

Mark Collins  
Head of Policy Projects  
PhonepayPlus 25th Floor  
40 Bank Street  
Canary Wharf  
London E14 5NR  
By Email to [consultations@phonepayplus.org.uk](mailto:consultations@phonepayplus.org.uk)

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## **Consultation**

# **PRS development through outcomes- focussed regulation: A Review of PhonepayPlus' regulatory framework**

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

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## **Background - AIME ([www.aimelink.org](http://www.aimelink.org))**

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

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 consumer and business media.

We are the only UK trade association with membership across all elements of the interactive media and entertainment value chain. Our membership represents in excess of 80% of 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 should be perfectly placed to exercise their freedom of choice and thereby enjoy the most effective form of consumer protection.

To this end, we do not support the predetermination of products that are made available to consumers or pricing of those products or even the length of time that a consumer can enjoy those products provided the consumer has made their choices freely and knowingly and that vulnerable consumers are adequately protected.

## **The Task**

PhonepayPlus have asked AIME and its members to contribute to a review of their regulatory framework consultation.

AIME welcomes the opportunity to respond to PhonepayPlus Consultation on its proposals for developing the regulatory framework to ensure that the regulation of premium rate services and premium rate charging mechanics is fit for purpose as consumers and their surrounding technologies evolve.

## Considerations

AIME has worked extensively with PhonepayPlus senior management over the last three years to assist in the evolution of the application of regulation and is enjoying a peak of the relationship that will benefit both industry and regulatory evolution.

### **Regulator intervention to aid growth**

AIME's role is to promote the commercial health of its member companies and to set out the environment for growth. Overly complex regulatory environments stifle growth and remove innovation, and so our role extends to guiding regulatory simplification.

We also understand that services and promotions that cause consumers to make inadvertent purchases or create charges without the consumer's permission damage existing industry mainly through increased rule sets to deal with the miscreants which in turn stifles growth.

In these situations, where our members business is being impacted by companies operating on the edge of acceptability or even fraudulently, we look to the regulator for a robust response. However, we expect correctly targeted, accurately detailed and proportionate response.

This is a difficult task to administer and AIME has full empathy with the difficulty of the regulatory role which is why we dedicate significant resource to provide assistance.

### **Current complexity hindering growth**

Our members, operating at the top of the value chain also expect regulatory intervention to protect their consumers and have developed their own regulatory environment as a layer on top of the existing statutory regulations to fill the gaps. Unfortunately, this creates a complex and multifaceted regulatory environment which would deter most companies from entering the premium rate environment particularly when competing payment environments are becoming increasingly ubiquitous across consumers.

The complexity of the regulatory environment means that the payment mechanism is attractive to small companies and innovators but is a deterrent to larger companies. While we fully support – and have as members – small companies and innovators, we also wish to see a broad mix of companies to ensure consumer awareness and usage of the charging mechanism becomes more mainstream.

### **Allocation of risk scores to individual businesses**

We are pleased with the proposals on the taxonomy of risk and on the disapplication of the Code for certain providers or certain services, but we do not agree with a blanket categorisation of services into a “High Risk” container particularly when risks are already mitigated.

The categorisation of “High Risk” is a deterrent to any company who is risk adverse. Therefore we urge a reconsideration of the need for naming any service category as “High Risk” instead of service categories that require Special Conditions. This would require an amendment to the 14<sup>th</sup> code in 18 places, but will encourage larger businesses to operate certain services.

We believe that the work put into the Taxonomy of Risk should be extended further to define when services through their very nature, through the consumer recognition of the provider or through their own risk mitigation present low risk.

The Taxonomy of Risk should be used for both ends of the spectrum.

### **Weighting risk factors**

We would like to see weighting placed on the risk categories. Most consumer calls to networks and regulators are as a result of charging with a miniscule proportion for other factors alone such as passing off or unreasonable offence. Usually, these other factors are mentioned while the consumer is complaining primarily about the charges. Therefore a high weighting on cost and recognition of a charging environment should be applied and a lesser weighting on other risk factors.

