers 0800 310 1070 or email 118helpdesk@gmail.com . Upon calling our 118 820 access number you agree to the following: you are authorised and wish to make this call to our information society service to have your call transferred and you agree to be charged at the call rate by your telephone provider of £6.98 connection charge which includes the first minute and then £3.49 per minute plus your telephone providers access fee. Any requests for redress, complaints or refunds will only be made directly to us Call the 118 113 helpdesk Limited. Not comreg, Ofcom PhonepayPlus your telephone provider or placed online via any website or social media. Following our investigation based on our terms and conditions of customer

fairness you agree that the maximum redress that you will receive will be a full refund of your call charges only. Please call this telephone number I will say it slowly 118 820"

It was the Executive's case that some consumers then proceeded to call 118-820 at a cost of £6.98 for the first minute including the connection charge and £3.49 per minute thereafter, not realising that they would be charged at this premium rate.

Jurisdiction

Throughout correspondence with the Executive, the Level 2 provider had asserted that the Service fell within the definition of an Information Society Service, for the purposes of EU law, as it was, in the Level 2 provider's view, provided by electronic means. As such, it argued that the Executive should have sought derogation before proceeding with the case against it, in accordance with the Ecommerce Directive (2000/31/EC).

The Executive submitted that the evidence gathered indicated that consumers had accessed and been provided with the service via the public switched telephone network in the UK. Annex I of the E-Commerce Directive makes it clear that services which are provided by voice telephony do not fall within the definition of services by "electronic means" and therefore do not fall within the definition of an Information Society Service. Accordingly, the Executive submitted that it was not required to follow the procedures set out in the E-Commerce Directive.

On 18 May 2017, the Code Adjudication Tribunal considered an application for interim measures in respect of this Service and it dealt with the preliminary issue of jurisdiction. Its determination on the issue was as follows:

"The Tribunal has considered a preliminary issue of whether the PSA had jurisdiction or whether the case fell within the ambit of the E-Commerce Directive (2000/31/EC) and therefore should have been referred to the Irish authorities in accordance with the E-Commerce Directive. The Tribunal noted that in correspondence the Level 2 provider contended that its Service fell within the definition of an information society service as it was provided by electronic means, and therefore the Executive should have sought derogation before proceeding with the case against it, in accordance with the E-Commerce Directive. The Tribunal noted that the Executive had stated that the evidence it had gathered indicated that the Service was provided other than by electronic means and therefore did not fall within the definition of an information society service and accordingly the E-Commerce Directive did not apply.

The Tribunal has determined that on the basis of the information before it, the Service was not an information society service and that it was a voice telephony service that fell within the voice telephony exclusion set out in Annex I of the Technical Standards and Regulations Directive (2015/1535/EU). The Tribunal was satisfied that the requirements of the E-Commerce Directive therefore did not need to be met and that it had jurisdiction to consider the application before it."

Adjudication by Consent against Numbergrp Network Communications (Ireland) Limited 16 May 2015 (Case ref: 34513)

On 16 May 2015 the Level 2 provider Numbergrp signed a consent order with the PSA. The consent order related to a directory enquiries service operating on the shortcodes 118 820 and 118 472 by the Level 2 provider.

The following breaches were admitted by Numbergrp in respect of the Service:

- Rule 2.3.1 - Consumers of premium rate services must be treated fairly and equitably
- Rule 2.2.1(a) - Promotional material must contain the name (or brand if part of the name) and non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious
- Rule 2.2.5 - In the course of any promotion of a premium rate service, written or spoken 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.

As part of the agreed sanctions within the consent order the following was agreed:

"... a requirement that the Respondent remedy the breaches by amending the IVR to ensure that...(ii) pricing is given immediately after recital of the premium rate number..."

