

Tribunal meeting number: 245  
Case reference: 151390  
Type of service: Directory enquiry  
Level 1 provider: Telecom 2 Limited  
Level 2 provider: Madlenka Limited  
Network operator: N/A

This case was brought against the Level 2 provider under Paragraph 2.2.7 and Paragraph 2.3.2 of the 14<sup>th</sup> Edition of the Code of Practice.

### Background and investigation

The case concerned a directory enquiry service that operated on premium rate numbers 118068 and 118298 (the “**Service**”) operated by Madlenka Limited (the “**Level 2 provider**”). The Level 1 provider for the Service was Telecom 2 Limited (the “**Level 1 provider**”).

The Level 2 provider registered with the Phone-paid Services Authority (the “**PSA**”) on 11 May 2018.

The Service operated in the following manner:

Consumers searching online for the number of a company they wanted to connect saw adverts served by the Level 2 provider directing them to call an 0345 number. If the 0345 number was called during office hours (Monday to Friday, 9am to 5pm), consumers were connected directly to the company (i.e. the AA, RAC, SKY). However, the numbers were not the official contact numbers for these companies. If dialed out of hours, there was a recorded message telling callers to dial a 118 number.

Consumers calling the service on either 118068 or 118298 were charged £6.98 for the call and £3.49 per minute thereafter.

An example of the promotional message played on the 0345 numbers was:

*“You can still talk to us on our out of hours service. Please hang up and redial 118 068. That number again is 118 068. Calls cost £6.98 per call plus £3.49 per minute plus your phone company’s access charge. Service provided by Madlenka Ltd customer service number 03030315015.”*

On 27 June 2018, the Level 1 provider advised that it had suspended all 0345 numbers allocated to the Level 2 provider until further notice.

The Executive sent a Warning Notice to the Level 2 provider in which the following breaches of the PSA Code of Practice, 14<sup>th</sup> Edition (the “Code”) were raised:

- Rule 2.2.7 – Pricing Prominence
- Rule 2.3.2 – Misleading

The Level 2 provider did not respond to the Executive's Warning Notice.

On 12 June 2019, the Tribunal reached a decision on the breaches.

### Preliminary issue - Service

In response to questioning by the Tribunal, the Executive confirmed that the Warning Notice and hearing date had been sent to the Level 2 provider by email and that a hardcopy of the bundle had also been sent to the Level 2 provider's registered address. The Executive further stated that attempts to contact the Level 2 provider by telephone had also been made.

The Tribunal was satisfied that the sending of the documents had been properly served by email and by post.

### Alleged breach 1

Rule 2.2.7

*"In the course of any promotion of a PRS, 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 asserted that the Level 2 provider had breached rule 2.2.7 of the Code, as pricing information provided on the recorded promotional message on the 0345 numbers for the Service, was not sufficiently proximate to the premium rate number when the initial call to action is stated on the promotional call recording.

The Executive relied on consumer complaints, promotional material including audio recording and transcript of the Service promotion and the PSA Guidance on Promoting premium rate services (the "Guidance"). The Guidance states:

"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.*

*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 complaints received from members of the public concerning the Service.

A sample of complainant accounts have been provided below:

*"I called a number trying to reach sky customer service and the robot suggested to call 118068. I called and after 16 sec I hung up. I was charged with £6.27 I was never told I'm going to be charged."*

*"...I feel this is unfair, as I had originally dialed the number 0345, which was inclusive in my minutes, not knowing that the number I am being transferred is a chargeable number - 118068."*

*"I believe this is a scam. I googled phone number for sky customer service. That number popped out as first. No info about high charges!!! I got billed £44." [SIC]*

Complainants stated that they were not aware of the pricing associated with calling the 118 number. The Executive submitted this was as a result of the length of time between the premium rate number being stated, which was repeated, before the pricing information was given, by which time some consumers may have disconnected the call.

The Executive asserted that the repetition, stating the premium rate number twice before pricing information was given, meant that the pricing information was not proximate to the initial call to action to the Service. The lack of pricing proximate to the first time the premium rate number was stated, could have caused consumers to hang up the phone and dial the Service without knowing the cost of the Service. The complaints received by the PSA, as noted in the sample of complainant accounts above, demonstrated that many consumers were unaware of the pricing information.

The Executive asserted that it was unlikely that consumers would stay on the line long enough to hear the pricing information, if it was not given directly after the initial call to action. The Executive stated that this was particularly the case where consumers were in an urgent situation of calling for emergency roadside assistance out of office hours. Further, it was the Executive's view that the risk of consumers not staying on the call long enough to hear the pricing information in these circumstances was such an obvious one and must have been apparent to the Level 2 provider.

