



**Review of the current PhonepayPlus  
Live Entertainment Services Compensation  
Scheme Arrangements**

**A PhonepayPlus Consultation document**

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## Section 1

### Executive summary

The PhonepayPlus Code of Practice (11<sup>th</sup> Edition, as amended April 2008) contains provision under paragraph 6.5 that certain categories of live services can only be provided where a PhonepayPlus-approved compensation scheme exists (see **Appendix B**). Such a scheme exists with the sole purpose of making available compensation to any person whose telephone has been used without the knowledge or permission of the bill-payer. Any person who suspects this to be the case is entitled to make a claim for compensation to PhonepayPlus.

#### How the scheme currently works

Live entertainment services are sexual (“sex lines”) and non-sexual One to One chat services, and psychic / tarot services. All service providers who wish to operate on premium rate numbers are required first to gain prior permission from PhonepayPlus. In addition to this they must also pay a fixed, non-refundable sum of £7,500 into an independent Trust Fund and also provide a bond, which is a legally binding guarantee set up by a third party (such as a bank), to a value determined by a number of factors including whether the service provider intends to employ information providers.

As an example, a new service provider wishing to operate live One to One chat services would be required to:

- Gain prior permission from PhonepayPlus;
- Pay a fixed one-off sum of £7,500 into the Trust Fund; and
- Provide a bond to the value of between £17,000 and £23,000, depending on their individual circumstances.

Claims for compensation can be made to PhonepayPlus by any person who suspects that their telephone has been the subject of unauthorised use to call live entertainment services, as defined above. When such claims are received by PhonepayPlus, the relevant service provider will be given the opportunity to investigate and settle the claim to the satisfaction of the claimant. If the service provider chooses not to settle the claim to the satisfaction of the claimant, then PhonepayPlus’ Executive will prepare a report to be promptly passed to the Adjudicator.

The Adjudicator is appointed by PhonepayPlus - although acts independently of it – and it is his/her job to come to a decision about whether a service provider must settle (or part-settle) a claim. If the Adjudicator directs that the service provider should pay the claimant and they fail to do so, PhonepayPlus will take place steps to enforce the service provider’s bond and use it to pay the claimant the sum that has been awarded by the Adjudicator.

In the unlikely event that the total of the award(s) made by the Adjudicator exceeds the service provider’s bond (which to date has never happened), PhonepayPlus will direct the Trustees to pay any such outstanding amount out of the Trust Fund. The Adjudicator’s guidelines can be viewed in **Appendix A**.

The Scheme only exists for the sole purpose of protection against *unauthorised use*. This means that it is not there to cover the cost of any service provider fines, sanctions, investigations, breaches of the Code or complaints against service providers. All of these are covered by other means such as permission certificates, the Code of Practice, adjudications and service provider breach histories, where necessary.

### **A better way**

The Scheme in its present form has now been in existence for approximately fifteen years, and during that time the vast majority of claims for compensation have been settled by service providers with minimal recourse to the Adjudicator, a minimal amount to the bonds of service provider and none whatsoever to the Fund.

PhonepayPlus is therefore of the opinion that the time is now right to review the existing arrangements. The aim is to establish first whether they are still fit for purpose. Secondly, to find a regulatory approach that continues to achieve the desired effect of protecting consumers, children and the vulnerable in the most effective manner and which continues to provide the means by which appropriate refunds are paid in full where there has been this kind of misuse of a telephone.

We have laid out proposals and available options for amendments, replacements and/or the removal (both complete and in-part) of the compensation scheme arrangements that are currently in place, in Section 4.

In summary, the reasons for PhonepayPlus conducting this review are the following, presented in more detail in Section 3:

- A changing industry, where the majority of consumers now call these types of services from their mobile phones which by their nature are not as susceptible to unauthorised use as landline telephones are
- Recent requests received from stakeholders questioning whether the Scheme and its components are still fit for purpose, and whether consideration should be given to its future
- A rapidly falling number of claims from members of the public over the past few years (down from 2,368 claims in 2003 to just 205 claims in 2007)
- The fact that the Trust Fund currently holds over £550,000 which has never been called upon, and in all likelihood, is not now ever likely to be
- There is a cost attached to the running and maintenance of the Trust Fund.

