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Consultation

PhonepayPlus Fourteenth Edition of the Code of Practice

Submission by Association for Interactive Media and Entertainment (AIME)

AIME (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.

Member Input

AIME welcomes the opportunity to respond to PhonepayPlus Consultation on its Code 14 proposals made in particular around significant changes to Part 4 – the Investigations Procedures and Sanctions of the Code.

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

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, but we experienced a low response to this consultation and we speculate that is because most providers do not expect to experience the investigations and sanctions procedures.

General Commentary

AIME is of the belief that where a provider deliberately breaches the outcome requirements of the Code, they also damage the industry around them, both through the direct consumer impact of their behaviour, the tilting of the playing field into their favour and through reputational damage to the broad industry. Providers such as this need to be treated appropriately by PhonepayPlus and there should be sufficiently robust procedures to deal with these organisations and remove their practices from the market.

Where a provider has set out to achieve the outcomes of the code but has inadvertently caused issues, or even with the proportionate application appropriate Due Diligence and Rick Control, issues have been caused by other parties along the consumer journey only remotely associated with the provider, then the provider needs to be treated fairly and pragmatically. The focus needs to be on education and improving operational practice.

Above all, regardless of intent, any provider is entitled to a process that is fair, proportionate, unbiased, just and professional. Very importantly, the process and people should acknowledge the human rights of the organisation and individuals inside.

Since 2013, AIME has expressed concerns to PhonepayPlus on the application of the existing adjudication procedures in that the final decision making on certain cases appeared to be overly influenced by the Executive's opinions; evidence appeared to be subjective, emotive and flawed; and decisions were taken that raised concerns (when reading the adjudication papers) that the provider had not had fair and independent treatment and in some instances may have been placed into financial distress preventing adequate defence.

AIME also challenged the emergency procedures that were deployed in 2013 against ten companies on the basis of the evidence gathering methods, the apparent lack of intent, the commercially destructive nature that an EP has on those affected and the impact that the publicity surrounding the EPs had on business investment by unrelated providers linked only by their digital advertising.

None of the 10 companies were AIME members, but we were concerned on behalf of our members about the commercial impact that this caused MNOs, L1s, L2s and broadcasters; the damage to the industry's reputation; and the damage to growth and investment (particularly when it involved digital advertising) through the increased risk to business continuity.

Despite industry unease, PhonepayPlus persevered and two of the providers concerned commenced a Judicial Review. Although the final outcome was found on one point of EU legality, 12 separate criticisms were documented regarding the processes deployed by PhonepayPlus.

We congratulate PhonepayPlus on rising to the triple challenges of a declining market, general industry apprehension, and the findings of the JR to grasp the nettle and to conduct a comprehensive review of Part 4 of the Code.

Largely we believe that that review has produced a substantially improved investigations and sanctions procedure (both in Code and from what we have seen so far in the procedures themselves).

It must not be forgotten, however, that regardless of its robustness, the Code and the allied procedures are applied by people under their own interpretation. Of the 12 criticisms from the JR, 5 related to the application of the process and are not easily resolved by a new process alone. Instead robust management oversight is required to ensure that in the heat of the moment, people uphold PhonepayPlus published values of proportionality, accountability, consistency, transparency and targeting.

With this possibility in mind (even though remote), we have identified areas in the new processes where we believe potential improvements can be made.

Our objective throughout – an objective we believe that is shared by PhonepayPlus itself – is for investigations and sanctions procedures that:

(1) deliver a fairer, more impartial, more visibly independent, faster and more efficient route from investigation to conclusion;

(2) is supported by a robust set of internal procedures, and strong management oversight;

(3) is underpinned by a neutral fact based viewpoint on evidence presentation utilising relevant expertise when required; and

(4) starts with an assumption of innocence (or at least an assumption of non-intent) until the facts prove otherwise.

However, despite this shared objective and despite the excellent improvements that Code 14 entails, it is still possible for errors and bad practice to occur. As such, our largest concern is the absence of an economical challenge facility to the Tribunal's final decision - either by the provider adjudicated against, by wider industry, or by the PhonepayPlus Executive itself.

