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**The Thirteenth Edition of the Code of
Practice**

Consultation Response by the

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 (PRS) billing facilities, and our membership, represents in excess of 80% of the annual industry PRS 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 the PhonepayPlus Consultation on the 13th Code of Practice

To assist AIME in providing a comprehensive input to PhonepayPlus across its whole Membership base of 84 companies, AIME researched Members in the following manner;

- Online Survey
- One-to-one discussions
- Workshop
- 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 also has in its Membership, professional support companies that provide legal and regulatory services to market participants. Their input provides qualification and gravitas to the statements and positioning within this response.

AIME received responses across all sections of the PRS value chain and from both small and large market entities.

Members rely on AIME to reflect their opinions with a consolidated response. Our response is predominantly gained from Member input and so views that may be expressed are not necessarily those of the AIME Executive or AIME Board.

Not all Members respond to PhonepayPlus via AIME. The responses that were received have all been unanimously in support of the positions set out in the response below, unless indicated accordingly within the relevant sections of the document. Some of AIME's Members who input their responses directly to PhonepayPlus through their regulatory staff and representatives have discussed their input with AIME. Wherever possible, we have ensured alignment of views.

AIME has expressed concern throughout this document over the planned implementation of changes that provide uncertainty for premium rate providers or reduce their rights to fair and reasonable processes when they are under investigation. To assist PhonepayPlus with the detail of these concerns, AIME Member, M Law LLC has prepared a document that will be (at the time of writing), submitted to PhonepayPlus and will aid further detailed discussion. Where possible we have cross referred to the M Law document in this consultation.

Our response is divided into two sections: **General Comments** and, as requested by PhonepayPlus, **Answers to Specific Questions**. This approach is adopted to allow a more strategic perspective but all the material in both sections should be regarded as an integrated response to the consultation.

General Comments

1. Live Services Spend Cap

AIME welcomes the increase to the spend cap for Live Entertainment Services to allow for calls of up to £45. We acknowledge the PhonepayPlus positive response to AIME's input and the desire to align with other payment mechanisms.

We further welcome the proposal that spend caps will be placed into a Code Annex introducing greater flexibility to allow for spend cap reviews, subject to industry consultation. This will enable spend caps to remain appropriate for market conditions and will support service innovation.

The requirement for a single positive opt-in to enable a call to go beyond £30 is therefore broadly accepted by AIME members to allow for the increase to £45. AIME and its members will input to the PhonepayPlus Guidance document to ensure that the requirements are technically feasible.

See also **Answers to PhonepayPlus Questions (1)** below.

2. Live Services Spend Reminders

The necessity for the £15 spend reminder has been challenged by a significant proportion of members operating Live Entertainment Services. A number of members have noted that a large majority of consumers feel in control of their spending under the current approach¹ and therefore the introduction of a new spend reminder at £15 is unnecessary, unwelcome, and potentially disruptive.

According to PhonepayPlus research, some consumers found their monthly phone bills to be higher than expected when calling Live Services², and we understand that this was a principal driver for the introduction of a £15 spend reminder.

The research was conducted at a time when the promoted cost of the service was different from the actual charge when using a non-BT provided service and the discrepancy would be exacerbated when the consumer uses a mobile to conduct the call.

In 2015, with the introduction of "unbundling", which is being introduced primarily to improve pricing transparency, these research findings will be superseded. It would therefore be wrong to introduce Code changes based upon them.

With unbundling, the Service Charge will be fixed across all networks, with the Network Access Charge variable according to network and price plan. A spend reminder at £15 is therefore likely to be ineffective at addressing the consumer issue of bills that are higher than expected as the provider of the service will not know the callers' Network Access Charge and a £15 reminder may thus occur at £20, for example. PhonepayPlus is therefore recommending a mechanic that will mislead consumers and perpetuate discrepancies between actual cost and indicative cost

¹Question 12. Depending on service type, between 65% and 72% of consumers feel in control of their

² Question 20

We submit that any spend reminder should be time based and not value based. It is also important that spend reminders are unobtrusive, so they do not act against the consumers' enjoyment of the call. A simple "beep", for instance, announced along with the call cost message that is presented at the beginning of the call would be adequate.

We expect considerable opposition to a detailed recorded message as a reminder and will be working with PhonepayPlus on Guidance in this area to ensure the needs of consumers are protected.

As a base position, AIME believes that spend reminders should be kept in reserve and reviewed once unbundling has been in place for at least one year and fresh consumer research conducted. This is supported by current government policy on impact assessment and review of proposals and measures that give rise to a burden on business.

See also **Answers to PhonepayPlus Questions (1)** below.

3. Children's Services Spend Caps

PhonepayPlus is proposing the introduction of monthly children's services spend caps at £3 but has indicated a £5 service charge as being acceptable, with a monthly cap at 4x the service charge, or £20 in total, across all services.

AIME Members support appropriate protection of minors, though there are mixed views on how this protection is best achieved.

It would be wrong to characterise children as naive, undiscerning consumers who are easily hoodwinked or duped into spending money unwittingly. Within the sphere of interactive and digital services, children are among the most savvy, streetwise customers around, often surpassing the digital skills of their parents.

The consumer research on which these conclusions were based focused on parental consumer preferences and not potential for harm. Codified spend caps should be focused on the levels where harm will occur as this is the proper basis for regulation.

Second, such caps are not neutral in terms of technology and regulation. App stores do not have caps on spending by children at anywhere near £12 per month per app and £20 per month overall. In addition, there will be technical problems with methods to control overall monthly expenditure.

As an alternative approach, it has been suggested that protecting children from over-spending could be adequately handled by implementing the new OFT guidance and under the existing Code provisions governing excessive use i.e. deal with the more extreme cases of children's overspending on an individual basis through refunds and barring where and as appropriate.

Formal and time-consuming adjudication procedures should instead be focused on deliberate inappropriate targeting of children or cases of clear intent to market to minors in breach of spend caps.