The Executive submitted that it was not sufficient to give pricing information after dialing the 118 number, as costs had already been incurred by the consumer.

In response to questioning by the Tribunal, the Executive clarified that there was no prescriptive requirement in the Code for pricing to be given before the premium rate number but that the Code did require more generally that pricing should be proximate.

2. The Level 2 provider did not respond to the Warning Notice but had previously corresponded with the Executive.
3. The Tribunal considered the Code, the Guidance, and all the evidence before it, including the correspondence exchanged with the Level 2 provider and the Level 1 provider, the complainant accounts and the recording of the promotional message played to consumers.

Although the Level 2 provider did not make representations in relation to the Warning Notice, in its emailed response to the Executive on 27 June 2018, the Level 2 provider stated:

*"...We promote 0345 ICSS services for the AA and RAC. These numbers pay zero revenue share to us, yet our marketing costs money. During office hours, these number connect directly to the AA and RAC respectively – meaning that we lose money. Out of office hours, the caller is informed that the main AA/RAC numbers are shut but that other numbers are available; however, they have to call our 118 DQ number in order to get these out of hours numbers (or to be connected). Calling our 118 DQ number is at a cost, and the caller is prominently, proximately and clearly informed of this cost. This is where we make our money – a service that the AA and the RAC do not provide themselves. (The Service in this case is signposting the out of hours contact numbers)*

*In your letter you state: "Costs have been included but the message is constructed in such a way most callers hang up before pricing." First, this is wild speculation. Where is your evidence that "most callers" hang up before pricing? Second, you are falsely ascribing a negative motive – namely that we have "constructed" this message to encourage people to not hear the pricing. Where is your evidence for this?*

*The Tribunal has adjudicated on DQ services. In Case 106260 "Call the 118 113 Helpdesk Limited (Ireland)" the Tribunal took issue (on Page 10) with there being "a significant gap between the telephone number for the Service being stated and the price being given". As you point out, with our service there is no gap at all. The Tribunal also took issue with the fact that "the number to call [is] only being given 'once'". As you point out, with our service, the number is given twice. The Tribunal made no reference whatsoever to the order in which the number and cost message are stated. Furthermore, we would argue that putting the price before the 118 DQ number is confusing and potentially misleading...because in that circumstance the caller may believe that the current call (the call to the 0345 number is at a premium rate..."*

Notwithstanding the fact that precedent adjudications are not binding on a later Tribunal, the Tribunal also had regard to the previous adjudication of Case 106260 "Call the 118 113 Helpdesk Limited" since the Level 2 provider had referred to the decision in its correspondence with the Executive. Each case has to be considered on its own facts and an assessment made using the Code.

The Tribunal listened to the audio recording of the promotional message for the Service. The Tribunal were of the view that there was an even greater need for transparency when consumers were responding to an audio recording in contrast to a written promotion since consumers did not have all the information visibly in front of

them. The Tribunal considered it was not fair for consumers to be placed at a disadvantage when listening to audio recordings and providers had a positive obligation to ensure that cost be included before any purchase is made and proximate to the premium rate service. The Tribunal considered that the pricing on the promotional message played on the 0345 numbers was not sufficiently proximate to the premium rate number given.

Although it was noted that earlier adjudications were not binding on a future Tribunal, the Tribunal considered the submissions made by the Level 2 provider that another Tribunal had adjudicated on a Directory Enquiry Service and that decision did not refer to the order in which the number and cost message was stated. The Tribunal also considered the Level 2 provider's submission that putting the price before the 118 number would be confusing and potentially misleading.

The Tribunal did not agree with the Level 2 provider's statement that putting the price before the 118 number would be confusing and misleading and considered that in fact putting the pricing first would be necessary for transparency reasons and could be done relatively easily.

The Tribunal made the following observations regarding the earlier adjudication that the Level 2 provider had referred to, namely:

- they agreed there was not a significant gap between the telephone number for the current Service being stated and the price being given
- they noted there were different tones and speed within the recording for the current Service
- the Tribunal considered that in this Service consumers were similarly not expecting to engage with a premium rate service and concluded that there was a risk that consumers would have potentially disconnected their call before hearing the pricing
- the Tribunal acknowledged that the premium rate number was given twice in this case but were not persuaded by the Level 2 provider's argument that the earlier tribunal's finding that only stating the number once was a deliberate discouragement for a person to stay on the line for more information meant that this Service complied with the Code.

