



# Amendment to the PhonepayPlus Code of Practice (11<sup>th</sup> Edition)

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

Consultation

Publication date: 5 December 2007

Closing Date for Responses: 16 January 2008

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## Section 1

# Summary

- 1.1 The regulation of premium rate services (PRS) in the UK is carried out under a co-regulatory arrangement between the Office of Communications (Ofcom) and PhonepayPlus (formerly the Independent Committee for the Supervision of Standards of Telephone Information Services, ICSTIS). Under the Communications Act 2003 (the Act), Ofcom has the power to set conditions to ensure that PRS providers comply with PRS regulation. Ofcom may also approve a code of practice for the regulation of PRS subject to certain criteria being met, which is then administered by an “enforcement authority”. PhonepayPlus has regulated PRS in the UK since their inception in 1986. Ofcom approved the PhonepayPlus Code of Practice (11th Edition) for Premium Rate Services in November 2006 and this came into force in January 2007. This document now invites comments on whether Ofcom should approve under section 121 of the Act proposed amendments to the PhonepayPlus Code of Practice (11th Edition) to reflect revised governance arrangements for PhonepayPlus.
- 1.2 In March 2007, PhonepayPlus issued a consultation document<sup>1</sup> recommending amendments to the 11<sup>th</sup> Code of Practice to reflect proposed changes to PhonepayPlus’ governance arrangements. The proposals included:
- Creating a smaller Board focused strongly on setting strategic direction, policy-making and supervising the work of the Executive;
  - Establishing a Code Compliance Panel (consisting of people with professional and other relevant skills and resources necessary to assure the quality and timeliness of adjudicatory work) from which to draw people to sit on Tribunals<sup>2</sup>, thereby resulting in a lesser degree of continuing Board involvement in adjudicatory work;
  - Ensuring that Tribunals sitting to make determinations on Code compliance issues are always chaired by a legally qualified Code Compliance Panel member.
- 1.3 PhonepayPlus received 10 responses to its consultation document<sup>3</sup> and, in light of comments received, concluded that the amended Code should be formally submitted to Ofcom for approval in accordance with section 121(6) and 121(7) of the Communications Act 2003 (the ‘Act’) on 25 June 2007. The relevant sections of the Code are attached at Annex 4 to this document, with the proposed amendments in bold. The full Code can be found at:  
<http://www.phonepayplus.org.uk/publications/cop/>
- 1.4 Ofcom is now inviting comments on whether it should approve the amendments to the Code. In order to approve the amendments to the Code, Ofcom would have to be satisfied that:

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<sup>1</sup> ICSTIS’ consultation document is available on the ICSTIS website at:  
[http://www.icstis.org.uk/pdfs\\_consult/gov\\_code.pdf](http://www.icstis.org.uk/pdfs_consult/gov_code.pdf)

<sup>2</sup> ICSTIS Tribunals make determinations in respect of Code breaches and approve requests for prior permission to run specified services under the Code.

<sup>3</sup> A summary of the responses received by ICSTIS can be found at:  
[http://www.icstis.org.uk/pdfs\\_consult/GovCode\\_ICSTISresponse.pdf](http://www.icstis.org.uk/pdfs_consult/GovCode_ICSTISresponse.pdf)

- 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 (the test in section 121(1)(a) of the Act);
  - 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 (the test in section 121(1)(b) of the Act);
  - c) all of the requirements in section 121(2) are met; and
  - d) having regard *inter alia* to the provisions of the Code, it is appropriate for Ofcom to approve it (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).
- 1.5 Having given preliminary consideration to the amendments to the Code, Ofcom is minded to decide that it is satisfied that those criteria have been met and to proceed to approve the amended Code under section 121. Ofcom's final decision will only be taken, however, once it has considered all responses to this consultation paper which are received during the consultation period.

### Consultation

- 1.6 Ofcom is inviting written views and comments by 5pm on 16 January 2007 on its proposed approval of the amendments to the Code, which are set out in Annex 4 to this document.
- 1.7 Details of how to respond can be found in Annex 1.

### Effective date

- 1.8 Ofcom is proposing that the amended Code should take effect four weeks from the date of publication of Ofcom's final Notification of approval, which gives approval to the amended Code - should we decide to issue such a notification following due consideration of responses received to this consultation. This is to allow PhonepayPlus time to implement the new governance arrangements.

## Section 2

# Background

### What are premium rate services?

- 2.1 PRS are defined in section 120(7) of the Act. In general terms, PRS offer some form of content, product, facility or service via fixed and/or mobile telecoms lines. These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS text, PC (e-mail, internet, bulletin board), 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 and interactive TV games. Directory enquiry services also fall within the definition of PRS.
- 2.2 The UK has one of the largest PRS markets in the world, with an estimated consumer spend of £1.2 billion per year. PRS vary in cost, typically between 10 pence per minute or per call up to £1.50 per minute or per call (for calls from UK landlines). In most cases the bulk of the revenue from calls to such services goes to the companies who provide them. The remainder of the revenue is usually shared by the consumer's telephone company (which receives a small fee for 'origination' of the phone call) and the telephone company that terminates the call to the party which is providing the service.

