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24 September 2014

Dear Sirs

Consultation on the 13th Code

We are writing in response to the consultation on the 13th edition of the PhonepayPlus Code of Practice. This response is compiled following consultation with the Board and Members of AIME and with clients, and with contribution from Gerry Facenna of Monckton Chambers. This response is focussed upon high-level legal, rather than commercial, points, and is made drawing on the experience of dealings with the Executive in representing clients under investigation. The response is not all-encompassing, and is restricted to certain of the questions asked. As an AIME Member, we have also had the benefit of sight of AIME's draft response, with which we wholeheartedly concur: this response is tailored accordingly so as to avoid duplication.

However, before responding to those questions in chronological order, we wish to make a few headline points concerning those aspects of the new Code which pose the greatest concern. In doing so, we refer to PhonepayPlus' rationale for its proposals at page 4 of the consultation document and the indication that some of the proposed changes stem from its *"experience in implementing the twelfth edition of the Code"*. As a firm that has represented many stakeholders in their dealings with PhonepayPlus and with first hand experience of how the Code has been implemented and its procedures applied, we hope PhonepayPlus will agree that it is equally important for our clients' experiences to be considered.

1. **The Maximum Fining Powers of the Executive**

Uncertainty of stakeholders accused of very serious breach

Previously, instructing Tom Richards of Blackstone Chambers, we acted for two clients in appealing a Tribunal decision where PhonepayPlus had imposed a fine significantly in excess of £250,000 on the basis that the £250,000 cap in section 123(2) of the Communications Act 2003 (as amended by the Communications Act 2003 (Maximum Penalty and Disclosure of Information) Order 2005), is a cap which applies *per breach* rather than per case.

We considered, however, that upon proper examination of the legislative and regulatory background, the statutory cap was intended to apply (and in fact applies) per case rather than per breach, and that PhonepayPlus had no power to impose a fine greater than £250,000 upon any infringer of the Code. We formally raised our objections (on the basis as set out below) but in one case the issue was not decided as the case was settled by way of an Adjudication by Consent, and in the other case our client was forced out of business before the case was heard.

We had also raised our concerns with OFCOM: since PhonepayPlus was exercising its powers under mandate from OFCOM, it was important that we clarify whether or not OFCOM agreed with the Executive's position. OFCOM's response was decidedly non-committal:

> *"We have considered those questions in light of the proper relationships between the Communications Act 2003 and the PP+ Code and between OFCOM and PP+, and of the relevant appeal procedures under the Code and the enforcement mechanisms provided for in the Act. We have considered whether there is a clear legal point on which this matter should properly be resolved without unnecessary proceedings.*
>
> *Having done so, it appears to us that there is an open question as to the proper construction of the relevant legislative provisions and of the PP+ Code. Our view is that it is appropriate for PP+ and its appellate bodies to consider that point under the relevant PP+ procedures and for the existing ongoing appeal proceedings to reach their conclusion, without intervention from OFCOM. It would be a matter for you and your client to consider whether it should seek judicial review of any decision PP+ makes. We would consider OFCOM's likely role in any such proceedings at that stage".*

OFCOM effectively sat on the fence, recognising that it was not clear-cut, and refusing to commit on the basis that the matter could be avoided until a later date.

Still to date, this issue has not been tested since PhonepayPlus has chosen not to impose fines in excess of £250,000 since we first raised this argument in these two cases back in 2012. One interpretation of this is that PhonepayPlus now accepts our argument concerning the limitation. Nevertheless, to take OFCOM's wording, there is still *'an open question as to the proper construction of the legislative provisions and of the PP+ Code'.* In the interests of transparency and clarity for stakeholders, we believe that this issue must form part of the consultation (or is considered separately alongside proposals for Enforcement Track procedures and Tribunal Processes Reform in respect of which AIME has requested a stay). This is particularly the case as these are complex legal arguments requiring interpretation by legal experts alone. Neither a Code Compliance Tribunal nor an Oral Hearing Tribunal is likely to rule against PhonepayPlus' stated position in this regard – and for reasons set out below (see point 2) there is no guarantee that this question will ever be tested before the IAB.

The Background to the Debate

Section 123 of the 2003 Act, in its original form, provided as follows:

*'**Enforcement of s. 120 conditions***

(1) Sections 94 to 96 apply in relation to a contravention of conditions set under section 120 as they apply in relation to a contravention of a condition set under section 45.

(2) The amount of the penalty imposed under section 96 as applied by this section is to be such amount not exceeding £100,000 as OFCOM determine to be—

(a) Appropriate; and
(b) Proportionate to the contravention in respect of which it is imposed.'

Crucially, section (1) establishes that the maximum amount to be imposed under section (2) is *'in relation to contravention of condition**s**'* – i.e. in relation to multiple breaches of the Code.