**Section 2** of this document provides a brief history of the current compensation arrangements. **Section 3** explains in more detail why we think we need to review the current arrangements, and **Section 4** outlines the options which we think are available to us, along with the advantages and risks of each (and making clear the options favoured by PhonepayPlus). **Section 5** summarises the Consultation questions as set out in the document, and **Section 6** explains the next steps following the issuing of this consultation document.

## Section 2

### A brief history of the Compensation Scheme

When premium rate services first came into existence in 1986, there was no regulation of live entertainment services. Calls to services were not recorded and there was no real evidence collected that would allow for investigation of potential breaches of the Code or claims for compensation.

A change was prompted by concerns surrounding chatline services in 1989. The Monopolies and Mergers Commission produced a report on premium rate services which concluded that while chatline services were not against the public interest and that they should continue to operate, they should continue with a scheme in place to protect consumers from unauthorised use.

From this point forward, ICSTIS (as PhonepayPlus was known) took on the regulation of live entertainment services, and:

- All service providers operating live entertainment services were required to record the calls
- Two separate compensation schemes were established; one for One to One live entertainment services, and one for multi-party chat services (“MPC”) services.

The One to One Services Compensation Scheme experienced few problems - it required all providers of live entertainment services to contribute a one-off fee of £7,500 into the Compensation Scheme (as remains the case today) and to contribute to the Fund in case it contained an inadequate level of funds at any point. The Trustees kept a tight grip on the Fund and allowed it to build up gradually.

In response to concerns raised by members of the One to One Services Compensation Scheme, particularly about the relatively high administration costs of the Scheme, ICSTIS introduced a bond scheme. This required service providers to arrange for a bond to be lodged with a bank acting as a guarantor. The bond could be set at variable levels according to the degree of risk associated with the particular service provider’s services, and could be varied if necessary. The bond scheme led to a greater degree of accountability for individual service providers and less direct involvement for the Trustees – and less risk for the Fund itself.

However, the MPC scheme began to run into difficulty. Demands on this Scheme through a very high level of claims for compensation for unauthorised use became greater than the Fund itself due to difficulties in collecting the ‘top-ups’ (the terms of the Trust Deed were such that as claims were paid, service providers that were operating services were required to ‘top-up’ the Fund). Claims outstripped assets, and the Scheme became no longer viable. The outcome of this situation was that MPC services were effectively banned in 1992, with BT agreeing to cover the deficit. MPC services were not brought back into circulation by ICSTIS in any form until 2002, when a trial was introduced. Greater consumer protection measures were required to be adopted by those providers wishing to operate them. However, the outcome of the trial could not be measured due to low interest and participation from service providers.

The same One to One arrangements – the Compensation Scheme and the Compensation Scheme Bond – for live One to One services remain in place today, and it is generally felt that these arrangements have always worked well. MPC services represented the more serious risk, and the two types of live service have been kept separate for the purposes of this review and at the time of writing, there are no such plans to conduct a review of the MPC compensation scheme arrangements.

## Section 3

### The need for a Review

PhonpayPlus is of the opinion that any review must seek to determine whether there is a need to amend the current compensation arrangements, replace it with an alternative that is, more appropriate given the current state of the industry or dismantle it and allow live entertainment services to operate in the same way as other premium rate services – that is with no provision for compensation arrangements for unauthorised use. These options, and others, have been set out individually in Section 4 of this document alongside potential risks to consumers and an assessment of impacts on businesses/service providers.

#### Determining factors

The actual decision to review the current compensation arrangements in place for live entertainment services has been derived largely from the following factors:

- A changing industry, where the majority of consumers who call these types of services do so from their mobile phones which by their nature are not as susceptible to unauthorised use as landline telephones are. We have been made aware that over 60%<sup>1</sup> of calls to live entertainment services are now made from mobile phones – even though many mobile phones are pre-barred from calling sexual services and in some cases premium rate numbers altogether, unless the network operator is requested to have the bar removed by the owner. We have received only a handful of claims for compensation from mobile phone holders in all of the time that mobile phones have been in circulation and it is likely that calls from mobiles will increase further in the future

#### Q1 – What evidence are you able to share to support our data and intelligence about the growth in the number of mobile phone calls to live entertainment services?