### How are premium rate services currently regulated in the UK?

- 2.3 The regulatory arrangements for PRS follow a co-regulatory approach, with the primary role of consumer protection falling to PhonepayPlus. PhonepayPlus is the industry funded regulatory body for all premium rate-charged telecommunications services, and has responsibility for regulating the content and promotion of services through its Code of Practice (11th edition). Ofcom has approved that edition of the PhonepayPlus Code under section 121 of the Act.
- 2.4 PhonepayPlus is responsible for receiving and investigating complaints from consumers and other persons about suspected breaches of the Code. PhonepayPlus has powers under that Code to give directions to, and in some cases impose sanctions on, certain categories of person involved in the provision of PRS. PhonepayPlus exercises its powers so as to protect consumers and ensure that the Code is upheld.
- 2.5 The provisions set out in the approved Code are targeted primarily at the parties with direct responsibility for the content and promotion of PRS (referred to as service providers (SPs) in the Code), rather than parties who do no more than provide the electronic communications networks and services which are used to access PRS. PhonepayPlus has a range of sanctions that it can impose on service providers if they breach the Code. These include obtaining assurances about future behaviour, requiring that refunds be offered, imposing fines, barring the provision of particular services, and prohibiting particular individuals from operating services for a set period.
- 2.6 Although the obligations in the Code are focused on service providers, the Code also contains provisions directed at specified categories of providers of electronic

communications networks and services which are used for the provision of PRS. These parties are referred to in the Code as Network Operators (NOs). PhonepayPlus may give directions to those parties in order to assist it in carrying out its responsibilities under the Code. Typical examples of such directions include a direction to cease dealing with a particular business or individual, a direction to block access to particular numbers or services, and a direction to withhold revenues from a particular SP or in respect of a particular service.

## The role of Ofcom

- 2.7 Ofcom has the power under section 120 of the Act to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS. Pursuant to section 120(3) the only provision that may be made by conditions imposed under that section is provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with:
- “(a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purpose of enforcing the provisions of the Approved Code; and (b) if there is no such code, the provisions of the order for the time being in force under section 122.”
- 2.8 The PRS Condition which regulates the provision, content, promotion and marketing of PRS took effect from 29 December 2003 (and has since been amended)<sup>4</sup>. The effect of the PRS Condition is to bind each and every person falling within the definition of “Communications Provider” in the PRS Condition to comply with (a) and (b) above. In general terms, that definition embraces providers of electronic communications networks and services which are used to provide PRS.
- 2.9 It is only in the event of an apparent failure by a person falling within that definition to comply with a direction given by PhonepayPlus under its approved Code that Ofcom’s powers of enforcement would apply. Those powers to deal with a breach of the PRS Condition (i.e. a failure, by a “Communications Provider”, to comply with a PhonepayPlus direction) are set out in sections 94, 95, 96, 123 and 124 of the Act and may, depending on the circumstances, include issuing an enforcement notification, imposing a financial penalty, or requiring the contravening provider to suspend (for an indefinite period) the provision of premium rate services provided by it.

## Changes to PhonepayPlus Governance arrangements

- 2.10 In March 2007, PhonepayPlus undertook a review of its governance arrangements with a series of objectives in mind. PhonepayPlus described these as:
- To ensure the Board has the capacity and focus to develop strategy, policy and relationships in a market that has grown in size and complexity;
  - Arrangements that will still work if the scope of regulation changes or the volume of adjudicatory activity increases within existing or reduced scope;
  - Arrangements that clearly demonstrate understanding of and belief in the principles of good regulation;
  - Arrangements that ensure that adjudication and enforcement processes are dealt with in a way that will ensure that decisions are reached in a professional and efficient way; and
  - Arrangements that reflect established practice in corporate governance.

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<sup>4</sup> <http://www.ofcom.org.uk/consult/condocs/prsconditions2/statement/prsconditions.pdf>

- 2.11 Following the review, PhonepayPlus brought forward proposals to create a smaller Board supported by a “Code Compliance Panel”, membership of whom could be drawn upon to staff Tribunals (which make determinations in respect of Code breaches and approve requests for prior permission to run specified services under the Code). The intention was to establish Tribunals which will always be professionally chaired by a legally qualified person who is not a member of the Board. PhonepayPlus said that this was to ensure the future quality of adjudications and efficiency of processes while also allowing the Board to focus on strategic governance and accountability matters.
- 2.12 PhonepayPlus proposes to move to a Board of ten members. The Chief Executive will be appointed as a member of the Board, but will be excluded from Code Compliance Panel work. There are currently three members of the Board who have an active involvement in the PRS sector and PhonepayPlus is not proposing any change to the status and roles of these members.
- 2.13 PhonepayPlus intends that the Code Compliance Panel will consist of a senior barrister or solicitor, who will act as Chairman, and two other lawyers also duly experienced and capable of chairing Tribunals. In addition, it is intended that three lay members be appointed to the Code Compliance Panel. Tribunals will continue to comprise of three members. Tribunals will always be chaired by one of the legally qualified Code Compliance Panel members, who will normally be supported by one lay member and one Board member. However, it is intended that the precise make-up of Tribunals will be left flexible so that the most appropriate Tribunal to a particular case can be formed with a view to ensuring, as best as possible, a fair and proper determination. This would mean in practice that Tribunals could sit at times with either two lay or two Board members.
- 2.14 The Chair of the Code Compliance Panel will be appointed by the PhonepayPlus Board, and will then be consulted by the Board on the appointments of the other two lawyer members and of the lay Panel members. The Chair will oversee the conduct of the Panel and supervise the performance of its members. The Chair will also be responsible for co-ordinating meetings with all members of the Panel and relevant members of the Executive to review decisions and to ensure calibration of outcomes. The Code Compliance Panel will be supported in its work by the PhonepayPlus Executive, including providing a legally qualified clerk to support each Tribunal as required.
- 2.15 The Code of Practice will continue to be set by the PhonepayPlus Board, but the drawing up of the Code will in future be informed by the experience of the Code Compliance Panel in applying the existing Code. The Board also has a duty to keep the sanctions guidance under review and ensure that the Code Compliance Panel has the opportunity to contribute to this work. Policy decisions by the Board will be effectively communicated to members of the Code Compliance Panel to ensure policies are clearly understood by those who are considering cases.

