

Miss Kelly German
In-House Counsel
Phone-paid Services Authority
25th Floor 40 Bank Street
Canary Wharf
London E14 5NR
18th May 2017

CONSULTATION RESPONSE

CONSULTATION ON PROPOSALS TO
ENHANCE THE EFFECTIVENESS OF
SANCTIONS IMPOSED BY PSA TRIBUNALS
ON NON-COMPLIANT PROVIDERS

SUBMISSION BY ASSOCIATION FOR
INTERACTIVE MEDIA AND
ENTERTAINMENT (AIME)

ABOUT AIME

The Association for Interactive Media and Entertainment (AIME) is the specialist 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.

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 the annual industry Premium Rate 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.

MEMBER INPUT

AIME welcomes the opportunity to respond to the Phone-paid Services Authority (PSA) Consultation on proposals to enhance the effectiveness of sanctions imposed by PSA Tribunals on non-compliant providers.

To assist AIME in providing a comprehensive input to Phone-paid Services Authority, AIME researched its Members in the following manner;

1. Written input from Members
2. One-to-one discussions

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 with Fixed line L1 and L2 providers

- Mobile Networks with Mobile L1 and L2 providers
- Broadcasters
- Charities and Charity enablers
- Industry Support companies

AIME sought responses from Members across all of the represented PRS industries, and we expected a low response for a consultation of this form due to our members operating or facilitating services with regulatory compliance in mind.

Some of AIMEs larger Members may input their response directly to PSA through their regulatory staff or regulatory representatives. Wherever possible, we ensure that views of members made through independent responses are in synergy with AIMEs collective views.

As our response is guided and supported by Members input, some views may be expressed that are not necessarily those of the AIME Executive or AIME's Board of Directors.

GENERAL COMMENTARY

1. AIME and its members are fully supportive of effective and timely investigation, adjudication and sanctions levied against companies or individuals who set out to cause consumer harm for financial gain. We recognise that to do otherwise would corrupt the reputation of the overall industry, tilt the playing field in favour of bad practice, and contaminate consumer complaint statistics thus potentially necessitating in new regulation that largely affects compliant companies. Also, we want to ensure that there is no financial motivation for repeat offending, where unscrupulous companies merely write down sanctions to "operational expenses".
2. On the counterbalance, our members are aware that it is quite possible to inadvertently breach an outcomes-based Code of Practice. One area of relevance is the use of marketing techniques that are used in other regulated environments without risk. Within PRS the view is that a "highly distracted consumer" using smartphone technology and with a low awareness of financial risk may transact with services inadvertently. In so doing, they can drive complaint statistics despite the services being perfectly compliant with the Code in all aspects.
3. With an outcomes based code, we therefore expect a regulatory sanction model that applies both skill and proportionality to assess the difference between intentional and unintentional / inadvertent consumer harm with procedures that robustly deal with the former (intentional harm) but not so much the latter.
4. With a prescriptive code, the skill required to determine a breach is purely based on legal interpretation and the severity of the breach is therefore easier to judge. The skills and tools required for both the PSA executive and the CAP / CAT, working with outcomes is to determine with surety the intent and severity and requires constant refinement to ensure continued proportionality and appropriate sanctions. We welcome any programme that improves these skills, and we welcome efforts to fine tune proportionality.

