



## Approval of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition)

This consultation document seeks comments on whether Ofcom should approve, under section 121 of the Communications Act 2003, a new edition of the PhonepayPlus Code of Practice for regulating Premium Rate Services

Consultation

Publication date:

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Closing Date for Responses:

8 July 2010

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## Section 1

# Summary

- 1.1 Premium rate services (PRS) typically offer some form of content, product or service that is charged to users' phone bills. They can offer information and entertainment services via fixed or mobile phone, fax, PC or interactive digital TV. Regulation of PRS is designed to ensure that consumers can use these services with confidence and have access to effective redress when they encounter problems.
- 1.2 PhonepayPlus has today published a draft Code of Practice for the regulation of PRS and is seeking feedback from stakeholders prior to formally submitting a Code to Ofcom for approval. At the same time Ofcom is undertaking its own consultation (through this document) on whether the draft Code of Practice meets the legal tests for being approved under the Communications Act 2003 (the Act).

## What are the key changes being proposed to PRS regulation?

- 1.3 The draft Code has been preceded by over 12 months of intensive stakeholder engagement by both PhonepayPlus and Ofcom. Several of the most significant proposals are a direct result of Ofcom recommendations from the PRS Scope Review.<sup>1</sup> In addition, many key aspects of the draft Code have already been subject to a discussion document issued by PhonepayPlus in June 2009.<sup>2</sup> Responses to date from stakeholders have demonstrated strong support for the direction taken in the drafting of the new Code.
- 1.4 From Ofcom's perspective, the most significant changes from the previous Code of Practice are:
  - i) those parties that control the operation/content of a PRS will now be held directly responsible by PhonepayPlus for complying with the Code, while providers offering intermediary services will face new obligations to undertake due diligence on their clients and to monitor the risks they may pose to consumers;
  - ii) before operating in the market PRS providers will need to register with PhonepayPlus (PhonepayPlus is proposing to exempt directory enquiries (DQ) and 0871 providers from this obligation);
  - iii) to facilitate effective investigations, an existing requirement for certain providers to withhold payments to their clients for 30 days after a PRS transaction has taken place will be extended to other providers in the PRS value chain;
  - iv) PhonepayPlus is proposing more informal investigation procedures for cases with minimal consumer harm as well as introducing new sanctions that can be imposed by its Tribunal (including automatic refunds for consumers);
  - v) PRS providers will be required to have effective complaints procedures in place; and
  - vi) PRS providers will need to take steps to identify excessive usage of a service to minimise cases of 'bill shock'.

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<sup>1</sup> See [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/](http://www.ofcom.org.uk/consult/condocs/prs_scope/)

<sup>2</sup> See <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

## What is Ofcom's view of the proposed changes to regulation?

- 1.5 The development of the draft Code recognises that a significant number of breaches of the previous Code could have been prevented if providers had undertaken more robust due diligence and risk control on their clients. It has also become apparent that PRS regulation has not necessarily been targeted at the parties in the value chain most likely to cause consumer harm and that opportunities still exist for some companies and individuals to take advantage of consumers.
- 1.6 As previously outlined in the Scope Review, Ofcom supports strengthening the regulatory regime by holding all PRS providers directly responsible for actions within their control. The proposed mandatory registration scheme will assist PhonepayPlus enforcement action and will enable PhonepayPlus and the industry to link companies and associated individuals with their compliance history in the PRS market. It will no longer be acceptable for providers to do business with those companies/individuals that are likely to cause consumer harm.
- 1.7 It is our position that, subject to consultation, the draft Code meets the legal tests for approval under the Act – including being objectively justifiable, transparent, non-discriminatory, proportionate, and appropriate to be approved by Ofcom. We are inviting views on this position.

## What is the consultation process?

- 1.8 Ofcom would like to invite views on whether it is appropriate for the draft Code to be formally approved, should PhonepayPlus decide, in light of comments received from stakeholders, to formally submit the draft Code with no material changes to its current form to Ofcom for approval. We are inviting comments by 8 July 2010.
- 1.9 We would draw to stakeholders' attention that PhonepayPlus has responsibility for drafting the Code of Practice and is today consulting on the substance of the draft Code and the merit of some detailed and technical changes. The PhonepayPlus consultation also closes on 8 July 2010.
- 1.10 When deciding whether to formally approve the draft Code, Ofcom will consider whether it is appropriate to consult further with stakeholders. A further consultation could be needed if PhonepayPlus proposed material changes to the draft Code that would significantly impact stakeholders or if consultation submissions raised new issues that had not been considered in the development of the draft Code.

## When will any new Code take effect?

- 1.11 PhonepayPlus is anticipating that a new Code will come into force by March 2011. Whether this is practical depends on the responses provided by stakeholders, the nature of any subsequent modifications that may need to be made to the draft Code, and the ability of Ofcom to formally approve the draft Code without any further consultation.
- 1.12 We consider stakeholders are likely to require at least three months notice following any Ofcom approval of a new Code before the new Code should become binding on them. We would welcome views from stakeholders on this implementation period.

## Section 2

# Background

## What are premium rate services?

- 2.1 In general terms, PRS offer some form of content, product, facility or service that is charged to a consumer's bill for electronic communications services.<sup>3</sup> These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS, PC, mobile phone downloads or interactive digital TV. Common forms of PRS include TV voting lines, competitions, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes, directory enquiry services and 0871 calls.
- 2.2 PRS vary in cost, typically between 5 pence per and £1.50 per minute/call for calls from UK landlines. In most cases the bulk of the revenue from such services goes to the companies who market and control the content. The remainder of the revenue is usually shared by the consumer's telephone company (which receives a fee for 'origination' of the phone call), the telephone company that terminates the call to the party which is providing the service, and any intermediary company that may be offering a technical platform to help deliver the service.

## How PRS is regulated in the UK

- 2.3 The current PRS regulatory framework comprises the following:
- i) sections 120 to 124 of the Act;
  - ii) PhonepayPlus' Code of Practice, as approved by Ofcom under section 121 of the Act; and
  - iii) the PRS Condition, made by Ofcom under section 120 of the Act, which amongst other aspects defines a narrower category of PRS as 'Controlled PRS'.
- 2.4 Section 120 of the Act defines PRS (as well as providers of PRS) and provides Ofcom with the power to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS. Ofcom has the power to approve a code for PRS that meets the legal requirements set out in section 121 of the Act.<sup>4</sup> In the past, Ofcom has approved the PhonepayPlus (formerly ICSTIS) Code of Practice for these purposes. The current version in force is the Eleventh Edition of PhonepayPlus Code, dated April 2008.<sup>5</sup>
- 2.5 In relation to those PRS which fall within the definition of 'Controlled PRS', compliance with the Code is *mandatory* and Ofcom retains backstop powers under

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<sup>3</sup> PRS are defined in section 120(7) of the Act

<sup>4</sup> Or approve modifications or withdraw approval, under section 121(6) of the Act

<sup>5</sup> See <http://www.phonepayplus.org.uk/output/Code-of-Practice-1.aspx>.

The Eleventh Edition of the Code of Practice was approved by Ofcom on 9 November 2006: see <http://www.ofcom.org.uk/consult/condocs/icstiscode/>.

The latest amendments to the Eleventh Code of Practice were approved by Ofcom under section 121 of the Communications Act 2003 on 28 March 2008: see <http://www.ofcom.org.uk/consult/condocs/phonepayplus/statement/>.

the PRS Condition. Insofar as a particular PRS is not caught within the definition of Controlled PRS, the PhonepayPlus Code of Practice applies to it, but compliance is *voluntary*.<sup>6</sup> In this respect, PhonepayPlus relies on its Code being enforced by contractual chains running from the Network Operators through the PRS value chain.

2.6 The PRS Condition requires communications providers falling within the scope of the PRS Condition to comply with directions given by PhonepayPlus in accordance with its Code of Practice and for the purposes of enforcing the provisions of that Code. The application of the PRS Condition is limited to 'Controlled PRS', so that only a specific subset of PRS are subject to Ofcom's enforcement powers for breach of the PRS Condition. The definition of Controlled PRS currently includes:<sup>7</sup>

- a PRS which costs more than 10p per minute;
- a PRS using a 'Special Services Number', e.g. 0871, which costs more than 5p per minute;
- a Chatline Service (as defined);
- a Sexual Entertainment Service (as defined); and
- an internet dialler (as defined).

2.7 These Controlled PRS are regulated by PhonepayPlus' Code and the relevant communications providers involved in their provision are subject to Ofcom's backstop enforcement powers.

### **Ofcom's PRS Scope Review**

2.8 In 2009 Ofcom published a statement as part of its Scope Review of PRS regulation.<sup>8</sup> We concluded that the characteristics of PRS are sufficiently unique that a specific PRS regulatory regime is necessary to protect consumers, above and beyond the protection afforded by general consumer protection regulation. The Scope Review also concluded that although the current regulatory regime is functioning well, there is the potential to further improve the existing framework in order to better protect consumers.

2.9 The Scope Review made a number of recommendations for PhonepayPlus that have been relevant to the development of its new Code of Practice, including:

- PhonepayPlus should expand its Number Checker to better assist consumers needing to identify the provider responsible for a particular service;
- PhonepayPlus should consider introducing complaints handling obligations as part of the drafting of its next Code of Practice; and
- We supported a move to hold parties accountable for actions within their control and concluded that if PhonepayPlus was to directly regulate those parties that control the content/operation of a PRS then it should introduce a mandatory registration scheme for the PRS industry.

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<sup>6</sup> As specified under paragraph 1.2.3 of the Eleventh Code of Practice.

<sup>7</sup> As defined in section (e) of the PRS Condition

<sup>8</sup> Ofcom PRS Scope Review, [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/](http://www.ofcom.org.uk/consult/condocs/prs_scope/)

- 2.10 There was strong stakeholder support for these recommendations and PhonepayPlus is now proposing to implement these policy initiatives through its new Code of Practice. Although we consider the case has been made for implementing these recommendations, stakeholders (including stakeholders who may not previously been aware of the implications of these proposals) will again have the opportunity to express their views and to comment on how PhonepayPlus is giving effect to these recommendations through its draft Code.

### **PhonepayPlus' 2009 Discussion Document**

- 2.11 For the past 18 months, PhonepayPlus has had a project underway to identify shortcomings with the current approach to PRS regulation and to develop a new Code of Practice (a 12<sup>th</sup> version). The development of the new Code has been a lengthy process and PhonepayPlus has been conscious of taking a 'no surprises' approach to engaging with the industry on the direction of the draft Code. In June 2009 PhonepayPlus published a discussion document outlining its initial proposals and inviting comment from industry and consumers.<sup>9</sup> This call-for-input prompted 19 submissions from interested parties.
- 2.12 The 2009 discussion document noted that the proposed revision of the Code of Practice would be among the most significant in the organisation's history. The discussion document raised the prospect of PhonepayPlus making four key changes to PRS regulation:
- that the new Code would be based on identifying desirable outcomes, supported with rules where appropriate, rather than prescribing a step-by-step guide to compliance;
  - that every business in the phone-paid services value chain would assume an appropriate degree of responsibility for the provision of compliant services and the delivery of consumer protection measures;
  - the creation of a database on which all Service Providers and Information Providers will be registered for due diligence and risk management purposes; and
  - that providers must have in place adequate customer care facilities to ensure consumers are able to register a complaint and seek redress as quickly as possible.
- 2.13 These four aspects have all been carried through into the draft Code published today and are discussed further below.

### **The process for consulting on PhonepayPlus' Code of Practice**

- 2.14 In June 2009 Ofcom published an 'information note' outlining its intended approach to consulting on the approval of PhonepayPlus' Code of Practice.<sup>10</sup> Ofcom stated that it intended to undertake its consultation on whether the draft Code should be formally approved in parallel with PhonepayPlus' consultation on the substance of the draft Code. It was considered that such an approach could speed up the process of approving the new Code of Practice, without prejudicing the fairness of the consultation process.