## Section 3

# Reasons for approving the amendments to the Code under section 121 of the Act

3.1 Having given preliminary consideration to the proposed amendments to the Code, Ofcom is, at present, minded to approve an amended Code under section 121. This section sets out the legal tests and principles that are relevant to Ofcom's decision whether or not to approve the amended Code and the reasons why Ofcom is proposing that it would be consistent with those tests and principles to approve it.

### The relevant legal tests and principles

- 3.2 In order to approve the amendments to the 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 (the test in section 121(1)(a) of the Act);
  - 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 (the test in section 121(1)(b) of the Act, discussed further below);
  - c) all of the requirements in section 121(2) are met (these requirements are also set out and discussed further below); and
  - d) having regard *inter alia* to the provisions of the Code, it is appropriate for Ofcom to approve it (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)<sup>5</sup>.
- 3.3 Each of these four matters is discussed further below.

### **a) Ofcom is minded to decide that the amended Code is a code which 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**

3.4 Ofcom is satisfied that the amended Code, drafted by PhonepayPlus, the regulatory body for premium rate charged telecommunications services, 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.

### **(b) Ofcom is minded to decide that the amended 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**

3.5 Ofcom is satisfied that the amended 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. The appropriateness of the extent to which the provisions of the amended Code regulate those activities is considered below (under heading (c)) as part of Ofcom's overall assessment of the appropriateness of approving the amended Code.

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<sup>5</sup> This reflects the fact that, even if (a) and (b) are met, Ofcom has a discretion whether to approve the Code and must exercise that discretion having regard to all relevant matters and against the background of its general duties under section 3 of the Act.

**(c) Ofcom is minded to decide that the amended 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**

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

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

- 3.7 PhonepayPlus is independent of both Ofcom and the PRS industry. PhonepayPlus consists of up to ten members (“the Board”), served by a full-time secretariat. All Board members are appointed in their individual capacities, excepting the Chief Executive who will now have a seat on the Board. With the exception of three members who are appointed on the basis of their contemporary industry knowledge, no member may have any commercial interest in the PRS industry. Any member with such commercial interests will, in any event, take no part in any adjudication process.
- 3.8 The amended Code makes provision for those who are at risk of having adjudications made against them to receive an oral hearing. In addition, any SP or NO who is subject to an adverse adjudication following such a hearing may appeal that decision to PhonepayPlus’ Independent Appeals Body (‘the IAB’). The IAB comprises a Chairman (currently His Honour Judge Derek Holden) and four lay members. All five are completely independent of PhonepayPlus. As well as hearing appeals against adjudications following an oral hearing, the IAB hears, and under the amended Code would continue to hear, appeals against refusals of applications for permission to provide services in cases where the amended Code requires that prior permission from PhonepayPlus be obtained, and appeals against the imposition of conditions as part of the permission granted to a SP to operate a service.
- 3.9 Having regard to the matters set out above, Ofcom believes that PhonepayPlus is sufficiently independent of providers of PRS.

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

- 3.10 PhonepayPlus is a non-profit making organisation and is funded primarily by a levy on SPs. NOs are responsible for paying the levy on behalf of the SPs whom they serve.
- 3.11 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.

- 3.12 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.

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

- 3.13 Ofcom believes that the amendments made to the Code of Practice in particular are objectively justifiable in relation to the services to which they relate, primarily because they are intended to result in a more effective regulatory regime for PRS, without increasing the regulatory burden on the PRS industry.
- 3.14 In particular, Ofcom notes that the proposed changes to the governance arrangements for PhonepayPlus are intended to lead to better separation of the strategy and policy making functions from adjudicatory work. In future Tribunals will always be professionally chaired by a legally qualified person who is not a member of the Board. This should ensure the future quality of adjudications and efficiency of processes while also allowing the Board to focus on strategic governance and accountability matters.

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

- 3.15 Ofcom believes that the provisions of the amended Code are not such as to discriminate unduly against particular persons or against a particular descriptions of persons as they do not benefit particular undertakings and will be applied uniformly to all relevant undertakings engaged in the premium rate sector, as defined under section 120 of the Act.

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

- 3.16 Ofcom believes that the provisions of the amended Code are proportionate to what they are intended to achieve. Ofcom notes, in that regard, that those provisions have been developed by PhonepayPlus as a result of extensive consultation with the PRS industry and in the light of PhonepayPlus' experiences of regulating that industry.