In December 2004, in instigating a Review of the Premium Rate Services industry, OFCOM recommended an increase in the maximum fining powers of the regulatory body (ICSTIS, as it then was). OFCOM's clear understanding at that time was that the cap was applicable globally, not on a per breach basis (see e.g. §4.10: '*the fines are subject to a £100,000 cap*'; §6.35 '*ICSTIS' current maximum fine is set at £100,000*'; §9.28 '*At present, the CoP allows ICSTIS to fine SPs up to £100,000*').

As a direct result of OFCOM's review, the DTI published a formal consultation on 29 June 2005, inviting responses within 3 months in relation to three discrete issues, of which two are relevant here: (a) whether the maximum fine to be imposed under section 123 should be increased from £100,000 to £250,000; and (b) whether a fine of £250,000 would represent sufficient deterrent to would-be infringers of the Code.

Within a week of the publication of the DTI consultation, on 5 July 2005, the case of PRS Communications Limited (in which we were instructed) came before the Executive's Independent Appeal Body. The ICSTIS hearing panel had, by decision of 14 October 2004, imposed fines totalling £230,000; the Appellant sought to overturn this decision on the basis, *inter alia,* that the panel had exceeded its powers as prescribed by the Communications Act, in imposing a fine in excess of the (then) limit of £100,000. On Appeal the issue was not relevant, because the fine was reduced to £100,000 (and so the issue of whether that was per case or per breach did not apply). However, the IAB, in obiter comments, expressed its view that the statutory limit of £100,000 applied in respect of *each breach* rather than in each case.

In its decision, the IAB noted the following:

'78. That OFCOM appear to consider, in their report to the DTI dated 9 December 2004, that s123(2) imposes a cap of £100,000 per service provider, does not fetter this tribunal in interpreting the law. We have taken a different view of the effects of the 2003 Act, for the reasons stated in this judgment, as is our prerogative.

83. *We have considered the contents of the OFCOM report for the Department for Trade and Industry, entitled "The Regulation of Premium Rate Services" and dated 9 December*

2004, which refers to a cap of £100,000 per case based on its (with respect, mistaken) interpretation of s123(2), but we note that it was issued too late to be relevant to any expectation of this appellant. In any event it could not rank as a representation made to this appellant, for it was addressed to the DTI'.

The IAB decision had necessarily changed the complexion of the DTI consultation. The fundamental premise of the original DTI consultation was that a fine of £100,000 did not represent a sufficient deterrent, given the rewards available to the premium rate services industry: the question was asked as to whether £250,000 *would* represent sufficient deterrent. Quite clearly, if the maximum fine being considered per service provider was no longer £250,000, but rather £250,000 *per breach,* then the question of sufficiency of deterrent asked in the consultation was based on a false premise, and was thus entirely redundant. If the IAB decision were correct, the reality – that the maximum fine was in fact *multiples* of £250,000, factored by how many allegations of breach had been made – was very different to that presented during the consultation.

Fortunately the scope for conflict between the ratio of the IAB decision and the planned increase in the fining powers of ICSTIS did not escape the notice of the respondents to the DTI Consultation. Concern was expressed as to the interplay between any decision to *raise* the maximum fining power to £250,000, and the recent IAB opinion that the maximum fine could be applied on a *per breach* basis.

We attach to this consultation response the 'ICSTIS (now PhonepayPlus) Brief on raising Maximum Fine Levels under the Communications Act 2003'. This response makes it *very* clear that PhonepayPlus' intentions at the time were that the £250,000 limit applied per case, rather than per breach. The Government Response to the Consultation, which duly attached the draft statute increasing the maximum fine limit from £100,000 to £250,000, included the following:

6. *Two responses raised the issue of how ICSTIS applies fines [following a recent Independent Appeal Body ruling] and suggested that ICSTIS could apply the maximum fine several times over if a service committed a number of breaches, and one suggested this obviates the need to raise the maximum fine. However, ICSTIS have noted that this is not the approach they have followed and that the maximum level needs to be increased in any event to allow for significant single breaches to be proportionately penalised. In light of this, we believe that the maximum penalty should be raised.* [Our emphasis]

Plainly it was on the basis of such assurances given by ICSTIS that the government approved the increase in the maximum fining powers of the Executive to £250,000. The fear, recognised by the Government in its response to the 2005 Consultation and still not addressed to date, is that the Executive can *'apply the maximum fine several times over if a service committed a number of breaches'*.