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<sup>9</sup> See <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

<sup>10</sup> See [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/12thcode/informationnote.pdf](http://www.ofcom.org.uk/consult/condocs/prs_scope/12thcode/informationnote.pdf)

- 2.15 To facilitate this approach Ofcom and PhonepayPlus have worked closely together over the past 12 months on the development of the draft Code. Ofcom representatives have been part of PhonepayPlus' 12<sup>th</sup> Code Programme Board and Ofcom has had input on the direction and substance of the draft Code. We consider that, subject to consultation, the draft Code published today meets the legal tests for Ofcom to approve it. We are inviting views on this position.

### **The Respective roles of the Two Organisations**

- 2.16 Both PhonepayPlus and Ofcom have today published their consultations on the proposed new Code of Practice. The two organisations have distinct functions and are consulting on different issues from different perspectives.
- 2.17 PhonepayPlus has responsibility for drafting the Code of Practice and is consulting on the substance of its draft Code. Its consultation examines the proposed changes from the current Code in detail and invites stakeholders to respond directly to PhonepayPlus on the merits and detail of the new draft Code.
- 2.18 Ofcom has responsibility for approving any Code of Practice and is consulting on whether the draft Code meets the legal tests set out in section 121 of the Act and should be approved if it were to be formally submitted by PhonepayPlus to Ofcom with no material changes to its current form. This consultation:
- invites stakeholders to consider the detail of the draft Code;
  - summarises the major changes that will impact stakeholders; and
  - asks for views on whether it is appropriate for the draft Code to be formally approved, should PhonePayPlus decide, in light of comments received from stakeholders, to formally submit the draft Code with no material changes to its current form to Ofcom for approval.
- 2.19 Please note that Ofcom and PhonepayPlus intend to share all submissions (both public and confidential) with the other organisation, since it is expected that stakeholder submissions to PhonepayPlus and Ofcom will overlap in terms of substance. If you do not wish your submission to be shared with PhonepayPlus then please explicitly request this.

### **Next Steps**

- 2.20 Following the closing date for submissions, PhonepayPlus (in discussion with Ofcom) will refine their draft Code in light of points raised by stakeholders and decide whether it is appropriate for PhonepayPlus to formally submit the draft Code (possibly with modifications) to Ofcom for approval. Should PhonepayPlus provide a 'final' version to Ofcom for formal approval under the Act, Ofcom, in light of stakeholder submissions, will subsequently consider whether it is appropriate to approve the Code.
- 2.21 When deciding whether to formally approve the draft Code, Ofcom will consider whether it is appropriate to consult further with stakeholders. A further consultation could be needed if PhonepayPlus proposed material changes to the draft Code that would significantly impact stakeholders, or if consultation submissions raised new issues that had not been considered in the development of the draft Code.

## Impact Assessment

- 2.22 Impact Assessments (IAs) provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice in policy-making. This is reflected in Section 7 of the Communications Act 2003, which states that we generally have to carry out IAs where our proposals would be likely to have a significant effect on businesses or the general public or when there is a major change in Ofcom's activities. As a matter of policy, Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to IAs, see the guidelines Better Policy-Making: Ofcom's Approach to Impact Assessment at [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf).
- 2.23 The analysis presented in this document constitutes an IA for our proposal to approve the draft Code.
- 2.24 As part of our Impact Assessments, we conduct an Equality Impact Assessment to identify whether our proposals would have particular effects on specific groups within society. We have therefore considered whether we were required to undertake a full Equality Impact Assessment for this review. On the basis of our Initial Equality Impact Assessment Screening, we determined that this was not required, because the changes to the Eleventh Code of Practice set out in the draft Code do not raise specific equality issues. They will affect consumers and citizens equally, regardless of race, gender or disability.

## Consultation period

- 2.25 Ofcom is inviting written views and comments by 5pm on 8 July 2010 on its proposed approval of the PhonepayPlus draft Code. Details of how to respond can be found in Annex 1.

## Effective date

- 2.26 PhonepayPlus is proposing that its new Code of Practice (12<sup>th</sup> Edition) come into force by March 2011. Whether this is practical will depend on the responses provided by stakeholders to both consultations, the nature of any subsequent modifications that would need to be made to the draft Code, and whether in light of responses Ofcom considers it can formally approve the draft Code without a further consultation.
- 2.27 It is our initial view that stakeholders are likely to need three months following any Ofcom approval of the draft Code before the provisions should be enforceable. We would welcome the views of stakeholders on this.
- 2.28 When PhonepayPlus submits the draft Code to Ofcom for approval under the Act, it will also provide a draft copy to the European Commission. This will begin a statutory three month standstill period required under the EU Technical Standards Directive.<sup>11</sup> As this period will begin running from the date at which the draft is lodged with Ofcom it is not expected it will impact on the proposed three month implementation timetable.

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<sup>11</sup> Directive 98/34/EC, as amended by Directive 98/48/EC.

## Section 3

# Summary of key aspects of the draft Code of Practice

- 3.1 PhonepayPlus has published its consultation on its draft Code of Practice (the draft Code) on its website: [www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf](http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf). Interested stakeholders are encouraged to provide submissions to PhonepayPlus on the substance of their draft Code. A copy of the draft Code is attached to this document as Annex 5.
- 3.2 The draft Code represents a fundamental shift in the way the PRS industry is regulated. From Ofcom's perspective, the most significant changes from the previous Code of Practice are:
- i) extending responsibility throughout the value chain for ensuring that PRS complies with the Code;
  - ii) introducing a mandatory registration requirement for PRS providers;
  - iii) extending the requirement for PRS providers to withhold payments to their clients;
  - iv) introducing new sanctions and more flexibility into PhonepayPlus investigations;
  - v) introducing new complaints handling obligations; and
  - vi) introducing obligations to minimise instances of unexpectedly high bills.
- 3.3 Each of these key changes are summarised below and are examined in turn against Ofcom's relevant legal tests in Section 4. For the avoidance of doubt, these are not the only changes contained within the draft Code, but are what Ofcom considers to be the proposals that will have the greatest and/or widest impact on stakeholders. We would encourage all interested parties to read the precise details of the draft Code and PhonepayPlus' consultation.

## Definitions of Parties in the PRS Value Chain

- 3.4 Before examining the key aspects of the draft Code it is useful to summarise the definitions to be used for each party in the value chain, many of whom will now be subject to new obligations.
- 3.5 Previous versions of Codes of Practice have defined parties as either Network Operators, Service Providers, or Information Providers. Service Providers were defined as the first party in a value chain who was not a Network Operator.<sup>12</sup> Any PRS Provider who was not a Network Operator or a Service Provider was deemed to be an Information Provider.<sup>13</sup>
- 3.6 Through the draft Code, PhonepayPlus is now proposing to replace the labels 'Service Provider' and 'Information Provider' with the terms 'Level 1 Provider' and

<sup>12</sup> See for example paragraph 11.3.6 of the 11<sup>th</sup> Code of Practice

<sup>13</sup> See for example paragraph 11.3.7 of the 11<sup>th</sup> Code of Practice

Level 2 Provider'. While in practice many Service Providers will now be Level 1 Providers and some Information Providers will be deemed to be Level 2 Providers, the new terminology may not always be directly substitutable for the previous terms.

3.7 The relevant definitions proposed by PhonepayPlus can be found in paragraphs 5.3.7 and 5.3.8 of the draft Code, which are replicated below:

5.3.7 Any person who falls within Section 120(9)(a)-(d) or Section 120(10) or (11) of the Act who is engaged in the provision of a premium rate service (“the relevant premium rate service”) and who is not a Network operator in respect of that service is a Level 1 and/or Level 2 provider.

5.3.8 (a) A Level 1 provider is a person who provides a platform which, through arrangements made with a Network operator or another Level 1 provider, enables the relevant premium rate service to be accessed by a consumer or provides any other technical service which facilitates the provision of the relevant premium rate service.

(b) A Level 2 provider is the last contracted person in the premium rate value chain who controls or is responsible for the operation and content of the relevant premium rate service and/or the use of a facility within the premium rate service.

(c) In respect of any relevant premium rate service where it is not clear whether a person involved in any way in the provision of the service and/or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant premium rate service is a Level 1 or a Level 2 provider, PhonepayPlus shall determine whether that person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time.

3.8 The key definition is that of a Level 2 Provider, who is essentially the last party in the PRS value chain exercising control/responsibility for the operation and content of a PRS.<sup>14</sup> Everyone else in the PRS value chain (as defined by the Act) that is not a Network Operator is deemed to be a Level 1 Provider.

3.9 To illustrate these definitions:

- Level 1 Providers are likely to include aggregators, resellers, organisations offering a billing services etc.
- Level 2 Providers are likely to include many PRS content providers, including broadcasters using PRS voting lines, organisations operating on 0871/09 numbers, DQ providers, companies offering and promoting mobile subscription services etc.

3.10 However, the examples above are not set in stone and will vary depending on the characteristics of any given value chain. As the definition makes clear, it is possible that there may be multiple Level 1 Providers in a given value chain or that a provider is considered both a Level 1 and Level 2 Provider. PhonepayPlus would retain the

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<sup>14</sup> The value chain runs from the Network Operator to the content provider. There will only be one Level 2 Provider in any given PRS value chain, this being the person controlling the operation and content of the relevant premium rate service.

ability to make an evidence-based determination of whether any person is a Level 1 or Level 2 Provider in respect of any given PRS.<sup>15</sup>

### **An ‘Outcomes Focused Code’**

- 3.11 Before we summarise the key changes proposed to the 11<sup>th</sup> Code, it is useful to note the deliberate shift by PhonepayPlus away from detailed and prescriptive rules to a more outcomes-focused Code. PhonepayPlus has acknowledged that many of the rules in previous Codes had been rendered obsolete by changes in technology, marketing, and general provider practice. PhonepayPlus is now proposing to follow the model of the Ofcom Broadcasting Code by identifying key consumer protection outcomes that providers need to deliver.
- 3.12 The six consumer protection outcomes that have been identified are:
- legality;
  - transparency and pricing;
  - fairness;
  - privacy;
  - avoidance of harm; and
  - complaints handling.
- 3.13 The draft Code sets out general rules aiming to achieve these outcomes, but also includes specific rules that target areas where consumer harm has occurred in the past. For example, under the ‘fairness’ outcome there are very detailed rules on price points at which relevant providers must take certain steps (such as sending reminders to subscription users).
- 3.14 PhonepayPlus has also proposed to supplement the outcomes and rules in its draft Code with non-binding guidance. The guidance may concern PRS in general or specific types of PRS and is intended to help clarify the rules for industry. The status of the guidance is described in paragraph 1.5 of the draft Code. PRS providers would only be bound by the rules contained within the Code. However, a Tribunal can take the guidance into account when determining whether a specific rule may have been breached and a Tribunal is able to consider the extent to which the relevant party attempted to comply with the Code (by following guidance or attempting to comply through alternative methods) when considering possible sanctions. PhonepayPlus has today published some draft guidance to help inform submissions on its draft Code, but will be formally consulting on its guidance later this year.
- 3.15 In the following paragraphs, we describe the most significant changes from the previous Code of Practice. The assessment of these changes and the entirety of the draft Code against the legal tests in section 121 of the Act is set out in Section 4 which follows.

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<sup>15</sup> Paragraph 5.3.8 of the draft Code

## **i) Extending regulatory responsibility throughout the value chain**

- 3.16 PRS is often provided through a complex supply chain, with large numbers of providers involved in the delivery of any PRS. To date PhonepayPlus has primarily held the first Level 1 Provider in the relevant value chain (previously known as the Service Provider) accountable if there is a breach of their Code of Practice regardless of whether a party further down the value chain actually caused the breach (e.g. a billing provider could be held liable for any misleading advertising by a PRS provider who uses their platform).
- 3.17 Although the current 11<sup>th</sup> Code largely focuses on regulating the conduct of Level 1 (Service) Providers, PhonepayPlus has been dealing with increasing numbers of investigations against Level 2 (Information) Providers through the so called 'IP passthrough clause'. Under paragraph 8.3.4 of the 11<sup>th</sup> Code, PhonepayPlus can take enforcement action against a Level 2 (Information) Provider if they accept full responsibility for ensuring that the PRS in question will comply with the PhonepayPlus Code - a practice that is becoming increasingly common as many Level 1 Providers insist on inserting clauses into their contracts requiring their clients to submit to the jurisdiction of PhonepayPlus if there is an alleged breach of the Code.
- 3.18 PhonepayPlus is now proposing to hold organisations accountable for those actions that are within their control. As such, all Level 2 Providers would now be held directly responsible for ensuring the promotion/operation/content of their PRS complies with the PhonepayPlus Code. Level 1 Providers and Network Operators will assume new responsibilities to perform effective due diligence and risk assessment on any party with which they directly contract. Such an approach to regulating the PRS industry was previously supported by Ofcom through the Scope Review.