On 23 November 2015 Numbergrp confirmed its IVR script for 118 820 as follows:

*"Sorry there is a fault on this phone line, please call our helpdesk and we will transfer you to the person/department or business you are trying to reach today or give you the alternative working phone number,
The helpdesk number to call is 118 820
calls are charged at £6.98 connection which including the first minute and then £3.49 per minute thereafter plus your provider access fee.
This information society service is provided by numbergroup.com, an Irish company based at the Digital Hub, Dublin 8, Ireland. Regulated in accordance with Directive 2000/31/EC on electronic commerce by Comreg.
As per phonepayplus regulations, for complaints and redress call freephone 08004118820"*

On 30 November 2015, the Executive confirmed to the provider that the above script appeared to comply with the remedy the breach sanction agreed between the parties in the consent order.

Summary of complaints

The Executive had received 73 complaints about the Service between June 2016 until May 2017. Complainants alleged that they were unaware of the cost of the call and complained that there was no pricing. Examples of the complaints can be found below:

"I tried to call my insurance company and misdialled area code 01296454454 instead of 01926454454. A message instructed me to call 118820. I was then transferred to my insurance company. In order to resolve a technical insurance issue the phone call was 25 minutes in length. For this call 118820 have charged me £94.27 ! This call was on July 21st and appeared on my BT bill on September 3rd and paid in full by automatic direct debit.

I have contacted BT who just gave me your details. I used your number checker to reveal a customer care number (08003101070) which I have called countless times only to get a message that no one is available. At no point before I was transferred using this service was informed of phone charges which added up to almost £4.00 per minute! Clearly a scam. "

"I have just discovered on my recent O2 mobile bill I was charged £20.69 + VAT for a 5 min call made on 22 August 2016 from my mobile number REDACTED to the number 118820. I was advised to ring this number when I was trying to call Nu Skin company customer service FREE number. The voicemail informed that there was an error on the number I was trying to call. There was no info re the charges per min for using 118820. I was sure in fact, I was ringing a replacement number for Nu Skin FREE rather than tel directory at a premium rate (as I found later). Lack of info re charges and misleading suggestion to call 118820 following a 'fault' led me to believe it was a fraud and that I have been scammed. I seek full refund of the monies charged. Please find attached copy of my tel bill."

"I am writing on behalf of my Mother in Law, XXXXX is 86 years of age and has just received the bill from BT with a charge of over £41. She is extremely worried and not sleeping due to this charge. She is unable to remember making a call to this number and wouldn't be aware of the premium rate call charges as also wears a hearing aid and can't always hear everything clearly that is said on the phone. I am trying to sort this out for her and when I spoke with BT they gave me the reference number of 34513 and asked me to contact you."

Interim measures

As set out above, on 18 May 2017, a Tribunal considered an application by the Executive for the imposition of interim measures. In respect of the Service, that Tribunal imposed an interim measure to impose a withhold on the Service's revenue.

On 19 May 2017 the Level 2 provider was notified of the decision and given an opportunity to apply for a review of these measures. On 23 May 2017 the Level 2 provider submitted an application to review the interim measures decision. This was refused by a Review Tribunal Chair on 25 May 2017.

The Investigation

The Executive had sent a Warning Notice to the Level 2 provider in which the following breaches of the PSA Code of Practice (the "Code") were raised:

- *Rule 2.2.7 (Code 13 and 14) - Pricing*
- *Paragraph 3.4.1 (Code 13) - Registration*
- *Paragraph 4.2.3 (Code 14) - Failure to disclose information*

At the paper-based hearing on 20 February 2018, the Tribunal reached a decision on the breaches. The Tribunal considered the following evidence in full:

- the complainants' accounts
- correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses, correspondence sent subsequent to the service of the Warning Notice and the Level 2 provider's responses)
- correspondence between the Executive and the Network operator
- interim measures Tribunal decision
- documents relating to case reference: 34513
- post warning notice correspondence with the Level 2 provider
- PSA Guidance on Promoting Premium Rate Services
- monitoring evidence
- revenue statistics for the Service.

Submissions and Conclusions

Preliminary Issues

Adjournment

The paper-based hearing of this case was initially listed on 26 January 2018 but adjourned to 20 February 2018.