While Members are happy to accept the principle of spend caps, the specific spending limits proposed are not currently supported. The £3 per transaction limit would fall below the spend levels required for many games and on-line services currently on the market. A spend limit of £5 per transaction is suggested to remain competitive and neutral. The combined four-

transaction limit at this higher level would still fall within the scope of the maximum £20 monthly spend proposed by PhonepayPlus. For purposes of comparison, the annual Halifax survey reveals a current average pocket money rate of £6.35 per week for 8-15 year-olds. In 2000 the figure was £3.60 and the PhonepayPlus limits have not kept pace with the times. .

AIME is also aware of potential EU changes to telecom regulation which may force a requirement for consumers to be able to set their own spend limits. If it does become possible for parents to set limits for their children's spending levels, we would expect any limits set now in regulation to be revisited.

See also **Answers to PhonepayPlus Questions** (8 and 9) below.

4. Children's Services Definition

As with "Vulnerability", AIME is concerned about the PhonepayPlus definition in operational circumstances on what constitutes a children's service. The proposed definition of "services aimed at, or which should have been expected to be particularly attractive to children;" is too wide, lacks clarity for practitioners and leans unfairly towards accidental targeting. In particular the wording "...expected to be..." is subjective without independent measures such as actual user demographics. One well known App (Candy Crush) which would fall into the "...should have been expected.." category is actually played predominantly by women in their late 30s³. In other words, a service may appear to be particularly attractive to children when in fact it finds its home in an older age bracket that cannot be said to be 'vulnerable'.

AIME has discussed with PhonepayPlus at the Industry Liaison Panel the need to clearly define the scope for marketing of products which may have appeal to children but are targeted at the general market. Children have a wide range of interests and access to media that significantly overlap with adults. AIME will work with PhonepayPlus on the generation of Guidance notes, but requests a non-subjective definition that is not simply determined by the regulator without reference to independent advice and evidence.

AIME recommends that individual refunds, rather than general sanctions, should be the standard redress in circumstances where children have not been intentionally targeted, but have suffered personal distress due to their expenditure. This outcome is speedier and more focused on the consumer.

5. Prior Permission

We support a reduction in the scope of the prior permission regime but will need to see a clear definition of the categories and services requiring the special conditions set out in a Code Appendix. We will need to consult closely on any proposed future change to how services are operated.

We are concerned, however, that subscription services have been placed in the same category as live voice services as this creates a future regulatory trap for providers by enabling a requirement for a forced disconnect if a consumer does not respond to a spend reminder. At present, this condition does not exist and it is up to the consumer to react to a subscription spend reminder with a "STOP" command if they wish to unsubscribe.

³ <http://candycrush-cheats.com/women-love-candy-crush/>

To achieve clarity, the special conditions for subscription services must be contained in a unique section of their own containing subscription services own unique requirements such as an initiation message, reminders and a Stop command. See Section 17 on Changes to Subscription Services below.

In addition, it is important that the allocation of responsibility and obligations between Level 1 and Level 2 providers is clear.

See also **Answers to PhonepayPlus Questions (21)** below.

6. Polluter Pays

The introduction of targeted refunds as a Tribunal sanction received unanimous support from AIME members. AIME views refunds as the most appropriate form of consumer redress and probably the primary motivation of consumers who contact PhonepayPlus. The universal refund policy, by contrast, is blunt in application and its imposition is therefore disproportionate. With services promoted via multiple routes, of which only one may be in breach, or where an issue impacts only a limited section of consumers, targeted refunds will allow a more pragmatic solution.

It should be noted that while refunds are considered a form of consumer redress rather than a sanction in their own right, after subtracting VAT and network charges a provider receives only about 63% of the fee billed to the consumer. This means that a provider incurs a significant loss plus administrative costs, for each full refund issued.

AIME members were generally of the view that setting minimum standards for service audits made practical sense. However, this was on the premise that members required greater detail on the standards that will be imposed before full support can be given. The principal concern from members related to the cost of appointing an external auditor. PhonepayPlus engagement with Industry will be necessary to define standards and consider whether it is necessary, in light of such standards, to adopt an approved list of auditors.

We refer also to government policy on small and micro businesses, and question whether a full, partial or temporary exemption is suitable and/or whether varying requirements should be applied according to type and/or size of business.

The application of administration charges, where breaches are upheld, is supported by AIME. Administration charges allow for the recovery of costs directly incurred by PhonepayPlus in relation to seeking redress for specific industry pollution. This being so, the recovery of cost enables a pure application of the Polluter Pays principle. AIME is opposed, however, to the imposition of administration charges where breaches are **not** upheld by the Tribunal. In such instances, administration charges would mean the provider paying for PhonepayPlus time to erroneously pursue a mistaken premise and where no pollution has occurred. Applying the same logic and standards of fairness, where breaches are partially upheld there should be a *pro rata* reduction in the amount of administration charge levied. This should reflect a fair assessment and reasonable apportionment of the work involved in investigating and adjudicating upon cases where only partial breaches are determined.

Consideration should also be given to cases of minor and moderate breach (which could reasonably have been resolved informally) and any procedural errors or failings which may render the imposition of administration charges unfair.

7. Vulnerability Definition and Scope

As with children's services, AIME reports widespread industry concern about lack of clarity on the definition and scope of consumer vulnerability. The proposed PhonepayPlus policy to apply strict liability for consumer harm and downplay intent as a relevant factor is not supported. Guidance must be very clear on what targeting consumer vulnerabilities looks like and the corresponding application of regulation must be proportionate. The regulatory focus should be on deliberate exploitation of people's vulnerability, not simply the fact that a vulnerable person may take part in a service of general appeal.

The definition of a Vulnerable Consumer must be expressly defined and mirror definitions found elsewhere in regulatory guidance (for example across NHS Safeguarding Policy, Social Services or OFGEM's Vulnerability Policy)

For example: "vulnerability is when a consumer's personal circumstances and characteristics combined with aspects of the [PRS] market to create situations where he or she is:

- Significantly less able than a typical consumer to protect or represent his or her interests in the [PRS] market; and/or
- Significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial"

The application of the definition must be transparent, consistent and objective.