One of the most common themes of consumer complaints is that they have no recall of the purchase. The reason for this lack of recall, fragments into several strands ranging from lack of recall of a legitimate purchase at one end to unauthorised charging at the other. We believe that a weighting should be applied to the factors that cause lack of recall. A subscriber entering a competition by sending a text is more likely to recall the transaction than a subscriber clicking a button on a web page. Therefore the methodology of the lead up to the payment aspect of a service has to govern the risk related to uninformed consent.

We do not think that unauthorised consent has a home in taxonomy of risk. In designing services a provider may agree that his services have a high cost as part of the design, but we should not recognise lack of robust consent to charge as part of the design activity other than for intentional fraud. We do however agree with PhonepayPlus view that more education of the industry is needed to help understand what “robust consent to charge” looks like so that deliberate scams can be prevented by parties further up the value chain.

As with all good risk assessment procedures, risks are weighted and the applied mitigations then remove or reduce those risks. When all risks are considered and mitigated, then the remaining risk score determines if the service is still a risk or not. Through these mechanisms there would be no necessity to categorise any services as “High Risk” as this would demonstrate that the mitigations have failed.

## **Methodology - Member Input**

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

- Written input from Members
- One-to-one discussions
- Discussions inside AIMEs Board and Member Working Groups

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

- Fixed Line Networks, Fixed line L1 and L2 providers
- Mobile Networks, Mobile L1 and L2 providers
- Broadcasters
- Charities and Charity enablers
- Industry Support companies

AIME sought responses from Members from all of the represented PRS industries and experienced mainly consistent views. In parallel with this consultation, the Mobile Operators issued their own consultation pivotal on an evolution of the mobile payment facilities and the cross network payment scheme to ensure it adequacy for proportionality across the spectrum of services and merchants. Members were very keen to ensure that the two Projects (Project 30 and Project Slimline) dovetailed into each other.

## **Specific Comments on the Consultation Questions**

### **Q1: Do you agree with our view that the current Code of Practice offers sufficient flexibility to address barriers to growth in the PRS market, without reducing consumer protection?**

Yes. The current code is an outcomes based code with six measurable outcomes. That gives PhonepayPlus the flexibility to work with providers to achieve the desired outcomes. If services do not completely meet outcomes then resources should be allocated to identify why the outcomes are not being met and to identify appropriate mitigation to enable successful outcomes.

The code also allows for services to fall under special conditions when outcomes cannot be achieved otherwise. These conditions allow for appropriate mitigation measures to be applied.

It is clear from research that in an entirely online purchase flow, many consumers are unaware of the fact that they can be charged and as a result are off-guard. They also do not read the charging information and can press buttons in fast browsing mode without understanding consequences. These weaknesses have been demonstrated in research, albeit from a small focus group. Mitigation steps are needed to overcome these weaknesses as they are exploitable by providers of services and their affiliate partners to maximize conversion to the detriment of consumers and in doing so, create industry impact through increased regulation.

The research demonstrated that the Payforit two-click design suffered from this weakness. It is useful to note that Payforit could have been redesigned to add appropriate friction to the services that generate high call traffic. This alternative approach is also within the scope of the Code. Although it requires collaboration of the Mobile Network Operators who also suffer from high call rates, this might have been the more proportionate and targeted response.

**Q2: Are there barriers to growth which exist in legislation and regulation other than the PhonepayPlus Code? Please identify them along with any arguments or evidence you have as to why a change would be desirable.**

Statement 1.18 asserts that the “Complex payment experience driven by riskier service types” is primarily within the remit of industry stakeholders. We disagree with this assertion.

The current payment experience evolved in response to a perception that there is a lack of appropriate control over providers who exploit weaknesses in the Code. This perception believes that robust application of the Code would have meant that the payment experience did not have to evolve to cover every loophole exploited by a small number of parties to the detriment of the larger industry and of growth.

