

## **Fox Mobile's Comments on the Draft of the 12<sup>th</sup> PPP Code of Practice**

First of all, we want to thank you for allowing us to be involved in the procedure of drafting the 12<sup>th</sup> Code. In general we think it is a great step forward in the right direction. The new Code seems much more aligned to the needs of our industry and will hopefully bring greater flexibility for new innovation.

In addition to AIME's response to the online questionnaire with which – as a member of AIME - we overall agree, we would like to address the following points in particular as one of the largest Level 2 Providers in the UK market:

- 1.) We have some concerns about the new categorisation. Under the definition of Level 2 providers, affiliate marketers and publishers are not included. The suggested liability of Level 2 providers concerning the affiliates does not reflect the existing market.

Due to the complicated network structure of the affiliate world, advertisers have very limited control over how an affiliate presents the advertiser's product to the end user. The only thing an advertiser can do is diligently select the first level of affiliate partners and bind them to obey the rules as well as to enforce the rules to their subcontractors.

In general someone can only be liable for something he can actually control/avoid. This is not the case with the affiliates and publishers. There should be special provisions in the Code that define affiliates as a "Level 3 Provider" and transfer a significant proportion of responsibility for misuse of marketing to them as long as the Level 2 providers did everything in their power to diligently select the first level affiliate.

- 2.) As responsibility for Level 2 providers will lie across the whole value chain we will need to adjust our contracts with aggregators by adding indemnification clauses to ensure we do not bear the entire responsibility. This relates especially to technical issues beyond our power and controlled by the aggregators (e.g. the sending out free messages or reacting on STOP command). This will create a large operational effort and cost to both ourselves and all other Level 2 providers in the market, this can't be the intention of PhonepayPlus. The shifting of responsibility caused by the re-categorization of Level 2 provider, should therefore be reconsidered. A standard solution should not be enforced at the expense of justice and a equality of the responsibilities.
- 3.) We think the Data protection regulations which are provided by the established law are sufficient. The regulations which PhonepayPlus wants to enforce seem unnecessary and as an overregulation in a sector where no more regulation is needed. Any further changes of the data protection law would cause unnecessary changes of the code as well, just to keep up with the law.
- 4.) The regulations on due diligence are not clearly defined. It is not apparent what exactly is understood by due diligence. This needs to be clarified, as it is essential for all involved parties to know exactly which requirements they have to meet.  
It should be taken into account that the requested due diligence would cause a lot of bureaucracy for the providers. We therefore suggest that due diligence

should be limited to somewhat of a standard good business practice. As soon as a company can be considered as reliable in these terms, it should be sufficient unless there are indicators to assume otherwise.

- 5.) Relating to the guidance notes we are concerned that there might occur a conflict with the case law set forth especially by the tribunal. No party should be deemed guilty by a tribunal if they conducted their business in accordance with the relevant Guidance notes. Therefore, it should be set out in the code that a provider who has fully complied with the relevant Guidance can not be charged to be in breach of the code. Furthermore it should be made clear that decisions of the tribunal will be immediately included in the Guidance notes. The Guidance notes should help to reduce uncertainty in interpretation while guarantee the required flexibility. In particular it is desirable that the Guidance notes will keep up with the times and can be changed quickly if needed.

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