AIME considers the objective basis for vulnerability to be narrow and encompass only those consumers who lack a qualified mental capacity for reason which would, in the circumstances specific to the service, render them unaccountable for their actions. We have already indicated that children can be among the most discerning consumers, and it would similarly be wrong and patronising to equate disability with lack of intelligence or age with senility. Instances of genuine intellectual or societal vulnerability are likely to be relatively rare.

Secondly, where there is no evidence of intent (or no such inference can be drawn on the balance of probabilities) on the part of the provider to take unfair advantage of people, redress should be restricted to refunds only. i.e. recompense the perceived harm without sanction.

Further AIME believes that a vulnerable consumer's experience must be considered in the context of the specific service. Vulnerable consumers (like all consumers) must bear proportionate responsibility for their actions to the extent they can be held fairly accountable for the same.

Where PhonepayPlus seeks to apply sanctions other than refunds AIME believes intent must remain the key relevant factor and be properly evidenced. A wider set of criteria needs to be satisfied to determine vulnerability, and redress for isolated cases of unintentional harm should be between the provider and consumer by way of a refund only.

For greater detail on this particular point, we will refer to M Law LLP's document as detailed earlier in this response.

See also **Answers to PhonepayPlus Questions (6)** below.

8. Determination of Value Chain Designation

AIME members are happy to support changes to rule 5.3.8c, which would provide PhonepayPlus with powers to determine Level 1 and Level 2 status. This change will remove the current ambiguity that may be present in some value chain situations and lead to the swifter resolution of any disputes. However, AIME has received evidence of concerns that these powers could be used to place responsibility for a L2 action on an L1 and to categorise support service companies that may not be registered as PRS providers as L2s. AIME seeks assurance that the intent of this change is not to create these situations.

We would also suggest that the safeguard of ‘reasonableness’ be imported into the amended: *‘where PhonepayPlus reasonably considers there to be a material doubt...’*. The Executive’s assessment in this regard cannot be absolute.

Consideration should also be given to adopting a discrete process for reviewing the exercise of such powers by the Executive, in accordance with core government and regulatory principles.

See also **Answers to PhonepayPlus Questions** (19) below.

9. Enforcement Track procedures and Tribunal Processes Reform

AIME is recommending a stay or delay to any changes to section 4 and other associated procedures in light of potential European and UK law anomalies identified in a recent High Court hearing and in other situations.

It is essential that PhonepayPlus has the relevant powers to deal with providers who create harm through deliberate or negligent actions, but it is the right of all providers to be dealt with in a way that is fair, reasonable and pragmatic, and can survive legal tests.

AIME is concerned about the increasing amount of litigation and legally focused challenges to PhonepayPlus procedures that serve only to increase costs, damage reputation and deter high brand worth entities from using PRS as an alternative payment mechanism.

There is no urgency for changes to Enforcement Procedures inside the 13th Code (this timetable being governed by NGCS related matters) and AIME recommends a detailed review of the complete suite of procedures, evidence presentation and the independence of the CCP from PhonepayPlus and within its own membership. PhonepayPlus should gain insight and guidance from relevant legal specialists, industry members and the outcome of any legal challenges currently in train. There is a significant risk that if changes are implemented following this consultation *before* the outcome of extant litigation, then the resultant Code will be out of step with any judgment and guidance from the Court, in which case the Code will have to be revisited *again* to be brought in line.

AIME welcomes a greater use of the Track 1 procedure and believes that this is the appropriate course of resolution and should be the default position in all instances where no or limited consumer harm has occurred.

Feedback received by AIME and observations made by AIME members on the conduct of enforcement procedures and tribunal procedures (including its independence) suggests that

an opportunity for a complete review exists now to ensure that the processes applied by PhonepayPlus do not continue to be tested through legal challenges by providers wishing to protect their business and their human rights.

Continued legal challenges and publicly available criticism of the processes deployed (as well as behind the scenes settlements), result in an undermining of PhonepayPlus's position to enforce against genuine polluters and increases the costs to the rest of the premium rate industry to support legal costs and settlements.

We are also concerned about the reluctance of new market entrants, particularly large businesses to invest on the perceived business risk.

As a result, AIME is recommending to PhonepayPlus that it stays all changes to enforcement procedures from the 13th Code consultation that would have a negative effect on providers (such as mandatory paper-based adjudication), and works with industry and legal specialists to review the complete procedures and application of the procedures to ensure that a proportionate, fair and legally robust system is proposed for a future consultation.

Given the severity of sanctions available to the Tribunal, the lack of rights in its eyes of a provider to gain full access to justice, we anticipate an increase in the use of injunctions, civil actions and judicial reviews.

AIME has commented on the proposed changes for this response, but would welcome the opportunity to discuss with PhonepayPlus moving these changes to a complete separate review when we will refer to M Law LLP's document as detailed earlier in this response.

See also **Answers to PhonepayPlus Questions** (13) below.

10. Access to Oral Hearings

Access to Oral Hearings is an issue which would benefit from further and deeper discussion and is indeed linked to the broader debate regarding Enforcement processes.

We request that this change be removed from the current 13th Code consultation and that no restrictions be made.

Most AIME members have not been, nor expect to be, subject to the Tribunal process. However, those that have been through the process have raised concerns about access to justice that would benefit from detailed consideration. These concerns carry particular weight as the proposed changes are not intended to decrease consumer harm, increase consumer protection, or lessen regulatory burden, but rather have a purely administrative justification.

AIME acknowledges and welcomes the fact that PhonepayPlus has already taken some steps to respond to feedback provided during the Call for Inputs. Namely, that providers will have an absolute right to an Oral Hearing, following a paper-based Tribunal and that an Oral Hearing may be granted in the first instance in exceptional circumstances but are concerned that this is solely at PhonepayPlus discretion. We believe that the situation should be the reverse: a provider should have the right to bypass the paper-based hearing should it wish, save in exceptional circumstances.