- A rapidly falling number of claims for compensation for unauthorised use from members of the public over the past few years. The figures below show the number of claims made, the value of the claims made and the value of the claims paid out by service providers for the years 2003 – 2007 (figures for 2008 not yet available):

Year	Claims	Amount Claimed	Amount Paid by Service Providers
2003	2,368	£20,895	£11,097
2004	1,311	£17,812	£10,313
2005	1,413	£24,292	£13,162
2006	1,242	£29,792	£17,285
2007	205	£9,506	£6,716

*Note: the amounts paid by service providers is lower than the amounts claimed for as service providers conduct their own investigations upon receiving a claim (or claims), and they are*

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<sup>1</sup> Industry estimates

*not obliged to pay a claim where they are of the opinion that genuine unauthorised use has not taken place. This tends to be common practice, and is only then put forward to the Adjudicator for independent review where the claimant disputes the service provider's assessment, and wishes to further pursue the matter.*

Furthermore, research<sup>2</sup> shows that of the overall phone-paid market which was worth an estimated £1.08 Bn in 2007, £153 million was spent by consumers on adult services (sexual entertainment services), and a further £58 million was spent on tarot/psychic services. Whilst this report does not give a breakdown as to what percentage of this money was spent on live adult or live psychic / tarot services (figures specifically for live were unavailable), it does give a perspective as to the size of this section of the market versus the small amount of claims for compensation that were received in 2007 (205 claims, with just £9,506 claimed and £6,716 paid out)

- Recent queries received from service providers questioning whether the Scheme and its components are still fit for purpose, and whether consideration should be given to its future. **Does it still protect those which it was originally designed for around 15 years ago? Is the Scheme still targeted and proportionate in 2008?** Many of the claims we have historically received have been from a parent where their child has called live “sex lines” on the family landline telephone. However, with the introduction of other technologies in recent years – technologies which have no connection with this Scheme such as the internet and social networking websites, for example - children in 2008 may also be less likely to call such services than they once might have been
- The fact that the Fund currently holds over £550,000 which has never been called upon, and in all likelihood, is not now ever likely to be. In the current climate – one where claims have rapidly fallen compared to other sectors such as mobile subscription where complaints have risen dramatically - this would now seem to be an excessive amount of money. The exact monies as held in the Fund in 2006 and 2007, are shown on the next page (figures for 2008 not yet available):

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<sup>2</sup> “Phone-paid Services: Today and tomorrow” - was undertaken by Fathom Partners on behalf of PhonepayPlus. It was published in February 2007 and is available at [http://www.phonepayplus.org.uk/pdfs\\_research/Phone\\_paid\\_services\\_Fathom.pdf](http://www.phonepayplus.org.uk/pdfs_research/Phone_paid_services_Fathom.pdf)

	2007		2006	
<b>Current Assets</b>				
Cash at bank	£574,739.26		£555,156.44	
Debtors: amounts falling due within one year	£1,076.03		£1,076.03	
		<b>£575,815.29</b>		<b>£556,232.47</b>
<b>Current Liabilities</b>				
Taxation	£5,719.95		£2,456.90	
Creditors: amounts falling due within one year	£2,183.75		£2,242.50	
<b>Net Current Sales</b>		<b>-£7,903.70</b>		<b>-£4,699.40</b>
<b>Total Assets Less Current Liabilities</b>		<b>£567,911.59</b>		<b>£551,533.07</b>

- There is a cost attached to the running of and the maintenance of the Fund.

## Section 4

### Regulatory options / Consultation questions

**Option 1 - Do Nothing** (This option would not require any alteration to the Code of Practice)

Nothing would alter from a practical point of view; the Compensation Fund would not be dismantled and the service provider bonds would also remain in place. New providers wishing to operate live entertainment services would continue to pay £7,500 into the Fund, would still have to lodge a bond with their bank and would still have to gain prior permission from PhonepayPlus before being permitted to operate. Claims for compensation would continue to be processed and dealt with as they are now.

This option is not favoured by PhonepayPlus, as it is felt that the time is right for change given the determining factors that are referenced in Section 3, namely market dynamics, requests from stakeholders to consider the future of the Scheme, a rapidly falling number of claims for compensation over the past few years and the Fund's excess amount of money which is now unlikely to ever be called upon to meet compensation claims.

In summary, this option is considered by PhonepayPlus to be outdated and the Scheme is in need of change.