We would therefore request further consideration to the industry concerns raised and are happy to discuss these further.

Proposed Process

We have examined the proposed process and feel that it is fair to providers by utilising enhanced oversight by senior managers and board members of the executive's documented details of the investigation. The provider also would appear to have adequate opportunity to discuss their case and, if appropriate, arrive at a settlement early on in the process.

We are comforted that there is no longer a review process that some felt did not offer a fresh perspective and thus hampered a provider who wished for a legal review of their case.

We are concerned about a few elements in the detail of the consultation or the code and have detailed them here. Some of these concerns may be negated after a detailed study of the Investigations and Sanctions Procedures. Unfortunately there was no time to examine the recently issued procedures while finalising this response.

We are very concerned as discussed above about the lack of an independent review process after a Tribunal decision or the ability to re-open a case if there was sufficient concern whether justice had been applied correctly, proportionally or fairly.

Specific Observations on Consultation Proposals

(Paragraph references are to the document *Part 4 Review Code Consultation Document.pdf)*

1. The name of the panel of people is the Code Adjudication Panel (CAP), but the proposed tribunal name is the PhonepayPlus Code Adjudication Tribunal (P-CAT). We question the addition of the PhonepayPlus part as it may suggest reduced independence of the selected parties from the CAP. We would encourage CAP and CAT as the two acronyms but also note that "CAT" is not used in the Code Part 4 wording.

2. There are delays and complications discussed with the establishment of jurisdiction. Some EU providers have reported raids on their premises after their country regulator received communication from PhonepayPlus. We would encourage the use of the registration database to resolve jurisdictional questions when a provider first enters the market. It may be permissible in EU law for a provider to waive their right to non-UK jurisdiction as part of the registration process.

3. We note that the Emergency Procedure (discussed at 2.6) will be replaced with a CAT decision on service suspension based on a recommendation from the executive and board. This is largely identical to the EP. The name is changed (which is more important than it might seem). Attempts will be made to

contact the provider … in most circumstances. However, the CAT can still suspend a service concerned even when the provider has already taken corrective steps to mitigate the identified consumer harm. And, the scope of suspensions may be too broad. For example, if the promotion of a service warrants suspension, but there is no evidence to suggest that an existing subscriber base is affected, how will PPP ensure that legitimately gained business remains unaffected?

4. We also note that "best endeavours" will be used to contact the provider about the alleged breach. We caution that this terminology may have legal and cost implications for PhonepayPlus.

5. Barring situations where immediate action is necessary, we expect a case that is presented to the CAT for suspension to include details of the efforts made to contact the provider and if not sufficient (best endeavours), then we would expect the CAT to reject the service suspension. We would also like to see a procedure that prevents suspensions from being issued late on a Friday without a support structure to quickly reverse decisions that would have otherwise been available during working days.

6. The process detailed at 2.9 allows a downgrade of a Track 2 to a Track 1 or even cancellation of investigation if the situation allows, usually through new information becoming available. We would like to see the procedure also releasing any withholds and suspensions automatically without the necessity for the provider to seek this.

7. The proposed CAP does not contain any members of the PPP Board (or executive) which will aid the perception of independence of each CAT formation. We expect that the process will be also refined to ensure that any review of a CAT decision is performed by different members of the CAP and that in each CAT there will be at least one legally qualified person.

8. With the increasing complexity of digital services, we would like independent relevant expertise to be offered to the provider, or for expertise sourced by the provider to be vetted and accepted beforehand and thus their advice is granted the credibility that it deserves. This is likely to become common practice when the investigator's evidence is contrary to how the service is designed, and around subjective assertions related to consumer expectations.