### **Holding Level 2 Providers Accountable for their Actions**

- 3.19 It is proposed that Level 1 Providers will no longer be held directly accountable by PhonepayPlus if a PRS breaches the Code of Practice, with this responsibility now shifting to those parties that actually exercise control over the service in question – Level 2 Providers.
- 3.20 The extent of responsibilities proposed to be placed on Level 2 Providers for the PRS they control/promote are outlined in Part Two of the draft Code. So for example, Level 2 Providers will now be accountable if consumers are not fully informed about a PRS before a purchase decision is made, if the promotion of PRS is misleading, if consumers cannot promptly exit a subscription service, or if the PRS is designed to target vulnerable consumers.

### **New Regulatory Responsibilities for Network Operators and Level 1 Providers**

- 3.21 Although Level 2 Providers would have new obligations under the draft Code for those activities that are within their control, this should not be interpreted as meaning that Network Operators and Level 1 Providers are relieved of all their regulatory responsibilities. All Network operators and Level 1 Providers involved in providing PRS will be required to take all reasonable steps in the context of their roles to ensure the rules set out in the draft Code are complied with.<sup>16</sup> In particular, they will

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<sup>16</sup> Paragraph 2 of the draft Code

now face obligations to undertake due diligence and ongoing risk assessment on their clients.

3.22 PhonepayPlus has proposed several new obligations, including requiring Network Operators and Level 1 Providers to:

- perform thorough due diligence on any party with which they contract in connection with the provision of PRS;<sup>17</sup>
- assess the potential risks of any party with which they contract in respect of PRS and to take reasonable ongoing steps to control those risks;<sup>18</sup> and
- carry out reasonable monitoring of PRS provided by a Level 1 or 2 Provider with which they contract.<sup>19</sup>

3.23 Network Operators have previously been under an obligation through the 11<sup>th</sup> Code to undertake due diligence on those with which they contract.<sup>20</sup> However, PhonepayPlus is proposing new requirements through the draft Code that Network Operators should now take reasonable steps to control the risks posed by their clients and should monitor PRS provided by those with which they contract.

3.24 As the current Code of Practice holds Level 1 Providers directly responsible if a PRS using their platform breached the Code of Practice, there was no need from a regulatory perspective to require them to conduct due diligence on their clients. Accordingly, the three obligations mentioned above in paragraph 3.22 with respect to due diligence, risk control and monitoring are all new obligations on Level 1 Providers.

3.25 It is important to note that if a Level 1 Provider delivers part of a PRS that ‘directly impacts on consumers’ then under the draft Code that provider will still have regulatory responsibility for ensuring the functions it performs comply with the Code.<sup>21</sup> So for example, this rule could be invoked by PhonepayPlus if a Level 1 Provider misused its billing platform or undertook advertising on behalf of its client.

## **ii) A mandatory requirement to register with PhonepayPlus**

3.26 PhonepayPlus has followed Ofcom’s recommendation from the Scope Review that if Level 2 Providers are to be held accountable for actions within their control, then a mandatory registration scheme is needed for all PRS providers.<sup>22</sup> The draft Code proposes that before providing any PRS all Network Operators, Level 1 and Level 2 Providers must register with PhonepayPlus. This requirement to register will be subject to PhonepayPlus’ ability to exempt particular categories of PRS.

3.27 The draft Code proposes a number of obligations on registrants, including

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<sup>17</sup> Paragraph 3.3.1 of the draft Code

<sup>18</sup> Paragraph 3.1.3 of the draft Code

<sup>19</sup> Paragraph 3.1.7 of the draft Code

<sup>20</sup> Paragraph 2.3.1 of the 11<sup>th</sup> Code of Practice

<sup>21</sup> Paragraph 3.8 of the draft Code

<sup>22</sup> See [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/prs\\_statement/prs.pdf](http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf), paragraphs 5.82-5.90.

- to supply such information as PhonepayPlus may require for the purpose of efficient and effective regulation;<sup>23</sup>
- to update any registration information provided to PhonepayPlus as soon as practicable;<sup>24</sup>
- to renew registration on an annual basis, or at another interval determined by PhonepayPlus,<sup>25</sup> and
- to pay a reasonable registration fee, which will be determined by PhonepayPlus.<sup>26</sup>

3.28 Industry information will be used to populate a registration database to be set up and maintained by PhonepayPlus. Through the draft Code PhonepayPlus is proposing that all breaches and sanctions imposed under the Code will be linked with the liable provider's registration details, together with relevant information arising from adjudications concerning associated individuals.<sup>27</sup> Level 2 Providers will have a separate obligation to provide PhonepayPlus with relevant details to identify their services to consumers and to identify the Level 1 Provider associated with the provision of the PRS.<sup>28</sup>

### **iii) Extending a requirement to withhold PRS payments**

3.29 In 2005, PhonepayPlus made an emergency Code amendment that required Network Operators to withhold payments to Service Providers (akin to Level 1 Providers) for at least 30 days after a consumer had made the relevant transaction. The rationale for this requirement was to slow down the flow of funds to a degree that would enable the regulator to take effective action against those that breached its Code of Practice.

3.30 The draft Code is proposing that this obligation be widened so that Network Operators *and* Level 1 Providers would be required to withhold payments to any provider for at least 30 days after the use of the relevant PRS.<sup>29</sup>

### **iv) Introducing new sanctions and more flexibility into PhonepayPlus investigations**

3.31 The draft Code is proposing greater flexibility on how PhonepayPlus can investigate and respond to potential breaches of its Code. The draft Code is proposing to replace the 'Informal Procedure' for investigations with a 'Track 1 Procedure'. The establishment of a Track 1 Procedure will provide PhonepayPlus with discretion in cases where there is little or no consumer harm to provide relevant parties with an 'action plan' for remedying the area of concern. If the party does not comply with the action plan then PhonepayPlus will still have the opportunity to invoke its more formal investigation powers through a 'Track 2 Procedure'.

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<sup>23</sup> Paragraph 3.4.4 of the draft Code

<sup>24</sup> Paragraph 3.4.5 of the draft Code

<sup>25</sup> Paragraph 3.4.6 of the draft Code

<sup>26</sup> Paragraph 3.4.7 of the draft Code

<sup>27</sup> Paragraph 3.4.8 of the draft Code

<sup>28</sup> Paragraph 3.4.12 of the draft Code

<sup>29</sup> Paragraph 3.5.1 of the draft Code

- 3.32 The draft Code also proposes two new sanctions that a Tribunal may choose to impose on a party found in breach of the Code:
- a) where there has been a serious breach of the Code and/or serious consumer harm a Tribunal can order refunds to be provided to all consumers for the full retail amount spent by those consumers;<sup>30</sup> and
  - b) a Tribunal can order a party in breach of the Code to submit to a compliance audit of their processes by an independent third party and to implement the resulting recommendations.<sup>31</sup>

## **v) New complaints handling obligations**

- 3.33 The current 11<sup>th</sup> Code of Practice requires Service Providers (who for the most part will now be Level 1 Providers) to have in place customer service arrangements that include effective mechanisms for considering consumer claims for refunds and making subsequent payments.<sup>32</sup> Network Operators are currently required to satisfy themselves that their clients have adequate customer service obligations to discharge their obligations under the Code.<sup>33</sup>
- 3.34 As the draft Code is proposing to now hold Level 2 Providers accountable for ensuring their PRS complies with the PhonepayPlus Code of Practice, PhonepayPlus is also proposing that such providers should face obligations with respect to their customer service arrangements. The proposed obligations go further than those imposed on Service Providers under the 11<sup>th</sup> Code and require Level 2 Providers to ensure that:
- consumers are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily;<sup>34</sup>
  - there must be a proportionate complaints process in place, which is easily accessible and effectively publicised;<sup>35</sup>
  - complaints must be handled promptly at all stages within a process that is clear to the consumer;<sup>36</sup>
  - if refunds are provided, this must be done promptly and in an easily accessible manner;<sup>37</sup> and
  - consumers who remain dissatisfied with the handling of their complaint must be provided with the contact details of PhonepayPlus.<sup>38</sup>
- 3.35 Under the draft Code, it is also proposed that Network Operators and Level 1 Providers will now face an obligation to ensure that PhonepayPlus regulation is satisfactorily maintained by taking all reasonable steps to ensure that consumer

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<sup>30</sup> Paragraph 4.8.2(j) of the draft Code

<sup>31</sup> Paragraph 4.8.2(k) of the draft Code

<sup>32</sup> Paragraph 3.3.5 of the 11<sup>th</sup> Code of Practice

<sup>33</sup> Paragraph 2.3.1(f) of the 11<sup>th</sup> Code of Practice

<sup>34</sup> Paragraph 2.6.1 of the draft Code

<sup>35</sup> Paragraph 2.6.2 of the draft Code

<sup>36</sup> Paragraph 2.6.3 of the draft Code

<sup>37</sup> Paragraph 2.6.4 of the draft Code

<sup>38</sup> Paragraph 2.6.5 of the draft Code

complaints are resolved quickly and fairly and that any redress is provided quickly and easily.<sup>39</sup>

## **vi) Preventing unexpectedly high bills**

3.36 The draft Code includes a new obligation on Level 2 Providers to take reasonable steps to identify excessive use of a service(s) and to inform the consumer of that usage.<sup>40</sup> The rationale for this new provision is to try to reduce the risk of consumers unknowingly incurring significant phone bills through 'excessive' use of a service.

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<sup>39</sup> Paragraph 3.1.1(d) of the draft Code

<sup>40</sup> Paragraph 2.3.6 of the draft Code

## Section 4

# Approving the draft Code under section 121 of the Act

4.1 Having given preliminary consideration to the provisions of the draft Code, and subject to the outcome of the current consultation, Ofcom is at present minded to approve it under section 121 of the Act. This section sets out the legal tests and principles that are relevant to Ofcom's final decision on whether or not to approve the draft Code and the reasons why Ofcom is at present of the view that it would be consistent with those tests and principles to approve it.

## The relevant legal tests and principles

4.2 In order to approve the draft Code, Ofcom must be satisfied that:

- a) a code has been made by any person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services;<sup>41</sup>
- b) the Code contains provisions for regulating, to such extent as Ofcom think fit, the arrangements made by the providers of PRS for promoting and marketing those services;<sup>42</sup>
- c) all of the requirements in section 121(2) of the Act are met; and
- d) having regard inter alia to the provisions of the Code, it is appropriate for Ofcom to approve it<sup>43</sup> (reflecting the fact, that even if the preceding tests are met, Ofcom has discretion whether to approve the draft Code and must exercise this discretion in line with its duties under the Act).

4.3 Each of these four matters is discussed further below.

### **a) Ofcom is minded to decide that the draft Code is a code that has been made by a person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services**

4.4 Ofcom considers that the draft Code, drafted by PhonepayPlus, the co-regulatory body for PRS, has been made by a person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services.

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<sup>41</sup> The test in section 121(1)(a) of the Act.

<sup>42</sup> The test in section 121(1)(b) of the Act.

<sup>43</sup> The test in section 121(1)(c), with Ofcom exercising its discretion in accordance with its duties under sections 3 and 4 of that Act.

**(b) Ofcom is minded to decide that the draft Code contains provisions for regulating, to such extent as Ofcom think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services**

- 4.5 Ofcom believes the draft Code provides for regulating the arrangements made by the providers of PRS (as those parties are defined in section 120 of the Act) for promoting and marketing those services.
- 4.6 The extent to which the provisions of the draft Code appropriately regulate the promotion and marketing of PRS is considered below (under heading (d)) as part of Ofcom's overall assessment of the appropriateness of approving the draft Code.

**(c) Ofcom is minded to decide that the draft Code meets all of the requirements in section 121(2):**

**that there is a person who, under the code, has the function of administering and enforcing it**

- 4.7 Ofcom is satisfied that PhonepayPlus would continue to have responsibility for administering and enforcing the draft Code should it be approved under section 121 of the Act.