**Q2 – Do you or do you not favour this option? Please give detailed reasoning where applicable.**

**Option 2 – Removal of the Current Arrangements in their Entirety** (This option would require alteration to the Code of Practice)

Implementation of this option would mean a drastic overhaul of the arrangements as they currently stand as it would involve the complete dismantling of both the Compensation Fund and the bonds. All service providers that have paid into the Scheme would eventually receive part of the money back that they originally paid in, from the Trustees of the Fund. The exact amount would be determined by the Trustees (and has therefore not been referenced in this review), but it is likely to be £7,500 minus the running costs of the Fund over the period of time during which it has been in place together with the costs associated with the full dissolution of the Fund. Service Providers would also be released from their bond obligations by their bank (this task would be carried out by PhonepayPlus).

New providers wishing to operate live entertainment services would continue to require prior permission from PhonepayPlus before operating such services, but they would no longer be required to pay into the Fund or lodge a bond with their bank. Claims for compensation would continue to be administered by PhonepayPlus, but there would not be a Fund or bonds to fall back on should service providers default on required compensation payments to consumers. Permission certificates for both new and existing providers would have to be amended so as to include specific conditions surrounding the

administration and payments of claims for compensation. Specific conditions would be decided upon outside of this consultation document if such a requirement arises.

This option is not favoured by PhonepayPlus as it would mean leaving this side of the industry open to too much risk all at once, especially from potentially unknown new entrants with no established record who could potentially cause consumer harm and drive high levels of unauthorised use without being immediately detected by the regulator. This view has been shared with us by some service providers.

Further, some commentators have argued that “sex lines” and psychic / tarot services are types of services that can, in some instances, prey on the vulnerable. So again, this option would allow providers into this section of the industry that could be looking to operate in a way that might not be entirely appropriate. PhonepayPlus does not necessarily agree with this view or think that the removal of the Fund and the bonds would automatically allow for this, as prior permission would still be required. But it is a consideration that has been noted.

In summary, this option is considered by PhonepayPlus to be too much of a change to go through at once, and one which it is felt may place unnecessary risk on this section of the industry notwithstanding the immediate positive financial impact, in the short-term at least, for businesses/service providers. It is therefore not a preferred option, and further, the implementation of this option would require Code alterations which would take a long period of time to be agreed and eventually implement.

**Q3 – Do you or do you not favour this option? Do you see the current arrangements as being the valuable ‘barrier to entry’ into this section of the industry that some providers have stated? Please give detailed reasoning where applicable.**

**Q4 – Do you agree with our assessment that the risks attached to this option are greater than the short-term positive business impact that would arise? If not, why not?**

**Option 3 - Removal of the Fund, but keeping the Bonds in place** (This option would not require any alteration to the Code of Practice)

All service providers that have paid into the Scheme would receive part of the money back that they originally paid in from the Trustees of the Fund. The exact amount would be determined by the Trustees (and has therefore not been referenced in this review), but it is likely to be £7,500 minus the running costs of the Fund over the period of time during which it has been in place, together with the costs associated with the full dissolution of the Fund.

This is likely to take over 12 months to implement as contributors would need to be located and payments would then need to be issued. For any new providers wishing to enter into the industry it would mean that they would no longer be required to pay into the Fund – instead, they would require prior permission from PhonepayPlus and a bank bond.

Claims for compensation would continue to be processed and dealt with as they currently are, with the only difference being that there would not be a Fund to fall back on should the need for this ever arise. However, should PhonepayPlus become aware of any risk once the Fund had been dismantled, this option would allow for bonds - for either individual service providers or across the board - to be increased in value, thus covering any such risk as and where deemed necessary. We have already stated that we consider this scenario to be highly unlikely, but the provision would be there should it be necessary.

In summary, this option would seem to offer the most rational and sensible solution and given the current climate which has already been referenced in this document, it would not seem to place any element of unnecessary risk on either PhonepayPlus or on the industry. This is the preferred option of PhonepayPlus. It would allow for the dismantling of the Fund which is now considered to be outdated, but with the service provider bonds remaining in place. The preference for this option is further enforced by virtue of the fact that no changes to the Code of Practice would be required. As well as minimising risks of consumer harm or detriment, the business impact of this approach is net-positive, reduces the regulatory burden and providing a one-off cash refund to existing contributors to the Fund.

