

Jonathan Levack
PhonepayPlus
1st Floor, Clove Building
4 Maguire Street
London SE1 2NQ

JLevack@phonepayplus.org.uk

3rd June 2014

**Code of Practice (12th Edition) Review
Update**

Submission by

**Association for Interactive Media and Entertainment
(AIME)**

AIME (www.aimelink.org)

AIME is the UK based trade organisation representing the commercial interests of member companies involved in the interactive media and entertainment Industry - where consumers interact or engage with services across converged media platforms, and pay for those services or content using a variety of micropayment technologies.

We uphold our Code of Ethics and Core Values to create an environment of consumer trust and industry confidence within which our members' commerce can grow. We are committed to furthering the interests of Interactive Media and Entertainment through the regular exchange of information and communication throughout the value chain, effective engagement with regulators and legislators and the presentation of a successful industry image to media.

We are the only UK trade association with membership across all elements of the interactive media and entertainment value chain, which is generally supported by Premium Rate Service (PRS) billing facilities, and our membership, represents in excess of 80% of annual industry revenues.

AIME promotes and abides by the philosophy that consumers who are accurately and openly informed of the nature, content and cost of participation in an interactive service experience are perfectly placed to exercise their freedom of choice and thereby enjoy the most effective form of consumer protection.

Member Input

AIME welcomes the opportunity to respond to PhonepayPlus' request for feedback on the Code of Practice (12th Edition) Review Update.

To assist AIME in providing a comprehensive input to PhonepayPlus, AIME researched its Members in the following manner;

- On-Line Survey
- One-to-one discussions
- Written responses

AIME Members who operate in the PRS markets are broadly split into three categories, although there is some overlap inside individual Member businesses.

- Fixed Line Networks, Fixed L1 and L2 providers
- Broadcasters
- Mobile Networks, Mobile L1 and L2 providers

AIME received responses from all sections of the value chain and from both SMEs and significant market entities. Whilst not all members have responded, the responses that were received have all been unanimously in support of the position set out in the response, with the exception of Children's Spend Caps. A minority of respondent's feedback gave support for spend caps, though signalled that the proposed limits were too low.

Some of AIME's larger Members will also input their requirements directly to PhonepayPlus through their regulatory staff or representatives as well as discussing their input with AIME. Outside of these parties, Members rely on AIME to reflect their opinions with a consolidated response. Our response is made up predominantly from Members' input. Views that may be expressed are not necessarily those of the AIME Executive or AIME Board.

General

Live Services Spend Cap

We understand that PhonepayPlus is proposing an increase to Live Service spend cap from £30 to £45, with spend reminders at £15 and a positive opt-in to go beyond £30.

AIME has previously submitted a business case with evidence that consumers are able and willing to spend higher amounts when using other payment mechanisms such as credit cards. AIME Members are supportive of the proposed new spend cap, which will enable PRS to re-enter a competitive position with other forms of payment.

We understand that PhonepayPlus is investigating how spend caps may be contained within a Code appendix to enable greater flexibility to alter spend caps according to market demand inflation and other factors. AIME supports this initiative as it will provide future flexibility.

Live Services Spend Reminders

Members have expressed concerns over the application of a £15 spend reminder.

In 2015, with the new clear Service Charge pricing prior to the call and protection against over spend with the proposed spend cap, it is unreasonable and anti-competitive to impose a further restriction by delegating, to the provider of the service, the consumers' responsibility for keeping an eye on the time taken.

Further discussion is also sought on the nature of the reminder, if it is to be adopted, to ensure this is not overly intrusive.

AIME Executive and Members have deep concerns over the research methodologies that were deployed to inform PPP of consumer opinion in this matter and feel that the data is unreliable to be used for the full consultation later this year. This is due to significant bias in the researchers questions which is unusual for a seemingly neutral research organisation.

We detail, in depth, these concerns in another document and will be happy to discuss with PPP the requirement to conduct new research prior to a full consultation.

Children's Services Spend Caps

PhonepayPlus is proposing the introduction of monthly children's services spend caps (either 4x the £3.00 service charge, or £20).

AIME Members support appropriate protection of minors and favour the monthly £20 option, though believe that there could be allowance for parental override to set higher spending limits if technical facilities exist now or in the future. AIME has requested via the ILP, a detailed

industry workshop together with PPP in order to clearly define PhonepayPlus' measure of children's services, how to align with the OFT Guidance and, in situations of consumer harm occurring, how the Children's Service definition is applied by PhonepayPlus Executive.

The AIME survey identified some respondents that are supportive of the principle of Children's Services spend cap, but felt that the proposed limits are too low.

We would welcome any insights as to why PhonepayPlus chose either the £20 monthly or £12 weekly cap, in order to respond or reflect this in the full consultation.

Prior Permission

PhonepayPlus is proposing the removal of some, or all, Prior Permissions regimes by re-housing the requirements into a Code appendix.

AIME supports all initiatives that will improve efficiencies while still striving to prevent consumer harm from services that have proved to have a higher risk profile.