In respect of the Level 2 provider's argument that the Executive had *falsely "ascribed a negative motive"*, the Tribunal concluded that the Level 2 provider had a positive obligation to comply with the spirit of the Code and to ensure that consumers were fully and clearly informed of how much the premium rate service was likely to cost them, before they committed to purchase and before making the call to action.

For the reasons outlined above, the Tribunal was satisfied on a balance of probabilities that in this case, the Level 2 provider had not complied with the Code and that consumers were not fully and clearly informed of the cost of the Service before interacting with it. Accordingly, the Tribunal upheld a breach of Rule 2.2.7.

Decision: UPHELD

## Alleged breach 2

### Rule 2.3.2

*“PRS must not mislead or be likely to mislead in any way”.*

1. The Executive asserted that the Level 2 provider acted in breach of Rule 2.3.2 of the Code, as the promotional message on the 0345 numbers was misleading.

The Executive relied on the complainant accounts, audio recording and transcript of the Service promotion, and the PSA Guidance on “Promoting premium rate services” (the “**Guidance**”). The Guidance states:

#### *Misleading promotions*

##### *“7.1*

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

The Executive relied on complainant accounts received, a sample of which are:

*“Lightening hit my house and damaged my Sky router I called the number for sky 03451742315 and the answering machine directed me to the out of hours line 118068 I was directed to sky where I was on with an advisor for some time. They didn’t fix my problem the first time so I called them again using the fame number. I had no idea the charge would be so high it was so confusing as it said sky out of hours. I have called 02 bt they are unable to help please can you help me try to recoup the money for this phone bill? Thanks” [sic]*

*“Charged over £7 for 40 secs and didn’t realise I had put through to them instead of company I wanted to talk to – looked up online. Put the phone down straight away.”*

*“Found Sky customer services number online which I called 03451742315. I now know this is not a genuine Sky contact number. I found it in the Google search results...”*

The Executive noted that the Level 2 provider had stated the following in correspondence with the Executive:

*“We promote 0345 ICSS services for the AA and the RAC. These numbers pay zero revenue share to us, yet our marketing costs money. During office hours, these number connect directly to the AA and the RAC respectively – meaning that we lose money. Out of office hours, the caller is informed that the main AA/RAC numbers are shut but that other numbers are available; however, they have to call our 118 DQ number in order to get these out of hours numbers (or to be connected). Calling our 118 DQ number is at a cost, and the caller is prominently, proximately and clearly informed of this cost. This is where we make our money – providing a service to the public out of hours – a service that the AA and the RAC do not provide themselves. (The service in this case is signposting the out of hours contact numbers).*



In light of the Level 2 provider's statement above, the Executive was concerned that consumers were not informed that the number they had been given was for a directory enquiry service. When the recorded promotional message stated "You can still talk to us on our out of hours service" followed immediately by a 118 number to dial, this created the impression that the recorded promotional message and alternative 118 number had been placed there by the company consumers were trying to reach. The Executive asserted that the impression given to consumers was that the company they were trying to reach had a different out of hours number, not that they were dialing a separate directory enquiry service unassociated to the company consumers were trying to contact.

2. The Level 2 provider did not respond to the Warning Notice and accordingly did not make representations in relation to the breach but as noted above had previously corresponded with the Executive.
3. The Tribunal considered the Code and all of the evidence before it, including the correspondence exchanged with the Level 2 provider and the Level 1 provider, the complainant accounts and, in particular, the recording of the promotional message played to consumers.

The Tribunal was satisfied on the balance of probabilities that consumers would have been misled into engaging with the Service for the reasons advanced by the Executive. In particular, the Tribunal was satisfied that the terms "us" and "our" in the promotional message were actively deceptive, as it gave the consumer the impression that they had contacted the company they wished to speak with directly and not a directory enquiry service.

Accordingly, the Tribunal found that there had been a breach of Rule 2.3.2 of the Code.

Decision: UPHELD

## Sanctions

### Assessment of breach severity

The Executive assessed the severity of the breaches as follows:

Rule 2.2.7 - Serious

Rule 2.3.2 - Very Serious

The Tribunal assessed the severity of the breaches as follows:

Rule 2.2.7 - Serious

The Tribunal considered that the breach had the potential to affect consumer confidence in phone-paid services and that the breach had been committed intentionally and/or recklessly.

## Rule 2.3.2 - Very Serious

The Tribunal considered that the breach would have had a clear and detrimental impact on consumers of the service and that the service had the potential to severely damage confidence in the phone-paid services.

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

### 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 based on a preliminary assessment of the breaches as "very serious":

- a requirement to remedy the breach
- a formal reprimand
- compliance advice
- that access to the Service be barred until the breach is remedied to the satisfaction of the Executive
- a requirement that the Level 2 provider refund all consumers who claim a refund
- a fine of £350,000 comprised as follows:
  - Rule 2.2.7 - £100,000
  - Rule 2.3.2 - £250,000.