**Q5 – Do you or do you not favour this option? Please give detailed reasoning where applicable.**

**Option 4 – Part-removal of the Fund, keeping the Bonds in place** (This option would not require any alteration to the Code of Practice)

This option is similar to option 3 and would also seem to offer a rational and sensible solution given the current climate already referenced earlier in this document. Once again, it would not seem to place any element of unnecessary risk on either PhonepayPlus or the industry. Service providers that have paid into the Scheme would eventually receive some of the money back that they originally paid in - how much would depend upon what the part-removal of the Fund meant in a practical sense, which would be decided later in the process.

If, as an example, it was decided that the Fund would remain in place but with all contributions being lowered to £1,500 in order to decrease the Fund's overall value, then all contributors would eventually receive back £6,000 minus the running costs of the Fund over the period of time during which it has been in place together with the costs associated with the partial repayment from the Trustees of the Fund. The bank bonds also would remain in place for existing providers. For any new providers wishing to enter into the market it would mean that they would now be required to pay the lowered amount of £1,500 into the Fund, gain prior permission from PhonepayPlus and lodge a bond with their bank.

Claims for compensation would continue to be processed and dealt with as they currently are – changes would not be required, as the Fund and the bonds would still exist. As with option 3, should PhonepayPlus become aware of any risk that may be creeping into the arrangements once the Fund had been reduced, this option would allow for bonds - for either individual service providers or across the board - to be increased in value, thus covering any such risk as and where deemed necessary. It

would in fact also allow for the value of the Fund to be increased by asking all contributors to pay some monies back in to the Fund if the need ever arose. However, as already referenced, the need for this would seem to be highly unlikely but the provision would still be there should it ever be required.

In summary, although this option offers the advantage of PhonepayPlus not having to decide whether to dismantle the Fund from the outset this option is not favoured by PhonepayPlus as it considers that the Fund is now out of date and no longer required in any size or in any format. Simply keeping the flexible service provider bonds in place on their own would seem to be more a proportionate option which reduces regulatory burden. Further, having the Trustees of the Fund contact all the contributors in order to give back some of the monies would be a very time consuming exercise which we consider could be put to better use by them contacting contributors to give back all monies, with a view to closing down the Fund completely.

The implementation of this option would not require any alteration to the Code of Practice.

**Q6 – Do you or do you not favour this option? Please give detailed reasoning where applicable.**

**Option 5 – Replacing the current arrangements with an Independent Service Provider Insurance Scheme (either individual or ‘blanket’ cover) (This option would not require any alteration to the Code of Practice)**

Some providers have suggested the idea of having an independent insurance scheme in place, rather than the current compensation arrangements. This would mean that all current providers and any new provider would need to approach insurance companies in order to have a policy in place to provide cover for claims for compensation which are not met. Alternatively, it could also mean service providers getting together as one to approach insurance companies in order to try to put ‘blanket’ compensation cover arrangements in place for the whole of the live entertainment sector of the industry.

No precise proposals have been brought to PhonepayPlus at this time. However, our initial analysis of this option is not favourable as we envisage concerns arising from an enforcement perspective. Additionally, it may be unlikely that suitable insurance of this nature could be easily secured. Our principle concern is that a service provider could evade their responsibilities by cancelling their policy before a number of claims emerged. This would leave the Claimant with no redress in the event that a claim was ordered to be paid by the Adjudicator, but the funds needed to pay it were not forthcoming and the call on the insurance invalid as the policy had been cancelled.

For reference, the implementation of these options would not require any Code alterations as such arrangements would still be classed as a ‘scheme’.

**Q7 – Do you or do you not favour this option? Please give detailed reasoning where applicable.**

*To be clear, the recording of all calls that are made to live entertainment services would still be required under all of the above noted options.*

## **Section 5**

### **Summary of Consultation Questions**

The following questions appear through the body of Sections 3 & 4 the consultation document:

**Q1 – What evidence are you able to share to support our data and intelligence about the growth in the number of mobile phone calls to live entertainment services?**

**Q2 – Do you or do you not favour option 1? Please give detailed reasoning where applicable.**

**Q3 – Do you or do you not favour option 2? Do you see the current arrangements as being the valuable ‘barrier to entry’ into this section of the industry that some providers have stated? Please give detailed reasoning where applicable.**

**Q4 – Do you agree with our assessment that risks attached to this option are greater than the short-term business impact that would arise? If not, why not?**

**Q5 – Do you or do you not favour option 3? Please give detailed reasoning where applicable.**

**Q6 – Do you or do you not favour option 4? Please give detailed reasoning where applicable.**

**Q7 – Do you or do you not favour option 5? Please give detailed reasoning where applicable.**

## Section 6

### The next steps and how to respond to this document

PhonepayPlus will give full consideration to all responses received to this consultation, and thereafter will issue a statement confirming decisions which have been made, and how it will be planning to implement these decisions.