AIME remains of the view that the paper-based Tribunal is not necessarily the right format for more technically complex cases, nor appropriate for considering cases which carry substantial business risk due to the high financial sanctions available to the Tribunal.

In these instances an Oral Hearing would allow the provider to better explain the nature of the service and relevant factors. Within the Oral Hearing environment any misconceptions or erroneous conclusions are more easily identified and addressed.

AIME recommends at the very least that an independent party is solely responsible for assessing if an Oral Hearing request – as an alternative to the paper-based hearing - is justified, but highly recommends a removal of this requirement altogether.

It is acknowledged that any provider dissatisfied with a premise upon which a paper-based decision is formed may then seek an Oral Hearing. However, AIME supports the prevailing view of the providers concerned that such an Oral Hearing will not start from a clean slate and errors made during the paper-based exercise could enjoy a presumption of reasonability and therefore risk being repeated at the subsequent Oral Hearing.

AIME is also concerned around the independence of the Code Compliance Panel from each other and from the PhonepayPlus Board to ensure an Oral Hearing is heard afresh without any prejudgements.

We also refer to comments made in a recent High Court hearing concerning the burden of embarking upon a second process.

For greater detail on this particular point, we will refer to M Law LLP's document as detailed earlier in this response.

See also **Answers to PhonepayPlus Questions (17)** below.

11. Test for Reviews

AIME commends the changes to the criteria for seeking a review. AIME members universally support the proposal to introduce a rationale other than 'unreasonableness' as a legitimate justification.

Members are concerned around the possibility of double jeopardy if the Executive itself were to seek reviews and we seek assurance that this will not be the case. Given the financial and resource burden that a Track 2 case imposes on a company, at the very least, should the Executive seek a review, AIME would recommend that the standards of proof shift from "balance of probabilities" to "beyond reasonable doubt" so as to prevent the possibility of vexatious reviews.

We believe the new test for a review to be a positive step forward.

See also **Answers to PhonepayPlus Questions (16)** below.

12. Earlier Notice of Track 2 Investigations

AIME members wholly welcome receiving swift notification where potential service issues are identified. Early notification would support the 'pre-empt and protect' ethos, enabling providers, where concerns are justified, to correct services and minimise further consumer harm. AIME believes this will lead to improved consumer outcomes.

Some members have raised concern that the introduction of earlier notification could become a mechanism whereby consumer contacts, which would previously have been dismissed or handled as a Track 1 procedure, might now be escalated to Track 2 investigations. We trust that early notification is simply a change in reporting methodology and will not alter the PhonepayPlus triage process or lower the evidential standards upon which a Track 2 case is instigated. AIME's support for this policy is dependent on this supposition.

To clarify, when the decision is made as to whether a case should be allocated to Track 1 or Track 2, insufficient investigation has been undertaken: it is undesirable that the default position, in such circumstances, be Track 2, particularly where revenue withholds may be the result. We seek assurances to this effect, that the decision to implement a Track 2 procedure is not one to be taken lightly.

We are also concerned that fear of regulatory intervention on the Level 1 provider for not disconnecting the Level 2 provider will cause problems for the latter, potentially creating legal issues for PhonepayPlus.

For greater detail on this particular point, we will refer to M Law LLP's document as detailed earlier in this response.

13. Track 2 Withholds

AIME has given consideration to the proposal for the introduction of earlier withholds in Track 2 cases. We see some weight in the argument that earlier withholds may be justified in circumstances where there is strong *prima facie* evidence of both consumer harm that cannot be immediately corrected and a high potential for a provider to default on a subsequent fine and administration charges.

During the Call for Inputs we pointed out that Emergency Procedures are available when there is an urgent need to suspend a service to prevent further consumer harm. PhonepayPlus has responded that Emergency Procedures and the proposed earlier withholds are intended to serve different purposes. Therefore, by definition, the early withholds are envisaged in cases where there is no continuing consumer harm and thus not the same urgency to take action.

This explanation has met with increased concern by members as, by definition, this new power is only required for non-urgent cases where there is no continuing consumer harm. However, the sanction (a revenue withhold is viewed as a sanction as most providers are small and have very limited cash reserves) is severe, imposed prior to firm evidence of a breach, without independent review, without limit, without right to reply and without an appeal mechanism.

Without independent review, a right to reply and appeal mechanisms, the presumption of innocence must be retained; otherwise there may be Human Rights issues.

AIME would therefore support this policy only if:

- i) There is an initial review of the case by a Tribunal member with a formal published Withhold test to assess that sufficient *prima facie* evidence of breach exists, and that there are reasonable grounds to suspect that there is a strong potential for the provider to default should a fine and costs be awarded.
- ii) All evidence and arguments (even though they are provisional and skeletal) are made available to the provider in the form of an indicative breach letter so that errors and misunderstandings can be spotted and corrected.
- iii) There is a right to reply, a process for an appeals and regular reviews of the need for revenue withhold.

- iv) There is an agreed firm timetable for the conclusion of the investigation, beyond which the case should progress immediately to adjudication or the funds released. This could include time-bound withholds.
- v) The cumulative size of the withhold is capped from the onset, and that providers are permitted to replace the revenue withhold with a bond.
- vi) There is a facility for a provider who is subject to withholds to request a release of emergency funds for business-critical expenses – even if doing so keeps the withhold below the cap suggested in (v) above.

For greater detail on this particular point, we will refer to M Law LLP's document as detailed earlier in this response.

14. PhonepayPlus Budget Sign-Off

AIME is very concerned that PhonepayPlus, as a result to changes to the Memorandum of Understanding between itself and Ofcom, has proposed a change to rule 3.2 that removes the only party that can provide independent approval of the PhonepayPlus budget.

PhonepayPlus operates within a protected market, being neither subject to direct market pressures nor accountable to stakeholders, either directly or indirectly, as a public body would be. With no independent budgetary approval, PhonepayPlus becomes wholly unaccountable for its spending. This position is unhealthy for corporate governance and is unacceptable to the industry that has to fund the PhonepayPlus budget.