It must be recognised that the Code evolved from a time where the service consumed by the consumer and the charging for the service were intrinsically tied, usually through a premium rate voice call. As such, the Code covers advertising, product supply, charging and post sale marketing and service.

To encourage industry growth, new merchants will need to come from environments that currently use other forms of payment such as credit / debit cards and emoney. These companies are used to different regulators for different aspects of the supply to the consumer, ranging from ASA for advertising, FCA for the charge, ICO for post sale marketing, Trading Standards for product supply etc.

While the concept of a one-stop-shop regulator may seem attractive, it has its down sides. The consequences of breaches of different part of the user experience (probably rightfully) attract different levels of sanction. Get advertising wrong and the ASA will name and shame you, whereas PhonepayPlus could apply a significant fine.

In an ideal world the same advert for the same product using a different charging mechanics should result in the same sanctions ... for the same breaches. It is not entirely clear that this is currently the case.

It is therefore critical that the regulatory overlap map is provided and that regulatory sanctions are normalised.

In addition to harmonising sanctions, it makes sense to harmonise perspectives.

We have encountered “unwritten” parts of the Code, whose very existence diminishes regulatory certainty. Members report being told that their service proposal breaches the code without

reference to specific provisions. We have seen this in PPP comments made inside AIME provided documentation.

To provide certainty, the Code (together with Guidance) must standalone. Ideally there should be outcome measures to demonstrate objectively whether a service is failing.

If a provider follows the code but cannot achieve the outcomes, then the provider and PPP need to engage to understand why and to mitigate identified issues.

Several members have commented on the difference in interpretation between Consumer Contracts Regulation when applied for distance sold products and PPP's interpretation. While these differences remain, a provider cannot achieve regulatory certainty.

While on this topic we would like to draw attention to the fact that previously we have drawn attention to cases when PPP staff members (and PPP Guidance) have made assertions about the requirements of other regulators without basing these assertions on any factual data.

We therefore believe that it is critical to industry growth and certainty that PhonepayPlus work with other regulators to harmonise interpretations and sanctions, and to ensure that a consistent view is expressed by all regulators with an interest in a given topic.

### **Q3 – Do you agree with the Taxonomy of Risk Characteristics proposed above as objective assessment criteria? Please give reasons, including for any changes or additions you would like to propose.**

Largely we support what has been included in the Taxonomy of Risk. We would propose two additions.

First, we believe that the method of promotion and service discovery should be included. Affiliate marketing has some way to go to stamp out bad practice, and it must be acknowledged that most issues currently arise through online promoted and discovered services, particularly on smartphones and particularly through social media promotions. Currently services that are promoted through broadcast media channels suffer less bad practice and thus represent reduced risk.

Second, the relationship that the consumer has with the provider of the service is also important. Consumers are comfortable with engaging with unknown brands as long as they feel protected at the payment part of the transaction (ecommerce research). Consumers who engage with known brands do not worry as much about the payment part of the transaction as they trust the brand.



We recognise that regulation cannot unnecessarily disadvantage innovation, which likely will not yet be a recognised consumer brand. Careful balance is required here.

As stated before, we do not believe that unauthorised charging has a place inside risk assessment criteria as it should not form part of the design of a service by a merchant.

**Q4 – Do you agree with our proposed Risk Assessment Process? Please give reasons, including for any changes or additions you would like to propose.**

Taxonomy of risk forms part of a risk assessment process but is not the entirety of such a process.

Risk assessment starts with taxonomy. At this stage certain services can be excluded as having zero or low risk. As an aside, this is a natural point at which the risk taxonomy can be extended to define low risk service types requiring proportionately lower regulation. To this end we would encourage PhonepayPlus to identify code requirements that are available for disapplication, identify the risks that required these code requirements, and thus by extension begin to map the sorts of services that would be eligible for disapplication.

For those services which are not zero or low risk, each criteria item should have a weighting based on the risk of consumer harm. In addition, each criterion should consider the full range of mitigation that would remove or reduce the risk either prescriptively or merchant defined.