5. We believe that part of the toolset available to the PSA, should also include other regulators and enforcement agencies and it is no longer possible for PSA to operate in standalone mode. With that said, we are not seeking double regulation, but rather we are looking for the PSA (where appropriate) to step away entirely from regulation in the safe knowledge that another regulator will ensure adequate consumer protection.
6. Our members are of the opinion that for issues where consumers have been charged without the provider being able to provide robust support of the consent to that charge, that consumers are advised of their rights under Consumer Contracts Regulation (Information, Cancellation and Additional Charges) (CCR), related to distance sales which entitles the consumer to apply for refund.
7. In egregious cases we would even support a requirement that the merchant notify all its subscribers of their right to obtain a refund as there was/may have been non-compliance with CCR.
8. While CCR is a regulation that is applied separately by other authorities, it empowers consumers to seek redress. AIME has offered PSA the opportunity to meet with Trading Standards for this purpose. The advantage of consumers seeking individual redress is to lower the threshold of proof for the PSA and increase the deterrent.
9. Where PSA have collected enough evidence that fraud may have occurred, we expect to see the appropriate law enforcement agencies notified of this to enable them to conduct their own individual investigation. While this may not always be successful, it acts as a deterrent to the propagation of deliberate scams. AIME introduced the specialist Met Police unit “Falcon” to PSA for this purpose.
10. These entities should be appropriate collaborators to address the issues that appear to exist in the 16 companies who received PSA adjudications over 2016/17 for breaches of rule 2.3.3.(Consent to Charge) and to prevent re-offending.
11. We observed that at least one of the adjudicated parties has repeated their activity resulting in a second adjudication in 2016/17. This clearly is an issue that needs addressing urgently.
12. It is also in the current powers of the CAP to direct a blanket refund of consumers. Where the evidence of consent to charge cannot be robustly provided it would act as a deterrent as this eradicates any profit to be made from miscreant behaviour. This facility should be used with extreme caution as it may push companies into insolvency but it appears to be rarely used despite evidence of deliberate fraud activity occurring over the last 18 months. We appreciate that there is (and agree that there should be) a high evidence hurdle to order this sanction, but believe that a message needs to be sent to those who seek to make profits fraudulently.
13. The mobile-charged PRS industry also felt that the effect of the operation of large scale unauthorised charging of mobile consumers impacted the ability of compliant companies to conduct business effectively by:

- a) Generating a high number of complaint calls that added to statistics which were then used to support the introduction of Special Conditions – especially against online adult services – knowing, of course, that the special conditions are highly unlikely to prevent deliberate fraud. This conclusion is based on the logic that if unscrupulous providers are ignoring the Code it is highly likely that they will also ignore Special Conditions.
 - b) Loss of confidence by Mobile Operators in the ability of providers to implement their own robust consent to charge procedures, forcing all online services to be moved to Payfortit.
14. Additionally, although AIME is primarily an industry support organisation, we believe that consumers who are victims to proven unauthorised charging should receive their refunds through the value chain to ensure that all inadvertent profit from this activity is negated, avoiding the obvious bad press.
15. We are assuming that the imperative for this consultation is as a result of these and similar cases and is mainly to ensure that a deterrent effect is facilitated. We have observed though that the CAP does not appear to be restricted by the absence of the suggested procedural changes.
16. Using analysis provided by one of our members, in the financial year 2016-17, fines levied to providers averaged £243.5k, an increase of £133.5k over the previous financial year. In the two months of this financial year (2017-18) they averaged £447k (across two cases). These figures reflect a CAT that is increasing its fine levels without needing any supporting changes to procedures.

PSA QUESTIONS

Q1 – DO YOU AGREE WITH THE PROPOSALS TO PROVIDE THE CAP WITH A REVISED PROCESS FOR IMPOSING FINE SANCTIONS, AS SET OUT WITHIN THE ATTACHED SUPPORTING PROCEDURES?

1. We agree that the process should always undergo a review in light of experience gained from cases actually heard to ensure that justice is being applied correctly, fairly and proportionately.
2. As detailed above in our general commentary, it does not appear that there are significant issues in the procedures that would justify an industry consultation. We feel that the detail of the issues that have been observed by PSA that encouraged changes to procedures has not been sufficiently supplied in the consultation documentation.
3. We believe that the issue of re-offending is occurring and welcome sanctions that are oriented towards prevention of a re-offence. Charging consumers without robust evidence of their consent would mean a sanction requires the existing database of “consenting consumers” to be scrapped plus a robust consent to charge facility must be in place before further consumer consents can be gained.

Q2 – DO YOU AGREE WITH THE PROPOSAL TO REPLACE REVENUE BANDS WITH A DESCRIPTION OF RELEVANT REVENUE, AS SET OUT WITHIN THE SUPPORTING PROCEDURES?

1. We agree that fines should be based on revenue received as a result of the breach or from the service that has the breach, even if the majority of consumers affected have not complained. For proportionality, the Tribunal should only attribute fines to the revenue received as a result of the breach(es) and disregard other revenues generated from the compliant service.
2. We think this should be made clearer in procedures. As an example, a compliant service that suffers a rogue affiliate issue for a short period of time should not have its previous revenue considered in any adjudication regarding the advertising issue.

