

## Your response

Question	Your response
<p><b>Question 1: Do you consider Ofcom should approve the PSA's 15th Code of Practice in its current form? Please provide an explanation to support your response.</b></p>	<p>The Association for Interactive Media and Micropayments (aimm) is the specialist UK-based trade organisation representing the commercial and regulatory interests of member companies involved in the interactive media and micropayment industries - where consumers interact or engage with services across converged media platforms and may pay for those services or content using a variety of micropayment technologies including premium rate. We are a not-for-profit organisation, funded by our members, run for our members. We create conditions for growth and protect the regulatory environment in which our members operate.</p> <p>aimm has a membership that represents the entire value chain – from the providers and promoters of information to the network operators and technical service providers that deliver and bill them to customers. No other organisation has such reach or representation. Members of aimm work collaboratively to address key industry issues and to build a trusted business environment, encouraging investment, creating new opportunities and developing business partnerships.</p> <p>Whilst aimm and its members recognise the good work that has been done by Mobile Network Operators and the PSA in reducing consumer harm, bringing down complaints and creating a healthier market, they cannot agree, as the Code stands, that Ofcom should approve this Code.</p> <p>We note that while some of the legal tests required are achieved there are significant issues with others, which we note below:</p> <p><u><a href="#">Legal tests:</a></u></p> <p><b>(a) the PSA will have the function of administering and enforcing the draft Code;</b></p>

**This test can be passed,** however as aimm have stated in the past, and produced research to demonstrate, just because the PSA will have the function, it does not mean that it is being carried out in the optimum manner. The value chain would like to see a regulator which sets high standards for itself as well as those that it regulates, and these standards are not always apparent in Code 15. One example of this is the Engagement and Enforcement proposals which detail timescales for the value chain to respond to enquiries from the PSA. This is of course completely acceptable. However, it has long been the case that the PSA themselves can be painfully slow at processing information and progressing investigations, often never informing providers that their case is long closed, or still being investigated, months after the initial contact.

To have the function of administering and enforcing the Code must mean you are able to hold your own processes to account, as well as those that you regulate.

**(b) the PSA is sufficiently independent of the providers of premium rate services;**

**This test can be passed.** It is worth noting however that when responding to the Business Plan and Budget Consultation, aimm produced global research that demonstrated that the best regulation happens much more collaboratively. This was dismissed, with the requirement for independence cited as the reason that it could not be contemplated. We understand this is an Ofcom requirement, but what aimm and its Members would like to see is that - whilst retaining their independent status – the PSA consider a much more collaborative approach to regulation. This would also bring with it efficiencies, and we have again shown in our research that this is successfully achieved in similar territories on much smaller budgets than that which the PSA operate on.

Industry has on many occasions offered engagement with the PSA to help with their understanding of the value chain and the complexities of some of the technicalities that

make up its provision. This has rarely been taken up. Just because the PSA is an independent body, it does not mean that it should stand removed from an Industry it is supposed to not only regulate, but champion and grow also.

**(c) there are adequate arrangements funding the activities of the PSA;**

**This test cannot be passed.**

Funding arrangement have been a source of grave concern for the value chain. The budget for the operation of the PSA is around £4million making them one of the biggest – if not the biggest - entities in the market, which in itself is surprising.

Complaints have fallen dramatically and are at the lowest in the history of the PSA, but the cost to Industry is greater than ever. Due to the demise of retained funds (through the lack of fine collection), this year the cost to Industry to fund the PSA has more than doubled.

Already the commercial proposition around phone-paid services is a tricky one, with outpayments to Merchants being lower than other payment methods.

As the cost of regulation has effectively more than doubled, this has naturally reduced those outpayments further, meaning that it is now less commercially attractive as a payment mechanic.

To add to this a new Code with proposals that disadvantage the market further (see below), will mean that many Merchants either cease to use phone-paid services, or never give this Industry any consideration.

**(d) the provisions of the draft Code are objectively justifiable;**

**This test cannot be passed.**

There is no justification for the proposal at 3.3.11 which requires the re-opt in for

subscription users and regular charity donors at 12 months. It states;

*“For all subscription services, the consent required to be established through an authentication method set out under paragraphs 3.3.8 and 3.3.9 above must be obtained by the merchant provider every 12 months.”*

There is zero consumer harm in this area for recurring charity donations and complaints about commercial subscription services have dramatically reduced.

Consent to Charge regulations already ensure that consumers know what they have signed up for, which is not a renewal product with an annual contract. Consumers have no expectation of opting back in after 12 months.

At a recent PSA ILP meeting complaints were cited to be at their lowest in PSA history which shows this is the case.

