

Tribunal meeting number	228
Case reference:	128953
Level 2 provider:	PowerTel Limited, London, United Kingdom
Type of service:	Directory Enquiries Service
Level 1 provider:	Telecom 2 Limited, London, United Kingdom

This case was brought against the Level 2 provider under Paragraphs 2.2.7, 2.3.2, 3.4.8 and 4.2.3 of the Code of Practice

Background

The case concerned a directory enquiry service operating on premium rate numbers 118023, 118822, 118093 and 118041 (the “Service”).

The Level 2 provider for the Service was PowerTel Limited (the “Level 2 provider”). The Level 2 provider first registered with the Phone-paid Services Authority (“PSA”) on 10 June 2011.

The Level 1 provider for the Service was Telecom 2 Limited (“the Level 1 provider”).

A company called IPV6 Limited (“IPV6”) obtained the 118 numbers, on which the Service operated, from Ofcom and was the number range holder. IPV6 is not part of the commercial agreement and contract made between the Level 2 provider and the Level 1 provider in relation to the Service. The Level 2 provider had been authorised by IPV6 to manage and act on its behalf for the Service on numbers 118822, 118041, 118093 and 118023.

IPV6 stated the Service started on 21 June 2016 for 118023, 1 October 2015 for 118822, 1 October 2015 for 118093 and 20 June 2016 for 118041.

The Service was said to be promoted via a recorded promotional message on unconnected and/or unallocated geographic numbers and via promotional websites. The promotional websites for 118023, 118093 and 118041 were launched in 25 March 2017. The promotional website for 118822 was launched on 1 October 2015.

IPV6 advised on 2 January 2018:

“Due to the ongoing and time-consuming nature of this (overall) enquiry, IPV6 directed that any and all announcements on unconnected and/or unallocated telephone numbers was to

cease. This means that such telephone numbers now give NU (Number Unobtainable), to consumers calling them.”

The Executive made test calls which confirmed the geographic telephone numbers now stated number unobtainable.

On 20 February 2017 and 26 October 2017 the Executive carried out monitoring of the Service on the geographic numbers that it had been made aware of via consumer complaints.

Transcript of 20 February 2017 monitoring:

“This number is out of service, call 118 023, call 118 023, call 1-1-8-0-2-3, for directory enquiries, calls cost £6.98 per call plus £3.49* per minute, plus your phone companies access charge” *The Executive view is the pricing per minute is unclear

Transcript of 26 October 2017 monitoring:

“This number is out of service, you can purchase this telephone number by e-mailing sales@powertel.co.uk that’s sales@p-o-w-e-r-t-e-l.co.uk. If you require another number then you can call directory enquiries on 118023, calls cost £6.98 per minute plus your phone company’s access charge.”

The Executive had received 12 complaints concerning the Service since 14 November 2016. 11 out of the 12 complaints related to 118023, the other complaint was about 118822.

Complaints related to the recorded promotional message and consumers variously alleged that they had never dialled the Service, or they were misled into interacting with it. Concerns had also been raised about pricing prominence.

A sample of complainant accounts are set out below:

*Checking on my current usage I noticed that a charge of £25.09 was made for a 5min 59sec call to 118023 at 15:30 on 6th Dec 2016.
I had phoned 01604380191 and received an automated message "This number is out of service call 118023." I was confused by the message and without thinking rang 118023 who found who I was looking for and asked if I would like to be connected, I was not advised of any cost implications and said yes.
I have spoken to BT who provide our telephone service who can't identify who provides the 118023 service. neither can your number checker.
I was given no understanding of the cost implication or why I was directed to 118023.
Have you contacted the Service Provider: Yes*

elderly consumer age 93; recently discharged from hospital due to an operation
consumer is the account holder; his phone provider contacted him to discuss an unusual high charge on his bill on 22/12/16 from 19:30 approx. 3-4 calls were made to 118023; supposedly by him
consumer recalls dialling 01785510002 in order to book MOT **SDW Automobile Stafford 510002 number shown on their visiting card when the call connected he heard a voice recording: "number out of service call 118023" (pricing heard at 26s - he didn't hang on long enough to hear pricing)
he dialled number as requested by the voice recording; he feels misled by the recording he feels he shouldn't be responsible for the calls; he was directed by the voice recording, didn't hang on long enough to hear pricing, misleading and unclear was never made aware of pricing when he dialled 118023