Arguably, Special Conditions are specific prescriptive mitigation steps. Therefore, each Special Condition should tie back to an unmitigated risk or set of risks. And, each Special Condition is available for disapplication if other forms of mitigation are effective.

Given the above, there is no need to categorise any service as “high risk” as the Special Conditions will have been designed to mitigate those risks

**Q5 – Do you agree with the conclusions of our application of the new Risk Assessment Process to existing Special Conditions regimes, and the proposals to remove the current regimes around Consumer Credit and Remote Gambling regimes? Please give reasons, including for any changes or additions you would like to propose.**

We agree that the existing Special Conditions should always be reviewed to establish if the risks still remain and if the mitigations are current. Having a set of special conditions for services that no

longer exist or where the issue has been removed by other factors would seem wasteful, however reviewing these Special Conditions may not generate a return on the time investment.

We support the removal of special conditions related to Consumer Credit and Remote Gambling as the risks are already mitigated through other regulatory environments.

We would like to see as detailed above, other factors built into the risk assessment process, weighting of these factors and the requirement for mitigation of the risks. The Special Conditions provide mitigation, but they must match the risks and demonstrate how each risk is mitigated and how the risk / mitigation balance can be measured.

For example, one issue with Pay-per-view services as detailed in *Regulatory Framework Policy Paper Annex B* is the high cumulative spend by consumers as evidenced by complaints. The Special Conditions reference information to be provided to consumer and requires a spend receipt on each charge. This does not demonstrate how the risk has been mitigated when research shows that consumers ignore text receipts when they do not believe that they **can** be charged.

As a result of the policy change to introduce a Risk Assessment process, we believe that each special condition should be reviewed for:

- Presence of the service type in the market and if dormant, then the review should cease.
- Demonstration how each special condition mitigates which risk(s) and to what extent.

We can see that the analysis has been performed, but it is unclear in our view how some of the conclusions have been reached.

We would also request a change to the Code starting at 3.11.1. The definition of “High Risk” has been placed on services that can cause unreasonable offence, but is then used thereafter for services that are or can produce a level of consumer harm.

We recommend that this is renamed (“Services requiring special risk mitigation”) and defined to apply to both 3.11.1 (a) and (b).

## **Q6 – Do you agree with our proposed Exemptions process? Please give reasons, including for any changes or additions you would like to propose.**

In broad terms, we agree with the proposals, but caution on applying exemptions for individual companies or services that can provide a competitive edge to that company. This would put PPP into the position of being subjected to lobbyists without the resources to deal with them.

We would like to see the risk assessment process being used by the providers of services to demonstrate how risks are being mitigated and the approach by PPP should be to treat the request for disapplication of the code as positive and not suspicious.

We must insist however, that fully auditable performance measures are put in place (KPI's) that track consumers' response to the service subject to an exemption. KPIs are part of any well structured risk assessment process as they inform on risks that emerge after the assessment has been performed.

**Q7 – Do you have any comments on, or suggested additions to, our list of areas where we might consider exemptions in the near future?**

We have already started work on proposing changes to the Special Condition for recurring charity donations. This will be focussed primarily on existing donor experience and reports of confusion plus a full risk assessment on the proposals.

We have some members whose business activity is focussed on consumer brands, who would look to take on most of the premium rate regulatory responsibilities of the L2 to provide a payment technology neutral environment for their clients. We anticipate that this will extend if the risk to the provider can be predictable.

**Q8 – Would a map of the digital payments regulatory landscape, setting out the intersecting remits and scope of different regulators, be of value? Please provide the rationale behind your answer.**

We believe this will be of significant value to both PhonepayPlus and the industry, particularly as set out in this document, the risks to industry members varies significantly dependant on the payment platform for the same service. We would see this as a forerunner to work needed to understand how other regulators react to consumer issues to provide a normalisation across parallel environments. Our example of an advertising breach detailed earlier for the same product, charged using different payment mechanisms can vary between a letter advising of the breach and corrective action, and a significant fine.