As such, there can be no justification for any further regulation that will decimate this area of the market. Charities/Merchants will move to payment methods where the risk of consumers being inadvertently opted out is not present, and this cannot be justified.

Global brands that operate in the UK have suggested that they cannot justify making these proposed changes purely for the UK market and if forced to in the draft Code, then they will cease to use carrier billing here.

Whilst we are told by the PSA that broader regulation around auto-renewal may be coming down the line, this is no reason for the PSA to include it here, specifically when phone-paid services appear to be out of scope. Equally, there is no justification to bring any future regulation that may, or may not, occur into the phone-paid services industry at this stage, when the Code can, if need be, be amended at a future date to account for this.

**(e) those provisions do not discriminate unduly against particular persons or against a particular description of persons;**

**This test cannot be passed.**

1. The requirement in the draft Code within the Fairness Standard proposed at 3.3.11 is absolutely discriminatory towards the phone-paid services industry. It states;

*“For all subscription services, the consent required to be established through an authentication method set out under paragraphs 3.3.8 and 3.3.9 above must be obtained by the merchant provider every 12 months.”*

We know that consumers partaking in phone-paid services are aware – through Consent to Charge regulations and various proven communications – of what they have signed up for, and that they can opt out of the service at any time. There is no contracted period to be served, and no notice period.

Subscribers receive regular information advising them of their subscription and how to exit from it. Charity supporters who give a regular donation (also included under this proposal), receive regular reminders that they can SKIP a donation or STOP their donations at any time.

Users are very familiar with this opt out method.

The public are often urged by consumer advice programmes and also by the PSA themselves, not to engage with unexpected text messages.

To move from a recognised opt out model, to then - once a year – sending consumers an opt in message which they are not expecting will result in two outcomes.

1) The consumer will assume it is SPAM and ignore the message, meaning they will be inadvertently and unwillingly opted out of the service or

2) The consumer may consider that it might be a real message, but be mindful of all the advice that states they should not engage with unexpected messages, and err on the side of caution, meaning they will be inadvertently and unwillingly opted out of the service.

In both scenarios, the consumer is opted out of the service and the Charity/Merchant loses that support/revenue.

Charity services receive no complaints from the public, and commercial subscription complaints have dwindled, so this hugely discriminates against them, when there is no consumer harm to fix. There is no solution required here.

Charities/Merchants will move to payment methods where this risk is not present, which discriminates against the phone-paid services industry. Equally, global brands that operate in the UK have suggested that if they are forced in Code to make these changes – purely for the UK market – then they will cease to use carrier billing here, again demonstrating that this proposal is unduly discriminatory to the phone paid services market.

Despite the intentions of the draft Code, this is doing the very opposite of aligning consumer expectations with other payment mechanics, as those paying by, for example, direct debit are not subject to this reauthentication. As such, phone-paid services will be discriminated against with this proposal, which will see users confused and overly bothered by unnecessary communications sent to them and will move towards easier methods such as direct debit. As such, how can consumer expectations be met under these proposals, when the two payment mechanics will be different, with one being discriminatory towards the industry and the consumers that use it?

Equally, new Merchants considering which payment channels to offer their consumers will be faced with a choice between payment mechanics such as PayPal or direct debit, where there is no requirement to opt in after one year, and phone-paid services where the requirement is in Code. The cost, technical requirements, and risk of user churn/inadvertent opt out will be so much higher with phone-paid services as to hugely discriminate against it as a form of payment.

The PSA will be knowingly materially disadvantaging and discriminating against a market with regulation that advantages

competitors which surely must be seen as market shifting.

The PSA have informally stated that there is to be a higher ruling due on this issue from the BEIS. We would ask for formal confirmation that this is the case and for the distribution of information related to it. If this relates to the letter here (which has been circulated by the PSA):

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...then rolling subscription services with robust consent to charge, spending receipts, no annual tie in, a method of opt out at any point and a SKIP function for Charity donations are clearly not in scope. It is clear that this is letter considering regulation on a distinctly different contractual model of subscription which feature an automatic renewal of a fixed term subscription with a price increase or significant change in other terms. Therefore, bringing in regulation to address a problem not in scope can only be seen as discriminatory.

Additionally, if there is to be a change of regulation at that level, which will affect ALL payment mechanics such as direct debit also (which has not been confirmed) Members suggest that the PSA are obliged to wait for that regulation to be confirmed, rather than force it through now with the result that phone-paid services will be hugely disadvantaged and discriminated against. By making this dramatic change earlier than other payment mechanics do, this will cause market shifting as merchants will simply move away from this Industry to other payment methods which do not yet require this step.