We are seeking the views of all stakeholders on the proposals and questions contained in this paper by no later than **Friday 3 October 2008** (12 weeks after issue date).

Where possible, comments should be submitted in writing and sent by e-mail to: [mszemelka@phonepayplus.org.uk](mailto:mszemelka@phonepayplus.org.uk).

Copies may also be sent by mail or fax to:

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If you have any queries about this consultation, please telephone or e-mail using the above contact details.

#### **Confidentiality**

We plan to publish the outcome of this consultation and to make available all responses received. If you want all or part of your submission to remain confidential, you must make a specific request for this, along with your reasons for making the request.

## **Appendix A**

### **LIVE SERVICES**

### **GENERAL GUIDELINES FOR ADJUDICATORS**

**PUBLISHED 2001  
AMENDED 2008**

## **1. General**

- 1.1. There is no appeal from determinations made by the Adjudicator. The Adjudicator must assume that his/her decisions will be subject to the oversight of the High Court by way of judicial review.

## **2. Procedural fairness and determining evidence of unauthorised use**

- 2.1. When exercising his or her functions concerning claims for compensation in respect of loss caused by the allegedly unauthorised use of a person's telephone (or computer) to call Live Services, the Adjudicator must operate on the basis of procedural fairness. The Adjudicator must pay regard to the rules of public law laid down, from time to time, by the Court so far as they may be relevant to the problem for decision.
- 2.2. The Live Services Code of Practice refers to claims for compensation and their investigation by the Executive of PhonepayPlus being passed to the Adjudicator. In these circumstances the Adjudicator must decide for him/herself, first, whether 'firm evidence' exists to support acceptance or rejection of the claim.

Where, having considered all the information available, it appears that on the balance of probabilities no authority express or implied has been given by the claimant to call the service then a direction may be given. For example, it is plain that where an admission has been made by a caller, either in writing or during the course of a recorded call, that the consent of the claimant has not been obtained, that alone may constitute sufficient evidence to found a direction to pay compensation from the Fund or Funds.

- 2.3.1 Nevertheless, the Adjudicator must still bear in mind the possibility of collusion between caller and subscriber and if s/he reasonably believes that it exists s/he should give weight to that factor. If s/he does not do so, a Court may consider that his/her mind has not been applied to all the relevant issues.
- 2.3.2 The Adjudicator should ensure that s/he is aware of any history of previous claims by the same subscriber or a refusal or failure to apply call-barring
- 2.3.3. There are a number of commonplace situations where the use of the telephone to call Live Conversation Services may, in the absence of special circumstances, perhaps be considered to have been impliedly authorised, in particular by spouses or co-habitees. However, in every case the claim must be considered on its own facts.
- 2.3.4. The Adjudicator should apply his or her mind to all the relevant factors which may be within the ambit of the Code when properly construed, and exercise his or her discretion "reasonably".

This means that the Adjudicator should take into account all relevant considerations and disregard all irrelevant considerations - s/he should also direct his/her mind to the right question.

## **3. Timescales**

- 3.1 Under the Live Services Code of Practice the Adjudicator has to consider what is a reasonable time in which a service provider should settle (or choose not to settle) a claim. In consideration of that task, the Adjudicator is entitled to have timescales which are generally applied in mind for the good and efficient progress of claims, but must remain open-minded to particular requests for additional time and consider each case on its own merits.

#### **4. Oral hearings**

- 4.1. Under the provisions of the Live Services Code, an oral hearing may be held if the Adjudicator considers it necessary, or if either the Claimant or service provider wishes there to be an oral hearing. The Adjudicator should be slow to decline any request for an oral hearing and should generally permit oral hearings to take place.
- 4.2. Oral hearings may be run entirely as the Adjudicator sees fit. PhonepayPlus and the Independent Appeal Body operate under specific procedures which are contained within the Live Services Code of Practice and the Adjudicator may reasonably expect to operate fairly on the basis of following those procedures. However, those procedures do not, as a general rule, anticipate the involvement of claimants who may at times be people of particular vulnerability. That is a matter that the Adjudicator must bear in mind in settling the procedure s/he considers appropriate in any particular case.
- 4.3. The Adjudicator should have regard to the Human Rights Act 1998 and in particular to Article 6 of the Convention. Whatever procedure is adopted the Adjudicator must give a full opportunity for representations to be made both by the claimant and by the service provider. It may be necessary on occasions for the caller (not being the person making the claim) to provide written or oral evidence in order that a full consideration can be given to the case.