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

- 3.17 Ofcom is satisfied that, in relation to what those provisions are intended to achieve, they are transparent, given that PhonepayPlus has consulted on the amendments and Ofcom is consulting on their approval.

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

- 3.18 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. While noting that these are minor amendments to an already approved regulatory regime, Ofcom considers that the provisions to amend the governance arrangements for PhonepayPlus are consistent with its general duties and the six Community requirements. This is because they further strengthen the regulatory regime for consumers in the premium rate services market. Furthermore, by providing improvements to the effectiveness of regulation they will encourage investment and innovation in the sector.

## Conclusions

- 3.19 Ofcom considers that the interests of citizens and consumers would be furthered were Ofcom to approve the amended Code.
- 3.20 In proposing to approve the amended Code, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that the approval of the amended Code would be compatible with those duties.
- 3.21 Ofcom considers that its approval of the amended Code would also be compatible with the six Community requirements in section 4 of the Act (so far as they are relevant).
- 3.22 Accordingly, Ofcom is today inviting written views on whether to on whether to approve the amended Code (attached at Annex 4) under section 121 of the Act.

# 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 Wednesday 16 January 2007**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/phonepayplus/>, 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 [anne.hoitink@ofcom.org.uk](mailto:anne.hoitink@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.
- Anne Hoytink  
Consumer Policy Manager  
Ofcom  
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 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 Anne Hoytink on 020 7783 4190.

### 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 February 2008.
- 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 version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest. We are consulting on these proposals for six weeks as they have already been consulted on by PhonepayPlus.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the 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. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

A2.8 We will look at each response carefully and with an open mind. 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	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	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)?

**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

# PhonepayPlus Code of Practice (Eleventh Edition)

## Amended Code paragraphs – Sections 1, 2, 3, 8 and 9

This section includes only the amended sections of the PhonepayPlus Code of Practice (Eleventh Edition). A full version of the Code can be read on the PhonepayPlus website at: <http://www.phonepayplus.org.uk/publications/cop/>

## About PhonepayPlus

### Introduction to PhonepayPlus

PhonepayPlus is the regulatory body for premium rate services. The Board consists of up to 12 members, all appointed in their individual capacities. Up to three members of the Board have contemporary industry knowledge. PhonepayPlus is committed to a co-regulatory approach to regulation and works closely with the premium rate industry and with Ofcom to ensure that its regulation meets the principles of good regulation and, wherever possible, draws on the support of industry in ensuring that compliance with this Code, along with our vision and mission, is achieved. PhonepayPlus is a non-profit making limited company. The Board is supported by a permanent Executive.

### Mission Statement

#### *Our vision*

As the regulator for premium rate services, our vision is that anyone can use these services with absolute confidence.

#### *Our mission*

In pursuit of our vision, we create a Code of Practice which sets appropriate standards for the promotion, content and overall operation of premium rate services, taking account of people, particularly children, who may be especially vulnerable. We promote compliance by giving advice on our Code to providers of premium rate services. If there are breaches of the Code, we promptly enforce its provisions in order to minimise consumer harm and encourage compliance in the future.

So that we can continue to protect and inform consumers faced with constantly changing technology, we regularly review our standards, consulting widely to obtain a cross-section of opinion.

#### *Our values*

In carrying out our mission, we are committed to the following:

- staying aware of, and responsive to, the ways in which consumers, or particular sets of consumers, may be vulnerable to harm when using premium rate services and striving to ensure that they receive the necessary protection,
- openness, fairness, even-handedness and impartiality when dealing with any individual or company involved in the provision of premium rate services,
- consistency when making decisions and imposing sanctions relating to breaches of our Code and having in place mechanisms to ensure that consistency,

- co-operative engagement with the constantly developing premium rate industry to secure its support for our work,
- working with legislators and other regulators to ensure that those who influence the operation of premium rate services fully understand and support our work,
- maintaining our understanding of relevant technological developments so that our regulation remains targeted and proportionate, and allows innovation and investment,
- being accessible to consumers and helping them understand how premium rate services work so that they can better protect themselves,
- acknowledging the important contribution made by all members of the organisation.

## **Independence**

PhonepayPlus operates in an entirely independent manner. Apart from up to three members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector. Any Board member with such commercial interests will take no part in any adjudication process.

## **Remit**

PhonepayPlus is responsible for regulating premium rate services in the UK. Through this Code, PhonepayPlus regulates services in their entirety – their content, promotion and overall operation. Premium rate services offer some form of content, product or service that is charged to users' phone bills.

Premium rate services typically offer information and entertainment services via fixed or mobile phone, fax, PC (e-mail, Internet, bulletin board), or interactive digital TV. There are many sorts of services, examples of which are:

- ringtones
- sports alerts
- TV voting
- competitions
- directory enquiries
- chat and business information.

They currently vary in cost from approximately 10 pence to £1.50 per call or minute (typically from a landline). Premium rate mobile services use short access codes - typically four or five-digit numbers, and will usually be shown on phone bills as 'premium rate call' or 'high premium rate service'. Premium rate charging for mobile content is generally on a per text message or per transaction basis, and includes services such as ringtones, logos, goal alerts and video clips.

UK-based landline premium rate services are normally carried on '09' dialling codes and directory enquiry (DQ) services on 118XXX codes.