The Warning Notice was sent to the Level 2 provider on 7 July 2017. On 11 July 2017, the Level 2 provider requested an oral hearing of the case, which was agreed to by the Executive.

On 19 September 2017, the Executive proposed a hearing date of 26 January 2018, which was on the basis of the availability of Tribunal members with a view to giving the parties sufficient time to prepare their cases in accordance with standard directions, while bringing the matter to a conclusion within a reasonable timeframe. The Level 2 provider did not agree to this date and suggested that a 2-3 day hearing in April 2018 would be more suitable as the director was by then based in the United States.

The issue was put before a Code Adjudication Panel Chair who, on 17 October 2017, decided that it was not appropriate to vacate the listed date of 26 January 2018. The Chair considered that there was sufficient time available in which the parties could prepare their cases and that arrangements could be made for the Level 2 provider to attend by way of telephone or video link if necessary.

Following this, the Level 2 provider stated that:

"Your side isn't willing to alter any conditions or dates, you are asking me to agree with your terms than (sic)I find that unreasonable..."

I'm not going to waste my time arguing points your side simply ignores.

I will be resigning my directorship of the company next week."

The Level 2 provider then disengaged from the process and from that time, all known contact email addresses were out of service and post sent to the Level 2 provider was returned . By a letter dated 22 November 2017, the Executive gave notice that the oral hearing had been struck out and would not be taking place. The letter stated that the case would proceed as a paper based tribunal and that *"Once the date of the Tribunal has been confirmed [the Executive] will advise of this."*

The paper based hearing was then arranged to take place on 26 January 2018, the date the oral hearing had been listed. However, the Executive, erroneously failed to serve notice of this date for the paper based hearing on the Level 2 provider.

The Tribunal on 26 January 2018 decided that it could not proceed as the Level 2 provider had not been given an opportunity to attend, either in person or over the telephone or video link. That Tribunal was of the view that it would be manifestly unfair for the hearing to take place in the circumstances notwithstanding the lack of recent engagement.

Notice

On 20 February 2018, the Tribunal was provided with evidence of all attempts to inform the Level 2 provider of the hearing. This amounted to an attempt to send notice via the only known email address and letters to the three known postal addresses for the provider. The email and two of the letters posted were returned.

The Tribunal had regard to the earlier correspondence with the Level to provider as well as the evidence of service and was satisfied that all possible attempts to notify the Level 2 provider of the hearing had been made and that it was fair to proceed.

Jurisdiction

The Tribunal noted that this matter had been considered and determined at the Interim Measures hearing on 18 May 2017. Nevertheless, it revisited the issue as the Level 2 provider had continued to make representations on it since that date.

The Tribunal was satisfied that the Service was operated as a voice telephony service which fell within the exclusion set out in Annex I of the Technical Standards and Regulations Directive (2015/1535/EU). It did not consider that any of Level 2 provider's submissions since the Interim Measures hearing undermined the earlier determination on this matter. It was satisfied that the requirements of the E-Commerce Directive were not required to be met and accordingly, it had jurisdiction to consider the case.

Alleged Breach 1

Outcome 2.2 Transparency and pricing

"That consumers of PRS are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made."

1. The Executive asserted that the Level 2 provider acted in breach of Rule 2.2.7 of the Code as pricing information provided on the IVR promotion for the Service was not sufficiently proximate to the premium rate number.

The Executive relied on the complainant accounts, monitoring of the Service and the PSA Guidance on "Promoting premium rate services" (the "Guidance"). The Guidance states:

Pricing information

"3.1

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 information in the Phone-paid Services Authority's Code of Practice is rule 2.2.7, which states the following:

2.2.7 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.

Prominence and proximity

3.7 Pricing information needs to be put where consumers will easily see it, not where it is hard to find. This is because the price ought to be part of what attracts consumers into making a purchase. The rules in our Code are there because consumers want this information so they can choose what they buy and how much they pay for it. It is likely to be judged as 'prominent' if the information is clearly visible when a consumer makes

their purchase and triggers the payment. Both the font size and use of colour are important to establishing prominence, and information on this is found at paragraphs 3.12 to 3.15 of this guidance. 6 3.8 'Proximate' is a key term within the Phone-paid Services Authority's 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 pricing information being proximate is when it is provided immediately before or above the call to action (i.e. the telephone number, shortcode or other access code or means of payment for the service) within the promotion."