The Level 2 provider did not make any representations to the proposed sanctions.

The Tribunal agreed with the Executive's initial assessment of sanctions, save that:

- the Tribunal assessed the appropriate fine in respect of the breach of 2.2.7 to be £150,000 rather than £100,000, to adequately reflect the seriousness of the breach.

### Proportionality assessment

#### Assessment of mitigating and aggravating factors

##### Mitigation

The Executive submitted that there were no mitigating factors. The Executive noted that the decision to suspend the 0345 numbers which the Service was being promoted on was made by the Level 1 provider Telecom 2.

The Level 2 provider did not make representations in relation to the Executive's suggested aggravating and mitigating factors.

The Tribunal found that there were no mitigating factors.



## Aggravation

The Executive submitted that it was an aggravating factor that the Level 2 provider had failed to follow Guidance on “Promoting premium rate services” that the pricing information should be prominent and proximate and not misleading.

In addition, the Executive submitted that it was an aggravating factor that previous adjudications including directory enquiry and ICSS services had made clear the importance of pricing prominence and services not being misleading.

The Executive further submitted that it was an aggravating factor that the Level 2 provider supplied false information stating that the AA and RAC did not provide an “out of hours” service when these companies did in fact provide a 24-hour service, 7 days a week. In addition, the Level 2 provider had stated that their main call centre was VeriCall Limited “who handle calls for 1181118 and many others in the industry”. VeriCall Limited advised the Executive “we do not, and have not to date, ever provided any services to 1181118”.

The Level 2 provider did not make representations in relation to the Executive’s suggested aggravating and mitigating factors.

The Tribunal considered that the fact that the level 2 provider had failed to follow guidance or pay heed to previous adjudications had already been reflected in the breaches that had been found proved. The Tribunal were, however, satisfied that it was an aggravating factor that the Level 2 provider had stated in its email of 27 June 2018 that they were providing an out of hours service to the public that was not provided by the AA and RAC directly. The Tribunal found this assertion to be wholly misleading.

The Tribunal further considered that it was an aggravating factor that the Level 2 provider had stated to the Executive that their main call centre VeriCall Limited handled calls for 118118 and many others in the industry when this was false.

## Revenue

The Executive asserted that the Level 2 provider’s gross revenue accrued from the service was £136,490.26. The Executive submitted that the entirety of the revenue flowed from the apparent breaches of Code paragraphs 2.2.7 (pricing prominence) and 2.3.2 (misleading).

In response to questioning by the Tribunal, the Executive clarified how it had arrived at the relevant revenue figure. The Executive explained that there were two separate Level 2 providers who operated the Service in May 2018. The Level 1 provider explained to the Executive that their reporting system did not support mid-month granularity and could only record one party, Madlenka Limited, for the entire month of May when reporting revenue information. The Executive clarified the dates that the Service was operated by a different Level 2 provider which was 01 May to 16 May 2018. The Level 1 provider confirmed that the relevant revenue period for Madlenka Limited started from 17 May 2018. Therefore, the revenue generated between 01 May to 16 May 2018 was disregarded by the Executive.

### **Financial benefit/ Need for deterrence**

The Executive argued that there was a need to remove the Level 2 provider's financial benefit in order to achieve the sanctioning objective of credible deterrence.

The Level 2 provider did not make any submission in relation to the financial benefit, as it did not respond to the Warning Notice.

The Tribunal accepted the Executive's assessment of the revenue accrued and agreed that it was necessary to remove the financial benefit made as a result of the breaches. The view of the Tribunal was that there was also a need to prevent the reoccurrence of such breaches by the Level 2 provider or the wider industry. The Tribunal acknowledged that the fine amount in its initial assessment, namely £400,000, exceeded the revenue proved to have flowed from the breaches and took into account that any fine would have a financial impact on the Level 2 provider.

### **Sanctions adjustment**

The Executive submitted that considering the revenue that had accrued from the breaches, the fine should be adjusted downwards to £250,000 in order to ensure a proportionate outcome.

The Tribunal agreed with the Executive that the fine amount should be adjusted downwards to ensure that it was proportionate.

## **Final overall assessment**

### **Sanctions imposed**

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

- a requirement to remedy the breach
- a formal reprimand
- compliance advice
- that access to the Service be barred until the breach is remedied to the satisfaction of the Executive
- a requirement that the Level 2 provider refund all consumers who claim a refund
- a fine of £250,000.

Administrative charge recommendation: 100%