9. We are concerned how "complaint" statistics can exacerbate the perception of an issue. At present, the consumer has to express some dissatisfaction in order to register a complaint, however the specifics of any given complaint may not relate to the code breach being adjudicated on. A Tribunal, hearing that a service has 100 complaints, may be misled into thinking that these complaints are relevant or even significant. Also, previous cases used the call centre narrative to detail the consumer's dissent; however this in itself can be used to mislead the CAT. Both practices are particularly disturbing given that a historic Tribunal stated that "the number of complainants establish[es] a strong prima

facie argument." ! We would like to see the practice of using complaint statistics balanced against transaction volumes and benchmarked against similar statistics for compliant services. We would expect complaint narrative that is refuted by robustly verifiable logs to be discarded.

10. We strongly disagree with the sentiments in the Part 4 review document section 2.24 regarding the motives of a provider to challenge an EP. Although the name (Emergency Procedure) and the associated reputation damage are important considerations, with respect to the last 11 EPs that have been applied by PhonepayPlus, the providers' businesses were frozen for at least several days without any evidence of real consumer harm taking place or on the basis of seriously flawed evidence. (Note: None of these last 11 EPs resulted in a fine anywhere near six figures – in essence retrospectively classifying these cases as Significant but neither Serious nor Very Serious.) At least one EP was issued late on a Friday, incorrectly freezing the providers business until the next week. An EP incorrectly applied will also breach human rights law. This is the main motive as to why EPs have been challenged previously.

11. We note that a proposal has been made to allow the provider to lodge a bond with PhonepayPlus as a substitute for the surety of a network withhold so that the providers cash-flow remains unaffected during a Track 2. We cannot see reference to this in Part 4 of Code 14.

12. In the case of a CAT finding that is incorrect due to an error of law, an error of fact or material flaws in the arguments provided, but the provider does not wish, or cannot afford, to take the case to a Judicial Review, we would like to see some mechanism for the provider, industry or PPP to review the case with the aim of overturning errors that can be proven, without recourse to the expense of a legal challenge. We suggest one of the following potential solutions.

    a. A provider (or a member of the ILP) can lay out their case for a review and the complete CAP performs both a regular assessment of all cases and a detailed assessment of the providers / ILP review request. If the complete CAP approves a review, the case is heard fresh by a differently formed CAT. This CAT can overturn some or all of the previous adjudication.

    b. A board member can be asked by the provider or by any member of the ILP to review a particular adjudication and if that board member agrees that an error may have occurred, then the provider is granted a case review together with the Board members findings.

    c. The provider or industry can construct an request for review to Ofcom detailing the reasons for incorrectly applied decision and Ofcom either instructs a fresh hearing or is able to overturn any decision.

d. An Independent Appeals Body is created that is empowered to overturn decisions or to demand a fresh hearing and explain the rationale for that decision. The body is formed from people qualified in taking an objective view of the facts of a case and is provided with contemporary knowledge of the operation of the industry by available but neutral industry expertise.

ASSOCIATION FOR INTERACTIVE MEDIA & ENTERTAINMENT

Specific Observations on Code Part 4 and Appendix 3 Proposals

(Paragraph references are to the document *Part 4 Review Code Consultation Document.pdf)*

4.1.1 The construction of the end of this sentence ("...complaint is made within a reasonable time from when it arose. ") requires review, but from recent discussions we had the impression that PhonepayPlus was moving away from a complaint-driven approach to regulation. Complaints may inform an investigation, but an investigation can arise even when there are no complaints – and conversely no investigation is automatically launched even if there are many complaints. As such this statement should be revisited.

4.3.5 (b) From recent discussions we had the impression that details would be included in the procedures, not the Code. This line discusses "adequate time" but does not define it. Yet, Lines 4.4.4 and 4.5.4 (for example) codify a specific number of days. It is not proportionate if the provider is given firm deadlines but PhonepayPlus is not.

4.4.5 (a) The final part of this sentence should also include 4.4.4

4.5.1 (a) This assumes that a service suspension is the only resolution to a consumer issue. As has been seen previously, a compliant service was promoted by an unauthorised party using a method that could cause consumer harm and suspension of the promotional route was the most effective method to remove harm. In support of the principle of "graded measures", we would like to see "or other agreed corrective action" as an alternative solution.