In the last two budget consultations, PhonepayPlus received industry responses pointing out that proposed budget levels were disproportionate to industry revenues, therefore incurring an increase in levy. Ofcom was the only backstop that controls future overspending. It is noted that the proposed three-year strategy indicated a desire by PhonepayPlus to move its role into other forms of micropayments. This proclaimed desire is outside of both remit and funding models and the removal of independent budgetary controls causes concerns that the PRS industry will be expected to fund this strategic change.

In the absence of Ofcom's governance over budget, another suitably independent and accountable body should fulfil the role. The Industry Members of the PhonepayPlus Industry Liaison Panel could be granted this responsibility, with formal sign-off authority enshrined in the Code.

In addition, the budgetary governance body should ensure that value for industry money, efficiencies and competitiveness are being achieved.

AIME would be happy to work with PhonepayPlus on the shape of the alternative budgetary approval body and this would need to be in place and ratified before Ofcom's control is relinquished through Code changes.

See also **Answers to PhonepayPlus Questions (20)** below.

15. Alternative Customer Support Arrangements

AIME members generally support greater flexibility in how customer service arrangements are handled. The use of additional channels for customer engagement and support are welcomed if they can provide the same or better levels of support. Certainly, digital services will benefit from on-line and email support mechanisms.

For voice-based PRS, most Members believe that customer service telephone numbers should be retained as their removal might adversely impact the consumer experience.

This proposed change may require changes to traditional database information such as PhonepayPlus number checker and networks' customer care support systems.

AIME recommends that the implementation of alternative support arrangements is kept under review in conjunction with developments made by the AIME and PhonepayPlus Consumer Journey workshops.

AIME would like to see a more robust approach towards developing and improving the current consumer support for post-sale billing enquiries as its failures create reputational damage for the industry and result in improper targeting of sanctions. Improvements should be supported by updated Guidance and appropriate penalties for those parties that consistently fail to adequately support their consumers.

See also **Answers to PhonepayPlus Questions (7)** below.

16. Registration Exemptions

AIME acknowledges that PhonepayPlus presently has powers through disapplication of the Code to exempt categories of service from registration (rule 3.4.2) and to exempt individual providers from any aspect of the code, including registration (rule 3.10.4 (a)).

We understand that the proposed changes are to support situations where disapplication would be impracticable due to the volume of registrants and where registration would provide no additional consumer protection benefit - such as the exemption for 0871 services.

AIME has significant concern if the revised policy is more generally applied or abused so that an unlevel playing field is created between providers, or if it introduces the perception that registering reflects negatively on a provider due to it becoming a tacit mark of high risk or bad practice.

AIME notes the PhonepayPlus assurance in our recent meetings that there is no intention for the policy to be liberally applied. On this basis AIME accepts the change with reservation of the right to revisit this policy in future if its application becomes detrimental to particular market segments.

At the appropriate time, AIME will want PhonepayPlus to elaborate on the impact this change will have on the Due Diligence responsibilities of other members of the industry when they contract with entities that have been exempted from registration. It would not be appropriate for the Due Diligence responsibilities of other members to increase in situations where PhonepayPlus has evidently decided that a certain class of provider is low risk.

See also **Answers to PhonepayPlus Questions (10)** below.

17. Changes to Subscription Services

AIME opposes the inclusion of subscription services under rule 3.12.2, linked to the requirements in 3.12.1.c (ii), which are mainly for live voice services. This creates a future

facility for PhonepayPlus to impose a new condition on subscription services that currently does not exist (even in £4.50+ services) and has not been consulted on.

Subscription services have their own unique characteristics and their own set of conditions for initiation, spend reminders and consumer-controlled termination, These conditions need to be detailed in a section separate from live services with the values for each condition detailed in an appendix.

If there are additional considerations for subscription services that require greater focus to resolve consumer issues, then these should be discussed with the industry and consulted upon in the normal manner. AIME works with PhonepayPlus on a number of issues-led topics and is happy to assist with subscription services as well.

See also **Answers to PhonepayPlus Questions (2)** below.

Answers to PhonepayPlus Questions

Q1. Do you agree with our graduated approach to caps on live services and the proposed points of intervention? Please evidence your response.

AIME does not support proposals for £15 spend reminders. The research findings relied upon to support the policy were based on pricing promotion that does not reflect the actual cost for non-BT users. Forthcoming NGCS changes also mean that the conclusions of the research will soon be redundant. The industry would not object to a positive opt-in at £30 to allow for an increase to £45, though the need for positive opt-in should be reviewed after a period of operation to determine whether it remains necessary for consumer protection.

We refer to current guidance on impact assessment reviews: where a measure gives rise to a burden on business, a review will establish whether, and to what extent, the requirement has achieved its original objectives and whether the objectives are still valid, whether the measure is still required and other options for achieving those objectives.

See also Sections 1 and 2 in **General Comments** above.

Q2. Do you agree with the new consolidated mechanism being introduced at 3.12 to govern spending caps and our proposal to sit the monetary values outside the Code? Please evidence your response.

AIME fully supports placing spend caps in a Code Appendix. However, considerable concern has been raised around including subscription services in this section. Subscription services have their own unique characteristics and their own set of conditions for initiation, spend reminders and consumer-controlled termination. These conditions need to be detailed in a section separate from live voice services with the values for each condition detailed in an appendix.

See also Section 17 in **General Comments** above.

Q3. Do you have any comments regarding the changes being proposed to the definitions listed above in response to Ofcom's NGCS review?

AIME has no objection to the definitions.

Q4. Do you agree with our proposed changes to Rule 2.2.1? Please evidence your response.

AIME supports the change to rule 2.2.1.

Q5. Do you agree with our proposed change to Rule 2.2.7? Do you agree with our intention to retain the level at which point this requirement is triggered at £3.83 plus VAT? Please evidence any response.

AIME has no objection to retaining the current spend points in connection with broadcast PRS. There is concern, however, that this is potentially a very broad term and could be interpreted to cover any form of online or mobile promotion and should not be allowed to creep into anything beyond traditional broadcast media.