Notwithstanding the basis on which the consultation had proceeded, the following year, with the new fine limit in place, ICSTIS assimilated the IAB ruling into its Sanctions Guide, published on 4 April 2006, as follows:

Application of the £250,000 sanction on a per contravention basis
Following a decision by the Independent Appeals Body in July 2005, and following legal advice taken by ICSTIS, we have decided that in certain circumstances ICSTIS can apply a sanction for each breach upheld up to the maximum of £250,000 per breach. This would occur in the most extreme of cases where at least one breach attracts a £250,000 fine. An example would include where a service provider had already been sanctioned with the £250,000 fine and had then repeated the same or similar service. This would indicate a serious and willful attempt to defraud or seriously mislead consumers with the full knowledge that its services were in breach of the Code of Practice. Please note that the per contravention approach will not mean that each breach will attract a maximum fine of £250,000. Rather each breach and any punitive sanction will be judged on its merits.

It is interesting to note the wording of the above: *"following a decision by the Independent Appeals Body in July 2005 … following legal advice … [ICSTIS] has decided"*. The Executive purported to derive its new powers not from statute, nor from delegated authority from OFCOM, but rather from the opinion of the IAB (which is not legally binding) and from its own independent legal advice.

The conclusion that the statutory cap is a cap per case, rather than per breach, is supported not only by the language of the statute, but by: (i) the Explanatory Notes to s. 123 ('*The penalty may not exceed £100,000*'); (ii) by OFCOM's own historic view; and (iii) by the illogical and disproportionate consequences that would follow from the contrary construction: if the cap were a cap per breach, PhonepayPlus could arrogate to itself greater fining powers by "splintering" its charges and seeking to identify multiple breaches of the Code, where in reality it has only one core complaint.

2. The 'Byzantine' Appeals Process

We are of the view that the current regime in place for challenging the decisions of the Executive is not working, a phenomenon identified by Judge Charles in the recent Ordanduu hearing. By way of evidence, since the 12th Code has been in place, three years ago, according to PhonepayPlus' web search facility, not one case has been before the IAB, and only five cases have been brought before the Oral Hearing Tribunal. If this is correct, then this is a clear indication of a flawed process.

The structure of the tribunal/review/OHT/IAB process appears driven by, and engineered towards, the Executive's desire to minimise the administrative and costs burden which it imposes upon itself. Whilst plainly the regime should not impose unnecessary burdens in this regard – and it must be as cost-effective as possible – nevertheless it is our view that the overriding principles of access to justice and the right to a fair hearing as enshrined in Article 6 of the Human Rights Act outweigh such concerns. Article 6 reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [Our emphasis]

There is a fundamental right to a *'fair .. hearing .. within a reasonable time by an independent and impartial tribunal'.* We do not believe that the reason no cases are reaching the stage of *'an independent and impartial tribunal'* (which is what the IAB provides) is because the decisions have been accepted. There are strong deterrents in place to prevent providers from negotiating the appeal process which the Code provides:

- Assuming that a provider has to negotiate the paper-based hearing *and* the Oral Hearing Tribunal *before* reaching the stage of the IAB, the legal process is too expensive;

- This is all the more the case because the costs-recovery basis is too weighted in the Executive's favour and proceeding to an oral hearing carries with it the risk that the Executive will seek to add new allegations of breach;

- The process is too time-consuming: we would estimate that it would take a minimum of a year to bring a case to the IAB, not least given the overly complex timetable and directions usually adopted for oral hearings;

- Until the IAB stage, there is a lack of independence and legal expertise on the part of the decision-makers;

- Given that the Oral Hearing Tribunal does not offer sufficient independence from the Executive: there is a lack of confidence in the industry that a fresh hearing before the OHT will result in a different result, particularly as the cases brought to the OHT are prosecuted in the knowledge of the paper-based decision and it is difficult to see how the matters can be considered afresh absent apparent bias;

- The Process consists of too many obligatory stages (a situation aggravated by the proposed 13th edition of the Code, which renders the paper-based hearing obligatory).

We refer to the comments of Judge Charles in the *Ordanduu* case (see the answer to question 18 below), in which surprise and concern were expressed at the regime in place, including in relation to apparent bias, complexity, fairness and the costs position. We believe that the system currently in place requires a complete overhaul, and we would suggest that this takes place by way of a separate and full consultation (as suggested by AIME). The issues involved are too important to be dealt with without proper consideration, and the risk otherwise is that *significant* issues (such as removing a provider's right to save costs and go straight to an Oral Hearing – plainly out of step with Article 6 above) and the Court's comments are decided by a broad-brush approach, with serious legal issues with serious practical implications for providers being overshadowed by the commercial issues which the revised Code seeks to address.