PhonepayPlus regulates through the imposition and enforcement of responsibilities on defined parties who are collectively termed providers of premium rate services. These are those who provide the networks which carry the services (network operators), those who provide the services which the networks then carry (service providers) and those who provide the content of the service if the service provider does not do that itself (information providers).

PhonepayPlus provides Help Notes which, although not part of the Code, do provide detailed advice on certain areas. These notes, together with a copy of the relevant legislation

and other relevant material, are available on the PhonepayPlus website ([www.phonepayplus.org.uk](http://www.phonepayplus.org.uk)) and on request from PhonepayPlus.

## **Sanctions**

PhonepayPlus investigates complaints and has the power to fine companies, bar access to services and order refunds. PhonepayPlus can also bar the individual person behind a company from running any premium rate services under any company name on any telephone network for a set period.

## **Funding**

PhonepayPlus is funded by a levy on the industry and is committed to ensuring wherever possible that funding is supplemented by other sources of income from those who from time to time breach this Code, thus reducing the financial burden on the vast majority of legitimate providers of premium rate services. For further details, see our website ([www.phonepayplus.org.uk](http://www.phonepayplus.org.uk)).

## **This Code**

In order to make this Code as accessible as possible, it consists of two parts.

Part 1. This contains information about the scope of the Code and how it can be changed. It goes on to set out the rules which apply directly to network operators and to service providers in setting up and operating their services. It then sets out the rules which apply to the content and promotion of services generally, and the rules which relate to certain specific kinds of service.

Part 2. Premium rate services exist in a complex world of statutes and regulations which apply to the fast-moving, technologically-advanced world of communications. It is necessary to have careful and formal definitions and procedures to ensure that the Code is legally comprehensible and enforceable. This part of the Code contains the definitions, the formal terms of reference of PhonepayPlus and the various procedures, including those which relate to Code breaches and the imposition of sanctions, appeal processes and the collection of money for funding PhonepayPlus.

## **Copy advice and general enquiries**

**Telephone 020 7940 7474**  
**Press Office 020 7940 7408**  
**Fax 020 7940 7456**  
**E-mail [executive@phonepayplus.org.uk](mailto:executive@phonepayplus.org.uk)**  
**Web [www.phonepayplus.org.uk](http://www.phonepayplus.org.uk)**

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# 1 INTRODUCTION

## 1. Principles of good regulation

1.1 In carrying out its activities, PhonepayPlus undertakes to have regard to five principles of good regulation, namely:

- transparency
- accountability
- proportionality
- consistency
- targeting

## 1.2 The scope of this Code

1.2.1 The Communications Act 2003 ('the Act') sets out in Section 120 the definition of premium rate services and who may be regulated in respect of them. The Act provides Ofcom with the power to approve a Code for the purposes of that regulation and Ofcom has approved this Code under Section 121 of the Act.

1.2.2 Providers of premium rate services are obliged, pursuant to the condition set by Ofcom under the Act and Section 120(3)(a) of the Act, to comply with directions given by PhonepayPlus in accordance with this Code for the purpose of enforcing its provisions.

1.2.3 The condition set by Ofcom applies to controlled premium rate services ('CPRS'), the definition of which is contained within Part 2 of this Code. The definition of CPRS is slightly narrower than the definition of premium rate services contained in the Act. Insofar as a particular premium rate service is not within the definition of CPRS, this Code applies to it but compliance is voluntary.

1.2.4 Nothing in this Code shall be construed as requiring any person, or as enabling PhonepayPlus to require any person, to provide any information in circumstances where:  
**a** the requiring of that person to provide information would be, or  
**b** the making of provision in this Code for PhonepayPlus to be able to require that person to provide that information would have been, contrary to Directive 2000/31/EC including Article 15 thereof.

## 1.3 Geographic reach of the Code

1.3.1 Save as is provided below, this Code applies to all premium rate services which are accessed by a user in the United Kingdom or provided by a service provider which is situated in the United Kingdom.

1.3.2 Some premium rate services may also be 'information society services' (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/40/EC). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce ('the E-Commerce Directive'). This Code will apply to such services when the service provider responsible for the provision of those services under this Code is:

- a** established in the United Kingdom, or
- b** established in the European Economic Area ('EEA') but only where the services are being accessed or may be accessed from within the United Kingdom, or
- c** established in another EEA member state, but only where:
  - i** the services are being accessed or may be accessed from within the United Kingdom, and

ii the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.

## **1.4 Amendments and advice**

1.4.1 This Code may be amended or otherwise modified from time to time by way of a process consistent with Section 121(6) of the Communications Act 2003.

1.4.2 PhonepayPlus may issue and/or amend advice concerning provisions of this Code from time to time. This may be in the form of Help Notes or statements which set out what PhonepayPlus' expectations are. These will include advice on the way it is anticipated that certain types or categories of service are likely to be dealt with under the Code and/or the way in which specific provisions are likely to be applied in relation to such services. Help Notes are intended to assist those involved in the provision of premium rate services to comply with the Code but do not bind PhonepayPlus and do not form part of this Code.