4.5.5 We would like to see that a provider can request an extension to the time set to respond under exceptional circumstances and that this is reasonably granted. We would also like deadlines set so as to progress the case not simply to meet an arbitrary number. We have seen letters requesting replies between Christmas and New Year, even though the executive who would receive the reply was on holiday on the due date and for over a week afterwards.

4.5.6 The CAP (full panel) cannot see the report otherwise this will prejudice any future review. The report has to be restricted to the three members that will make up the Tribunal as detailed elsewhere in this section.

4.6.2 This clause is too open ended as it details "part or all" without justification as to why "all" would be warranted. The Tribunal may not understand that suspension of all services may not have any effect on consumer protection but can remove the provider's rights as it severely limits the available management attention and financial

resources, and almost assumes guilt across all services with the emphasis on proving innocence after the fact.

4.6.3 (a) We would like to see what measures are encompassed in "best endeavours" and how the Tribunal is advised of the methods deployed to contact the provider.

4.6.3 (a) We cannot see in this section what the PhonepayPlus process would be once the representations are received. We can only see a process that assumes no representation and thus, require an expansion of this clause.

4.6.3 (b) The "reasonable timeframe" is entirely at PPP discretion and needs to have a minimum period defined to provide surety. Or, as stated above, the Code should include no specific time periods at all, with all time periods listed in procedures.

4.6.3 (c) We do not believe that this ensures that the provider is being represented without bias if PhonepayPlus are the sole party that notifies the three members of the CAP. At the point that the CAT is formed, the provider must be able to ensure that the representations made to the CAT are the ones it wishes the CAT to see (and may be separate from the debate between the provider and PhonepayPlus) or have been passed through to the CAT without modification. Given the serious impact a suspension can have on a company, there should be a mechanism for the provider or his/her representatives to be present.

4.6.4 This section should also detail that PhonepayPlus must explain why it was not possible or appropriate to notify the relevant party, or what efforts were made to notify.

4.6.5 We would like to see a reference to the relevant party's representations also presented unaltered to the three members of the CAP. As stated above, ideally the provider or their representative would be present.

4.6.5(a) The rules of grammar are unclear on this point. There may be a missing "and/or" at the end of the sentence, otherwise it assumes a withhold in all circumstances.

4.6.5(c) As discussed previously, a suspension of a service may not be the most effective (graded measures need to be considered) corrective action and therefore this will need to also allow for the corrective action

4.6.6 We are concerned around the wording here as it presents a significant barrier to request a review. The original Tribunal decision regarding interim measures may have been flawed; the provider might have required further time to disprove the assumptions; or the issue that caused the interim measures may have been resolved.

4.6.6(a)(ii) This suggests an uncovering of new information but it may be that it just needs the old information presented in a different way to clarify the situation to the Tribunal. This wording represents a barrier. As the provider will potentially be covering the costs of the Tribunal and the providers business may be frozen, the barrier to an urgent review has to be lower.

4.6.6 (b) This does not detail who will take the decision to permit an urgent review.

4.6.6 (d) Most digital services operate on a 24*7 basis and two working days may not be sufficient priority treatment to undo a mis-applied interim measure. Any suspension of service or of revenues that would affect the provider's ability to conduct business pending a fuller review is against European Human Rights Laws. PhonepayPlus needs to consider how the term "urgent" is treated in real life.

4.7.2 The detailed information of any case must be excluded from the full panel to ensure a review is heard fresh.

4.7.4 There is significant confusion between a case using papers but with oral representation and an Oral Hearing. There needs to be a naming convention established to provide clarity, remembering that most providers will be inexperienced with the process and will be encountering this process for the first time, often in the face of business and revenue suspension. We would recommend that the Code does not distinguish these two cases but rather merely states that the Tribunal will receive relevant representations. The procedures can then detail that these representations can be written, can be oral, can be a combination, etc.