I dialled 01254450045 by mistake it should have been 01282450045, which is Specsavers. I got a message "This number is out of service call 118023". Thinking this was a specsavers message I dialled 118023. I realised my mistake immediately and hung up. I was not advised of any charges when I got the message and was shocked to see a charge for £7.05 for 22 seconds on my bill. I spoke to BT and they have advised me that this is a directory enquiries number but I question who would use it if they were advised of the charge. This is a one off charge but I am extremely unhappy that people are still getting away with scams like this and there seems no protection for consumers. BT are just not interested
Have you contacted the Service Provider: Yes

On the 22nd of May, I tried to book my daughters ballet show tickets at Ticket Source Ltd. I got to their website and on the show booking there was a contact number which I called on 01606 258666. There was a message saying "This number is not in use, please dial 118023" which I did immediately and then when I spoke to the lady she said she was directory enquiries. I immediately put the phone down as I realised I had just dialled a 118 number without realising, and I had heard that those numbers are very very expensive.
I have just checked my bill and I have been charged £7.53!!! For a one second call! I am so angry.
Have you contacted the Service Provider: Yes

The Investigation

The Executive had sent a Warning Notice to the Level 2 provider in which the following breach of the PSA Code of Practice, 14th Edition (the "Code") was raised:

- Rule 2.2.7 – Pricing prominence
- Rule 2.3.2 - Misleading
- Paragraph - 3.4.8 Registration renewal
- Paragraph 4.2.3 – Failure to provide information

On 18 September 2018, the Tribunal reached a decision on the breaches. The Tribunal considered submissions of the Executive and the Level 2 provider as well as 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 and correspondence sent subsequent to the service of the Warning Notice
- correspondence between the Executive and the Level 2 provider in relation to its registration with the PSA
- compliance advice supplied to the Level 2 provider by the Executive in relation to another directory enquiry service
- correspondence between the Executive and the Level 1 providers
- correspondence between the Executive and IPV6
- PSA Guidance on "Promoting Premium Rate Services"
- revenue statistics for the Service.

Submissions and Conclusions

Preliminary Issue

The value chain

The case, initially, had been allocated on the basis that IPV6 was the Level 2 provider responsible for the Service. On investigation, the Executive identified other parties in the value chain: Telecom 2 and PowerTel Limited.

The Executive requested information from IPV6 and Telecom 2 Limited to establish the value chain and to determine which entity was the Level 2 provider. IPV6 claimed to be the Level 2 provider, however, further to enquiries the Executive found PowerTel Limited to be the Level 2 provider in respect of the Service.

The Phone-paid Services Authority Code paragraph 5.3.7(b) states:

"A Level 2 provider is the person who controls or is responsible for the operation, content and promotion of the relevant PRS and/or the use of a facility within the PRS."

The Phone-paid Services Authority Code paragraph 5.3.7(c) states:

"In respect of any relevant PRS where the PSA considers there to be a material doubt whether a person involved in any way in the provision of the service and/or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant PRS is a PRS provider falling within (a) or (b) above the PSA shall determine whether that person is a PRS provider and whether the person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time."

IPV6 had informed the Executive that it obtained the 118 numbers from Ofcom but authorised PowerTel Limited to manage and act on its behalf for the Service on numbers 118822, 118041, 118093 and 118023. PowerTel Limited was the party who first registered with the PSA regarding the Service. Further, PowerTel Limited was the party who contracted with Telecom 2 Limited for the provision of the Service and who receives outpayments from Telecom 2, as well as deriving revenue from the Service.

Having considered all of the above, the Executive determined, in accordance with paragraph 5.3.8(c) of the Code, that PowerTel Limited was the Level 2 provider for the Service.

PowerTel Limited was given an opportunity to make representations in respect of this determination on 15 January 2018, however no representations or response were received from PowerTel Limited.

The Executive had noted that a Mr Peter Lyons was the director of both PowerTel Limited and IPV6.