## **1.5 Confidentiality**

Confidential information (such confidentiality being judged on an objective basis) received by PhonepayPlus will be kept in confidence by PhonepayPlus and will not be divulged to any third party other than PhonepayPlus employees, officers, professional advisors and Ofcom or other proper authority without consent (such consent not being unreasonably withheld or delayed). PhonepayPlus may divulge such information if it is necessary for it to do so in order to discharge its responsibilities under this Code or for the purpose of prevention of fraud or because disclosure is required by law.

## **1.6 European Commission**

This Code was notified in draft to the European Commission in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.

## 2 CONSTITUTION

### **2 Constitution**

**2.1 PhonepayPlus is constituted as a not for profit company limited by guarantee. The members of PhonepayPlus Ltd are also its directors, of which there may be up to 12 at any time, and who together form the Board of Directors ("the Board") which is responsible for the discharge of all duties which fall upon PhonepayPlus under this Code.**

**2.2 Board members are appointed in their individual capacities. Up to three Board members are appointed in the light of their personal contemporary industry knowledge and may have commercial interests in the premium rate sector. They can take no part in any adjudicatory function or process.**

**2.3 The Board has determined that the function of undertaking adjudications or reviews of adjudications in respect of alleged breaches of the Code and in respect of the grant or refusal of permissions and the imposition of conditions in permissions granted under the Code ("the adjudicatory function") will be delegated to Tribunals which will include one or more persons who are not Board members but are members of the Code Compliance Panel ("the Panel") and may include non-industry members of the Board. The relevant processes are set out in Part 8 of this Code.**

**2.4 The Board is supported by a permanent Executive body, the Chief Executive of which may be appointed to be a Board member but will take no part in any adjudicatory function or process.**

## **3 THE CODE COMPLIANCE PANEL**

### ***3 The Code Compliance Panel***

#### ***3.1 The Panel consists of:***

- ***The Chairman of the Panel who shall be a qualified barrister or solicitor who has not less than 15 years' relevant experience.***
- ***Two legally qualified members who shall be qualified barristers or solicitors who have not less than 10 years relevant experience.***
- ***Three lay members***

#### ***3.1.2 The Chairman of the Panel shall be appointed by the Board.***

#### ***3.1.3 The legally qualified members and lay members shall be appointed by the Board in consultation with the Chairman of the Panel.***

#### ***3.2 The Chairman of the Panel shall attend all relevant parts of all meetings of the Board as determined by the Chairman of PhonepayPlus.***

## 10 PROCEDURES AND SANCTIONS

### 10.1 Tribunals

**Whenever the rules of this Part or Part 11 of the Code require the constitution of a Tribunal, then it shall consist of three members who shall be:**

- **The Chairman of the Code Compliance Panel or such of the two legally qualified Panel members as he shall nominate (who shall sit as Chairman of that Tribunal).**
- **Two persons who shall be drawn from the lay members of the Panel and/or the Board members entitled to undertake adjudicatory functions. The selection of the Tribunal members other than the Chairman shall be carried out as the Board may from time to time decide.**

### 10.2 Permissions

**All applications for permission required under this Code will be considered by a Tribunal which may grant or refuse any application for permission and in granting a permission may impose any condition which it considers to be appropriate.**

### 10.3 Complaint investigation

10.3.1 PhonepayPlus will consider and, where appropriate, investigate all complaints which it receives, provided that the complaint is made within a reasonable period from the time when it arose.

10.3.2 PhonepayPlus, through its Executive, monitors premium rate services. The Executive can itself initiate an investigation where there appears to be a breach of the Code.

10.3.3 During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:

- call volumes, patterns and revenues,
- details of the numbers allocated to a service provider
- details of services operating on particular premium rate numbers,
- customer care records,
- arrangements between networks and service providers,

10.3.4 Throughout these procedures, PhonepayPlus will deal directly with service providers and network operators. PhonepayPlus may also deal with information providers in any case in circumstances where the service provider requests that PhonepayPlus deals directly with the information provider and:

**a** the information provider

- accepts full responsibility for the service and/or its promotion,
- undertakes that, in the event that a breach is established and a sanction and/or administrative charge is imposed, it will be responsible for compliance and/or payment, and

**b** the relevant service provider undertakes that, in the event that the information provider fails to comply with any sanction and/or make any payment due, the service provider will retain responsibility for compliance and/or payment in respect of any sanction and/or administrative charge that has been imposed, and will comply on demand from PhonepayPlus without any entitlement to further process, and

**c** PhonepayPlus accepts that the case is one in which it is appropriate for it to deal with the information provider. The procedure in respect of cases in which PhonepayPlus is asked to deal directly with information providers is set out at paragraph 8.7.

#### **10.4 Informal procedure**

In appropriate cases where an apparent breach of the Code has caused little consumer harm, the Executive may use the 'informal procedure'. Factors including the seriousness of the breach and the service provider's case history will be taken into account when deciding whether the informal procedure should be applied. In such cases:

- a** The service provider will be contacted and informed of the apparent breach.
- b** If the service provider agrees that a breach of the Code has taken place, the service provider will be required to remedy the breach and accept any condition that the Executive may require. No other sanction will be imposed nor any administrative charge levied.
- c** The service provider will be sent a letter confirming what has been agreed.
- d** If the service provider disputes the breach, the standard procedure may be invoked.
- e** A record will be maintained in respect of breaches of the Code dealt with through the informal procedure.