**that that person is sufficiently independent of the providers of PRS**

- 4.8 We note that PhonepayPlus is proposing to publish a 'Governance Statement' which contains details relating to PhonepayPlus' constitution, strategy, budget and levy setting procedures. This Governance Statement would sit outside the Code of Practice. We are satisfied with this approach, on the basis that adequate provisions will remain within the draft Code to satisfy Ofcom that PhonepayPlus is sufficiently independent of PRS providers.
- 4.9 In particular, the draft Code states that all Board members of PhonepayPlus will be appointed in their individual capacities. A minority of Board members may have commercial interests in the sector (and be appointed on the basis of their contemporary industry knowledge), but any such members will be prohibited from taking part in the adjudication process.<sup>44</sup>
- 4.10 We consider that the draft Code also contains appropriate provisions to guarantee the independence of the bodies responsible for making adjudications. The draft Code precludes more than one Board member from sitting on a Tribunal that adjudicates on provisions of the Code (and that this Board member must be a minority on the Tribunal).<sup>45</sup>
- 4.11 As with the current 11<sup>th</sup> Code, the draft Code makes provision for parties to apply for a review and/or oral hearing of adjudications. Following an oral hearing relevant parties have the right to appeal decisions to the Independent Appeals Body (IAB). The powers and procedures of the IAB are outlined in Annex 2 of the draft Code and require all members of the IAB to be fully independent of PhonepayPlus.

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<sup>44</sup> See paragraph 1.4.1 and 1.4.2 of the draft Code

<sup>45</sup> See paragraph 1.4.3 of the draft Code.

**that adequate arrangements are in force for funding the activities of that person in relation to the draft Code**

- 4.12 PhonepayPlus is a non-profit making organisation and is currently funded by a levy on outpayments from Network Operators to Service Providers.
- 4.13 In addition, PhonepayPlus receives some of its income from fines and administrative charges imposed on regulated persons who are found to have breached the Code. The rationale for the use of such fines and charges to fund PhonepayPlus' activities is that those who place an additional cost burden on PhonepayPlus, in terms of a need to carry out investigative and enforcement activities, should pay an increased share of PhonepayPlus' expenditure rather than imposing higher costs on the majority of participants in the PRS industry who act responsibly and are complying with the Code.
- 4.14 PhonepayPlus consults on its budget plans each year, following which the plans (and the level of the levy necessary to meet that budget) are submitted to Ofcom for approval. The funding arrangements for PhonepayPlus are outlined in Annex 1 of the draft Code and meet the requisite legal test for ensuring there are adequate funding arrangements in place.
- 4.15 We also note the intention of PhonepayPlus to ensure that the development and operation of the registration scheme will be self-funding by requiring registrants to pay a reasonable registration fee.<sup>46</sup>

**that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates**

- 4.16 Ofcom believes that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates. We consider that when taken in its entirety, the draft Code will result in a more effective regulatory regime for PRS, without unnecessarily increasing the regulatory burden on the PRS industry. The extent to which the major changes proposed in the draft Code are objectively justifiable is discussed in section (d) below where Ofcom examines the appropriateness of the draft Code.
- 4.17 PhonepayPlus has identified a number of issues with its current Code that it is trying to address through drafting the new Code of Practice, including:
- a) PhonepayPlus has recognised that many of the rules in previous Codes had been rendered obsolete by changes in technology, marketing and general provider practice. Through the draft Code, PhonepayPlus is proposing to move, where appropriate, to a more flexible outcomes-focused approach to regulation. This approach is intended to ensure PhonepayPlus is better placed to respond to emerging issues of consumer harm, while also giving the industry greater flexibility in how the draft Code can be complied with.
  - b) The proposal in the draft Code to hold Level 2 Providers accountable for their actions is prompted in part by a desire to move towards a fairer means of regulating the PRS industry. The draft Code will now facilitate targeting those companies in a value chain that have been more directly involved in causing consumer harm. It is anticipated that holding Level 2 Providers responsible for

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<sup>46</sup> Paragraph 3.4.7 of the draft Code. The registration fee is discussed further below at paragraph 4.25.

the compliant operation and promotion of their PRS will also assist in efforts to target repeat offenders, as such parties will no longer be able to use the existence of a Level 1 Provider above them in the value chain to shield them from liability;

- c) PhonepayPlus (and Ofcom through its Scope Review) have recognised that this new regulatory environment is likely to require a complementary registration scheme. Without a registration scheme it would be very difficult for PhonepayPlus to take effective enforcement action against the smaller Level 2 Providers, as well as adding to the compliance costs of Network Operators and Level 1 Providers who will be under new due diligence obligations with respect to their clients;
- d) The draft Code recognises that although the current requirement for Network Operators to withhold payments for 30-days has been very effective in preventing scams and unscrupulous behaviour, this provision does not preclude Level 1 Providers from paying their clients in advance of receiving payment from Network Operators. PhonepayPlus has identified this as an area that should be addressed through the draft Code to help it identify breaches and issue relevant directions before the flow of funds becomes impossible to track;
- e) PhonepayPlus has identified several aspects of its investigations/sanctions which it would like to address through its draft Code. As many consumers do not pursue legitimate refunds for PRS due to the time/effort involved in pursuing an often small amount of money owed,<sup>47</sup> PhonepayPlus considers a mechanism is needed where a Tribunal can order automatic refunds to be made. The draft Code also codifies the ability of PhonepayPlus to require providers to submit to a compliance audit of their internal procedures, a power that has been used indirectly in the past where Tribunals have suspended sanctions if the provider took certain steps to improve their internal procedures. Finally, PhonepayPlus also considers the approach to investigations required under the current Code to be too formal and would like the flexibility in cases where consumer harm to be minor to deal with the matter in a more informal manner, without having to publish a record of the breach.
- f) PhonepayPlus considers that there is a problem with inadequate complaints handling procedures in the industry and is proposing new obligations on Level 2 Providers to have effective procedures in place for the resolution of consumer complaints. This proposal stems from Ofcom's PRS Scope Review, where we recommended PhonepayPlus examine whether formal regulation was needed in this area (noting that any such expectations would need to be proportionate to the size and resources of the party in question); and
- g) PhonepayPlus and Ofcom are of the view that more could be done by providers to reduce instances of 'bill shock', where consumers receive unexpectedly high bills. Ofcom recognises that originating communications providers play a key role in bill shock, although this is beyond the scope of the PhonepayPlus Code of Practice. To address the responsibilities of PRS providers, the draft Code proposes that Level 2 Providers take reasonable steps to notify consumers in cases there could be high usage.

4.18 Ofcom and PhonepayPlus continue to believe that an effective regulatory regime is vital in order to protect consumers and the reputations of legitimate PRS operators,

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<sup>47</sup> See for example, the June 2009 PhonepayPlus Discussion paper on the 12<sup>th</sup> Code of Practice, <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>, paragraph 4.21

as well as to keep pace with changes in technology and the PRS industry. We are satisfied that the issues that have been identified above with the current regulatory regime need addressing and that the provisions of the draft Code are based on reasonable grounds and are justifiable in respect of the services to which the draft Code relates. The likely effects of the provisions of the draft Code are discussed further below.

### **that those provisions are not such as to discriminate unduly against particular persons or against a particular descriptions of persons**

4.19 Ofcom believes that the provisions of the draft Code do not discriminate unduly against particular persons or against a particular descriptions of persons, and that any PhonepayPlus Code will be applied uniformly to all relevant parties engaged in the premium rate sector, as defined under section 120 of the Act. Below we consider the extent to which two key changes could potentially be considered to be discriminatory. The extent to which the other major changes could be considered to be discriminatory is examined in the following section on the appropriateness of the proposals (part d).

#### *Considering whether the Proposed Regulatory Responsibilities are Discriminatory*

4.20 With respect to regulatory responsibilities, the three identified parties in the value chain will face varying obligations:

- a) Network Operators: the role of Network Operators continues to be central to regulation of the PRS industry, with Network Operators having responsibilities to carry out due diligence on their clients, bar access to services where necessary and withholding revenue payments;
- b) Level 1 Providers: in the past Level 1 (Service) Providers have been targeted by PRS regulation for reasons largely of pragmatism, with PhonepayPlus and Ofcom viewing them as a 'gatekeeper' whose control of the PRS platform meant they were in a unique position in the value chain to prevent harm from occurring. Under the draft Code, Level 1 Providers will no longer be held responsible if, for example, the promotion or content of a PRS breaches the Code of Practice, but they will now face new due diligence and risk assessment obligations with respect to their clients (as well as barring access and withholding revenue payments); and
- c) Level 2 Providers: in the past Level 2 (Information) Providers were only held accountable for their actions in a narrow range of circumstances – where the provider consented to being held responsible for any breaches of the Code of Practice and PhonepayPlus was satisfied it was appropriate to deal with this provider rather than the Service Provider.<sup>48</sup> The draft Code will now hold Level 2 Providers accountable for complying with specific rules regarding the operation, promotion and content of the PRS they control, regardless of whether they consent to the jurisdiction of PhonepayPlus. This approach recognises that it will often be the actions of Level 2 Providers that cause consumer harm.

4.21 It is not discriminatory to assign regulatory responsibilities that vary depending on what activities any given party carries out in the value chain and the provisions of the draft Code will apply equally to parties within each category.

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<sup>48</sup> The so called 'IP pass-through', paragraph 8.3.4 of the 11<sup>th</sup> Code of Practice.

- 4.22 The draft Code does provide some scope for certain Level 1 Providers to be treated differently – those Level 1 Providers that provide part of a PRS that directly impacts on consumers are required to comply with Part Two of the Code (the part of the Code that is binding on Level 2 Providers).<sup>49</sup> Such a provision is not unduly discriminatory as it is only applicable to those Level 1 Providers that are providing an aspect of a service that they control and which directly affects consumers (such as advertising or billing) and is consistent with the intention of PhonepayPlus and the draft Code to hold all providers accountable for their actions.

*Considering whether the Proposed Registration Requirement is Discriminatory*

- 4.23 With respect to the proposed registration scheme, the draft Code only proposes high-level obligations: all PRS providers need to register annually with PhonepayPlus (subject to their discretion to exempt particular services), provide such information as PhonepayPlus may require, and pay a reasonable registration fee. Ofcom is satisfied that these broad powers are not in themselves discriminatory, since the registration requirements will apply to all PRS providers, except for a limited category of PRS service in relation to which the imposition of such requirements would not be proportionate.
- 4.24 These ‘exempted PRS’ will be identified by PhonepayPlus, following the current consultation. PhonepayPlus has indicated in their consultation document that they anticipate exempting providers of 0871 and DQ services from having to register. We do not consider such an approach to be unduly discriminatory and support PhonepayPlus taking steps to ensure that the requirement to register is only targeted at providers of those services that have a higher risk of causing consumer harm and where there is an expectation of more rigorous due diligence on the part of associated providers.
- 4.25 The ability to charge a registration fee could conceivably represent a barrier to market entry if the fee was set at a level that effectively discriminated against new entrants (who may not have access to significant resources). However, the draft Code restricts PhonepayPlus’ ability to charge any more than a ‘reasonable’ fee and their consultation document makes clear that the fee will be set on a cost-recovery basis. We strongly support this approach and wish to stress that the registration scheme will not be a revenue-raising mechanism. The exact level of the registration fee will not be known until later this year once PhonepayPlus better understands the possible costs of the scheme and the number of likely registrants – but their consultation indicates it could be around £100, a figure that should not represent a barrier to market entry. Should the registration scheme come into effect we will work with PhonepayPlus to ensure the registration fee is set in a transparent manner.
- 4.26 The possible implementation of the registration scheme is discussed further below in the sections on the proportionality and appropriateness of the proposed requirements.

**that those provisions are proportionate to what they are intended to achieve**

- 4.27 The central objective of PRS regulation is to protect consumers from the risks of harm that may accompany the use of such services. Such an objective cannot be pursued in a vacuum and both PhonepayPlus and Ofcom must ensure that any regulatory obligations are proportionate to the nature of the consumer harm. Ofcom considers that the provisions of the draft Code are proportionate in light of this

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<sup>49</sup> Paragraph 3.8.1 of the draft Code

objective. Below we consider the proportionality of the two key proposals in the draft Code. The extent to which the other major changes could be considered to be proportionate are explained in the following section as part of an assessment of the appropriateness of each of the proposals (part d).