Q3 – DO YOU AGREE WITH THE PROPOSAL TO AMEND THE WORDING OF THE DESCRIPTORS AND INTRODUCE SUPPORTING INTERPRETIVE FACTORS, AS SET OUT WITHIN THE ATTACHED SUPPORTING PROCEDURES?

1. We are extremely uncomfortable with the concept of judging the consumer value of a service (procedures section 192) as this is highly subjective and is also easily overcome in the case of deliberate non-compliance. Consumers do purchase services that appear to have little value to others but have a high value to themselves.
2. A CAT may consider the service to be of low value based on their own socio-economic environment. A deliberately non compliant service will create a service of high value (but little used) to avoid this analysis.
3. The descriptors need to assess impact on the overall consumer base likely to use the service and not just complainants. As an example, a broadly marketed service that has complaints only from people

with poor eyesight (complaining that they could not read the pricing information) should be assessed on the proportion of consumers affected from the addressed market. If however, the provider targeted people with this vulnerability, then the proportion affected from the addressed market is considerably higher.

4. We would like to see a separation of 184.C into two categories. “Deliberate” is not the same as “Reckless”. The description of “reckless” in 187 does not match dictionary definitions which discuss having no regard to risk, rather than being aware of the risk and ignoring it.
5. A deliberate action is conceived and executed knowing the risks and it is this behaviour that requires penalising and preventative sanctions. “Reckless” requires training and rehabilitation especially if the provider indicates regret about their reckless behaviour and a desire to provide redress.

Q4 – DO YOU AGREE WITH THE PROPOSAL TO REVISE THE PROCESS BY WHICH THE TRIBUNAL ARRIVES AT THE APPROPRIATE SANCTIONS FOR A CASE, AS SET OUT WITHIN THE ATTACHED SUPPORTING PROCEDURES?

1. We are always, as detailed earlier, supportive of revising the process to ensure that the CAT is effective in protecting consumers and industry from harm caused by a minority of entities. The revised procedures appear to align with our extensive and supportive commentary when Code 14 was under consultation.
2. We would caution however on putting too much faith on compliance updates and adjudication papers.
3. We find ourselves in an industry with an overburdening mass of regulatory updates of which PSA constitutes merely a small proportion as evidenced by the discussions at PSA’s May forum.
4. We are critical of compliance updates that are not clear for the reader as industry needs to “get it” immediately without the need for secondary interpretation.
5. We do not believe that industry regularly reads adjudications (AIME however does) as our members operate with compliance of the published code at the root of their operation. Do citizens regularly read court hearings to ensure that they remain model citizens?
6. We also would be concerned about timing if a case followed the publication of a tribunal hearing, but the investigation into that case had started several months prior to the publication.

Q5 – DO YOU AGREE WITH THE PROPOSAL FOR COMMENCEMENT OF THE NEW DECISION MAKING PROCESS SET OUT IN THE SUPPORTING PROCEDURES?

1. To be completely fair, the decision making process should not be implemented for any Track 2 cases that have received the Warning Notices as this is the point where a provider would seek professional advice and that professional needs to be familiar with the changes.
2. As detailed earlier, with the average fines increasing, it does not appear that the CAT are under significant restriction in the processes being deployed.
3. With PSA’s concern that repeat offending is increasing, we highly reckoned utilisation of other enforcement agencies and authorities to deter this and this can be implemented at executive level and does not require CAT authorisation.

Q6 – DO YOU AGREE WITH OUR ASSESSMENT OF THE POTENTIAL IMPACTS BOTH ON THE PHONE-PAID SERVICES AUTHORITY AND PROVIDERS? DO YOU HAVE ANY FURTHER INFORMATION OR EVIDENCE WHICH WOULD INFORM OUR VIEWS?

1. We are of the opinion that appropriate and proportionate sanctions will not deter compliant providers from operating conditional on the presentation of the evidence being robust and the providers case being accounted for correctly.
2. We believe that the level of fines may have reached a point where they become uncollectable, incurring costs for the compliant industry and potentially affecting human rights of the providers.
3. However the deterrent effect for deliberate non-compliance must be appropriate and this is the operational balance that PSA needs to consider.

CLOSE

We assure you that, as ever, our comments are made constructively, compiled from member input and with the intent of achieving an effective, fair, economical and proportional regulatory regime for premium rate charged 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

Sincerely AIME