#### **10.5 Standard procedure**

When the Executive receives or initiates a complaint, the 'standard procedure' will usually be used:

- a** The Executive will provide the service provider with all the necessary information about the complaint, including details of the service or promotional material which gives rise to the apparent breach of the Code, and will be referred to the relevant provisions of the Code.
- b** The service provider will be given a reasonable time in which to respond and to provide any information requested. This response will normally be required within five working days. In exceptional circumstances, a shorter time limit may be set but this will not be less than 24 hours.
- c** If the service provider fails to respond within the required period, the Executive will proceed on the assumption that the service provider does not wish to respond.
- d** The Executive will prepare a report, together with relevant supporting evidence, which will be placed before a ***Tribunal which shall adjudicate on the matter.***
- e** The ***Tribunal*** may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the ***Tribunal***.
- f** At any point in the course of a standard procedure, PhonepayPlus may inform the relevant network operator(s) of the apparent breach of the Code and direct that it withholds from the service provider any payments (relating to the relevant services) outstanding under the contract between it and the service provider.

#### **10.6 Emergency procedure**

10.6.1 Where it appears to the Executive that a breach of the Code has taken place which is serious and requires urgent remedy, the 'emergency procedure' will be used:

- a** The Executive will undertake an immediate investigation of the complaint.
- b** On completion, the Executive will notify its findings to ***any three people each of whom is either a member of the Code Compliance Panel or of the Board and entitled to undertake adjudicatory functions.***
- c** If all three ***people so notified*** agree that there appears to be a serious breach of the Code requiring urgent remedy, the Executive will:

- i** use reasonable endeavours to notify the service provider (by phone, fax or e-mail) that the service appears to be in breach of the Code, that the emergency procedure has been invoked and that the service must be removed immediately,
- ii** advise the relevant network operator(s) of the breach and direct that it withholds from the service provider any payments outstanding under the contract between it and the service provider,
- iii** if the service provider cannot be contacted, or, having been contacted does not remove the service immediately, direct that the network operator(s) bar access to the relevant service(s) or number(s) forthwith.

**d** Once the service has been removed, the service provider will be provided with all the necessary information relating to the complaint and will be referred to the relevant provisions of the Code. The service provider will then be required to respond in writing within five working days.

**e** All relevant information including any response from the service provider will, in the absence of special circumstances, be laid before a **Tribunal** within 10 working days from the provision of the service provider's response or as soon thereafter as is practicable.

**f** The **Tribunal** may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the **Tribunal**.

**g** The time limits set out in this Section may be extended at the discretion **of the Chairman of the Tribunal** if **he** considers that their strict application might cause injustice.

10.6.2 If, within 10 working days following the use of the emergency procedure in a particular case, another case comes to the notice of the Executive which exhibits substantially the same characteristics, the Executive may, subject to the approval of one member of the **Code Compliance Panel or one member of the Board entitled to undertake adjudicatory functions**, proceed with the emergency procedure in that other case. The Executive will promptly inform the **Chairman of the Code Compliance Panel** of such action.

10.6.3 **a** Within two working days following the making of a direction under paragraph 8.6.1, service providers may apply to PhonepayPlus for an urgent review of the use of the emergency procedure in the particular case.

**b** The application must be made in writing together with any supporting evidence setting out:

- i** the grounds on which the service provider considers that the emergency procedure should not have been used in respect of the services and/or;
- ii** the grounds on which the service provider considers that access to the services or numbers should no longer be prevented.

**c** Subject to any requirement for further information, **a Tribunal** will consider the matter within two working days of receipt of an application for review and shall decide, through whatever process **it decides**, whether the prevention of access to the services or numbers should continue pending completion of the normal process under paragraph 8.6.1, or whether access should be permitted to some or all of the services or numbers concerned, and if so upon what, if any, conditions.

## 10.7 Information provider cases

10.7.1 In any case in which a service provider and information provider wish PhonepayPlus to deal directly with the information provider, the service provider must provide to PhonepayPlus:

**a** the service provider response to the case required under 8.5 or 8.6, together with a request in writing for PhonepayPlus to deal directly with the information provider in respect of the case, and

**b** the acceptance and undertakings of the service provider and information provider required in accordance with paragraph 8.3, in such form as PhonepayPlus may prescribe.

10.7.2 PhonepayPlus will (subject to any requirement for further information) determine within five working days thereafter whether it is willing to exercise its discretion to deal directly with the information provider in the relevant case.

10.7.3 If PhonepayPlus determines that it is willing to deal directly with the information provider, the case will be processed for the purposes of these rules as if the information provider was the service provider so that the information provider shall (together with any other rights or obligations) be entitled to require an oral hearing and to appeal to the Independent Appeals Body (IAB) in respect of the case, and shall be subject to any sanction duly imposed.

10.7.4 For the avoidance of doubt, **the Tribunal** may, in determining any sanction against an information provider, take into account to the extent appropriate any breach history of the information provider, including any involvement of the information provider in services where a breach was upheld against a service provider. Once a determination has been made under this paragraph, the service provider will have no further right to take part in the process as a party.

10.7.5 **The Tribunal** may, for good cause, determine at any time in the course of the process of a case that the case is not suitable to be dealt with other than directly with the service provider. If **the Tribunal** so determines, the case shall recommence as a case in which PhonepayPlus deals directly with the service provider and, in so far as practicable, no **Tribunal** member previously involved in the matter shall take further part in the process.