*Considering whether the Proposed Regulatory Responsibilities are Proportionate*

- 4.28 Ofcom's Scope Review outlined the range of potential harm from PRS, including where consumers pay higher than expected prices, receive low quality services, are discouraged from seeking redress, access inappropriate content, have their privacy infringed, or are the victims of scams.<sup>50</sup> PhonepayPlus has subsequently framed its draft Code around upholding six consumer protection outcomes: legality, transparency and pricing, fairness, privacy, avoidance of harm and complaints handling.
- 4.29 The draft Code seeks to uphold these consumer protection outcomes by distributing appropriate responsibilities throughout the value chain. Experience shows that consumer harm is most often caused by Level 2 Providers. Such Level 2 Providers control the operation and content of a PRS, have direct contact with consumers, are best positioned to ensure a PRS does not breach the Code and are best positioned to remedy any consumer harm. It is a logical step that such providers should therefore bear the primary responsibility for ensuring that any given PRS complies with PhonepayPlus' Code of Practice.
- 4.30 The effect of this approach is that many Level 2 Providers will now for the first time be directly regulated by PhonepayPlus. We do not consider this to be 'regulatory creep' but are satisfied it is a measured step to improving the protection of consumers. Level 2 Providers will no longer be able to escape regulatory scrutiny for their actions. In light of their role in controlling a PRS we consider it is proportionate to hold them responsible for any harm they cause.
- 4.31 While it is reasonable that Level 2 Providers should now bear responsibility for their own actions, those further up the value chain also have an important role in minimising the risk of consumer harm by virtue of their role as 'gatekeeper' in the value chain. Such parties are in a position to decide whether to do business with a Level 2 Provider, or in the case of a Network Operator whether to allow a particular provider to have access to their network. We therefore support the proposal from PhonepayPlus that Network Operators and Level 1 Providers should face new obligations to take appropriate steps to minimise the prospect that a PRS utilising their platform/network will cause consumer harm. As noted in the Scope Review, in the absence of very strong due diligence obligations on these parties, there is a risk that Level 2 Providers will see opportunities to conduct scams.<sup>51</sup>
- 4.32 Every business involved in the provision of a service will now assume some degree of responsibility for ensuring consumers are not harmed, but this responsibility will only extend to those activities that are within a party's control. We consider this to be a fairer and more proportionate means of regulating the PRS industry. It is also likely

<sup>50</sup> See, [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/prs\\_statement/prs.pdf](http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf), paragraphs 4.7 – 4.23.

<sup>51</sup> See, [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/prs\\_statement/prs.pdf](http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf), paragraphs 5.82 – 5.90.

to support efforts to target repeat offenders, with Level 2 Providers being held directly accountable for their actions.<sup>52</sup>

*Considering whether the Proposed Registration Requirement is Proportionate*

- 4.33 Mandating the registration of PRS providers will impose a compliance cost on PRS providers, but we consider this is a proportionate and necessary means of minimising the prospect of consumer harm occurring under the draft Code. A well functioning registration scheme will support PhonepayPlus' enforcement activities and the new obligations on certain providers to undertake due diligence on their client's activities.
- 4.34 The draft Code grants PhonepayPlus a broad discretion in how the registration scheme should be implemented, but we are satisfied that there is an appropriate system of 'checks and balances' in place so that the burden on the PRS industry is no more than necessary to support the objectives of the draft Code.
- 4.35 PhonepayPlus is consulting publicly on key registration issues and their consultation document seeks views from stakeholders on issues such as who should register, what information should be provided, and what an appropriate means of setting the registration fee would be. PhonepayPlus' governance arrangements, effective working relationship with the PRS industry, and the Framework Agreement<sup>53</sup> with Ofcom are further checks on ensuring the registration scheme will be implemented in a proportionate manner. Following consultation with the industry, PhonepayPlus will consider how any registration scheme can be implemented in a manner that best supports the objectives of the new Code, while being proportionate to the risks of consumer harm from certain PRS.

**that, in relation to what those provisions are intended to achieve, they are transparent**

- 4.36 Ofcom is satisfied that, in relation to what the draft Code is intended to achieve, the proposed provisions are transparent. Ofcom notes that the provisions of the draft Code have been drafted with a view to ensuring a sensible balance between making them as clear and unequivocal as possible with the need to reflect the fast-moving and dynamic PRS industry which delivers PRS across various different platforms.
- 4.37 The draft Code has been developed by PhonepayPlus as a result of ongoing dialogue with the PRS industry and in the light of PhonepayPlus' experiences of regulating that industry. A number of the provisions of the draft Code which would represent changes to the existing PhonepayPlus regime stem from Ofcom's Scope Review, which was published in October 2009. As noted above, PhonepayPlus also issued a discussion document in June 2009 on the development of its draft Code, which sought initial industry views on the direction of its 12<sup>th</sup> Code of Practice.
- 4.38 Although Ofcom is at present minded to approve the draft Code, we are conscious that the proposals contained in the draft Code are likely to have the greatest impact on Level 2 Providers – some of whom may not have been regulated directly by PhonepayPlus or Ofcom in the past and are less likely to be familiar with the contents of the two previous consultations on these issues. For example, organisations using

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<sup>52</sup> Although we note some have already been held accountable if they consented through IP pass-through arrangements.

<sup>53</sup> The Framework Agreement has formalised the relationship between Ofcom and PhonepayPlus and outlines the responsibilities of each organisation with respect to PRS. See <http://www.ofcom.org.uk/consult/condocs/phonepayplus/formalframework.pdf>

0871 numbers are less likely to be aware of PhonepayPlus given that 0871 numbers have only relatively recently been brought within the remit of PhonepayPlus.

- 4.39 Nevertheless, we are confident that PhonepayPlus has a robust communications plan in place for raising awareness of its draft Code and for engaging with this community of PRS providers. PhonepayPlus has planned a major awareness-raising exercise during the consultation period as part of an effort to reach those PRS providers who may have limited visibility of PhonepayPlus and Ofcom consultations. Their communications plan involves stakeholder meetings held around the country, mail-outs, engagement with trade associations and media briefings.
- 4.40 A key factor when Ofcom is deciding whether or not to approve the draft Code will be whether PhonepayPlus has been able to effectively communicate the likely impact of its proposals to Level 2 Providers.

**(d) Having regard inter alia to the provisions of the draft Code, Ofcom is minded to decide that it is appropriate for Ofcom to approve it**

- 4.41 In deciding whether Ofcom is satisfied of those matters, Ofcom must act consistently with its general duties under section 3 of the Act, as well as with the six Community requirements set out in section 4 of the Act.

**Section 3: Ofcom's general duties**

- 4.42 Section 3(1) of the Act sets out the principal duties of Ofcom in carrying out its functions:
- a) to further the interests of citizens in relation to communications matters; and
  - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.43 Section 3(2)(b) of the Act is also relevant: the requirement that Ofcom secure the availability throughout the UK of a wide range of electronic communications services.
- 4.44 Section 3(3) of the Act provides that, in performing their duties under subsection (1), Ofcom must have regard, in all cases, to-
- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
  - b) any other principles appearing to Ofcom to represent the best regulatory practice.
- 4.45 In addition, section 3(4) of the Act provides that, in performing its duties, Ofcom must have regard to "such of the following as appear to them to be relevant in the circumstances", including:
- the desirability of promoting competition in relevant markets;
  - the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

- the desirability of encouraging investment and innovation in relevant markets;
- the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
- the needs of persons with disabilities, of the elderly and of those on low incomes;
- the desirability of preventing crime and disorder;
- the opinions of consumers in relevant markets and of members of the public generally; and
- the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

4.46 Section 3(5) of the Act provides that Ofcom, in performing its duty of furthering the interests of consumers, must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

#### **Section 4: The six Community requirements**

4.47 Section 4 of the Act sets out the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive<sup>54</sup>) which Ofcom, in carrying out its functions under inter alia Chapter 1 of Part 2 of the Act, must act in accordance with.

4.48 In broad terms, the six requirements are as follows:

- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom's activities contribute to the development of the European internal market;
- ii) to secure that Ofcom's activities contribute to the development of the European internal market;
- iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 20 of the EC Treaty<sup>55</sup>);
- iv) to take account of the desirability of Ofcom's carrying out its functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, service or associated facility, or (b) one means of providing or making available such a network, service or facility, over another;
- v) to encourage (to such extent as Ofcom consider appropriate for certain purposes which are specified in section 4(8) of the Act) the provision of network access and service interoperability; and

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<sup>54</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, which has been recently amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

<sup>55</sup> Ex Article 17, prior to the amendments introduced by the Treaty of Lisbon.

- vi) to encourage such compliance with the standards specified in section 4(10) of the Act as is necessary for facilitating service interoperability and securing freedom of choice for customers of communications providers.

### **Ofcom's overall assessment of the appropriateness of approving the draft Code**

- 4.49 Ofcom has carefully considered the entirety of the PhonepayPlus draft Code and considers that, subject to consultation, it would be appropriate to approve it. The draft Code will strengthen the regulatory regime by more clearly targeting regulation at those parties in the value that are responsible for causing consumer harm. We consider the draft Code will promote greater consumer confidence in the PRS market and, as a result, will encourage investment and innovation in the sector.
- 4.50 The following section examines the most significant changes from the existing PhonepayPlus Code of Practice and summarises Ofcom's views on why we would consider it appropriate to approve the draft Code, if, following the receipt of stakeholder submissions, the draft Code (with no material changes that would significantly impact stakeholders) were to be submitted to Ofcom for approval.<sup>56</sup>

#### *An Outcomes Focused Code*

- 4.51 We consider a move to an outcomes-focused Code of Practice will support PhonepayPlus' efforts to respond to emerging issues of consumer harm that may not have been anticipated, while also allowing the industry flexibility in certain areas as to how they can choose to meet the proposed outcomes.
- 4.52 A key risk of moving to a fully outcomes-based Code is that regulated entities often lack certainty about how the outcomes will be interpreted by the regulator and what steps they would need to take to ensure compliance. PhonepayPlus has mitigated this by retaining a degree of prescription in certain areas where it considers that the protection of consumers' interests requires compliance with specific rules (e.g. stating the spending threshold after which subscription reminders need to be sent, stipulating the minimum content required to accompany PRS advertising, etc.). This is a pragmatic approach to take and we consider PhonepayPlus has struck an appropriate balance between high-level and prescriptive rules. Where the rules in the draft Code are not very prescriptive, the addition of guidance will also assist PRS providers to better understand what is needed to comply with the draft Code.

#### *Extending Regulatory Responsibility throughout the Value Chain*

- 4.53 By virtue of their more permanent presence in the industry and ability to exercise control over the platform through which PRS is delivered, Level 1 Providers have traditionally been the key focus for regulation in this industry even though Level 2 Providers are exercising control over the promotion and operation of PRS and are potentially the parties responsible for causing consumer harm.
- 4.54 We have previously supported the approach of holding Level 1 Providers accountable for ensuring the PhonepayPlus Code was complied with largely for reasons of pragmatism:

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<sup>56</sup> As explained above, when deciding whether to formally approve the draft Code, Ofcom will consider whether it is appropriate to consult further with stakeholders.