The Executive relied on all the complainant accounts received by the PSA. Examples of the complaints received are:

"wife misdialled a number 01903377700 and received a recorded message: 'there is a fault on the line' but if you dial the following number 118820 somebody will put you through" there is a gap in the message before pricing information is given..."

"consumer was trying to call the co-op bank. Consumer misdialled the number 03456212212. Consumer saying there was a recorded message saying there was a fault on the line and she had to call a 118 820 number consumer saying they did not straight away mention the pricing information..."

"consumer is aged 90 years old. Consumer mentioned she tried to contact her friend, whilst on the call she was transferred to 118 820. Consumer didn't know she would be charged for the call. Consumer didn't hear the pricing for the call..."

The Executive monitored the Service between November 2016 and February 2017. The Executive noted on each occasion it called one of the numbers in question, the Level 2 provider's IVR stated: *"if you call that number you will be able to speak to an operator to obtain an alternative number or they will put you through to the right person."* From all of the calls monitored by the Executive, it was asserted that at no point was pricing given proximate to the recital of the premium rate number. The Executive submitted that the additional wording between the premium rate number and the pricing information meant that the pricing information was not proximate to the means of access to the Service. The lack of pricing proximate to the premium rate number could have caused consumers to hang up the phone and dial the Service without knowing the cost. The complaints received by consumers demonstrated that many of them were unaware of the pricing information.

An example IVR script the Executive heard during the monitoring is below:

Call made on 5 July 2016

"Sorry we've got a fault on this number. Please call this telephone number. I will say it slowly the number is 1-1-8-8-2-0 if you call that number you will be able to speak to an operator to obtain an alternative number or they will put you through to the right person. Calls are charged at the call rate of service charge 72 which is £6.98 for the

first minute including the connection charge and £3.49 per minute thereafter plus your access fee from your carrier....”

As such, the Executive submitted that the IVR promotion for the Service did not contain pricing information that was proximate to the premium rate number.

Further, given the previous Adjudication by Consent involving Numbergrp, the Executive asserted that it was clear that this Level 2 provider was on notice of the issue regarding pricing on the IVR message. The Executive therefore argued that the placement of non-compliant pricing on the current IVR message was intentional.

At the Tribunal, the Executive was asked who owned the telephone numbers on which the IVRs were placed, stating that there was a fault. The Executive confirmed that these numbers were owned by the director of the Level 2 provider. It was explained that the Executive had been provided with details of these numbers by the complainants and had then used them to carry out monitoring of the IVRs.

2. The Level 2 provider denied the breach. It made the following arguments:
 - The IVR for the Service run by Numbergrp (or Call the 118) was considered by the Executive on 13 July 2016 and the Level 2 provider was informed: “I agree the pricing information is much clearer on the new recording...” As such, the Level 2 provider had done all that was necessary to ensure compliance with the Code.
 - The Level 2 provider also asserted that there is no requirement under the Code for the pricing of a service to be stated immediately or straight after the PRN. The requirement is merely for the pricing to be proximate.
3. The Tribunal considered the Code and all of the evidence before it, including the correspondence exchanged with the Level 2 provider and the Network operator, complainant accounts, the previous consent order and the post-warning notice correspondence.

Upon listening to the recordings of the IVRs, the Tribunal was of the view that there was a significant gap between the telephone number for the Service being stated and the price being given. The Tribunal also noted that there were different voices and volumes within the IVR. As consumers were not seeking to engage a premium rate service when making their calls, it was likely that they would not wait on the line after hearing the new number to call. The Tribunal considered that stating that the number to call would only be given “once” was a deliberate discouragement for a person to stay on the line for more information. The Tribunal noted the Level 2 provider’s comments about the earlier compliance advice it had received. However, it was of the view that the pertinent evidence was in the IVR recordings and therefore based its conclusions on these.