Actions already in place in the Code mean that the PSA will be over-regulating to the point of discrimination if they overreach to this point.

2. The approach to Engagement and Enforcement was partly based on a recognition by the PSA that improvements were required on both sides to streamline the effectiveness of enforcement.

Whilst there is a clear process in place for Industry, Members were very disappointed that there is no accountability for performance of any kind mentioned as being applicable to the PSA. This does not feel like the right approach as it is not addressing both sides of the problem and as such is discriminatory towards Industry.

3. Complaints are defined in the draft Code as follows;

*“A complaint is a written or oral expression of dissatisfaction made by a consumer of PRS”*

If comments made on social media or in open public forum are designated as ‘complaints’ as per the proposed requirements, then this will discriminate against providers who will be held to a much more onerous standard of customer care than other payment providers.

4. Proposals to introducing a new “single decision maker” as an alternative to the full Tribunal could be discriminatory depending on the level of qualifications/industry experience and knowledge held by the individuals concerned.

5. Proposals to limit the circumstances in which a provider can request an oral hearing could be discriminatory depending on the threshold set, which has not been published and as such cannot be scrutinised or agreed to be fair and non-discriminatory.

**(f) those provisions are proportionate to what they are intended to achieve;**

**This test cannot be passed.**

1. The proposal at 3.3.11 which states;

*“For all subscription services, the consent required to be established through an authentication method set out under paragraphs 3.3.8 and 3.3.9 above must be obtained by the merchant provider every 12 months.”*

...is entirely disproportionate.



There is no longer an issue with unknowing sign up to subscriptions.

Consent to Charge is robust.

Multi Factor Authentication means the risk of harm is no longer present and the PSA demonstrated at the May Industry Liaison Panel meeting that complaints are at their lowest level in PSA history (and there were zero complaints for the Charity sector which will be suffer significant reductions of monthly donations as a consequence of this proposal).

The BEIS letter that has been circulated by the PSA on this puts phone-paid subscriptions out of scope.

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There is no problem to solve as phone-paid services are not described in the letter. Consumers sign up to an ongoing service, not an annual contract and can opt out at any time. There is no annual renewal process.

If the phone-paid services industry are forced to implement this and other payment mechanics are not, or are not until a later date, then Merchants and Charities will simply choose not to employ the use of our industry for their subscriptions and recurring donations. Global subscription brands have indicated that they may decide not to make these onerous changes that only affect the UK market and could drop phone-paid services and utilise other payment mechanics instead. This cannot be seen as proportionate against a risk that is negligible to consumers and has not been impact assessed.

If later down the line there is regulation of this nature, it should be applied equitably, at the same time and in a proportionate way across all payment mechanics. The PSA may not even need to codify that regulation as it will come from government and as such – in order to ensure the regulatory process is simplified and not duplicated as is the intention of the Code, may not require replication.

It has also been recognised that the proposal of obtaining a valid opt-in every 12 months will increase costs for some providers and will absolutely decrease revenue for no proportionate reason. The impact assessment for this fundamental change which will put this Industry at a disadvantage to other payment mechanics has not been carried out to our knowledge – and as such this cannot be judged to be proportionate. Regulatory Guidance suggests that this assessment should have been carried out when the impact is likely to be in the region of over £5 million and over. This would be required to prove proportionality.

2. The consultation document states at point 501 that;

*“Under Code 15, we propose to make it mandatory that providers retain all information that is potentially relevant to an investigation by bringing this within the scope of Code 15. This would give us the ability to impose a penalty if a provider fails to retain any relevant data as required.”*

This is disproportionate and appears to misalign the Code with the current privacy laws with a requirement to hold, for a prolonged period, undefined amounts of data.

3. The new Organisation and Service Standard increases the obligation on Providers to submit enhanced Registration evidence when entering the market. It is agreed that robust validation and verification of phone-paid service providers is essential to protecting consumers and growing a healthy and sustainable market.

However, it is concerning to see that - despite extensive consultation and feedback – there is still no proposal for the PSA to verify the data that they are requesting. It is common sense that increasing the amount of evidence and information requested to someone entering the market will not protect consumers if that evidence is found to be false having not been verified by the regulator, and as such is disproportionate. This is one of the main concerns regarding Code 15 amongst some Operator Members. Members were expecting accountability to be taken by the regulator for

regulating newcomers and this is simply non-existent in this proposal. Members feel that this Standard could be fundamental in improving Industry if information was verified, but falls disappointingly short of it in this proposal.

As such, this disproportionately increases the burden on industry with no upside, and removes any accountability from the PSA for regulating rogue newcomers.

