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**CONSULTATION RESPONSE**

**FOR**

**VULNERABILITY GUIDANCE**

**BY**

**ASSOCIATION FOR INTERACTIVE MEDIA  
AND ENTERTAINMENT**

**(AIME)**

**MAY 2016**

## 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 Vulnerability Guidance Document.

As AIME and members of AIMEs board have had the opportunity to meet and discuss the proposed Guidance Document with PhonepayPlus, our comments on this document will be unusually lightweight and focuses around the AIME members' commentary received since the Guidance Consultation was published.

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 due to the structure of the document fulfilling most company's needs.

## GENERAL

1. AIME welcomes the opportunity to respond to the Guidance Consultation as we have strongly supported the concept of comprehensive guidance to the industry to ensure the outcomes of the Code are maintained. Guidance is particularly relevant for new market entrants, where the potential for inadvertent consumer harm is high, but also acts as a reference for L1's and L2's to turn to when queried by their clients or when setting up new services.
2. We have previously criticised some Guidance for providing a threat tone, emphasising what a Tribunal would consider when a Code breach has occurred instead of advising industry how to remain compliant with the code. This Vulnerability Guidance breaks the mould through its moderated tone and helpfulness. AIME members found the hypothetical examples particularly useful and many respondents to AIME requested more hypothetical examples. We feel these can be added to the document with minimal need for additional consultation in the future.
3. The major concern expressed by AIME Members is around PhonepayPlus determination that the vulnerability clause has been breached in either a vulnerable group situation or individual vulnerability situation particularly when the vulnerability is unknown in advance. This concern has been born out of previous adjudications where the provider was accused of taking advantage of a vulnerable group or had not dealt with the vulnerability of a single person through systems design. However, in these historical cases the provider asserts that they had not set out to do that or could have even have foreseen it (except with hindsight).
4. We believe that an approach to vulnerability issues needs to run along the same lines as the CAA's approach to near-miss incidents affecting aircraft. Vulnerability issues identified through PPP call centre should be treated as an opportunity for industry to learn and develop and thus encourage industry to positively report issues to assist with the wider learning. It would also help to design systems that capture vulnerable user's usage patterns.
5. Industry is concerned that there is a fine line between taking advantage of vulnerability and taking an **unfair** advantage of vulnerability and this needs to be defined through further hypothetical cases. Marketing products at the point of need and mindful of the circumstances are techniques to gain optimum return on investment and can in certain circumstances be taking advantage of vulnerability. For example, marketing antivirus software on an adult services site returns higher click-through than on a commercial broadcaster's web site. This would be certainly taking an advantage of a short-term vulnerability (user's paranoia) but not an unfair one. An unfair one would be to ensure the user receives a virus from a downloaded video and then markets a product to get rid of it.
6. An additional concern has arisen from recent consumer journey research that demonstrates that consumers in "high tempo gaming mode" are switched-off to financial risk and may not even read correctly provided pricing information and buttons that gain the consent to charge. This in theory

puts consumers into a “vulnerable” state dependant on the start of their purchasing journey and greater clarity is needed on PhonepayPlus own view as to the vulnerability of these types of consumers and the source of the journey they took to lead to a purchase.

7. Concern has also been noted on the difficulty that advertisers for products that are targeted at over-16's have with restricting their ads to not appear in children's apps. Many app providers do not categorise their apps correctly as they prefer a broader audience and wider advertising opportunities even though the app is clearly appealing to children. The advertiser cannot blacklist individual apps, relying on the App store to perform this role. As a result, general advertising may appear in children's apps and there is a risk that this will be perceived as being targeted. More information is required on how to mitigate the risks and harm when it occurs.
8. Reasonable foresight is also highly subjective as the decision rests with the accuser often with hindsight. Telling a provider that they could have foreseen an issue is far easier than foreseeing the issue particularly if the incident has not arisen in the past.
9. Emphasis on the documentation of procedures that demonstrates reasonable foresight cannot be strong enough. This is often a question that we are asked and a “log everything” and have an established description of the product and user journey are excellent tools to demonstrate that a consideration has been made towards potential vulnerabilities.

## CONSULTATION QUESTIONS

**Question 1: Do you consider the proposed vulnerability guidance helpful and effective in supporting providers meet Rule 2.3.10 of the Code? Please provide an explanation to support your response.**

AIME Response: We have previously criticised some Guidance for providing a threat tone, emphasising what a Tribunal would consider when a Code breach has occurred instead of advising industry how to remain compliant with the code. This Vulnerability Guidance breaks the mould through its moderated tone and helpfulness. AIME members found the hypothetical examples particularly useful and many respondents to AIME requested more hypothetical examples. We feel these can be added to the document with minimal need for additional consultation in the future.

**Question 2: Do you consider the proposed Vulnerability Guidance to be fair and proportionate? Please provide an explanation to support your response.**

The Guidance is found to be fair and proportionate, but concern exists within industry on whether this will extend to investigations as a result of complaints and whether a dose of pragmatism will also be thrown in. The major concern is how PhonepayPlus will treat individual cases where the user declares themselves to be vulnerable after the event and the provider was not given any indication of the vulnerability during their usage. The Guidance would benefit from additional hypothetical cases and will also benefit from real-life updates as a result of new incidents (see commentary on CAA approach above). This does not require Tribunal cases as hopefully most incidents are treated with pragmatism and sensitivity but the learning should be made to all industry to improve foreseeability.

**Question 3: Is our definition of a vulnerable consumer clear? Please provide an explanation to support your response.**

The definition is clear, but concern has recently arisen on how this is interpreted when a consumer is in a certain mindset while browsing the internet and chancing across chargeable services. While the lists of characteristics and circumstances are clear, they are not comprehensive. Consumers can see identical pricing and opt-in screens across two products and not read one, but read the other dependant on their browsing circumstances. Industry will need greater clarity if this phenomenon is going to lead to breaches.

**Question 4: Does the explanation of unfair advantage and reasonable foresight clarify our expectations of providers? Please provide an explanation to support your response.**

Please see our general comments above. We are concerned that the measure of reasonable foresight is applied retrospectively which puts providers at a disadvantage and we encourage the updating of information to industry as an appendix to this Guidance after isolated incidents to be the most practical way of improving foresight. The hypothetical examples should be increased to take in situations that have been encountered in the past (single vulnerable users, marketing to over 65's, etc.) and to build on the list of vulnerable characteristics and vulnerable circumstances. In particular, the English as a second language characteristic is hard to cater for in a broadly marketed product in the UK without adding complexity to advertising and payment displays.

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