It was the view of the Tribunal that consumers were not fully and clearly informed of all information likely to influence their decision to use the Service before engaging with it. Accordingly, it upheld the breach of rule 2.2.7.

DECISION: UPHELD

Alleged Breach 2

Paragraph 3.4.1 of Code 13

“Before providing any PRS all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus subject only to paragraph 3.4.3 below”

1. The Executive submitted that the Level 2 provider was not registered with the PSA for a period of time when the Service was operational and was accordingly in breach of the obligation set out in Paragraph 3.4.1 of the Code. The Registration scheme database showed that the Level 2 provider registered with the PSA on 4 April 2016.

The Executive noted that the Level 2 provider was incorporated on 21 December 2015 and that the Service was previously operated by Numbergrp. On checking the register at Companies House, the Executive discovered that on 21 January 2016, Numbergrp had been dissolved.

On 10 February 2017, the Executive directed the Network operator to confirm the number of phone calls to the Service, broken down on a month by month basis from May 2015 to date. The breakdown received showed that between January 2016- April 2016, there were a total of 8,302 calls to the Service. The Executive was, therefore, of the view that this demonstrated that during the period January 2016 – April 2016, the Service was operational.

On 3 July 2017 the Network operator confirmed the following information

*“Telecom has stated that For traffic running from Jan 2016-April 2016 the **Level 2 provider** would have been **Numbergrp Network Communications (Ireland)**” email response to you on 29th June @15:19pm*

Our history of contracts for 118820 and that time frame is as follows:

26th September 2013 - 12th April 2016

Numbergrp Network Communications (Ireland) Ltd

...

12th April 2016 – 2017

Call The 118113 Helpdesk Ltd”

The Level 2 provider had signed a contract with the Network operator on 12 April 2016. It was the Executive's case that the signed contract formalised the agreement between the Network operator and Level 2 provider, however, given the dissolution of Numbergrp on 21 January 2016 the Executive considered that it was not possible for Numbergrp to have been the Level 2 provider for the Service between 21 January 2016 and 12 April 2016.

In light of this, the Executive asserted that the Level 2 provider had operated the Service from 21 January 2016, and not 12 April 2016 as stated by the Network operator. Therefore, between 21 January 2016- 4 April 2016, the Level 2 provider was operating the Service whilst it was not registered on the Registration Scheme as required by the Code.

Accordingly, the Executive submitted that the Level 2 provider acted in breach of paragraph 3.4.1 of the Code because it was operating a premium rate service whilst not registered with the PSA.

At the Tribunal, the Executive confirmed that it had obtained the information that Numbergrp had been dissolved through a creditsafe report but the source of this information was Irish Companies House.

2. The Level 2 provider denied the breach. It stated that it had made contact with PhonePayPlus (now the PSA) to register the Service on 4 April 2016 and that it did not complete its contract with the Network operator to provide the Service until 13 April 2016.
3. The Tribunal considered the evidence supplied by the Executive and the representations and correspondence submitted by the Level 2 provider. It was satisfied that Numbergrp had been dissolved on 21 January 2016 and that the Level 2 provider had been incorporated shortly before, on 21 December 2015. The Tribunal considered the Level 2 provider's assertion that the Service was provided by Numbergrp but found that this could not have been the case as that company had been dissolved at the relevant time. It was clear that the sole director of the two companies was the same and the income flow was uninterrupted throughout this period.

Accordingly, on the balance of probabilities, the Tribunal found that the Level 2 provider was providing a premium rate service without having registerd with the PSA between 21 January 2016 and 4 April 2016 and upheld the breach of paragraph 3.4.1 of the Code.

DECISION: UPHELD

Alleged Breach 3

Paragraph 4.2.3 of Code 14

“where a direction is made pursuant to paragraph 4.2.1 a party must not fail to disclose to the Phone-paid Services Authority, when requested any information that is reasonably likely to have a regulatory benefit in an investigation.”