- it placed very strong incentives on Level 1 Providers to monitor those with whom they did business; and
  - it made investigations and enforcement action straightforward by avoiding the need for PhonepayPlus to navigate an often complex value chain in its investigations to try to identify the party that may have actually been directly responsible for consumer harm.
- 4.55 The draft Code now proposes distributing regulatory responsibility along the value chain. Level 2 Providers will have responsibility for ensuring that the day-to-day promotion and operation of PRS complies with the Code of Practice,<sup>57</sup> while Level 1 Providers will face new obligations to take appropriate steps to minimise the prospect that PRS utilising their platform will cause consumer harm.<sup>58</sup>
- 4.56 As outlined in the Scope Review (and reiterated in paragraph 4.54 above), there are challenges with altering the responsibilities of providers in this way. However, we are satisfied that the approach adopted through the draft Code would be effective. Most importantly:
- Level 1 Providers will continue to have strong incentives to monitor those with whom they do business; but rather than being liable for the actions of their clients, they will now face liability for due diligence failings;
  - Level 2 providers who were previously not directly subject to regulation by PhonepayPlus will now be directly responsible for complying with the draft Code; and
  - the introduction of an industry registration scheme will greatly assist PhonepayPlus' efforts to identify relevant parties and take effective enforcement action.
- 4.57 We accept there are a number of small risks with this shift in regulatory focus, including:
- the risk that under the draft Code some Level 2 Providers might be able to conduct a scam and exit the market before remedying consumer harm (i.e. although the company will be liable for its actions, it might be wound up and its assets disbursed before being held to account). We consider this risk has been adequately managed through the extension of the 30-day withhold rule to Level 1 Providers,<sup>59</sup> the introduction of robust due diligence requirements on Level 1 Providers to monitor their clients, and the ability of PhonepayPlus to link the breach history companies to specific directors through its registration scheme.
  - That if the proposals in the draft Code go ahead, it is likely that the percentage of fines successfully collected by PhonepayPlus will decrease. On the whole, Level 2 Providers are less likely to have a permanent presence in the PRS industry (when compared to Level 1 Providers), which increases the likelihood that some Level 2 providers may choose to exit the market rather than pay fines to PhonepayPlus. A reduction in fine collection could be viewed by some in the industry as a failing of PhonepayPlus. However, we consider that the primary focus of PRS regulation is the prevention of consumer harm and that the draft

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<sup>57</sup> As referenced above in paragraphs 3.19 - 3.20 above

<sup>58</sup> As referenced above in paragraphs 3.21 - 3.22 above

<sup>59</sup> See paragraphs 3.29 - 3.30 above

Code is likely to achieve this objective, even though the collection of financial penalties might prove more challenging.

- 4.58 We are satisfied that the proposal to spread regulatory responsibilities throughout the value chain is an appropriate step to take and that PhonepayPlus has adequately mitigated the risks identified above. We consider the specific regulatory responsibilities that would apply to each provider<sup>60</sup> are reasonable and should not unduly burden those focused with running a legitimate business and looking after their customers' interests.

#### *A Mandatory Requirement to Register with PhonepayPlus*

- 4.59 As signalled through Ofcom's PRS Scope Review, any move to hold Level 2 Providers directly accountable for their actions should be complemented by the introduction of a mandatory registration scheme for PRS Providers. We are satisfied that the proposal in the draft Code for PRS providers to register with PhonepayPlus is appropriate: such a registration scheme would support the new due diligence obligations in the draft Code and would assist the enforcement activities of PhonepayPlus.
- 4.60 As part of its PRS Scope Review, Ofcom commissioned Plum Consulting to assess the benefits of mandating an industry registration scheme. The option recommended by Ofcom, and adopted by PhonepayPlus through the draft Code, was estimated to provide Net Present Value of £3.8m over five years.<sup>61</sup> Plum Consulting noted this was a conservative estimate based on an assumed 2% reduction in breaches of the PhonepayPlus Code of Practice.
- 4.61 Although the direct impact of a requirement to register with PhonepayPlus is likely to be minimal for any given business (e.g. filling out an online form describing their business and services and paying a nominal registration fee), failure to register would be a breach of the Code that could trigger a range of sanctions.<sup>62</sup> As such, it is important that the implementation of any registration scheme is done in a targeted manner.
- 4.62 Although we consider the provisions in the draft Code relating to registration to be appropriate, these provisions must not be implemented in a manner that is discriminatory or disproportionate. PhonepayPlus is currently consulting stakeholders on the main aspects concerning the implementation of the registration scheme. We therefore support the proposal of PhonepayPlus to exempt 0871 and DQ providers from a requirement to register with PhonepayPlus, given the relatively low risks posed by these services.

#### *Extending a Requirement to Withhold PRS Payments*

- 4.63 The proposal to require Level 1 Providers to withhold PRS payments to their clients for 30 days mirrors the obligation that currently exists on Network Operators. The intention behind this proposal is to essentially close a loophole whereby, even though Level 1 Providers would not receive money from Network Operators for 30 days, there was nothing to preclude Level 1 Providers from paying money to their clients in advance of receiving funds from the Network Operator. Such a scenario would defeat

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<sup>60</sup> See paragraphs 3.16 - 3.25 above

<sup>61</sup> Plum Consulting, 'The Benefits of a Standalone Reputational Database for Premium Rate Services' [http://www.ofcom.org.uk/consult/condocs/prs\\_scope/annex6.pdf](http://www.ofcom.org.uk/consult/condocs/prs_scope/annex6.pdf), see option 'F2'.

<sup>62</sup> Paragraph 3.4.1 of the draft Code.

the purpose of trying to sufficiently slow down the flow of PRS payments to enable PhonepayPlus to identify situations of consumer harm and to take appropriate steps.

- 4.64 Ofcom considers this proposal to be a proportionate measure to take. In 2005, Ofcom approved the requirement for Network Operators to withhold funds for 30 days on the basis that it made it much more difficult for a Service Provider (now essentially a Level 1 Provider) to disappear before being held to account for any Code breaches.<sup>63</sup> In the environment of the draft Code, where Level 2 Providers are likely to be held accountable if a PRS breaches the Code of Practice, we consider the same rationale to hold true. There is a possibility that if Level 2 Providers receive payments too quickly it increases the risk of opportunistic behaviour and the likelihood of scams occurring.

#### *Introducing New Sanctions and Flexibility into Investigations*

- 4.65 We are satisfied that it is appropriate to introduce a more flexible 'Track One' procedure for investigations into cases where the alleged breach is of a minor nature (which would result in a compliance plan for the relevant party to follow). We do not consider this move will have any adverse effect on PRS providers as if they disagree with the resulting compliance plan or fail to follow it, they will still have the opportunity to fully defend an alleged Code breach should PhonepayPlus initiate a more formal investigation. The opportunity to deal with such cases in a more informal manner is consistent with the efforts of PhonepayPlus to introduce a more flexible approach to regulation that enables it to focus its resources on instances of serious consumer harm.
- 4.66 We will now deal with the appropriateness of the proposed two new sanctions in turn: (i) the ability for a Tribunal to order automatic refunds to all consumers<sup>64</sup> and (ii) the ability to require a provider to submit to a 'compliance audit' of their processes and to adhere to the recommendations.<sup>65</sup>
- 4.67 Both Ofcom and PhonepayPlus recognise the potentially punitive nature of a sanction that requires a PRS provider to provide full refunds to all consumers who have been charged for the relevant PRS. Such a sanction would apply to all consumers, regardless of whether they lodged a complaint in relation to the service in question and would require the PRS provider to refund the full retail price of the PRS regardless of how much of the retail revenue had been retained by other parties (including originating providers, terminating providers and Level 1 Providers). However, we are satisfied that there are a number of safeguards in place to ensure this sanction would not be disproportionate:
- this sanction can only be imposed in cases where there has been a 'serious breach of the Code and/or serious consumer harm'. Given that refunds would be supplied to all consumers, it is likely that a Tribunal would only impose such a sanction where the service in question could not have provided any material value to consumers (e.g. a scam);
  - as Tribunals must have regard to the proportionality of the sanctions they impose (including considering *all the sanctions* imposed on a PRS provider), the ability to require automatic refunds should not lead to a disproportionate burden relative to

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<sup>63</sup> Notification of Approval of an Emergency Code Amendment to the ICSTIS Code of Practice (tenth edition) <http://www.ofcom.org.uk/consult/condocs/icstis/statement/ecpa.pdf>

<sup>64</sup> Paragraph 4.8.2(j) of the draft Code.

<sup>65</sup> Paragraph 4.8.2(k) of the draft Code.

the seriousness of the breach of the Code (e.g. given the financial impact this sanction could have on the relevant provider, the Tribunal could decide to reduce the level of sanctions that would otherwise be imposed to ensure the totality of the punishment remained proportionate);

- recognising that it may not always be technically or legally possible to credit a consumer's account or to notify consumers of the availability refund, the draft Code provides PhonepayPlus with the discretion to instead require a donation to charity; and
  - as with other sanctions, the affected party will be able to make an application to review or appeal the decision.
- 4.68 Ofcom considers the PhonepayPlus Tribunal procedures to be highly effective and expects that this new sanction will further assist Tribunals in ensuring that infringers remedy the consequences of their breaches.
- 4.69 With respect to the proposed sanction that a party must submit to a compliance audit by a 3<sup>rd</sup> party (including paying the costs of the audit and implementing the recommendations within a defined period), we are also satisfied that this is also an appropriate remedy for a Tribunal to consider imposing.
- 4.70 The establishment of new due diligence obligations through the draft Code is likely to result in more cases going to Tribunals about process related issues (i.e. failure to monitor clients) than previously. If, for example, a Tribunal concluded there had been significant shortfalls in a provider's due diligence, or there had been repeated due diligence failings, it may be appropriate in such a scenario to try to remedy the situation by imposing a compliance audit rather than a fine.
- 4.71 We recognise that complying with such a sanction could result in a provider making costly and complex changes to their internal processes, the precise nature of which may not be known at the time the sanction was imposed. To address this concern PhonepayPlus will allow providers subject to a compliance audit to formally appeal the resulting audit recommendations.

#### *New Complaints Handling Obligations*

- 4.72 The proposed complaints handling obligations are a result of a Scope Review recommendation that PhonepayPlus should examine strengthening the requirements in this area. We consider the obligations to be reasonable and do not consider they will be particularly onerous for providers to comply with.
- 4.73 As noted in paragraph 3.34 above, the key obligations will fall on Level 2 Providers, who will now be required to have proportionate complaints procedures in place, to resolve complaints quickly and fairly, and provide dissatisfied consumers with the contact details of PhonepayPlus. The key aspect of these requirements is the test of proportionality – with the nature of complaints processes being proportionate to the nature of the PRS business. For example, a broadcaster offering PRS would be expected to have a markedly different complaints procedure in place for dissatisfied consumers than a GP's surgery that was offering an 0871 number to patients.
- 4.74 As with other key changes proposed in the draft Code that impose obligations on Level 2 Providers, there is some risk that a large category of providers will be subject to these new obligations who may not have previously been aware of PhonepayPlus or this consultation. Prior to approving the Code, Ofcom will need to be satisfied that

PhonepayPlus has taken all reasonable steps to draw to the attention of all PRS Providers (but particularly Level 2 Providers) the implications of these regulatory changes.

- 4.75 Under the draft Code, Network Operators and Level 1 Providers will now be obliged to ensure that PhonepayPlus regulation is satisfactorily maintained by taking all reasonable steps to ensure that consumer complaints are resolved quickly and fairly and that any redress is provided quickly and easily. As such, there is no direct obligation on such parties to resolve complaints themselves, but rather to support the draft Code obligations on Level 2 Providers by taking reasonable steps. We understand that a working group under the Industry Liaison Panel<sup>66</sup> is looking to come up with some 'best practice' on what Network Operators and Level 1 Providers should do when consumers make complaints about PRS. This best practice will then be issued for consultation by PhonepayPlus with a view that it becomes guidance to sit alongside the Code requirements.
- 4.76 The complaints handling obligations in the draft Code are very high level and allow providers a great deal of flexibility in how they may choose to comply. On balance, we are satisfied that the provisions in the draft Code are appropriate. While there may be some initial uncertainty as to how complaints should be resolved 'fairly', 'easily', and 'quickly', we expect that PhonepayPlus Tribunals will apply these qualifying factors in a reasonable manner in order to determine whether a provider has breached their complaints handling obligations. We also anticipate that PhonepayPlus will issue relevant guidance in this area to clarify the steps providers may consider taking to meet their obligations.