3. Policy Considerations

In their response, AIME have touched on a number of policy considerations which we expand on here. As the Executive will be aware, under current government policy, and in accordance with the regulatory principles that apply under s3 of the Communications Act 2003, there is a general

presumption that regulation should not impose costs and obligations on business unless a robust and compelling case has been made, a priority reflected in the Small Business Enterprise and Employment Bill. The basic premise is that in developing policies and rules that will regulate business, the following principles should be observed:

(a) it is clear that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches;

(b) analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches;

(c) the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.

There have been special initiatives in support of small businesses (e.g. the three year micro-business moratorium) and there remains in operation a requirement to consider the impact of any new regulation on small (up to 49 full-time employees) and micro-businesses (up to 10 employees) – specifically, whether they will suffer disproportionately from the associated burden. Time and effort should be spent on gathering evidence from and considering the treatment of small and micro-businesses with a view to ensuring that all new regulatory proposals are designed and implemented so as to mitigate disproportionate burdens.

The assumption is that there will be a legislative exemption for small and micro-businesses where a large part of the intended benefits of the measure can be achieved without including them. Therefore the default option is for small and micro-businesses to be exempted from new regulatory measures. If the assessment is that full exemption is not viable (or compatible with achieving a large part of the intended benefits of the measure), this must be supported with appropriate analysis. Consideration must also be given to the options for mitigating the burdens on these businesses while delivering a large enough part of the intended benefits. We list below some of the options available (in the original policy wording):

***Exemption (default option)**: where a sufficient proportion of the intended benefits from regulation can be achieved without including small and micro-businesses in the scope of the regulation.*

***Partial exemption:** where small and micro-businesses are exempt from specific requirements within the regulation, or where only some businesses are fully exempt. In the former case that might include, for example less onerous compliance requirements (e.g. issuing warnings to smaller businesses rather than applying sanctions where non-compliance is identified), or by deeming a certain subset of rules not applicable to smaller business. In the latter case, that might involve limiting the exemption to small businesses that are also micro-businesses.*

***Extended transition period:** where all businesses of a defined size are given a fixed extension to when they are required to comply compared to larger business, reducing the costs associated with implementation of new regulatory requirements. For example, the tobacco display ban gave shops below the Sunday Trading threshold an additional 3 years to comply.*

Temporary exemption: *where smaller businesses can apply for a temporary extension where immediate compliance would harm their business: an example might be where a service or product needs to be redesigned to be compliant which might take some smaller businesses longer to do (for capacity or financial reasons) than larger businesses.*

Varying requirements by type and/or size of business: *where businesses below a certain size are, for example, only required to register but not to be fully licensed or by exempting smaller businesses from having to register or from registration or other licensing fees. This might also apply to charges for inspection (although HMT rules on cost recovery and avoiding cross-subsidy will need to be considered). This might also be done through simplifying reporting requirements for smaller businesses, less frequent/less onerous inspection etc.*

Specific information campaigns or user guides, training and dedicated support for smaller businesses: *providing good information and support tailored to the specific needs of smaller businesses may mitigate the disproportionate demands in respect of understanding what compliance looks like and what is required (where larger businesses have staff already in place to deliver against new or changed regulation where smaller businesses do not).*

Direct financial aid for smaller business: *for example the ability of smaller businesses to obtain financial re-imbursement of costs associated with compliance (particularly around transition, where new or substantially changed regulation places significant new financial costs on business).*

Opt-in and voluntary solutions: *where businesses below a certain size are allowed to voluntarily "opt-in" to the full regulatory regime, or where they agree to an industry-led voluntary scheme.*

In addition (and not only in the context of small and micro-businesses), consideration should be given to the benefit of reviewing certain of the proposals at a time preceding future Code consultations. The current policy on the review of measures that regulate business including both domestic and EU-derived measures (with some exceptions) is in some instances mandatory and in others a matter of good practice. The options are to insert a review clause into those measures to establish whether, at a given later date, to what extent the measure has achieved its objective, and whether it should continue in operation and/or a sunset clause causing certain measures to expire automatically within e.g. one year of coming into force. As a minimum, the sunset or review clause should apply to the elements of the proposals that give rise to the regulatory burden on business. Uncertainty regarding the effect of a measure at the time of introduction suggests that an early post-implementation review is wise.

We would ask that the above be considered in the context of the impact assessment. We also raise the matters above in light of the following proposals under the proposed 13th Code, which we suggest require special attention due to their likely impact on small, and micro-business and/or the uncertainty regarding their effect:

(a) making the paper-based hearing obligatory (thus adding an extra layer of costs in the appeal process), with one-sided costs recovery provisions;

(b) decreasing the accountability of the Executive in its wielding of its withhold powers, particularly where such powers can drive a small business into administration;

(c) the decision as to whether to allocate to track 1 or track 2, before the issues in the case have properly been investigated.