1. It was the Executive’s assertion that it directed the provision of information from the Level 2 provider, which was not supplied and that this information was likely to have had a regulatory benefit to the investigation. The Executive therefore asserted that paragraph 4.2.3 of Code 14 had been breached for the reasons outlined below.

The Executive had sent a direction for information to the Level 2 provider on 8 March 2017 and requested the following information (amongst other information) from the Level 2 provider :

1. *On 30 November 2016 and 2 February 2017, the Executive made test calls to the numbers 01258422619 and 01563616466 respectively. The Executive notes that the IVR started with the phrase ‘sorry we’ve got a fault on this number.’ Please can you advise of the exact fault that was present on these lines and if these have now been resolved. If these have been resolved please advise the dates on which these faults were resolved and the steps taken for resolution. Please provide evidence of this.*
2. *Since 30 November 2015, please detail all changes made by Call the 118 113 Helpdesk Limited and Numbergrp Network Communications (Ireland) Limited Service’s IVR, including dates and reasons for any change. Please provide evidence of any changes made.*

On 15 March 2017 the Executive received the following response from the Level 2 provider:

“Following a meeting with legal council in Dublin on the 6th March 2017, Call The 118113 Helpdesk Ltd has elected to seek recourse against the PSA in the Irish High Court for breaches of EU Directives and for breaching the agreed terms of the consent order.

The PSA claiming that complying with the consent order by using the word "fault" within the IVR advert which you demanded could be in breach of the code, when you yourselves have admitted you made a mistake in agreeing the consent order is not the actions of a fit and proper independent regulator.

As the level 2 provider of UK PRS Number 118820, on the 7th March 2017 we terminated the service and ceased all UK PRS business, withdrawing from your registration scheme, code and left the industry.

Unfortunately your request for Directions was issued after this date on the 8th March.

If you require any further information please forward your request and legal basis to obtain this in writing only, as this email address will no longer be used.”

On 23 March 2017 the Executive wrote to the Level 2 provider, acknowledging the above letter and explaining that the termination of the Service did not prevent the Executive from sending a direction for information under 4.2.1 of the Code and as such, it was still valid. The Level 2 provider was warned that a failure to comply with the direction may result in a breach of paragraphs 3.1.4 and/or 4.2.3 of the Code.

On 6 April 2017 the Executive received another email from the Level 2 provider stating the following:

"Hi

This is just an email out of courtesy just to confirm that the Call the 118113 Helpdesk Ltd ceased trading on the 7 March 2017.

I terminated all services and operations. The company will remain dormant until struck off by the CRO in Ireland.

Operations were ceased after telecom2 refused to make out payments following your notification that you intend to investigate the service operating on 118820.

Without any income the business was insolvent and it was my duty as director to cease trading immediately.

Telecom2 urged the company to continue the 118 service but demanded that we use their sub contractors call centre only, and Telecom2 would operate the service under their total control. Call The 118113 Helpdesk Ltd would have only advertised the number.

This level of oversight demanded by the Level 1 provider isn't normal as It appeared that Telecom2 wished to operate the service, yet leaving Call the 118113 Helpdesk Ltd responsible for your code.

Telecom2 only carried out compliance on the 2nd March by asking for a copy of my ID, I felt this rather late considering the service had operated for almost a year.

There is a small number of 7 customers who I'd like to refund not due to compliance reasons but simply because they weren't happy with the service, however with approximately £93,000 retained by telecom2 this isn't possible.

I will pass these customers details to any appointed official receiver in due course.

All the information you requested has already been submitted to you either earlier in this case, or during the consent order agreed between phonepayplus on the 28th May 2015 case reference 34513

Telecom2 have already told me they submitted the revenues, the start date and the average call durations to you.

In terms of the advert, as you already know I was ordered by Phonepayplus, your legal representations and the tribunal resulting in the consent order to say "there is a fault".