4.7.4 (e) In the event that the Tribunal seeks oral representations from PhonepayPlus to provide clarity, the provider must be notified of this so that they can hear what is said. Transparency is key here so that the provider does not feel that the executive may have distorted the Tribunals view without the provider being able to give a balancing representation. This also works the other way although it would be unusual for the Tribunal to seek provider representation without PPP knowledge.

4.8.3 (c) There are other companies who are adequately placed to provide compliance advice and this does not necessarily have to be the exclusive role of PhonepayPlus after a breach. In section (k), third parties are mentioned for compliance audit, therefore we assume they have the required skill. We expect PhonepayPlus to also approve external organisations (third parties) that can provide compliance advice and therefore this (4.8.3.c) and similar clauses should reflect this.

4.8.3 (d) We believe that the exercising of the £250,000 maximum fine per breach has created excessive fines in the past which forces the provider to liquidate. Liquidation creates an uncollectable fine and admin charge that is left to the remaining industry to fund. The opportunity to review this area is now as part of this consultation. We had

understood that PPP was seeking to simplify cases where two breaches are not cited for the same thing. Focus on the £250,000 per breach would act against this direction.

Annexe 3

3.1 (a) For clarity insert "or" at the end of the sentence.

3.2 Drafting mistake: There is no 3.1(c)

3.7 and 3.8 These two clauses may be identical and could be combined.

3.9 It is surprising but the "pre-hearing" process has not been previously referenced or defined in Part 4 of the code. Transparency is critical at any pre-hearing. We strongly recommend that details are added to the Code about this.

3.11 Industry is likely to find this statement inflammatory and unacceptable. If PhonepayPlus progressed incorrectly with a case, the provider's reasonable costs should be recoverable. We appreciate that there are complications here but would like this issue considered carefully.

3.13 All discussions between Tribunal members, and the Tribunal and other parties regarding the case should be fully logged, recorded and if possible witnessed by the provider or their representatives to ensure full transparency of process and the independence from external influence.

3.14 The provider should be able to request that their hearing is witnessed by external parties and that PhonepayPlus should have no objection to this on the basis of full transparency.

Other

We would like to see the practice of adjudicating on a "balance of probabilities" reviewed as this is highly subjective and does not incentivise robust evidence presentation. Some consumers forget their spontaneous transactions or do not always link the charges to their activities. Robust evidence of consumer opt-in is required from providers as part of the code, therefore there should be no reliance on balancing probability particularly with the potential level of fines that could result.

ASSOCIATION FOR INTERACTIVE MEDIA & ENTERTAINMENT

Specific responses to PhonepayPlus questions

Q1 – Do you agree with the proposal to set out allocation criteria at a high level within the Code?

We agree with this proposal on the understanding that the primary criteria is to resolve the apparent breaches using informal or Track 1 procedures as a priority and Track 2 in exceptional circumstances. The allocation criterion is highly subjective and requires senior management oversight to ensure correct allocation. PhonepayPlus should build a "graded measures" assessment test into its internal procedures and indicate if they have applied this test to every case.

Q2 – Do you agree with our proposal to consider interim measures automatically, and at an earlier stage, in all Track 2 cases?

If applied fairly, proportionally and with the default line to uphold the human rights of the entities involved, then this proposal may be more effective and will result in fewer cases needing to be reviewed by the Tribunal. However excessive fines and "double whammys" described earlier will negate this efficiency and the majority of cases will request Oral Hearing. It is vital also that small providers with limited funding should not be forced to accept an interim measure just to escape the potential cost of an Oral hearing.

Q3 – Consequent to Q2, do you agree with our proposal to remove the Emergency procedure from the Code?

The emergency procedure and its potential pitfalls has been replaced with the suspension procedure with its own potential pitfalls. We have identified several areas where the Code Part 4 as drafted can recreate most of the issues that were criticised during the JR processes. The one difference is that the provider may be contacted and given the opportunity to resolve the issue identified, however we do not see any process defined that removes a suspension as fast as it could be applied. We have also identified that if 24*7 services are suspended prior to a weekend or holiday, 2 working days response to their representation is not adequate.