In terms of the Options put forward by PhonepayPlus (http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~media/Files/PhonepayPlus/Consultation%20PDFs/2013_Code_Review/2014_Code_Review_Update_Paper.pdf), we feel that Options B (Annex a streamlined version of the current regime conditions to the Code) or C (Introduce a suite of conditions as an annex that can be applied to higher risk Services) would be the preferred approach, as we agree with PhonepayPlus that that Option A may not achieve PhonepayPlus' outcome-based objectives.

We would note (and agree with PhonepayPlus) that some of the existing conditions within certain prior permission regimes are already covered by the 12th Code.

For example under conditions applicable to L1 provider in the regime for Broadcast PRS:

- Conditions (iii) and (vi) are covered by PhonepayPlus code section 4.8;
- Condition (vii) is covered by PhonepayPlus code section 3.1.7;
- Conditions (xii) and (xv) are covered by PhonepayPlus code section 2.3.1;
- Condition (xvi) is covered by PhonepayPlus section 2.6;
- Condition (xvii) is covered by PhonepayPlus section 3.1.3 and 3.3;
- Condition (xix) is covered by PhonepayPlus code section 3.3.3;

And for conditions applicable to L2 Providers:

- Condition (xx) is covered by PhonepayPlus code section 3.3.3.

We need to consider that Level 1 providers currently derive some benefit from the Prior Permission system as a checklist on higher risk services before they are implemented. We are keen that careful consideration is given to how moving specific prior permissions to an annexe that cross refers to Code conditions might impact on allocation of responsibility and obligations between Level 1 and Level 2 providers, especially in areas such of broadcast services which have had to be subject to previous guidance as set out at clause 3.10 of the 30 March 2011 guidance to the Code.

We are supportive of the changes to the prior permissions regime, and AIME Members would welcome the opportunity to work with PhonepayPlus to define the additional support and guidance that may be required to support due diligence and risk controls and how new services should be structured if the prior permission regime is removed.

On the basis of collaboration between AIME Members, other industry participants and PhonepayPlus on this detailed activity, AIME supports Option C.

Polluter Pays

PhonepayPlus indicates that it is proposing to strengthen the implementation of the polluter pays principle.

AIME has always been supportive of the “polluter pays” principle, where it has been clear that the act of “pollution” was either deliberate or occurred through negligence and appropriate controls, AIME members report that they have lost confidence on the robustness of the definition of the polluting act through some tribunal cases over the last year and that the polluting act of some providers that caused consumer issues was not adequately targeted by the Executive or the Tribunal.

AIME is keen to engage with PhonepayPlus on the detail around what is meant by “strengthening” and in the detail of why an increase of non-payment of fines should occur. As previously stated in our response to PhonepayPlus budget (Feb 2014), the increase in litigation attempts should not be dismissed lightly or dismissed as an attempt to circumvent processes. Both the Tribunal process and fine amounts should be openly reviewed to ensure transparency, fair and pragmatic treatment and efficiency. AIME is pleased that the opportunity to discuss Reviews, Oral Hearings and Appeals will be made available to Members in the full consultation and would be willing to input information early if that would help guide the consultation.

Vulnerability Definition

PhonepayPlus is proposing changes to the ‘Vulnerability’ definition and scope (current Rule 2.3.10).

AIME Members would welcome greater clarity and discussion to ensure balanced interpretation. AIME is currently minded towards a wider set of criteria that needs to be satisfied to determine vulnerability.

In any investigation, emphasis should be placed on whether the characteristics of a group of vulnerable consumers are being specifically targeted, rather than the fact that a vulnerable consumer just happened to use a service. If the service passes the ‘reasonable person’ test, we would hope to see redress limited to the vulnerable consumer(s) affected on an exception basis rather than prompting a full review of the service.

Determination of Value Chain Designation

We understand that PhonepayPlus is proposing changes to its power to determine L1 / L2 status (current rule 5.3.8c).

AIME will welcome more clarity behind the requirement for this change before we can express an opinion.

Access to Oral Hearing

PhonepayPlus is proposing for an Oral Hearing only to be available after completion of paper-based adjudication.

AIME acknowledges that conducting a paper-based adjudication in the first instance has potential efficiency savings. Efficiency savings are supported providing this can be achieved whilst respecting the principle that achieving a fair and just outcome must remain paramount.

With providers potentially liable for significant sanctions where Code breaches are alleged, the adjudication system is under ever increasing scrutiny. Providers who have been subject to the adjudication process have reported to AIME concern that the paper based exercise does not provide sufficient opportunity to challenge any flaws or assertions that may be present in the evidence presented to the Tribunal by the investigation team.

Further, a technology centric and constantly innovating sector often presents circumstances that necessitate additional explanation to ensure the Tribunal has the appropriate depth of knowledge to make a determination. The visibility of understanding of any technical complexity by a Tribunal member will not be evident during a paper based review, possibly with an unfair outcome, but can become obvious during an Oral Hearing allowing for greater understanding and a more just decision process.