#### *Preventing Unexpectedly High Bills*

- 4.77 For some time Ofcom has had concerns about cases that are commonly referred to as 'bill shock', where consumers run up unexpectedly high bills on their telephone accounts. Such cases are by no means limited to the PRS industry, with one common cause being consumers roaming overseas. Nevertheless, we have become aware of instances where consumers have run up significant bills for PRS such as gambling services or virtual chat services over a relatively short time period. In such instances, although a provider may adhere to daily caps on spending for their service (e.g. terminating sexual entertainment services once a spending cap for the call has been reached), we have concerns that this may not be sufficient to reduce the potential for consumer harm.
- 4.78 The draft Code includes a new obligation on Level 2 Providers to take reasonable steps to identify excessive use of a service(s) and to inform the consumer of that usage.<sup>67</sup> The rationale for this new provision is to try to minimise those instances where consumers may unknowingly run up significant phone bills through 'excessive' use of a service.
- 4.79 We are conscious that in many cases, a consumer is willing to spend a sum of money on PRS that may be considered by others to be excessive. This obligation would not require PRS providers to stop offering such services, but rather to have procedures in place to identify users who may be running up unusually high bills and to inform them appropriately. For example, as a result of this obligation we would expect Level 2 Providers to be able to identify those consumers who are repeatedly

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<sup>66</sup> An industry group comprising members from across the value chain that meets on a quarterly basis to advise PhonepayPlus on regulatory, technical and commercial issues in the PRS industry.

<sup>67</sup> Paragraph 2.3.6 of the draft Code.

hitting any prescribed spending caps in a short period of time (i.e. those callers who are repeatedly having to be forcibly released from calls over a short period of time, or are receiving repeat reminders about their subscription charges over a short period of time).

- 4.80 We acknowledge that by itself this provision will not solve the problem of unexpectedly high bills and we will continue to consider the wider consumer issues in this area. Although much of the responsibility for informing consumers about high bills is likely to lie with originating providers, we consider it appropriate that Level 2 Providers have some responsibility where consumers are incurring very high charges through their use of a PRS.

## Conclusion

- 4.81 Ofcom has considered the entirety of the PhonepayPlus draft Code and considers that, subject to the outcome of this consultation, the draft Code published today meets the legal tests for Ofcom approval.
- 4.82 Ofcom considers that the draft Code would further protect consumers from the risks of harm that may accompany the use of PRS. The draft Code would strengthen the regulatory regime by more clearly targeting regulation at those parties in the value chain that are responsible for causing consumer harm. Similarly, proposed new due diligence requirements on those parties that control the platforms and networks across which PRS is delivered go beyond those contained in the current Code of Practice and would ensure a more co-ordinated approach to reducing consumer harm in the PRS industry. We expect this approach will make it more difficult for repeat offenders to operate in the industry and will lead to increased in consumer confidence in the PRS market.
- 4.83 The draft Code represents a fundamental shift in the way the PRS industry is regulated. From Ofcom's perspective, the most significant changes from the previous Code of Practice are:
- i) extending responsibility throughout the value chain for ensuring that PRS complies with the Code;
  - ii) introducing a mandatory registration requirement for PRS providers;
  - iii) extending the requirement for PRS providers to withhold payments to their clients;
  - iv) introducing new sanctions and more flexibility into PhonepayPlus investigations;
  - v) introducing new complaints handling obligations; and
  - vi) introducing obligations to minimise instances of 'bill shock'.
- 4.84 The requirement for PRS providers to register with PhonepayPlus is a significant step in a liberalised communications market where many providers would only deal with the regulator if it was alleged they had breached a specific regulation. This proposal has not been taken lightly and both PhonepayPlus and Ofcom consider it is a necessary measure to rid the PRS market of individuals and companies that repeatedly cause consumer harm, while also supporting the ability of reputable providers to identify those parties they may wish to do business with. With an

effective registration scheme in place, PhonepayPlus will be able to move to a fairer and more proportionate means of regulating the industry, by specifically requiring those parties that control the operation/content of a PRS to comply with their Code of Practice.

- 4.85 We recognise the proposal to extend regulatory responsibility throughout the value chain is likely to have the greatest impact on those parties responsible for controlling/promoting PRS content, but are satisfied this is an appropriate step to take. It is Ofcom's view that the substantive rules contained in the draft Code are reasonable and we support the concept of holding parties directly accountable for those actions within their control.
- 4.86 In concluding that, subject to consultation, it would be appropriate if the draft Code were to be approved, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that any approval of the draft Code would be compatible with those duties, not only because the draft Code would be in line with Ofcom's primary duty to citizens and consumers, but also because it would promote legitimate competition in the provision of PRS and the networks and services by which PRS are provided. Effective competition can only exist where consumers are not misled about the cost or nature of services and where traders who cause consumer harm are held accountable. We are satisfied that the draft Code would further these aims.
- 4.87 We would draw to stakeholders' attention that the Ofcom consultation on the draft Code has a narrower focus than the consultation published today by PhonepayPlus. PhonepayPlus has responsibility for drafting the Code of Practice and is today consulting on the substance of the Code and the merit of some detailed and technical changes, whereas the Ofcom consultation focuses on the extent to which the proposed changes meet the legal tests for approving a Code under the Act. Stakeholders are strongly recommended to also read the PhonepayPlus consultation and draft Code and to provide submissions directly to PhonepayPlus.
- 4.88 Ofcom would like to invite views on its position that it would be appropriate for the draft Code to be formally approved under section 121 of the Act. The consultation period will close at 5pm on 8 July 2010.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 8 July 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://www.ofcom.org.uk/consult/condocs/ppp/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [jeff.loan@ofcom.org.uk](mailto:jeff.loan@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Jeff Loan  
Floor 6  
Strategy and Market Developments  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7981 3706
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Jeff Loan on 020 7981 3761.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in October 2010.
- A1.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing  Name/contact details/job title

Whole response  Organisation

Part of the response  If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

Ofcom intends to share all submissions with PhonepayPlus unless explicitly requested otherwise. Please indicate if you do not want this to occur:

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Consultation questions

A4.1 Please find below a list of questions included in the consultation document.

*Question 1: Do you consider Ofcom should approve the draft PhonepayPlus 12<sup>th</sup> Code of Practice in its current form?*

*Question 2: If not, what changes do you consider need to be made to the draft Code?*

*Question 3: If the draft Code were to be approved by Ofcom, what period of time do you consider would be appropriate before the 12<sup>th</sup> Code of Practice became enforceable by PhonepayPlus?*

## Annex 5

# The Draft 12<sup>th</sup> Code of Practice

A5.1 The draft Code of Practice is attached separately.

<http://www.ofcom.org.uk/consult/condocs/ppp/cop.pdf>

## Annex 6

## Summary of changes from the current 11<sup>th</sup> Code

A6.1 The following table has been prepared by PhonepayPlus to demonstrate to stakeholders the specific changes that are being proposed to be made to their existing 11<sup>th</sup> Code of Practice.

11 <sup>th</sup> Code para.	Description of 11 <sup>th</sup> Code paragraph	Draft Code Status Update	Location in Draft Code
1.1	Principles of good regulation	Removed.	N/A
1.2.1-1.2.4	Scope of the Code	Altered wording around scope of the Code and parties to whom the Code applies.	1.2.1-1.2.2 and 1.3
1.3.1-1.3.2	Geographic reach of the Code	Now located at 'reach of the Code'. Wording around information society services has been simplified, with a link to full definition at sub-paragraph 5.2.1.	1.7.1-1.7.2 and 5.2.1
1.4.1-1.4.2	Amendments and advice	Altered wording. Guidance still to be non-binding, but providers will be invited to consider whether they follow it, or comply with the Code by other means. Doing nothing is not an option.	1.5.1-1.5.5
1.5	Confidentiality		1.6
1.6	European Commission	Removed. Referred to in separate Governance Statement	N/A
1.7	Constitution	Removed. Referred to in separate Governance Statement. References to independence at sub-paragraphs 1.4.1-1.4.3.	N/A (see sub-paragraphs 1.4.1-1.4.3)
1.8	Code Compliance Panel (CCP)	Reference is made at sub-paragraph 5.1.1 'delegation of powers' to the right of the Board to delegate powers to others, including the Code Compliance Panel. Full reference to CCP in Annex 2.	5.1.1 and Annex 2
2.1.1	Network responsibility	A general responsibility around due diligence and risk assessment and control is proposed for all those who subcontract with a client defined as being part of the PRS delivery chain. In addition responsibility to have internal arrangements to ensure Code compliance, and to carry out reasonable monitoring of clients have been added.	3.1.1a-c, 3.1.3, 3.1.5, 3.1.6, 3.1.7

<b>11<sup>th</sup> Code para.</b>	<b>Description of 11<sup>th</sup> Code paragraph</b>	<b>Draft Code Status Update</b>	<b>Location in Draft Code</b>
2.1.2	Network registration	Proposed to be extended to all those in the PRS delivery chain. Additionally registration of services will be required by the Level Two providers responsible. Lastly, registration will result in such details as provided being made accessible to the public and/or other registrants.	3.4.1-3.4.12
2.1.3	Network responsibility for funding provisions	Reference is made at para 3.1.2 to the need for all parties to have regard to and comply with funding provisions as set out at Annex 1.	3.1.2 and Annex 1
2.1.4	Network response to instructions	Proposed to be extended to all those in the delivery chain.	3.1.4 and 3.2.2-3.2.3
2.1.5	Period after which instructions become effective	See above. Proposed this is extended to all in delivery chain	3.2.1
2.1.6	Application of Code where networks are also Service Providers	Reproduced in the new Code.	3.7.2
2.2.1-2.2.2	Data Protection	Reproduced in the new Code.	3.6.1-3.6.2
2.3.1-2.3.2	Due Diligence requirements	A general responsibility around due diligence and risk assessment and control is proposed for all those who subcontract with a client defined as being part of the PRS delivery chain.	3.3.1-3.3.4
2.3.3	30-day rule	Proposed to be extended along the value-chain to all registered parties who contract with another client. PhonepayPlus would also be able to specify a longer withhold period for any party upon instruction.	3.5.1-3.5.4
2.3.4	Disapplication of para 2.3.1 until 2007	Removed.	N/A
2.4.1-2.4.2	Record and supply of information about numbers and number allocation		3.7.3
2.5.1	Provision of information	Proposed to be extended to a requirement to all registered parties to provide any information which PhonepayPlus	3.1.4 and 4.2.3-4.2.5

11 <sup>th</sup> Code para.	Description of 11 <sup>th</sup> Code paragraph	Draft Code Status Update	Location in Draft Code
		requests in the performance of its duties as an investigator.	
2.5.2	Instructions to networks	Proposed to be extended to all registered parties.	3.2.2-3.2.3
2.5.3	Contract with banned or restricted parties	Proposed to be extended to all parties in delivery chain.	3.1.6
2.5.4	Mis-payment of withheld funds	Proposed to be extended to all registered parties.	3.1.6
2.6.1	Sanctions against Network operators	Removed, as it is proposed that Network operators will no longer have their own responsibility or investigation procedure.	N/A. See paragraph 4.8 around sanctions
3.1.1	General Service Provider responsibility	Removed, given that the new due diligence requirements on all registered parties will supersede this	N/A
3.1.2	Funding responsibility		3.1.2 and Annex 1
3.1.3	Compliance with instructions	Proposed to be extended to a requirement to all registered parties to provide any information that PhonepayPlus requests in the performance of its duties as an investigator.	3.1.4
3.2.1 and 3.2.3	Registration	Proposed to be extended to all those in the PRS delivery chain. Additionally registration of services will be required by the Level 2 providers responsible. Lastly, registration will result in such details as provided being made accessible to the public and/or other registrants.	3.4.1-3.4.12
3.2.2	Provision of information	Proposed to be extended to a requirement to all registered parties to provide any information that PhonepayPlus requests in the performance of its duties as an investigator.	3.1.4 and 4.2.3-4.2.5
3.3.1	Misuse of number ranges	Responsibility proposed to be placed upon Level 2 provider.	3.9.2
3.3.2	Documentary evidence to support factual claims	Removed. This is in light of a general responsibility not to mislead, and a requirement to provide any information requested by PhonepayPlus in the course of an investigation.	N/A
3.3.3	Technical quality	Proposed to be extended to all parties, in reasonable context of their roles in providing a service.	3.1.8
3.3.4	Bringing Code to attention of clients	Removed. This is in light of the Code being the responsibility of all registered parties. No party will be able to connect	N/A