At the Tribunal, Mr Lyons on behalf of PowerTel Limited asserted that PowerTel was not the Level 2 provider.

The Tribunal considered the evidence, including a letter from Mr Lyons to the Executive, dated 2 January 2018 which stated that:

“PowerTel has the authority to deal with commercial matters with these ranges. PowerTel setup a commercial contract (relationship) with Telecom 2, who in turn, host the ranges and provide the DQ service(s) therein. From that, Telecom 2 pay Powertel, from time to time, commercial outpayments, based on the revenue yield from the ranges. PowerTel deals with financial and administrative matters outside of any commercial contact with Telecom 2. For example, Powertel processes timely refunds, to consumers who have requested such a refund, in relation to the ranges. IPV6 itself does not have any commercial involvement in the ranges, as IPV6 is the range holder, with no independent commercial arrangements.”[sic]

The Tribunal found that, in accordance with paragraph 5.3.7(b) of the Code, PowerTel Limited is the Level 2 provider in this case.

Adjournment

The Warning Notice, setting out the allegations against the Level 2 provider, had been sent to the Level 2 provider by email on 20 July 2018. There was no response to this and a further copy was sent to the Level 2 provider on 6 August 2018. Mr Lyons, the director of the Level 2 provider responded on 7 August 2018, confirming that he had received the email of 6 August 2018 but was unable to open the attachments. He stated that he would be away until 1 September 2018 and would provide a full response after that date. On the same day, the Executive granted an extension for service of the response to 20 August 2018. The Level 2 provider responded, also on the same day, requesting a further extension of this deadline until

17 September 2018 as he was out of the office and was the only person who could reply. The Executive responded that evening, explaining that the PSA's Code 14 Supporting Procedures ("the Supporting Procedures") would not allow for a further extension of time.

On 13 August 2018, the director of the Level 2 provider sent an email stating that he "*was on the other side of the world with highly restricted internet, no computer and in a series of very remote locations*". He further stated that it was a small company with no employees and he was the only person who could respond to the Warning Notice.

On 15 August 2018, the Executive reminded the Level 2 provider that there was no power to extend time for the response beyond 20 August 2018 and advised the Level 2 provider that the hearing would be listed for the first available date after 20 August 2018. The Executive stated that it was, however, prepared to immediately ask the Tribunal Chair for an adjournment and informed the Level 2 provider that it should send any additional evidence for consideration by the Chair.

No further correspondence was received, and the application was therefore put before the Chair on 9 September 2018 on the basis of the correspondence already submitted by the Level 2 provider.

The Chair considered all of the evidence and decided to refuse the adjournment.

The Chair considered that it was in the public interest for the case to be dealt with expeditiously. The Chair found that there was limited explanation from the Level 2 provider as to why it could not provide a full response and no evidence as to why the Tribunal should be adjourned. It was implied in the Level 2 provider's response that it felt it has insufficient time to prepare for the Tribunal. The director of the Level 2 provider had stated that he had been abroad with limited access to the internet until 1 September 2018. However, at the date of the application, he had been back in the UK for 8 days. Since his return, he had not contacted the Executive to provide further information about any ongoing difficulties in providing a response or attending the Tribunal.

The Chair found that the director of the Level 2 provider had had adequate time since his return to prepare a response or an explanation for why additional time was required. There were no circumstances beyond the reasonable control of the parties why the Code Adjudication Tribunal could not fairly adjudicate on the issues before it on 18 September 2018. The adjournment was therefore refused.

Application for the Tribunal to be recorded

The director of the Level 2 provider attended the substantive hearing on 18 September 2018. Before the hearing began, the Level 2 provider made an application for the proceedings to be recorded. This application was granted.

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 unconnected and/or unallocated geographic numbers, for the Service was not sufficiently proximate to the premium rate (118) number given. Further, it was submitted that the per minute pricing was not clearly audible.

The Executive relied on the complainant accounts, monitoring of the Service by the Executive, compliance advice given by the PSA to the Level 2 provider in 2011 and 2012 and the PSA Guidance on “Promoting premium rate services”. This 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.