4. The draft Code at 3.8.4 states;

*“The following further requirements in respect of registration will apply to merchant providers:*

*(b) Merchant providers must provide the identity of any other PRS providers involved in the provision of the service, as well as information about any other person contracted for, or otherwise involved in, the promotion and delivery of the service. Merchant providers must provide the identity of any other PRS providers involved in the provision of the service, as well as information about any other person contracted for, or otherwise involved in, the promotion and delivery of the service.”*

Merchant providers suggest that this is not proportionate and that to gather information on all those who may be involved in a service may be an impossible task, and certainly very onerous. For those not recognised in the value chain and therefore not regulated by the PSA, there is no incentive to provide this information. Whilst this may be aimed at capturing details of technology partners and affiliate marketeers, as it is written it is unworkable. Does this mean that merchant providers are to be forced to gather information of this type for advisers, financial assistance received, compliance help, search engine expertise and legal advice?

5. Code 15 asks at Q54 of the consultation;

*“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 Code 14?”*

This would allow investigations already under way under Code 14 to be judged under new Code 15 procedures, which could disadvantage those businesses and is not fair or proportionate. For example, a business under investigation could be denied an oral hearing which they would have been entitled to under Code 14, despite the fact that the investigation was underway under the Code 14 regime.

**(g) they are transparent in relation to what those provisions are intended to achieve.**

**This test cannot be passed.**

1. The Guidance and Best Practice that support this draft Code have not yet been published. This is an issue due to the nature of Guidance and Best Practice. The Code consultation states that;

*“While the guidance will not be binding on providers, we will take into account whether or not providers have followed the guidance in considering any alleged breach of the Code and/or the imposition of sanctions.”*

and

*“We propose to take compliance with best practice information into account when considering any alleged breach of the Code and/or imposing sanctions.”*

This means that the value chain is being asked to agree to a Code that will be supported by Guidance and Best Practice that may be used against them with no transparency around that Guidance/Best Practice.

As such, the draft Code is not transparent enough for Industry to be able to agree or disagree with its contents.

2. The research that supports the notion that consumers expect as 12-month reauthentication to a non-renewal product (proposed at 3.3.11) which has no service level change or price change has not been shared.

	<p>The impact assessment for this fundamental change which will put this Industry at a disadvantage to other payment mechanics has not been shared – and as such the justification for this proposal is not transparent. Regulatory Guidance suggests that this assessment should have been carried out when the impact is likely to be in the region of over £5 million and over. If this has been done, Industry have not had sight of it.</p> <p>3. The Code proposes several types of supervision, including thematic reviews;</p> <p><i>“Thematic – to undertake wider diagnostic or remedial work in respect of the provision, content, promotion and marketing of PRS where similar or connected instances of non-compliance with particular provisions of this Code, or of actual or potential harm to consumers, have arisen in relation to a number of PRS providers and/or services.”</i></p> <p>The value chain requires much more transparency on what would trigger a thematic review. Members are concerned that thematic reviews (based on the scarcity of the detail provided) could be onerous and problematic in terms of resource and would like to know what reasonable and justifiable KPI would trigger a review of this nature.</p> <p>Members note that thematic reviews appear in other Codes of Practice, but are usually accompanied by KPIs. As such it is difficult for Members to agree with the approach without this level of detail or transparency.</p>
<p><b>Question 2: Do you have any views on the appropriate implementation period?</b></p>	<p>Such a fundamental change in the regulatory landscape will need a lengthy transition period to enable providers to understand and implement changes required to comply. We suggest that this is set at a minimum of 6 months, with an optimum period of 9 months.</p> <p>Additionally, we note that Code 15 asks at Q54 of the consultation;</p> <p><i>“Do you agree with our proposal to set out transitional arrangements that allow the new</i></p>

*Code procedures to apply from the commencement date to all investigations and/or complaints or monitoring which commenced under Code 14?”*

Some services that have been under investigation for a prolonged period of time could be held by the PSA for the purpose of investigating them under the new Code 15 procedures, which could disadvantage those businesses.

It is wrong to try and ‘retro fit’ ongoing investigations with new process and that this is not fair or proportionate. For example, a business under investigation could be denied an oral hearing which they would have been entitled to under Code 14, despite the fact that the investigation has been running for many months/years whilst under Code 14.

Members feel that there needs to be visibility of the scope and extent of the impact assessment that has been conducted on this proposal, as well as the legal basis for its presence in the Code draft.

Unlike previous iterations of the Code, this Code establishes manifestly different (and entirely new) standards, different procedures and different outcomes so Members feel that it is entirely inappropriate to suggest that just because this occurred in the last Code update, it should be permitted in this instance.