Question 2 - Do you agree with the new consolidated mechanism being introduced at 3.12 to govern spending caps, and our proposal to sit the monetary values outside the Code? Please evidence your response?

Our concern: intention to target children should be a requirement for the purposes of paragraph 3.12.2(i) of the 13th Code

We echo the comments of AIME relating to the proposed paragraph 3.12.2(i). The proposed drafting captures services *"which should have been expected to be particularly attractive to children".* For the same reasons as set out in our response to question 6 below, dealing with vulnerability, we believe that intention is a required element of the test.

Question 6 – Do you agree with our proposed change to the vulnerability provision? Please evidence your response?

Our concern: by removing any requirement of intention to target the vulnerable, this becomes a strict liability offence: if the vulnerable, or a vulnerable group, are in any way compromised by a service, intention of the service provider is irrelevant. This closes the door to any argument based on overwhelming evidence of fact, as lack of any intention would not prevent breach of the Code.

The suggested justification for this change is that where it is difficult to establish intent, vulnerable consumers who have been "disproportionately affected" by a non-compliant PRS will still have the protection of this Code breach. However, there is little logic in this approach: vulnerable consumers will still have the protection of the other provisions of the Code. A PRS will only be non-compliant if caught by one of the other, substantive provisions (or the perverse result will be that non-compliance can be established solely on the basis *of non-intentional* vulnerability, there being no other grounds for breach): it is difficult to envisage that a service which is compliant in all other respects can ever be said to have "disproportionately affected" the vulnerable where there is no intention to target them. This Code provision was never intended to capture such circumstances and its ambit should not be broadened. We would also point out that, in addition to other Code provisions, a non-compliant PRS can be assessed as 'very serious' by virtue of the sanctioning factors that automatically lead to such a finding ('where the nature of the breach….takes advantage of a consumer who is in a position of vulnerability').

We acted for a client in which this precise issue was hotly debated. In that instance it was strongly argued by the Executive that the wording of the Code, in its 12th iteration, did not *require* intention – and that a breach of the Code was made out even if intention could not be evidenced.

We argued to the contrary, on the basis that all the evidence pointed to there being no intention to *target* the vulnerable (evidence adduced included marketing initiatives, advertising placements, confirmation from third party advertising companies, and actual statistics). All such evidence would be irrelevant under the new provision: this revision removes any doubt, establishing that a breach will be made out if the promotion or provision of the services '*results in … any vulnerability caused to consumers by their personal circumstances'.*

If the wording proposed by the Executive is passed into the Code, any charge of breach of this provision will be upheld in circumstances where it can be demonstrated that certain of the complainants are consumers belonging to a vulnerable group, who might be likely to use such services, and who had in fact used such services. This is too low a hurdle.

By way of example, let us take the group of those addicted to gambling: if a gambler has used a gambling service, and if that service has been 'promoted' or 'provided', then purely by virtue of the gambler having used the services, there is a risk of breach of the Code, as drafted, purely on the basis that an '*unfair advantage [will have been taken] of any vulnerability caused to consumers by their personal circumstances'*.

We would suggest that this amendment to the Code is a direct response to the high-profile case in which this issue was hotly debated. However the Executive has moved the goalposts too far, such that perfectly legitimate marketing activity risks being captured. The solution, we would suggest, is for the Executive to introduce a degree of 'constructive knowledge', where a breach will be made out if a service provider, without targeting the vulnerable particularly, realises or ought to realise that a vulnerable group is in some way harmed, and yet does nothing to remedy.

Question 10 – Do you agree with the proposed changes to allow for greater flexibility to exempt services or providers from registration? Please evidence your response.

Our concern: shifting the application of exemptions from services to *'categories of service providers'* risks inconsistency, and the opposite of the intended purpose – less flexibility.

This question is incorrectly framed: the revised wording of the Code does not permit *any* exemption of services from registration. The new exemption regime will extend to *'categories of providers'* not the services themselves.

Ostensibly the proposals are suggested *'to allow for greater flexibility to exempt services or providers from registration'.* The suggested change will mean that the exemption applies to the 'categories of Network operators, Level 1 or Level 2 providers' NOT to the *services* which those same providers were responsible for. The difficulty is that this may lead to inconsistency: we need greater understanding of how these 'categories of providers' are to be defined? Plainly we cannot have a situation where one provider is exempt, when another is not, even though it is providing the same service and just because it has been categorised differently.

In fact, this very difficulty is illustrated by the drafting of Rule 3.4.4, which is inconsistent with the proposed wording of Rule 3.4.3, the former suggesting that the *'premium rate service'* is operating within an exemption, rather than the category of service provider.

Question 11 – Do you agree with our proposed change to Paragraph 3.3.3(b)? Please evidence your response.