#### **5. The exercise of the Adjudicator's discretion**

- 5.1. The courts have steadfastly refused to countenance any fetter upon the discretion of decision-makers. It is reasonable and sensible to have a general policy which enables cases of a similar type to be treated on a consistent and speedy basis. However, care must be taken, whilst attempting to exercise discretion consistently, to avoid the closing of the Adjudicator's mind to the circumstances of any particular case.
- 5.2. While it is a matter in the discretion of the Adjudicator, and for him/her to give its proper weight, where a claimant has made a previous successful claim and the circumstances in issue are substantially similar, s/he may think it appropriate not to make a direction. Moreover, other factors such as a previous recommendation that call-barring should be implemented may well be relevant in subsequent claims.
- 5.3. When considering a claim from a business subscriber or limited company, the Adjudicator may, take into account the level of business, commercial expertise or resources available to the business or company in question.

5.4. The Adjudicator will be at liberty to listen to recordings of telephone calls to Live Conversation Services and to make up his or her mind about the circumstances and whether or not they were authorised. On occasion, the Adjudicator may feel that this information should be obtained from a monitor - that is a matter within his/her discretion.

## **6. Payments from the Fund: the Adjudicator's tests**

6.1 It may be helpful to set out some of the questions which the Adjudicator should ask him/herself when considering whether or not to make a direction as to payment from the Fund:

- Have I got the powers under the Live Services Code of Practice to do what I want to do?
- Am I exercising the power for the purpose for which it was given, that is, compensating a person for the cost of unauthorised calls made from that person's telephone or computer?
- Have I taken into account all relevant information and excluded all irrelevant considerations?
- Are the reasons which I propose to give the correct ones? It may have been necessary as part of the decision-making process to acquaint interested people with the current state of one's thinking. For example, if it is proposed to proceed on certain factual assumptions, it may be necessary to check those facts with anyone who could be in a position to challenge them.
- Am I using 'make weight' reasons for my decision which may not hold up under close examination? It is better to give two good reasons than three good and one bad.
- Have I made clear in my written decision that all representations have been considered and taken into account?
- Have I considered the point of view of people likely to be affected by the determination? Have they been put in the picture sufficiently?
- Have I made up my mind in advance of receiving any representations or even given that impression? For instance, have I merely blindly followed "policy" without considering the circumstances of a particular case?

Finally, the Adjudicator may make recommendations about costs and expenses reasonably incurred by a claimant and these may be paid from the relevant Compensation Fund.

## **Appendix B – Section 6.5 of the Code of Practice 11<sup>th</sup> Code (amended April 2008): Claims for Compensation**

- 6.5.1** Where it considers it appropriate, PhonepayPlus will not grant permission under paragraph 6.1.1 unless it is satisfied that compensation arrangements exist for the prompt and effective provision of compensation. Compensation must be available to any person whose connection to the electronic communications network has been the subject of unauthorised use of the relevant live service(s) and in respect of which the Adjudicator has made an award in accordance with paragraph 6.5.4 of the Code.
- 6.5.2** At the time of publication of this Code, neither live entertainment services nor chatlines may be provided unless a compensation scheme approved by PhonepayPlus is in place and the relevant service provider has complied with the terms of the relevant compensation scheme.
- 6.5.3** Claims for compensation may be made by any person whose connection to the electronic communications network has been the subject of unauthorised use. When claims are received by PhonepayPlus, the relevant service provider(s) will be given an opportunity to settle them to the satisfaction of the claimant.
- 6.5.4** If the service provider does not settle the matter to the satisfaction of the claimant within a reasonable time, the matter will be referred to the Adjudicator, who will determine the matter in accordance with his procedures and who may require that the service provider pays the claim or part of it, together with an administrative charge and appropriate provision for the claimant's costs.