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 which indicated that when dialling or misdialling landline numbers they heard a recorded message advising "This number is out of service" and to call 118023 to reach directory enquires.

The Executive monitored the Service on 20 February 2017. Monitoring identified that if a consumer dialled from a landline number, a geographic number the Service was being promoted. On the call they were given the 118023 number to call. A transcript of the promotional message is shown below:

118023

"This number is out of service, call 118 023, call 118 023, call 1-1-8-0-2-3, for directory enquiries, calls cost £6.98 per call plus £3.49 per minute, plus your phone companies access charge"

The Executive noted that PSA compliance advice had been requested by the Level 2 provider on 21 November 2011 regarding the promotion of premium rate numbers on unallocated telephone numbers. The PSA had replied on 23 November 2011 stating the importance of pricing information. On 17 January 2012, PSA compliance advice was again requested by the Level 2 provider in relation to it promoting a directory enquiry service on unallocated geographic numbers. The PSA replied on 17 February 2012 providing advice including advice on how to ensure consumers received the necessary pricing information.

The Executive based its submissions on this breach on two reasons:

Reason 1

Complainants had 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 in the promotional message, which was repeated three times and very slowly on the third time it was repeated, before the pricing information was given. It was the Executive's case that, due to the period of time and the repetitions of the number, consumers would likely have disconnected before the pricing information was played.

The Executive submitted 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, was submitted to have caused consumers to hang up

the phone and dial the Service without knowing the cost of it. The complaints received supported this as they stated that they were unaware of the cost of the call, or that they were engaging with a premium rate service at all.

The Executive asserted that the Code and guidance were clear that pricing must be proximate every time the premium rate number is mentioned. As this was not the case, there had been a breach of Rule 2.2.7.

Reason 2

The tariff for 118 023 was £6.98 per call then £3.49 per minute plus the consumer's phone company's access charge. The Executive asserted that the recorded per minute pricing information on the promotional call recording was distorted and not clearly audible. The Executive submitted that the information that the price was "£6.98 per call" was audible, however, the per minute rate of £3.49 was so distorted as to be inaudible.

The Executive therefore asserted that the pricing information was not clear.

Accordingly, the Executive submitted that there had been a breach of Rule 2.2.7 of the Code.

2. The Level 2 provider denied the breach. The Level 2 provider asserted that it had not been given sufficient guidance by the Executive as to the definition of "proximate". The Level 2 provider had sought compliance advice following the concerns about the Service being raised and claimed it had not been assisted by the PSA. The Level 2 provider submitted that there was not a substantial delay between the reading out of the number for the Service and the pricing on the promotional message. It argued that as only 12 complaints had been made to the PSA about the Service, it had been unfairly treated by being brought to a Tribunal.

The Level 2 provider also stated that it had subsequently amended the recorded message so that the pricing was closer to the "call to action" to the Service. It suggested that the promotional message, in the form set out above, had only been in operation for approximately two months. It accepted that, upon calling the directory enquiries numbers, consumers would not be informed of the cost; the pricing was only available in the promotional message and any consumer who did not continue to listen to it until the price was given, would not be informed of it before being charged for the service.

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 the Executive's monitoring, in particular, the recording of the promotional message played to consumers. It also considered the submissions of the Executive and the Level 2 provider at the hearing.

The Tribunal listened to the audio recording of the promotional message for the Service. It noted that consumers were not expecting to engage with a premium rate service and concluded that consumers would likely have disconnected their call before hearing the pricing due to the repetition of the reading of the premium rate number three times, the third time very slowly. The Tribunal was concerned that there was no pre-call announcement of the pricing when a consumer dialled the premium rate number and found that the breach of Rule 2.2.7 was clearly made out. This was on the basis that the pricing was not sufficiently proximate to the premium rate number given on the promotional message and as consumers would likely have disconnected the call before hearing it; the price of the call was not given before the purchase was made.

The Tribunal noted that the Level 2 provider had requested compliance advice from the Investigations Executive on numerous occasions throughout the investigation process. The Tribunal accepted the Executive's response, which had been made clear to the Level 2 provider, that it was not appropriate for the Investigations Executive to give compliance advice to a provider but that the Compliance Team could be contacted for free at any time (contact details were given). The Tribunal noted that the Level 2 provider had received compliance advice in relation to issues relevant to the breaches in 2011 and 2012 and had not implemented it. In any event, the Tribunal further noted that although advice may be sought from the PSA's Compliance Team, it is the responsibility of providers of premium rate services to ensure that they are compliant with the Code.