Our concern: to the extent that this amendment is intended to apply to providers based in Member States, it is not binding.

This amendment is based upon the false assumption that the Executive necessarily has the right to dictate terms of contracts for overseas providers. In respect of Member States, this is a false assumption. Providers based in Member States have no requirement to be bound by the provisions of the Code at all, and will only be judged by the terms thereof at the point where the regulator in its own Member State has declined jurisdiction, or the situation has correctly been judged to be so urgent as to require the bypassing of the requirements of Directive 2000/31/EC.

By this amendment, PhonepayPlus seeks to allow itself the right to enforce terms of contracts between service providers, one or both of which may be based in foreign jurisdictions. We would comment that the ability of PhonepayPlus to seek to rely on the equivalent of the Contracts (Rights of Third Parties) Act 1999 in a foreign jurisdiction must still be subject to the overriding requirement that PhonepayPlus cedes such right to the regulator of the relevant Member State to take such action itself. Any change to this provision enacted ostensibly in order to allow PhonepayPlus greater power over foreign service providers must be viewed, and drafted, in light of European law, and in particular, Directive 2000/31/EC (the subject of the recent Ordanduu case).

Question 13 – Do you agree with the changes we propose to the Track 1 and Track 2 procedures?

Our concern: the decision to allocate a case to Track 2, possibly resulting in the termination of a Level 2 provider's contract by a Level 1 provider, could be taken prematurely without the benefit of full investigation and of all the relevant information.

We agree with the confirmation of the general principle that the Track 2 procedure be used *'for more serious Code breaches'.* The difficulty we have with the proposed amendment is that it imports a decision as to whether to implement the Track 2 procedure *before* the case has thoroughly been investigated. It may transpire that a Track 2 procedure is instigated which is subsequently downgraded to Track 1 by the Executive, upon closer examination of the case: the problem is that at this point, for example, the Level 1 provider may have already terminated the services, causing significant damage. The legitimate concern is that the decision to initiate the Track 2 procedure, with all the resultant complications, will become the 'default' position where there is doubt following receipt of a complaint, pending thorough examination.

Question 14 – Do you agree with the proposed change to 4.4.6 (now 4.4.7) to ensure the effective retention of revenue made from harmful services and prevent abuse of the review and oral hearing processes?

Our concern: the imposition of a withhold is a serious sanction, the impact of which the Executive does not appreciate, and which needs to be subject to the same process of checks and balances as any other sanction imposed.

We disagree both with the spirit and with the effect of the amendment to this Code provision. We suggest that the Executive has underestimated the effect which a withhold can have on a provider's business: effectively it amounts to a serious sanction, threatening the ongoing business activities of a provider. In one case in which we were instructed, a withhold was in place which was in excess of what we perceived the likely level of any fine: the Executive refused to reduce the amount of any withhold, the effect being that our client had no funds to meet ongoing business costs, including legal costs. Our client was unable to continue with the case, despite the Executive being on notice that our client's business faced closure and that serious issues as to access to justice were posed. We have also been aware of the cases of five other companies which have been put out of business by the invocation of the withhold power.

In another case in which we were instructed, with our client already starved of funds due to a withhold in place, the Executive then issued a 'security for costs' application, in respect of its costs for the pending Oral Hearing. (A 'security for costs' application is where one side makes an application to the Court for the other side to make a guarantee payment to cover their costs in the event that they lose). Such litigation tactics, which drove that particular client out of business, are of real concern to our clients' and other stakeholders, particularly small and micro-businesses. For a regulator, for whom access to justice ought to be a driving concern, there must be a considered assessment of risk and alternatives.

The concern is that the power be used as a weapon in the regulatory process, to starve a client of funds required to fight any decision by the Code Compliance Panel or the Oral Hearing Tribunal. Contrary to the wording of the question, we would suggest that the greater purpose is to deprive the provider of access to the review and oral hearing process. In some cases, by virtue of a withhold being in place, the invocation of the Emergency Procedure would have been preferable to the more protracted Track 2 process

It is against this background that we wholeheartedly support the recommendations in AIME's consultation response: the decision to impose a withhold is a significant sanction, and it needs to be treated as such. The Executive needs to be accountable both for its decision to impose a withhold, and for the amount of any such withhold in place.

Question 15 – Do you support the changes proposed to 4.5.3? Please evidence your response.

Our concern: we require confirmation from the Executive within the Code that services can only be suspended if the Emergency Procedure is invoked: the practice of informal

recommendations to Level 1 providers by case officers who are not mandated to impose sanctions must cease.

We do not agree with the proposed changes, for the reasons set out in AIME's consultation response.