## **Q9 – Would a joint working group of regulators, to consider and provide a joint response to questions of regulatory overlap, be of value?**

We feel that this would be of value, but an objective needs to be set.

Our recent work with the UK Primary Authority on Consumer Contracts Regulation (CCR) demonstrated an intransigence to accept another regulators viewpoint.

We were also disappointed that the guidance detailing the parallel regulatory requirements between CCR and PPP, (which we believe would have significantly helped industry) had to be removed on Ofcom's insistence. We were also disappointed with PPP commentary that screen samples demonstrating CCR compliance were in breach of PPP's code.

It therefore would be useful to know the objective of any such meeting and whether all regulatory participants were entering discussions open to the possibility of relaxing their own views. Note: Almost by definition it is easy for regulatory participants to be open to strengthening their existing regulatory regimes.

## **Q10 – Which regulators should we invite to take part in such a group, and why?**

We note that Trading Standards, despite the Primary Authority scheme set out by BRDO and despite them upholding significant parts of consumer protection laws are mentioned only in brackets and question why they would not feature amongst the list of regulators to invite to a working group.

Advertising Standards is another area which might benefit from consistency of approach.

Again, we would like to emphasise that working with other regulators does not automatically mean that the regulator with the more relaxed regime defers to the regulator with the strong regime where there is overlap. Instead, where there is overlap, we would look for a genuine review of the differences in approach to see whether a stronger approach is still justified.

If in contrast it is felt by both regulators that a stronger approach is required (e.g. for affiliate marketing) then (in this example) PhonepayPlus should encourage the ASA to take a more robust approach regardless of payment mechanic.

## **Q11 – We would welcome any comments on the scope and approach of a joint monitoring capability.**

We fully support the efficiencies that a joint monitoring facility can provide on the understanding that this will be used to understand common consumer journeys and that the information it provides will be used to work with the advertisers (L2's) and their L1's to improve the consumer experience.

We would not support a return to reaching into the dark corners of the internet to discover issues as these are not common consumer journeys and are highly likely to throw up issues that distort the findings.

To this end, if any monitoring is ultimately used as evidence, we would expect the CAP to be informed of the percentage of monitored journeys leading to that service that suffered from non-compliance and for sufficient information to be passed to the L2 Merchant so that they can calculate the percentage of revenue affected by the non-compliance.

A monitoring facility must be able to visit multiple sites and record journeys. These recordings can be used to match with consumer complaints to be able to analyse why a seemingly normal journey can generate a complaint. As consumer recall of their purchase seems to be the most aggravating factor behind a complaint, a visual recording of the purchase experience may help PPP handle the call to conclusion.

We also would expect a joint monitoring facility to provide information to our MNO members in a transparent fashion and the results discussed in a working group designed to develop pragmatic (and testable) solutions to industry wide issues.

Finally, we trust that monitoring will be used to advise L2's that they have advertising issues in a timely fashion to enable quick intervention?

## **Conclusion**

We fully support PhonepayPlus efforts to provide an environment for industry growth and our observations on the proposals will hopefully help to focus PhonepayPlus direction on policy changes. We believe that the excellent work on the "Taxonomy of Risk" needs further refinement to provide an excellent tool for defining risk and establishing mitigation. With this tool, low risk becomes clearly definable enabling disapplication of Code requirements using objective measures and ongoing performance indicators.

To develop industry and realise the potential benefits discussed by the Juniper and Deloitte reports, PhonepayPlus has to view mobile charging as just another payment mechanism with the potential added risk of its "frictionless" and age neutrality, and thus harmonise the application of regulation by other regulators involved in other payment mechanisms.

We would be supportive of further workshops to assist with this policy development based on our comments inside this document.

### **Close**

We assure you that, as ever, our comments are made constructively and with the intent of achieving an effective, fair, economical and proportional regulatory regime for premium rate charged 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 the AIME office via [regulatory@aimelink.org](mailto:regulatory@aimelink.org)

Sincerely

AIME