In relation to Reason 2 The Tribunal noted that recorded promotional message appeared to be distorted at the point when the pricing was given for the Service. It considered, however, that it could make out the cost of the call. It was concerned that there was distortion but did not consider that this had been sufficient to amount to a breach of Rule 2.2.7.

For the reasons outlined above, the Tribunal was satisfied that consumers were not 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 of the Code

"PRS must not mislead or be likely to mislead in any way."

1. The Executive asserted that the Level 2 provider had acted in breach of Rule 2.3.2 of the Code, as the recorded promotional message on unconnected and/or unallocated geographic numbers, for the Service, was misleading.

The Executive relied on the complainant accounts, monitoring of the Service and the PSA Guidance on “Promoting premium rate services”. This 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 submitted that consumers had indicated that, when dialling or misdialling landline numbers, they heard a recorded message advising that the number was out of service and to call 118023 to reach directory enquires.

In relation to the following complaint:

*“consumer recalls dialling 01785510002 in order to book MOT **SDW Automobile Stafford 510002 number shown on their visiting card when the call connected he heard a voice recording: ‘number out of service call 118023’*

the Executive had checked the number for SDW Automobile Stafford and it appears the complainant had misdialled, mixing up the landline 01785 281 700 and mobile 07815 510 002 contact numbers for the company.

Another complaint was as follows:

“I dialled 01254450045 by mistake it should have been 01282450045, which is Specsavers. I got a message ‘This number is out of service call 118023’. Thinking this was a specsavers message I dialled 118023. I realised my mistake immediately and hung up. I was not advised of any charges when I got the message and was shocked to see a charge for £7.05 for 22 seconds on my bill.”

The Executive had checked and confirmed the number for Specsavers in Burnley was 01282450045.

The Executive was concerned that consumers were not being informed that the number they had been given, 118 023, was for a directory enquiry service as this information was give on the promotional message, only after the number had been read out three times, the third very slowly. The Executive submitted that as the promotional message stated that the number dialled was “out of service” and followed immediately by another number to call, 118 023, this created the impression that the recorded promotional message and alternative number had been placed there by the

company they were trying to reach. The impression created was that the company number had been taken out of service and replaced, rather than that they had simply misdialled and could try re-dialling again for free. It was argued further that in the absence of a recorded promotional message of this nature, a consumer would be likely to understand that they had misdialled, for example by the presence a number unobtainable message or tone and would have therefore simply redialled the correct number.

The Executive's view was that the above points, coupled with a lack of prominent placing of pricing for the service, had the combined effect of misleading consumers into dialling an expensive directory enquiry number. The Executive's view was that, had consumers been aware that they were dialling a directory enquiry service for which they would incur significant cost, its highly likely that they would not have dialled the number stated.

For the reasons set out above, the Executive submitted that the recorded promotional message on unconnected and/or unallocated geographic numbers for the Service was misleading and was a breach of Rule 2.3.2.

2. The Level 2 provider denied the breach. It had not previously explained how the Service worked. However, upon being questioned by the Tribunal, it was explained that the promotional number was placed on "hundreds of thousands" of out of service numbers that had been allocated to IPV6. The vast majority of the traffic to the Service came via the promotional message on these out of service numbers. The Level 2 provider also had a website promoting the Service, but this did not generate a lot of traffic. The Level 2 provider stated that he considered that the placing of the promotional message on these out of service numbers was an acceptable practice as he was aware that other telecoms companies used the same business model.
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 the Executive's monitoring, in particular, the recording of the promotional message played to consumers. It also considered the submissions of the Executive and the Level 2 provider at the hearing.