The consultation should also consider the instances where the Executive has secured the suspension of the services *without* the implementation of an Emergency Procedure, through informal recommendations to Level 1 providers (with the veiled threat of breaches of the Code being levelled against them if the services continue in operation). This is inappropriate. The Emergency Procedure is a specific procedure developed for the cases of serious consumer harm, which requires the unanimous decision of the CCP to be put into place, and which provides other safeguards. It ought to be only by this process that a suspension of services should be put into place.

Instead, there have been instances where the *effect* (if not the state) of an Emergency Procedure has been achieved, through the termination of services by a Level 1 provider (on the Executive's 'informal recommendation'), with there having been no formal decision taken at all. We would ask that the Executive provides guarantees that such activities have ceased. The truth is that in many cases in which we have acted for client, due to the 'backdoor' imposition of sanctions by unqualified case officers, it would have been *preferable* for a case to have been dealt with by the Emergency Procedure; the impact of the Executive's actions on the business operations would be the same, but at least a swifter resolution, with all the appropriate safeguards, would be provided.

Question 16 – Do you agree with the changes being proposed to reviews? Please evidence your response.

Whilst we suspect that the decision to lower the threshold for 'review', effectively abandoning the Judicial Review principles thereof, may be one driven by a desire to lessen the number and cost of more onerous Oral Hearings which the Executive has to deal with, we are wholly in support of this change.

Question 17 – Do you support our intended changes to oral hearings? Please evidence your response.

Our concern: the proposed changes make the adjudication and appeals regime in place more convoluted than it is already, when industry experience and High Court commentary suggest a drive in the opposite direction should be favored. We refer to our headline comments in the introduction to this letter at paragraph 2 above.

We object to the proposed changes in the strongest possible terms.

Currently it is possible for a client to bypass the paper-based hearing and go straight to the Oral Hearing. This is a route we have advised our client to take on numerous occasions, in more complex cases, for the following reasons:

- Essentially we believe that in cases with issues of law or technical detail, the Oral Hearing Tribunal provides the best prospect of a fair outcome.

- The OHT is better equipped to deal with more complex cases, as there is a legally qualified representative present, and allows clients fully to present their case outside of the constraints of the paper-based process;

- Indeed a paper-based hearing proceeds on the basis of a case put together by a case officer, who is not legally qualified, often dealing with complex legal points: the Statement of Case for an Oral Hearing Tribunal is at least drafted by lawyers, ensuring greater consideration of legal issues which are often key to a fair result for a client.

- Further the case which has been brought to the Oral Hearing Tribunal has been 'filtered' from that investigated by the case officer, ensuring greater impartiality.

The Executive states, in the pre-amble to this question, that *'some providers have been ill-advised to pursue an oral hearing ahead of a paper-based Tribunal in an attempt to secure a more favorable outcome resulting in significant, and arguably, unnecessary cost'.* It is not for the Executive to comment on whether such providers have been ill-advised to pursue this route, but the Executive's interpretation is most worrying. It demonstrates a lack of support in the Oral Hearing process (as supported by the statistics as to the number of Oral Hearings already provided). In our view, the proposed amendment to the Code, is entirely self-serving. We have no doubt that in those instances where our clients have bypassed the paper-based hearing; the end result has been preferable, both in terms of eventual sanction and in terms of avoiding the additional layer of costs which the paper-based hearing represents. The Executive's proposed amendments to the Code are purely engineered so as to limit its own administrative burden. Whilst we do not object to the Executive's wish to reduce its own cost base, this *cannot* be at the expense of basic principles of access to justice.

In the recent *Ordanduu* High Court hearing, an application for permission for judicial review, the Judge expressed his surprise at the *'byzantine'* procedures in place, his concern being that it was not possible for a provider who had been subject to an adjudication to bypass the Oral Hearing Stage and go straight to the Independent Appeal Board for the issue if that is what it wished. The Judge's concern was that the PhonepayPlus regulatory process had too many layers through which a provider had to pass before there could be an independent right of appeal.

The problem we have is that rather than taking into account the comments of a High Court Judge, in extant legal proceedings, the Executive has chosen to instate *another* mandatory layer of regulatory/judgment process. The reality is that, now, more than ever, only those providers who have very deep pockets will be able to challenge the Executive's decisions.

If the Executive is concerned that the number of Oral Hearings poses too heavy a burden, the solution lies *not* in removing that *de facto* right and making it subject to another expensive process, but rather in bolstering the industry's confidence in the Tribunal process, such that it is no longer thought necessary to skip straight to the Oral Hearing stage, and/or by streamlining the Oral Hearing stage to speed that process up and reduce costs.

Question 18 – Do you agree with the changes to the appeals process? Please evidence your response.

Our concern: we believe that a provider, like the Executive, should have the right to appeal directly to the IAB.