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		with any party who has not registered, and all parties should be informed of the existence of the Code, and their need to check their responsibilities relating to it, at point of registration.	
3.3.5	Customer service arrangements	Proposed to be replaced by separate Outcomes and Rules around complaint handling, and a requirement for all parties to ensure complaints are handled quickly and fairly in the context of their roles.	2.6.1-2.6.6 and 3.1.1d
3.4.1-3.4.2	Data Protection	Reproduced in the new Code. Rule 3.6.2 of new Code proposes to require consumers consent to any usage of data, having first been clearly informed of the intended usage.	3.6.1-3.6.2
3.4.3	Data Protection – collection of consumer details	Proposed to be replaced by a more detailed set of requirements under Privacy Outcome, and by part of Rule 3.6.2 of new Code.	2.4.1-2.4.4
3.5	Engagement of associated individuals	Proposed to be replicated and extended to all parties.	3.1.6
4.1-4.2	Information Providers	Removed – rendered obsolete by extension of requirements along value-chain.	N/A
5.1, 5.1.3 and 5.1.4	Prior Permission	To be retained, but with changes to the regime to allow different types of Prior Permission based on risk, and different parties to be required to seek Prior Permission.	3.10.1-3.10.8 and Annex 1
5.1.2	Prior Permission to disregard a specific Code provision	Retained	3.10.5a
5.2	Legality	Replicated under new Legality Outcome and Rules. In addition, new Rules around privacy and consent to marketing added at new Code section 2.4. As a result, unsolicited marketing will no longer be covered by Legality Outcome	2.1.1-2.1.3 (and paragraph 2.4)
5.3.1-5.3.2	Harm and offence	Replicated, but with some alterations, as part of Avoidance of Harm Outcome. In light of the increasingly tolerant attitude towards bad language where it is appropriate to the	2.5.1-2.5.8

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		context, and similarly violence/sadism/cruelty as relates to video or video game downloads, the requirements at 5.3.2 have been removed.	
5.4.1	Fairness	Replicated as part of Rules under Fairness Outcome, but the requirement not to charge consumers without consent has been separated from the requirement not to mislead or take advantage.	2.3.2, 2.3.3 and 2.3.10
5.4.2	Undue delay	Replicated with slight updates to text, under Fairness Outcome.	2.3.4
5.4.3	Unauthorised use	Replicated under Fairness Outcome. Additional Rule around bill shock added.	2.3.5, 2.3.6
5.5	Service replacement	Removed. Covered by a requirement to be transparent.	N/A (see 2.2.1)
5.6.1-5.6.4	Internet diallers	Removed. Internet diallers require Prior Permission, the Rules and conditions of which will be listed on the PhonepayPlus website with other Prior Permission regimes.	N/A
5.7.1-5.7.4	Pricing information	5.7.1, 5.7.2 and 5.7.4 are replicated, with minor alterations, at 2.2.6, 2.2.7 and 2.2.8 respectively. 5.7.3 is removed, on the grounds that this requirement is covered by the general requirement at 2.2.1. Guidance can make this clear.	2.2.6-2.2.8
5.7.5	50p rule	Removed in light of regulation now extending to any service above 10p.	N/A
5.7.6	Service instructions	Replicated as Rule under Transparency Outcome.	2.2.7
5.8	Contact information	Replicated as Rule under Transparency Outcome.	2.2.2
5.9.1-5.9.2	Service identification	5.9.1 removed, on the grounds that if the consumer is clearly aware of the price they should already know if it is a PRS. 5.9.2 replicated with minor alterations.	2.2.9
5.10	Promotions with long shelf lives	Removed, in light of the lack of cases brought, and the development of the market away from print towards electronic promotion.	N/A
5.11	Use of 'free'	Removed, in light of the confusion around the rule, and the fact it can be captured by a requirement not to mislead	N/A
5.12	Inappropriate promotion	Replicated, with changes, within the Rules under 'Avoidance	2.5.6

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		of Harm’.	
5.13	Promotion by non-PRS	Replicated as part of Transparency Outcome.	2.2.4
5.14	‘STOP’ command	Replicated, but with additions and alterations, in light of developing technology that makes ‘STOP’ unusable in some cases. A clear, simple, and standard cost exit is required. For most services, this will be the STOP command.	2.3.11
6.1.1.-6.1.2	Live service Prior Permission	Removed, as this will be reflected as a category of service which requires Prior Permission on the PhonepayPlus website.	N/A
6.2	Live service Promotional material	6.2a replicated at 2.2.5, with changes to take account of the fact we now regulate 087. 6.2b covered in part by 2.3.7.	2.2.5, 2.3.7
6.3.1a	Conduct of live services	Removed.	N/A
6.3.1b	Conduct of Live Services	Replicated at 2.5.9, with alterations to widen the scope to Virtual Chat and other contact services.	2.5.9
6.3.1c&d	Conduct of Live Services	Replicated at 2.3.7 as part of Fairness Outcome.	2.3.7
6.3.2	Conduct of Live Services	Covered by 2.3.7 as part of Fairness Outcome.	2.3.7
6.4.1-6.4.2	Multi-party chat	Removed, as the need for Prior Permission, and rules and conditions that support it, can be listed on the PhonepayPlus website.	N/A
6.5.1-6.5.4	Compensation scheme	Removed, as the compensation scheme may be abandoned for some services, and the rules surrounding the rest can be incorporated into their Prior Permission requirements.	N/A
Section 7	Additional provisions for specific service types	<p>It is proposed that majority of provisions within this section are removed, on the grounds that the wrongdoing can be captured by overarching Outcomes and Rules, with Guidance being written to give further detail in relation to specific service types.</p> <p>The exceptions are as follows:</p> <p>Children’s services –</p> <ul style="list-style-type: none"> <li>• 7.5.3a&amp;c covered at 2.3.9;</li> </ul>	See left hand column

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		<ul style="list-style-type: none"> <li>• 7.5.4a covered at 2.3.12b;</li> <li>• 7.5.3b replicated at 2.5.8</li> </ul> <p>Subscriptions –</p> <ul style="list-style-type: none"> <li>• 7.12.5 replicated at 2.3.12d</li> </ul> <p>Virtual chat –</p> <ul style="list-style-type: none"> <li>• 7.3.3a&amp;b altered, and inserted at 2.3.12c</li> </ul> <p>Sexual entertainment –</p> <ul style="list-style-type: none"> <li>• 7.11.6b replicated at 2.3.12a</li> </ul>	
8.1	Tribunals – composition	Moved to Annex 2.	Annex 2
8.2	Permissions	It is proposed that responsibility for considering Permissions can be delegated by the Board, either to a Tribunal or the Executive. This will be covered in Guidance around Prior Permissions .	N/A
8.3.1-8.3.3	Complaint Investigation	Proposed to be replicated under Approach to Investigation heading, and extended to all registered parties. The example list of information which PhonepayPlus may request has been expanded to include evidence of due diligence and risk assessment/control.	4.2.1-4.2.3
8.3.4	Complaint investigation – Information Provider passthrough and retention of Service Provider liability in the event an Information Provider defaults	Removed. The proposed new arrangement allows PhonepayPlus to investigate and raise breaches against more than one party in the case of consumer harm. Whilst each party will be investigated separately and have separate cases raised, PhonepayPlus does reserve the right to use different levels of procedure depending on the harm caused and the registered party’s role in it. This is covered at 4.2.7-4.2.8.	N/A (see 4.2.7-4.2.8)
8.4	Informal procedure	Proposed to be renamed “Track 1 procedure’, and amendments made to reflect how it can be applied to any	4.3.1-4.3.5

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		registered party. Also any actions to be time-based, and the registered party will hold responsibility to prove actions have been completed.	
8.5	Standard procedure	To be replicated, but proposed to be renamed 'Track 2 procedure', with amendments to reflect that the procedure can now be applied to any registered party.	4.4.1-4.4.7
8.6.1-8.6.3	Emergency procedure	To be replicated, with proposed amendments to reflect that the procedure can now be applied to any registered party. Also additional text to reflect that when an Emergency procedure is downgraded to a Standard procedure, then the Executive may, with the consent of one CCP member, also instruct the release of outpayments or the unblocking of access in connection with the investigated service.	4.5.1 – 4.5.3
8.7.1-8.7.5	Information Provider cases	Removed, on the grounds that there is no need for Information Provider passthrough where breaches can be raised against all registered parties.	N/A
8.8	Adjudications	Replicated under 'Adjudications' heading, with alterations to reflect that investigations and adjudications can apply to all registered parties.	4.6.1
8.9.1-8.9.3	Sanctions	Replicated under 'Sanctions' heading, with additions to reflect new sanctions around refunds to all consumers, submission to independent compliance audits, and a requirement to immediately register (where that has been the breach).	4.8.1-4.8.4 & 4.8.6
8.9.4-8.9.5	Sanctions in relation to oral hearings	8.9.4 replicated at 4.8.6. 8.9.5 covered in Annex 2.	4.8.6 and Annex 2
8.9.6	Refunds	Replicated under 'Refunds' heading, with alterations to reflect that instructions around refunds may apply to any registered party.	4.9.1-4.9.4
8.10.1-8.10.4	Reviews	Replicated under 'Reviews' heading, with alterations to reflect that the right to review may apply to any registered party in respect of an adjudication against them. Also amendments to reflect that reviews may be requested in	4.7.1-4.7.5

11 <sup>th</sup> Code para.	Description of 11 <sup>th</sup> Code paragraph	Draft Code Status Update	Location in Draft Code
		relation to denial of Prior Permission and administration charges, and an additional sub-paragraph that sets out sanctions are not automatically suspended by an application for a review.	
8.11.1-8.11.11	Oral hearings	Referenced at 4.11.1-4.11.3 in terms of the right to an Oral Hearing and initial timings around same. Details around procedure moved to Annex 2.	4.11.1-4.11.3 and Annex 2
8.12	Administrative charge	Replicated, with alterations to reflect that charges may apply to any registered party. In addition, to reflect that PhonepayPlus may require the withhold of numbers or revenue until an administrative charge is paid, and that administration charges can be appealed.	4.10.1-4.10.5
Section 9	Network operator procedures	<p>Removed, on the grounds that Network operators will no longer require a separate procedure in the proposed new Code. All registered parties will be subject to the same investigation procedures.</p> <p>The exception to this is the sanction at sub-paragraph 9.2.5c, which prevents networks from providing any connection in respect of PRS. This will be covered in the list of sanctions at 4.8.2 of the new Code.</p>	N/A (see 4.8.2)
Section 10	Appeals	The grounds for an Appeal are set out at 4.12.1-4.12.4. The process of the Appeals is set out in Annex 3.	4.12.1-4.12.4 and Annex 3
11.1 and 11.2	Terms of reference and 'delegation of powers'	Terms of reference have been removed. 'Delegation of powers' is replicated, with alterations to reflect delegation to CCP or PhonepayPlus employees.	5.1.1
11.3	Definitions	<p>To be retained in part. Some definitions, especially those which have not changed as part of the Communications Act 2003, are replicated.</p> <p>Other definitions, especially those of service types, have been removed where they cease to be relevant in new Code terms.</p>	5.3.1-5.3.33

11 <sup>th</sup> Code para.	Description of 11 <sup>th</sup> Code paragraph	Draft Code Status Update	Location in Draft Code
		Lastly sub-paragraphs 5.3.7-5.3.8 sets out proposed new definitions for the delivery chain. Networks remain as per the Communications Act 2003 definition. However service providers and information providers are replaced by Level 1 and Level 2 providers, definitions which are nearly, but not entirely, analogous.	
Annex 1	Funding arrangements	Forms Annex 1 of the new Code. New definitions of “financial year” and “own service” – in the context of a service operated by a network operator – at paragraph 1.2. Proposed new Rule around forecasting at paragraph 4.2, which allows PhonepayPlus to make a forecast of likely outpayments/revenue in the absence of a network making a forecast by the required date.	Annex 1
Annex 2	Procedures of the Independent Appeals Body (IAB)	Moved to Annex 3. Proposed that PhonepayPlus can also appeal to the IAB at paragraph 1.2, and the maximum costs of the hearing proposed to increase by £5,000 at paragraph 11.1, to take account of the length of time since fees were last increased. This would raise the current maximum award to any party to £30,000, and the maximum award in respect of costs to £25,000.	Annex 3