The advert was only updated only after requests to do so by Michael Burgess of the PSA. He made 4 requests in total to update the IVR, which were done even though 3 of them didn't even appear in the code or supporting documents. He acknowledged that the re-recoding or the price information and price proximity to the call to action was acceptable.

Please do carry on your investigation, however I am no longer in a position to reply as the company is dormant, waiting to be struck off the companies register.

As the service has ceased, I hope you do find a breach and issue a fine. Please do take the money retained by Telecom2. Any residual can be used to appoint a receiver and the refunds can be issued promptly.

This is my last act of company director and my responsibility under Irish law are met.

Regards

*Jody Rhodes (REDACT)
Call The 118113 Helpdesk Ltd"*

The Executive submitted that throughout all of the correspondence received from the Level 2 provider, at no point was a substantive response provided to the questions raised in the formal direction sent on 8 March 2017. The Executive noted the Level 2 provider's reference to providing the information requested, in relation to an earlier case (case reference 34513). The Executive acknowledged that information was provided to the Executive during that case. However it submitted that it was necessary for the purposes of this investigation to request further information from the Level 2 provider as a significant period of time had elapsed since that previous case and in any event this was a new investigation concerning a service that was operated by a different legal entity.

The Executive then sent a further direction on 7 April 2017 requesting a response to the previous direction for information and the following additional information:

"On what basis was the IVR message promoting your Service allocated to number ranges operated by Numbergroup Network Ltd . Please provide any evidence of this."

The Executive did not receive a response to this direction. However on 25 April 2017 the Level 2 provider did contact the Executive via telephone and advised that his position was set out in his email of 6 April 2017.

It was the Executive's case that without this information it was unable to make further enquiries into the Service. Specifically, the Executive was not able to determine whether there was a genuine fault on the line and accordingly whether consumers had been treated fairly and equitably. Nor was the Executive able to establish how long the Service had been using the IVR promotion heard by the Executive in its monitoring. The Executive therefore asserted that the Level 2 provider had failed to provide information following a PSA direction and that this information was reasonably likely to have had a regulatory benefit in an investigation.

2. The Level 2 provider denied the breach. It stated that it cancelled its registration with the PSA on 7 March 2017 and as the direction for information by the Executive was made after this date, suggested that there was no legal obligation on the company to supply any information.
3. The Tribunal considered the Code and all of the evidence before it on this issue, including the correspondence between the Executive and the Level 2 provider. It was noted that the Level 2 provider had engaged throughout the process and had corresponded with the Executive. However, the Tribunal found that the real mischief in the case was that the Level 2 provider had been consistently evasive and vague and had not provided the information requested. The Tribunal rejected the Level 2 provider's argument that as the service was no longer registered with the PSA, it was not required to comply with a direction of the Executive. The PSA has jurisdiction over all providers of premium rate services. Where a provider is not registered with the PSA, this is dealt with by way of proceedings for a breach of the registration requirements.

The Tribunal considered that the failure by the Level 2 provider to explain the basis on which the IVRs were operating and the failure to explain whether there actually had been faults on the lines were significant and impeded the Executive's investigation into whether the Service had been run in an misleading way.

Accordingly, the Tribunal concluded that the Level 2 provider had failed to disclose to the Executive, information that was requested, which was reasonably likely to have a regulatory benefit in an investigation and upheld the breach of paragraph 4.2.3.

DECISION: UPHELD

SANCTIONS

1. Initial assessment of sanctions

The Executive's initial assessment, before any potential uplift or downgrade in light of aggravating or mitigating features, was that the following sanctions were appropriate:

- a formal reprimand

- that access to the Service be barred until compliance advice on the Service and its promotions is sought and implemented to the satisfaction of the PSA. And that compliance advice must remain implemented for the duration that the Service remains in operation unless otherwise agreed with the PSA.
- a requirement that the Level 2 provider refund all consumers who claim a refund; and
- a fine of £400,000.

based on a preliminary assessment of the breaches as “very serious”.