The Tribunal was satisfied that consumers would have been misled into engaging with the Service. Consumers were likely to have disconnected their call to the original number dialled before hearing the part of the promotional message that stated that the 118 number given was for a directory enquiries service. The Tribunal accepted the Executive's arguments in relation to this breach in full. The Tribunal did not find the Level 2 provider's argument, that it had promoted the Service in the same way as other telecoms providers, persuasive. The Tribunal was clear that compliance with the Code is the responsibility of each individual provider.

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

Decision: UPHELD

Alleged Breach 3

Paragraph 3.4.8

“Registration must be renewed annually or at intervals determined by the PSA.”

1. The Executive submitted that the Level 2 provider failed to renew its registration with the PSA and therefore operated in breach of paragraph 3.4.8 of the Code. The PSA Registration Scheme database showed that the registration for the Level 2 provider lapsed on 4 October 2017.

Due to a technical issue, two PSA automated registration reminder emails meant to be sent one month earlier on 4 September 2017, and 14 days earlier on 20 September 2017, were not sent to the Level 2 provider. The Executive confirmed that registration renewal reminder emails are an additional courtesy service provided by the PSA. The obligation to renew registration remains, at all times, with the Level 2 provider.

The PSA registration system did send automated registration reminder emails on 3 October 2017, 5 October 2017, 2 February 2018 and 15 February 2018. A manual email from the PSA Registration Officer had been sent on 7 March 2018 to the Level 2 provider to advise that it was required to renew its registration with the PSA, or inform the PSA if it was no longer operating a premium rate service. In addition, a manual email was sent from the Registration Officer on 26 March 2018 to an alternative contact for the Level 2 provider. However, as of the date of the Tribunal hearing, the Level 2 provider was continuing to operate a premium rate service without being registered with the PSA.

It was the Executive’s case that from the period of 4 October 2017 onwards, it was clear to the Level 2 provider that it was required to renew its registration.

Accordingly, the Executive submitted that the Level 2 provider acted in breach of paragraph 3.4.8 of the Code.

2. The Level 2 provider denied the breach. It was the Level 2 provider’s case that, there had been insurmountable difficulties in re-registering PowerTel Limited with the PSA. IPV6 had been registered however, and the Level 2 provider was under the impression that this was sufficient as IPV6 was the range holder of the numbers on which the promotional message was played as well as the directory enquiry numbers. The Level 2 provider suggested that it had contacted the PSA’s registrations officer in relation to its difficulties in renewing its registration of PowerTel Limited, however, it did not provide any evidence in support of this, nor of there being a problem with the website.

3. The Tribunal considered the Code and all of the evidence before it, including the correspondence exchanged between the Executive and the Level 2 provider, as well as the submissions of the Executive and the Level 2 provider at the hearing.

The Tribunal found that the Level 2 provider was in breach of the requirement to renew its registration from 4 October 2017. It concluded that the Level 2 provider had been clearly notified of the requirement on numerous occasions and must therefore have been aware the registration of PowerTel Limited had expired.

The Level 2 provider, in submissions at the hearing, stated that it had thought that the registration of IPV6, as range holder, was sufficient. However, the Tribunal found that the notifications sent by the PSA in relation to PowerTel Limited were clear and the registration of IPV6 was not raised by the Level 2 provider in response. Neither did the Level 2 provider respond to the Registrations Officer to state that PowerTel was no longer providing premium rate services.

In relation to the Level 2 provider's assertion that the registrations system was not working when he sought to renew the registration for PowerTel Limited, the Tribunal applied the rebuttable presumption that the PSA's computerised registration system was working. The Level 2 provider had not supplied any evidence to support its assertion that it was not working.

In all the circumstances, the Tribunal found that the Level 2 provider had an obligation to renew its registration as of 4 October 2017. It was reminded of this on numerous occasions and had not demonstrated any reason why this could not be done. Accordingly, it found that there had been a breach of paragraph 3.4.8 of the Code.

Decision: UPHELD

Alleged Breach 4

4.2.3

"Where a direction is made pursuant to paragraph 4.2.1 a party must not fail to disclose to the PSA, when requested, any information that is reasonably likely to have a regulatory benefit in an investigation."

1. The Executive submitted that a breach of paragraph 4.2.3 of the Code has occurred because the Level 2 provider failed to provide information requested in a formal direction, to allow the Executive to fully investigate the service.