**Q6. Do you agree with our proposed change to the vulnerability provision?
Please evidence your response.**

AIME has concerns about the current scope of the vulnerability definition, which is too broad and all-encompassing to be practically applied. With vulnerability so loosely defined we believe evidence of some systematic intent to exploit a specific vulnerability must remain the paramount criterion when considering a breach on these grounds. The regulatory focus should be on deliberate exploitation of people's vulnerability, not simply the fact that a vulnerable person may take part in a service of general appeal.

AIME submits that providing refunds for individual vulnerable consumers, based upon the circumstances, provides an appropriate and workable solution. AIME believes that to justify sanctions over and above providing a refund to the affected consumers, intent to target a specific vulnerability must be demonstrated. If intent cannot be proven on the balance of probabilities, we do not believe that a breach of the Code can be adequately shown to have occurred.

In instances where intent may be too difficult for the Executive to prove, we believe that in the interests of justice the case must be dropped, as a breach cannot rest on unsubstantiated assertions. AIME is strongly of the view that avoiding any possibility of a miscarriage of justice, which may see an innocent provider sanctioned, must remain of paramount importance.

AIME requests that (1) vulnerability be more tightly defined; (2) that it is cited only when vulnerability is (a) significant, (b) relevant to the alleged breach, and (c) specifically targeted; and (3) that the issue of vulnerability will not be directly linked or equated with 'bill shock'.

See also Section 7 in **General Comments** above and the subsequent detail contained in M Law LLP's document.

Q7. Do you agree with our intention to amend Rule 2.6.2 to make it more flexible and outcomes-focused? Please evidence your response.

The use of additional and alternative channels for customer engagement and support is welcomed if they can provide the same or better levels of support than the current telephony only support. Certainly, digital services will benefit from on-line and email support mechanisms. Voice service providers should continue to use voice based support mechanisms as it is appropriate for the channel under which the original service was consumed.

We believe that not all contacts with providers are complaints and the language should be changed to reflect the support requirement rather than just complaints.

We also believe that a second sentence should be added that says: "Networks and Level 1 providers must direct users to the Level 2's consumer support and complaints resolution process where this exists."

We suggest this wording;

Level 2 providers must provide an appropriate and effective consumer support and complaints resolution process which is accessed by the consumer in a similar manner to the premium rate service and is free or low cost. Networks and Level 1 providers must direct users to the Level 2's consumer support and complaints resolution process where this exists.

See also Section 15 in **General Comments** above.

Q8. Do you support the intention to maintain a one-off cap on children's services at £3? Please evidence your response.

AIME proposes the single transaction limit is set at £5 to enable PRS to be viable for many mainstream digital children's products currently on the market. The current limit has stood for many years and is overdue for review and should be centred on the level where harm could occur. The principle of a one-off spend cap at a more appropriate level is generally, though not universally, supported.

As with vulnerability, we note general concern in the industry around the lack of clear definitions for children's services. The proposed definition of "services aimed at, or which should have been expected to be particularly attractive to children;" is too wide, lacks clarity for practitioners and leans unfairly towards accidental targeting. AIME requests a non-subjective definition that is not simply determined by the regulator without reference to independent advice and evidence.

See also Sections 3 and 4 in **General Comments** above.

Q9. Do you support the introduction of a cumulative cap on children's services? And if so, should this be set at £12, £20 or an alternative amount per month? Please evidence your response.

We support £20 but AIME has concerns about the technical feasibility of a cumulative spend cap across different services from the wide range of Level 1 and 2 providers. We also feel the principle of a parental override should be allowed to permit a spend limit to be exceeded. And, if in future the existence of parental overrides becomes a legal requirement, the presumption should then be that cumulative caps for children's services will be eliminated.

See also Section 3 in **General Comments** above.

Q10. Do you agree with the proposed changes to allow for greater flexibility to exempt services or providers from registration? Please evidence your response.

AIME supports the proposal as long as this power is used extremely rarely. If there is a benefit to registration then there should not be a need to exempt people from it. The creation of a two-tier system is opposed on the basis that it creates an uneven playing field.

AIME has significant concern if the revised policy is too liberally applied or abused so that an unlevel playing field is created between providers, or if it introduces the perception that registering reflects negatively on a provider due to it becoming a tacit mark of high risk or bad practice.

See also Section 16 in **General Comments** above.

Q11. Do you agree with our proposed change to Paragraph 3.3.3 (b)? Please evidence your response.

AIME believes the change to rule 3.3.3 (b) requires some additional context to clarify the “relevant terms”. We therefore propose it should read “the term(s) of that contract relevant to Rule 3.3.3(a).” AIME supports the principle of the changes to paragraph 3.3.3 (b).

Q12. Do you agree with our proposed change to the requirement to register numbers? Please evidence your response.

To support the consumer journey AIME believes it is appropriate that numbers are registered with PhonepayPlus in good time to enable the number checker to remain accurate. AIME has no objection to the proposal that numbers are registered within two days of the service going live; similarly, for other forms of support.

It should also be recognised that the registration pages on the PhonepayPlus website do not make the inclusion of Level 1 details mandatory; however, Rule 3.4.14(a) says that these details **are** mandatory. We suggest removing the requirement to report “any Level 1 providers concerned”. First, this is not required from a customer services point of view and may confuse the consumer. Second, this information is requested (and supplied) with the first RFI relating to the service. Third, the current stance of the PhonepayPlus website contradicts this rule.

AIME is fully supportive of providing correct information to consumers to enable a greater degree of self-help to prevent “enquiries” becoming “complaints”. We have pointed out to PhonepayPlus that the current website has become outdated in its assistance for consumers who have used services that are billed without PRS numbers (direct billing). AIME has volunteered help to PhonepayPlus with updating the website information and support and this becomes even more relevant when non-telephony forms of support are being offered.

Q13. Do you agree with the changes we propose to the Track 1 and 2 procedures? Please evidence your response.