The Level 2 provider did not make any direct response to the proposed sanctions but in correspondence stated the following:

“This is a completely pointless exercise, the level of security held by the Level 1 provider is approximately £91,000. The company isn’t in a position to pay a £1 fine over the monies withheld by Telecom 2 Ltd.

Call the 118113 Helpdesk Ltd has ceased trading and closed down, the company has applied to be struck off the register of Irish Companies on 19 May 2017.”

The Tribunal considered the severity of each of the breaches:

Rule 2.2.7 (Pricing):

- There had been a clear detrimental impact, directly or indirectly on consumers;
- The Service would have damaged consumer confidence in PRS;
- The cost incurred by consumers was high;
- The breach was committed with a degree of recklessness
- The pricing was on the IVR but the information was not sufficiently prominent and/or proximate to the means of access to the Service;
- In light of the above, the Tribunal found that the breach was “Serious”.

Paragraph 3.4.1 (Registration)

- The Level 2 provider did register, but this was after operating for a four month period with no registration;
- There was a potential for a material impact, directly or indirectly, on consumers;
- The breach had the potential to cause a drop in consumer confidence in premium rate services;
- In light of the above, the Tribunal found that the breach was “Significant”.

Paragraph 4.2.3 (Failure to provide information)

- It was considered that the Level 2 provider intentionally avoided providing information that would have allowed the Executive to fully investigate the Service;

- There was a clear and highly detrimental potential impact, directly or indirectly, on consumers;
- The nature of the breach was likely to severely damage consumer confidence in premium rate services in that the Level 2 provider had sought to avoid regulatory action by obfuscation and failure to comply with requests for information;
- The breach demonstrated fundamental non-compliance with the Code in respect of a high revenue generating service.
- In light of the above, the Tribunal found that the breach was “very serious”.

Overall, the Tribunal was of the view that the initial overall assessment of the case was “very serious”.

The Level 2 provider’s evidenced revenue in relation to the Service in the period from January 2016 to March 2017 was in the range of Band 2 (£500,000-£999,999).

Assessment of aggravating and mitigating factors

It was the Executive’s case that the following aggravating features were present in the case:

- The sole director of the Level 2 provider was also the sole director of a company providing a similar service. As such, the Level 2 provider was fully aware of the PSA requirements relating to the Service;
- The breaches continued after the Level 2 provider became aware of them;

It had been the Executive’s submission that there were no mitigating factors in this case. The Executive noted that the Level 2 provider suspended the Service of its own volition but did not consider this to be a mitigating factor as the Service had continued to operate for many months beforehand when the Level 2 provider was aware of the Executive’s concerns.

The Level 2 provider did not make any response to the Warning Notice in relation to the Executive’s suggested aggravating and mitigating features.

The Tribunal considered that it was an aggravating feature of the case that the sole director of the Level 2 provider had a past record of breaches of a similar nature when running a similar service. The Tribunal did not find that there were any mitigating factors.

The Tribunal’s final assessment of the overall breach severity was that it remained “very serious”.

Sanctions imposed

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

- a formal reprimand;

- a total fine of £425,000, comprised of:
 - £150,000 in respect of the breach of rule 2.2.7 (pricing);
 - £25,000 in respect of the breach of paragraph 3.4.1 (registration);
 - £250,000 in respect of the breach of paragraph 4.2.3 (failure to provide information);
- that access to the Service is barred until compliance advice on the Service and its promotions is sought and implemented to the satisfaction of the PSA. Compliance advice must remain implemented for the duration that the Service remains in operation unless otherwise agreed with the PSA;
- 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 the PSA that such refunds have been made.

In reaching the above fine amounts, the Tribunal had regard for the principles of proportionality and totality and took into account the severity of the breaches found proved. It was considered that it was important for a strong message to be sent out to other providers about the importance of complying with directions of the Executive. It was the view of the Tribunal that this was not a case in which there would be any negative impact on innovation in the premium rate services market.

In light of these factors, the Tribunal was satisfied that the total fine in the amount of £425,000 was proportionate in all the circumstances of the case.

Administrative charge recommendation

100%