The Executive had sent a 4.2.1 Formal Direction for information dated 26 February 2018 with a deadline for response of 5 March 2018. Question 3 of the formal direction stated:

“Please confirm the number range(s) and how many geographic numbers the recorded promotional message was promoted on? Please confirm who the number range belongs to. Please provide any supporting evidence.”

The Level 2 provider replied on 12 March 2018 asking:

“Which geographic numbers are you referring to?”

The Executive replied on 12 March 2018 stating:

“IVRs were set up on geographic numbers in order to promote the DQ services on the numbers shown above, The Executive wishes to ascertain the number range(s) and how many geographic numbers the recorded promotional message was promoted on.”

The Level 2 provider then replied on 16 March 2018:

“there was not a set amount of numbers, announcements were used on some numbers which were not in service.”

The Executive sent a further 4.2.1 formal direction on 20 April 2018 stating:

“PowerTel should be aware of which number range(s) and how many geographic numbers the recorded promotional message was promoted on. And who the number range(s) belong to. Please provide this information.”

On 25 April 2018, the Level 2 provider stated:

“To clarify and for the avoidance of any doubt, Powertel Limited was not a holder/controller of any number range/s.

You assert the terms “Owner” and “Belong” however these statements are too broad-brush to provide an accurate reply. The term “Owner” may refer to a range allocated to a company by Ofcom, a number which is in use by a subscriber, a number sub-allocated, a number ported or otherwise leased or resold. Please confirm your definition of “Owner”. All ranges are owned by Ofcom. Ofcom allocate ranges from time to time, in accordance with the General Conditions. As far as possible, responses have already been provided previously.

We also note there have been no replies to any of our own queries or questions to date. Powertel has repeatedly requested compliance advice from the PSA and has not had reasonable replies.

Powertel will continue to assist the PSA as reasonably requested. However, Powertel can only continue this assistance if all its outstanding queries are answered, and if the PSA clarify the above terms.”

On 30 April 2018, the Executive responded:

"Your Service is currently under investigation, so compliance advice will not be provided by the Investigations Executive. However, compliance advice is free and always available through our compliance advice team at compliance@psauthority.org.uk.

The Executive notes that you stated "As far as possible, responses have already been provided previously." However, the Executive's view is that you have not provided a complete response to the Executive's direction for information. The Executive will therefore be proceeding to Warning Notice and you will hear from us in due course."

The information had been requested so that the Executive could investigate the scope and scale of the promotion of the Service, including the full range of promotional messages placed on "out of service" numbers. The information requested would also have enabled the Executive to assess, in view of the complaints received, whether or not IVR messages had been placed on numbers that were close to (or one digit or so out) from a widely used business number such as Specsavers.

While the Level 2 had provided some information, it had not provided key information on number ranges as requested by the Executive.

For the reasons set out above the Executive asserted that the Level 2 provider had intentionally not complied with the Code in relation to responding to formal directions for information.

2. The Level 2 provider denied the breach. In response to the Tribunal's questions, Mr Lyons on behalf of the Level 2 provider stated that he gave the information requested, stating that the promotional message had been played on "hundreds of thousands" of out of service numbers within the number ranges held by IPV6.
3. The Tribunal considered all of the evidence in the case, including the correspondence between the Executive and the Level 2 provider, as well as the submissions of the parties at the hearing.

The Tribunal found that the Level 2 provider's response to the 4.2.1 direction was highly evasive. Although it explained the way in which the Service operated when questioned at the hearing, it clearly did not do so in response to the Executive during the investigation.

The Tribunal found that there was a duty on the Level 2 provider to disclose the information requested by the Executive in the direction issued under paragraph 4.2.1 of the Code and that the Level 2 provider failed to do so. The Tribunal considered that the information requested was likely to have had a regulatory benefit in the

investigation and found that the information, only given by the Level 2 provider on the day of the hearing, about the scale of the use of the promotional message was important to the understanding of the case.

Accordingly, the Tribunal found there had been a breach of paragraph 4.2.3 of the Code.

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
- a requirement to remedy the breach
- 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; and
- a fine of £750,000.