Q4 – Do you agree with our proposal to introduce a P-CAT review of its decision to withhold revenue or suspend a service if the provider requests it?

We do not agree with the name P-CAT in particular as it is never used in the Code and also gives the impression of PhonepayPlus influence over it. We do agree with the

need to provide a review process, but we have identified an area where the independence of one Tribunal from another is compromised.

Q5 – Do you agree with our proposal to issue a Warning Notice to providers, setting out both breaches and sanctions in advance of any P-CAT consideration, in order to allow the potential for the case to be resolved prior to a hearing?

Subject to the issues and concerns identified with the Part 4 clauses detailed in this document, and subject to our concerns around forcing a provider to accept the Warning Notice as they may be unable to fund an Oral hearing, we believe that this can create operational and economic efficiencies. Our concerns will need assessment after a few months of real-life implementation and as such, we propose a six monthly review at ILP for the first two years and then annually.

Q6 – Do you agree with our proposal to establish a new decision-making panel capable of bringing independent judgement to bear, from which PhonepayPlus Board Members will be excluded?

We fully support the concept of an independent panel and believe there are other factors that will provide the comfort of independence to the industry. Independence of one tribunal from another, independence of influence from PhonepayPlus executive, documentation of all conversations regarding a case is essential and the ability for provider's information that will be, by necessity, routed through the executive to be passed without alteration to the Tribunal members – ideally passed by the provider directly to the Tribunal.

We also believe that the Tribunal will need to be able to access relevant expertise on a particular matter to ensure that a provider is never compromised by inaccurate assessment of complex operating environments.

Q7 – Do you agree with our proposal to remove post-adjudication reviews and Oral Hearings?

We believe that a mechanism for review must remain and have proposed two potential methods. We have witnessed in the past, cases that should not have received the decisions that were made, to feel confident in a newly formed panel and an untested process. The route to conduct a Judicial Review presents too high a barrier for most providers.

Q8 – Do you agree with our proposal to remove the current Independent Appeals Body hearing, on the grounds set out above?

The current Independent Appeals Body hearing does not provide the level of recourse that a provider may be seeking and is inexperienced. As such it is ineffective and the process was criticised in the JR. We believe however that a review process must be in place that can overturn an incorrect decision by the tribunal and provide damages without necessity for litigation.

Q9 – Do you agree with our proposal to set out transitional arrangements that allow the new Code procedures to apply from the commencement date to all investigations, and/or complaints or monitoring which commenced under the 13th Code?

We believe that the providers who potentially will be put through the new procedure should be given the choice. It is not the gift of industry to determine the process that an individual provider will go through. Under current (estimated) case load, it should not take much time to finalise cases being built under Code 13.

Q10: Do you agree with our assessment of the potential impacts both on PhonepayPlus and providers? Do you have any further information or evidence which would inform our views?

We are of the opinion that the new procedures will work towards the success criteria detailed by PhonepayPlus in the terms of reference for the Part 4 review namely:

> *The revised Code and procedures have addressed concerns raised in the O&O judicial review and by industry and are now robust enough to stand the test of a legal challenge in that they are lawful, sound, fair and proportionate (as far as can reasonably be judged in the absence of a challenge). The revised Code and procedures will have regard to principles of good regulation (proportionality, accountability, consistency, transparency, targeting)*

We are also of the view that operational and economic efficiencies will be created. We do however have some concerns when viewing the proposed procedures through a cynical lens. We urge PhonepayPlus to consider our concerns and to reflect on our detailed commentary on both the proposals and the Code Part 4 draft.

Conclusion

We have provided extensive commentary on the consultation proposals and the wording for the Code. We believe that all concerns and identified issues of potential absence of correctly applied procedures should be resolved before AIME members are confident with the proposals being made and ask for urgent corrective work prior to these proposals being placed before Europe.

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

Sincerely

AIME