We agree with the amendments to this Code provision, but we propose a further amendment for consultation.

Currently, paragraph 1.2 of Annex 4 reads as follows:

"PhonepayPlus may appeal to the IAT against CCP Tribunal decisions and adjudications (other than any adjudication by consent)."

We would suggest that a provider equally should have the ability to appeal to the IAT. We see no reason why the Executive is able to skip the Oral Hearing Tribunal, but a provider is forced to go through this additional (and extremely costly) stage in order to obtain the assessment of an independent panel.

This same issue was considered by the Mr. Justice Charles in the recent Ordanduu decision (paragraphs 16 and 17):

16. I asked during the course of the hearing whether or not the claimants could move straight to the appeal before the Independent Panel. The indication was that that had been asked for and it had been refused. The argument is firmly that there is a two stage process and that PhonepayPlus require these claimants to go through what would be an expensive process with no prospect of recovering their costs before the Independent Panel was engaged.

17. How is that just and fair? To my mind it is not.

The problem is that the Oral Hearing Tribunal offers no provision for the provider to recover its costs, whereas the IAT process *does.* As such, in order to get a stage where a) a provider faces an independent panel; and b) a provider may recover its costs; it must pass through two prior stages of adjudication which are not independent and which do not allow for cost recovery. The *'Byzantine appeals process'* as currently formulated prevents access to justice in that it is simply too expensive.

We would suggest that the Code provides for the ability to appeal a decision directly to the IAT (as the Executive can). It would appear though that the Executive is heading in the opposite direction

in fact, in making the paper-based hearing mandatory: this is not in keeping with Mr. Justice Charles' sentiments in this recent Queens Bench Division judgment. The consultation on this Code appears to provide an opportunity for the Code to be brought in line with Court guidance and we would ask that this opportunity be taken.

Question 19 – Do you agree with the changes planned to 1.7.2, 5.2.1 and 5.3.8(c)? Please evidence your response.

Our concern is with the drafting of 5.3.8(c): whether a party is categorised as a Premium Rate Service provider is important and currently there is no ability for the Executive's decision as to whether a party is a premium rate service provider (and which category of provider that party is) in any way to be challenged. We would suggest that the first sentence be rephrased as follows:

'In respect of any relevant premium rate service where PhonepayPlus reasonably considers there to be a material doubt….

We would also suggest that there be a procedure for challenging the Executive's decision under this provision.

Question 20 – Do you agree with our proposed change to Annex, paragraph 3.1? Please evidence your response.

We strongly agree with AIME's response in relation to this point: regulatory powers require their balances and their checks, and we believe that the approval by OFCOM of the Executive's budget is an integral part thereof.

Question 25 – Do you agree with the changes to 4.8.2? Please evidence your response.

Our concern: the prevailing wind of public opinion, as expressed in the media, simply has no place in the determination of sanction by a Court.

We disagree with the revised drafting of paragraph 4.8.2 in two fundamental respects:

1. *'unreasonable offence to the general public'* should not in any way be relevant to the question of whether refunds be given. The issue of a refund is a sanction, to be decided by a Tribunal based upon the question of whether there has been a breach of the Code alone. Otherwise the concern is that the Tribunal has one eye on the question of the Code, and another eye on the question of public opinion, as expressed in the media. We have suspected previously that press attention has had a bearing both upon the outcome of a case, and upon the activities of PhonepayPlus in the public arena. The concern is that now this will be wholly endorsed by the Code, whereas this is not the correct approach.

Ordinarily, in other aspects of the law and regulation, the Courts are keen to ensure that public opinion should *not* impact upon the outcome of any Trial (it is for this reason that there are restrictions on press reporting and significant sanctions in respect of Contempt of Court). In this amendment the Executive is doing precisely the opposite: it is effectively giving itself licence for Tribunals to take into account press campaigns in reaching verdicts. This does not even to begin to address the practical implications of how *'offence to the general public'* is assessed: the tabloid press cannot sensibly be a barometer thereof, but how else is the Executive proposing that the question of '*offence to the general public'* be assessed?

2. On a matter of drafting, we would suggest that, at paragraph (j), these are not alternative, but rather cumulative, options.

Putting points 1 and 2 together, we would suggest this Code provision read as follows:

(j) 'require in circumstances where there has been a serious breach of the Code and serious consumer harm that refunds for the full amount…. Etc'.

Question 31 – Do you have any comments about the contents of this document? Do you agree with our overall approach to the thirteenth edition of the Code? Have we neglected anything?

We refer to the beginning of this response, and to the Executive's failure to address the question of the maximum fining powers of the Executive.

Yours faithfully,

M LAW LLP

Enclosed – ICSTIS Brief on raising Maximum Fine Levels under the Communications Act 2003