AIME has identified two principle concerns:

- a) Following a paper review, access to an Oral Hearing would be blocked unless new evidence is presented. This potentially means that if the Tribunal has misunderstood a technical matter, there is no new evidence and the provider would be prevented from having an opportunity to correct an interpretation. A case in point being the Tribunal and PP+ Executive understanding of the complexity of the Affiliate Marketing ecosystem and the undue evidential weight initially given to Alexa as a due diligence tool.
- b) In conducting a paper based hearing any technical misconceptions or evidential flaws will already have framed the tribunal members' perception of the case. Where a subsequent Oral Hearing is heard by the same Tribunal members, as is currently the case, human nature dictates that these preconceptions can inadvertently bias an objective determination.

AIME recommends:

Further detailed work to restore confidence in the current Tribunal process, which in itself may result in paper based adjudications being seen as more viable by providers who report low confidence in the existing procedure.

Completion of a paper-based adjudication should not block a provider's absolute right to an Oral Hearing (providers are subject to administration fees, limiting vexatious referral of cases to an Oral Hearing).

Oral hearings should be conducted by a fresh panel, without reference to the previous decision to ensure no bias is present.

AIME is engaging with PhonepayPlus to discuss the industry concerns further and help achieve a more transparent Track 2 process.

Track 2 Withholds

PhonepayPlus is proposing the introduction of earlier withholds in Track 2 cases.

AIME feels this proposal would duplicate powers already available via an Emergency Procedure, and would lessen the burden of proof necessary for PhonepayPlus to invoke powers. AIME feel that detailed checks and balances through Tribunal signoff should remain in place and be further re-enforced.

For any changes to be considered we would need to understand what notification and information would be given around the investigation and would need to understand in much greater detail what scenarios might give rise to justifying withholding provider revenues. In particular there is a need to understand what checks and balances would remain in place for providers to ensure they can still present their position in a fair forum in good time.

Track 1 Admin Costs

PhonepayPlus is proposing the introduction of admin costs for Track 1 cases.

This proposal would be in line with the polluter pays principle, though it currently lacks the necessary detail as to how disputed costs could be challenged without progressing the case to the full Track 2 process.

We would like to explore how the proposal could be taken forward with an appropriate process to seek a review of costs.

Case Reviews by PhonepayPlus

PhonepayPlus is proposing a lower barrier for PhonepayPlus to seek a case review.

This proposal is potentially at odds with the principle of double jeopardy, if, at PhonepayPlus' request, the provider has to re-defend a case previously dismissed by the Tribunal. The proposal also presently lacks a provision to make PhonepayPlus liable for the provider's costs if the requested review fails, without which, it would increase the providers financial liability.

Finally further discussion is required on how revenue withholds are handled in the event of a review.

Consumer Spend Caps Research

We note that spend cap proposals under consideration for the 13th Code are based upon recent research by Analysys Mason, commissioned by PhonepayPlus.

AIME Members reviewed the research questioning methods and measured these against available best practice recommendations on research methodology. Through this exercise it was identified that the wording and order of several questions diverted from the best practice, and may have introduced bias to the survey outcome.

AIME has produced a full report identifying the flaws in the survey methods for discussion with PhonepayPlus.

Until fresh research is undertaken, aligned to best practice principles, AIME believes that the development of policy should not be based on the current consumer soundings.

Conclusion

AIME is broadly supportive of the work so far in reviewing the 12th Code. We welcome the objective of future proofing the 13th Code and the aim to deliver regulation that is technology neutral. We acknowledge and support the objective of streamlining the administration of regulation, through proposals to overhaul prior permission.

We are appreciative of the positive response to AIME's request to increase spending caps and the ongoing work to explore a framework that enables greater flexibility for spend caps to be increased in the future.

AIME is fully committed to the Polluter Pays principle and, though prescient of the potential difficulty in ensuring a stable budget, we anticipate an increasingly compliant industry, whilst ensuring sanctions remain relative to consumer harm.

Whilst harbouring some concerns over proposed changes to the adjudication process, we also recognise and commend PhonepayPlus' underlying motivation to respond to industry requests for a streamlined, cost effective process to resolve service issues. AIME is keen to support the desired outcome and to discuss the detail of these proposals so as to allay any ill-founded concerns, and, or, identify other potential improvements to the process.

Statement of Representation

AIME confirms that this response has been compiled following a process of internal discussion and distribution of the relevant Consultation documentation to all AIME members.

A list of members can be found at <http://aimelink.org/company/>

The views expressed in this response are a fair representation of the majority views held by the responding AIME membership. Individual members are actively encouraged to submit their own independent views as they deem fit and at their sole discretion.

Close

We assure you that, as ever, our comments are made constructively and with the intent of achieving an effective, fair and proportional regulatory regime for Premium Interactive Media and Entertainment services in the UK.

If any clarification to our response is required or if we can be of any further assistance please contact Andrea Putnam-Moorcroft at +44 (0) 1252 711 443, or andrea@aimelink.org

Sincerely

AIME