AIME has commented on the proposed changes in this response (see Section 9 of **General Comments** above) but is recommending a stay or delay to any changes to section 4 and other associated procedures in light of potential European and UK law anomalies identified in a recent High Court hearing and in other situations.

It is essential that PhonepayPlus has the relevant powers to deal with providers who create harm through deliberate or negligent actions, but it is the right of all providers to be dealt with in a way that is fair, reasonable and pragmatic, and can survive legal tests.

AIME is concerned about the increasing amount of litigation and legally focused challenges to PhonepayPlus procedures that serve only to increase costs, damage reputation and deter high brand worth entities from using PRS as an alternative payment mechanism.

There is no urgency for changes to Enforcement Procedures inside the 13th Code (this timetable being governed by NGCS related matters) and AIME recommends a detailed review of the complete suite of procedures, evidence presentation and the independence of the CCP from PhonepayPlus and within its own membership. PhonepayPlus should gain insight and guidance from relevant legal specialists, industry members and the outcome of any legal challenges currently in train.

AIME welcomes a greater use of the Track 1 procedure and believes that this is the appropriate course of resolution and should be the default position in all instances where no or limited consumer harm has occurred.

See also Section 9 in **General Comments** above.

Q14. Do you agree with the proposed change to 4.4.6 (now 4.4.7) to ensure the effective retention of revenue made from harmful services and prevent abuse of the review and oral hearing processes? Please evidence your response.

As detailed in Section 13 in **General Comments** above, while in agreement for the potential fine and administrative charges to be held pending Tribunal for deliberate breaches of the code, we are concerned that without supporting processes, the financial health of a legitimate provider could be jeopardised and in doing so, their legal rights at stake. There needs to be an element of accountability in respect of the serious decision to impose a withhold. AIME would therefore support this policy only if:

- i) There is an initial review of the case by a Tribunal member with a formal published Withhold test to assess that sufficient *prima facie* evidence of breach exists, and that there are reasonable grounds to suspect that there is a strong potential for the provider to default should a fine and costs be awarded.
- ii) All evidence and arguments (even though they are provisional and skeletal) are made available to the provider in the form of an indicative breach letter so that errors and misunderstandings can be spotted and corrected.
- iii) There is a right to reply, a process for an appeals and regular reviews of the need for revenue withhold.
- iv) There is an agreed firm timetable for the conclusion of the investigation, beyond which the case should progress immediately to adjudication or the funds released. This could include time-bound withholds.
- v) The cumulative size of the withhold is capped from the onset, and that providers are permitted to replace the revenue withhold with a bond.
- vi) There is a facility for a provider who is subject to withholds to request a release of emergency funds for business-critical expenses – even if doing so keeps the withhold below the cap suggested in (v) above.

We refer to government policy on (i) small and micro businesses, and (ii) the review of measures which impose a burden on business, in support of our recommendations.

AIME has concern over the use of the word “harmful” as this pre-judges the outcome of a review and therefore indicates to industry the futility of the review. AIME has no objection to the principle of the change to rule 4.4.6 if the wording was changed so that it does not “criminalise” the provider and therefore breach their human rights.

See also Section 13 in **General Comments** above and the subsequent detail contained in M Law LLP's document.

Q15. Do you support the changes proposed to 4.5.3? Please evidence your response.

AIME does not support the changes to rule 4.5.3. An Emergency Procedure is a serious sanction imposed prior to the Level 2 provider seeing the evidence and answering the charges. We do not see the need to limit the ability of Level 2 providers to question this sanction – especially given that the main effect of the proposed change would allow the Executive to ignore meaningful and compelling evidence that they deem could have been raised within two days of the EP being invoked. AIME is supportive of any measure to promote constructive discussion between providers and PhonepayPlus.

An Emergency Procedure is an extremely disruptive action. The management team at the Level 2 provider will have to take an extensive range of drastic actions to prevent their company from immediately becoming insolvent; this will place resource constraints on collecting evidence to counter the claims made by the Executive that may contain evidential errors.

Regardless of whether this change is implemented, AIME believes that there must be a requirement for the Executive to make available all evidence they have against the Level 2 provider at that point: all draft monitoring evidence, all skeleton arguments for the eventual breach letter, all correspondence and verbal discussions with CCP members. Given the severity of Emergency Procedures, AIME believes this is necessary for Level 2 providers to retain any access to justice.

As has been publicly stated, the use of an Emergency Procedure where the provider is able to be contacted and given an opportunity to immediately resolve the stated issue does not constitute “gradient measures” that should be deployed and may breach UK laws. Emergency Procedures should become part of the Enforcement Procedure review recommended by AIME to ensure that EU and UK laws are not breached.

We refer also to M LAW LLP's forthcoming detailed document on this point.

Q16. Do you agree with the changes being proposed to reviews? Please evidence your response.

AIME suggests that in relation to rule 4.7.3 the person assessing the review request should be independent of the original adjudication panel, to prevent bias.

AIME is otherwise supportive of the changes to the review process, which we believe will lower the barrier to seeking a review and produce a fairer process overall. AIME is concerned that the PhonepayPlus Executive could utilise this lower barrier to exercise reviews on cases that have not fallen in their favour and we would see this as vexatious and against the spirit of the change to 4.7.3 and seek assurance in this regard.

Q17. Do you support our intended changes to oral hearings? Please evidence your response.

AIME does not support the proposed changes to Oral Hearings. AIME has significant concerns that introducing a restriction to the accessibility of the Oral Hearing facility may adversely impact access to justice.

AIME does acknowledge revisions to the proposal since our response to the PhonepayPlus Call for Inputs which aims to make the Oral Hearing accessible to all providers at some point in the process, and in exceptional circumstances the paper-based hearing may be bypassed.

AIME is concerned that the decision to allow an Oral Hearing as the first hearing rests solely with the Chair of the CCP and, at present, this position is not independent enough for the Chair to assess the request with full neutrality.

AIME's additional concern is that any factual or interpretive errors in the paper-based hearing may bias a subsequent Oral Hearing as the members of the CCP are not truly independent of each other or of PhonepayPlus. This revision to policy may not survive legal testing.