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

The Level 2 provider did not accept the sanctions and argued that the Executive had brought the case to Tribunal with the sole aim of extracting a large fine from it. It did not make any specific submission about the individual sanctions.

The Tribunal's initial assessment of the breaches of the Code was that they were, overall, Very Serious. In coming to this assessment, the Tribunal found the following:

Rule 2.2.7

- this breach was Very Serious
- there had been a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers
- the breach was likely to severely damage consumer confidence in premium rate services
- the breach was committed recklessly
- the breach demonstrates a fundamental disregard for the requirements of the Code, particularly in light of the compliance advice that had been sought in 2011 and 2012, and apparently not followed.

Rule 2.3.2

- this breach was Very Serious
- there had been a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers
- the breach was likely to severely damage consumer confidence in premium rate services
- the breach was committed recklessly
- the breach demonstrates a fundamental disregard for the requirements of the Code.

Paragraph 3.4.8

- this breach was Serious
- the breach was committed recklessly
- the breach indicates a wider problem in the procedures and controls of the Level 2 provider
- the Tribunal noted that the Level 2 provider had been sent a number of reminders about its registration and failed to take any action.

Paragraph 4.2.3

- this breach was Serious
- the Tribunal found that the Level 2 provider had been deliberately evasive and the breach was therefore committed intentionally.

Based on its initial assessment of the severity of the breach, the Tribunal considered that the following sanctions were appropriate and proportionate:

- a formal reprimand
- access to the Service to be barred
- a prohibition on the Level 2 provider from involvement in PRS
- a general refund
- a fine of £375,000, comprised of £150,000 each for the breaches of Rule 2.2.7 and 2.3.2, £25,000 for the breach of Paragraph 3.4.8 and £50,000 for the breach of Paragraph 4.2.3.

2. Proportionality Assessment

Assessment of aggravating and mitigating factors

It had been the Executive's submission that there were no mitigating factors in this case. It had noted that the Level 2 provider had amended its recorded promotional message following communication with the Executive about the investigation. However, the Executive argued that this should not be taken into account as mitigation as this was only done once the Level 2 provider was on notice of the Executive's concerns and in any event, the concerns were not

fully addressed by the changes made. The Executive also suggested that it was potentially a mitigating factor that the recorded promotional message ceased entirely on 2 January 2018.

The Level 2 provider, at the hearing, supplied evidence of refunds made to consumers.

The Tribunal agreed that the changes to the Level 2 provider's promotional message did not mitigate the seriousness of the breaches of Rules 2.2.7 and 2.3.2. The Tribunal accepted the Level 2 provider's evidence that some refunds had been made to consumers. While this was a mitigating factor, it did not reduce the seriousness of the case overall. The Tribunal did not find that the ceasing of the recorded promotional message in January 2018 was a mitigating factor as the Service had continued to be run in a non-compliant manner for a number of months after the Level 2 provider became aware of the Executive's concerns.

The Executive submitted that it was an aggravating factor that the Level 2 provider had been supplied with compliance advice about the provision of pricing information when promoting a premium rate service on unallocated numbers in 2011 and 2012 but had not implemented it

The Level 2 provider did not accept the aggravating factor put forward by the Executive.

The Tribunal noted the factor asserted by the Executive but found that it had already been taken into account when determining the severity of the breach. The Tribunal did not, therefore, find any separate aggravating factors.

Financial benefit/Need for deterrence

The Executive asserted that the Level 2 provider generated an estimated £75,771.68 from the breaches in this case and argued that there was a need to remove this financial benefit in order to achieve the sanctioning objective of credible deterrence.

The Level 2 provider did not make any specific submission in relation to the financial benefit.

The Tribunal decided that it was necessary to remove the financial benefit made as a result of the breaches and 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 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 Tribunal agreed with the Executive that the fine amount should be reduced to ensure that it was proportionate.

The Tribunal concluded that the seriousness of the case should be regarded overall as very serious.

3. Final sanctions

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

- a formal reprimand
- a fine of £200,000
- a requirement that the Level 2 provider remedy the breach by ensuring 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.
- A bar on access to the Service 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.
- A requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to the PSA that such refunds have been made.

Administrative charge recommendation:

100%