See also Section 10 in **General Comments** above and the subsequent detail contained in M Law LLP's document.

Q18. Do you agree with the changes to the appeals process? Please evidence your response.

AIME has no objection to the change of name from 'Body' to 'Tribunal'.

AIME has concern about raising costs, which may prevent smaller providers from accessing justice. We believe the impact of this change should be kept under review.

Q19. Do you agree with the changes planned to 1.7.2, 5.2.1 and 5.3.8 (c)? Please evidence your response.

We welcome changes to 1.7.2, 5.2.1 and 5.3.8 to introduce clarity on the potential regulatory overlap with the jurisdiction of other EU member states.

Q20. Do you agree with our proposed change to Annex, paragraph 3.1? Please evidence your response.

No, we do not agree. AIME has substantial concerns that PhonepayPlus is proposing to remove Ofcom from budgetary oversight of PhonepayPlus without an alternative independent budgetary control body being appointed. With no independent budgetary approval, PhonepayPlus becomes wholly unaccountable for its spending. This position is unhealthy for corporate governance and is unacceptable to the industry that has to fund the PhonepayPlus budget. In the absence of Ofcom's governance over budget, another suitably independent and accountable body should fulfil the role. The Industry Members of the PhonepayPlus Industry Liaison Panel could be granted this responsibility, with formal sign-off authority enshrined in the Code.

See Section 14 in **General Comments** above.

Q21. Do you agree with our new approach to existing prior permissions regimes? Please evidence your response.

AIME agrees with the new approach to administering higher risk services and the migration of Prior Permission to reference Special Conditions in the Code, thus making these provisions more prominent. We hope to see appropriate industry representatives fully involved in the scoping of the requirement assigned to each category of service and in drafting any supporting guidance.

AIME does not support the inclusion of subscription services in the section otherwise dedicated to live voice services. To achieve clarity, the special conditions for subscription services must be contained in a unique section of their own containing their own unique requirements such as an initiation message, reminders and a Stop command. The current proposal allows for PhonepayPlus to apply new forced-termination conditions without consultation and we cannot see the motivation for enabling this future power.

See Section 5 in **General Comments** above.

Q22. Is the process of implementing the new regime clear?

AIME believes the process as outlined is generally clear and will assist PhonepayPlus in its implementation of service specific conditions.

However, AIME has concerns over the positioning of subscription services in the wrong section as discussed above.

AIME would also propose within the context of rule 3.11.1(a) that “consumer harm” is contextualised. Often PhonepayPlus appears to automatically equate the number of complaints with the level of consumer harm. Although complaints may indicate apparent consumer harm, one type of service might attract more complaints than other types due to volume of usage or a characteristic of the consumer usage.

At rule 3.11.1(a) we would like PhonepayPlus to elaborate with examples that compare the number of complaints with the volume of usage.

We accept that PhonepayPlus has the right to investigate every complaint, even if there is only one. However, Special Conditions should be reserved for services that run a higher risk of consumer harm through objective and transparent measures.

We also feel that there needs to be clarity of language used in 3.11.1 where it refers to “category” of PRS and then “high risk service” as the same thing. A category and a service are different items. We would prefer to see language consistency to ensure clarity.

Q23. Do the three illustrative examples attached to this consultation at Annex 2 help explain how we intend to implement this new system?

Specific provider comment should be sought on each service category to agree the final detail. AIME feels the illustrative examples are a good foundation.

Q24. Are the 24 special conditions fit for purpose? Have we missed anything?

AIME sees potential problems with the following conditions:

Annex 2: Special Conditions (H). “Close proximity” may be very difficult to define for online marketing.

Annex 2: Special Conditions (R) introduces the right of access to premises. The illustrative example includes the concept of reasonable notice. The new special condition does not. We believe this should be reinstated.

Annex 2: Special Conditions (T) introducing revenue withholds as a matter of course is extremely contentious, especially given that the same result can be achieved with (U) a bond

Annex 2: Special Conditions (V) introduces a one-member CCP panel. We believe this change should be specifically consulted upon.

Q25. Do you agree with the insertion of this Rule at 2.1.4? Please evidence your response.

AIME agrees with the principle that providers hold all appropriate professional licences required by law and qualifications appropriate for the service being operated and supports rule 2.1.4.

We would not support a requirement to substantiate this except in the case of a formal investigation. AIME would generally see primary responsibility for enforcement sitting with the relevant licensing body or legal authorities.

Q26. Do you agree with the changes to 4.8.2? Please evidence your response.

AIME is supportive of this change to refund arrangements to allow for targeted refund directions to be made.

See also Section 6 in **General Comments** above.

Q27. Do you agree with the change being proposed to the naming of individuals provision? Please evidence your response.

AIME has no objection to amending the term ‘named individual’ to ‘associated individual’ to align with terminology used elsewhere in the Code but we emphasise the continuing need for clarity on the scope of the definition.

Q28. Do you agree with the proposed change to 4.9.3? Please evidence your response.

AIME does not object to increasing the window in which the direction for refunds can be made from three months to four months.

Q29. Are there other areas of change that we have not considered here but should? If so, please provide appropriate evidence of the likely impact of the change.

We would like to see a review of administration costs to allow for a *pro rata* reduction in the application of costs where certain breaches are not upheld. We also feel it appropriate that providers have the facility to reclaim their costs from PhonepayPlus in circumstances where the alleged breaches have not been upheld.

See Section 6 in **General Comments** above.

Q30. Do you agree with our assessment of the potential impact of the changes proposed to the Code in this consultation? Please provide appropriate evidence to support any assertion.

AIME has no objection to or comment on the impact assessment.

Q31. Do you have any comments about the contents of this document? Do you agree with our overall approach to the thirteenth edition of the Code? Have we neglected anything?

AIME has outlined above where we have concerns with the current Code - in particular the enforcement processes, which we feel require reform to ensure access to justice and remove the issues that can cause further legal challenges.

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://www.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