## 10.8 Adjudication

On the basis of the evidence presented, the **Tribunal** will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits. Service providers will be notified of the adjudication in writing. Where the adjudication has been made on the papers alone, or following informal representations in person, the notification will include reference to the service provider's right to an oral hearing.

## 10.9 Sanctions

10.9.1 Once **a Tribunal** has determined that there has been a breach of the Code, the Executive will put before it the service provider's details. These will include a list of any relevant breaches previously upheld, sanctions imposed on the service provider and any other relevant information.

10.9.2 **The Tribunal** has a range of sanctions which it may apply according to the degree of seriousness with which it regards any breaches. Having taken all relevant circumstances into account, **it** may singularly or in any combination in relation to each breach:

**a** require the service provider to remedy the breach,

**b** issue a formal reprimand,

**c** require the service provider to submit certain or all categories of service and/or promotional material to PhonepayPlus for copy advice and/or for prior permission for a defined period,

**d** impose an appropriate fine on the service provider to be collected by PhonepayPlus,

**e** require that access to some or all of the service provider's services and/or numbers be barred for a defined period and direct the relevant network operator(s) accordingly,

**f** prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of a particular type or category of service for a defined period,

**g** prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of any premium rate services for a defined period,

**h** require, in circumstances where there has been a serious breach of the Code and/or where an intent to mislead or defraud has been demonstrated, that the service provider pays all claims (or any specified category of claims) made by users for refunds of the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.

10.9.3 The failure of any service provider to comply with any sanction within any reasonable time period imposed on it by PhonepayPlus will result in:

**a** PhonepayPlus issuing a direction to all relevant network operators requiring suspension of access to some or all of the numbers allocated to the service provider until full compliance with PhonepayPlus sanctions has been achieved,

**b** a further breach of the Code by the service provider, which may result in additional sanctions being imposed

10.9.4 If a **Tribunal** considers that it may wish to make a recommendation under paragraph 8.9.2f or 8.9.2g in respect of any named individual, **PhonepayPlus** shall first make all reasonable attempts to so inform the individual concerned and the service provider or information provider in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the **Tribunal** in person and of the right of any of them (or of PhonepayPlus itself) to require an oral hearing.

10.9.5 Where an individual (or PhonepayPlus) requires an oral hearing **before a Tribunal** pursuant to the right set out in paragraph 8.9.4 but the associated individual fails, without good cause, to appear (either himself or through his representative) at an oral hearing which is properly established, then that **Tribunal** may make such a finding as it considers fit.

10.9.6 Refunds

**a** Where payment of refunds has been imposed as a sanction in accordance with 8.9.2h, it is the responsibility of the service provider to pay all claims for refunds as required by PhonepayPlus, except those where there is good cause to believe that any such claim is not valid.

**b** If money that would otherwise have been paid to the service provider has been retained by a network operator in accordance with a direction from PhonepayPlus or other obligation under the Code ('a retention'), and if the service provider satisfies PhonepayPlus that it is unable to comply with the sanction without recourse to the money so retained, it may pass details of payable claims to the network operator which shall make the refund payments due from the retention.

**c** If the service provider fails to deal promptly with claims made for refunds, PhonepayPlus (without prejudice to taking action against the service provider under paragraph 8.9.3) may direct any network operator which has a retention to deal with claims for refunds and pay the refunds from the retention.

**d** If PhonepayPlus has not issued directions under paragraph 8.9.6c, the obligation of the network operator shall cease three months after completion of the PhonepayPlus adjudication process and any time period for appeal to the IAB or the conclusion of such appeal or, if sooner, when the retention has been fully expended.

**e** If there is a retention remaining following payment of all claims for refunds or at the end of the three-month period, it must be used to discharge in whole or in part PhonepayPlus fines and/or administrative charges outstanding and payable by the service provider. If any retention remains thereafter, the network operator shall be entitled to deduct from the retention its costs and expenses arising from dealing with refunds.

## 10.10 Reviews

10.10.1 On reasonable grounds, **a Tribunal** may, at its discretion, review determinations made in respect of applications for prior permission and adjudications and/or sanctions.

10.10.2 A service provider or applicant for prior permission may request a review by setting out in writing the case for such a review.

### 10.10.3 *Review procedure*

Having received a written request setting out the reason why a determination made in respect of an application for prior permission or an adjudication and/or sanction should be reviewed, **the Chairman of the Code Compliance Panel** will decide whether the review is merited **in which event a Tribunal will carry out the review**.

10.10.4 Following such written request, **the Chairman of the Compliance Panel** may suspend any sanction imposed pending a review.

## 10.11 Oral hearings

10.11.1 Any service provider, applicant for permission or associated individual ('the applicant') may, by notice in writing to the Executive, require that an oral hearing be held:  
**a** in the event of a refusal by **a Tribunal** to grant prior permission to provide a service, or only to grant it upon condition,  
**b** following receipt of any communication from the Executive alleging a breach or breaches of the Code,  
**c** in respect of any adjudication made by **a Tribunal** without an oral hearing,  
**d** in the circumstances of an intention to make an order under 8.9.2f or 8.9.2g.

10.11.2 The applicant must, within such written notice, provide details of the allegation or decision in respect of which the oral hearing is required and set out clearly the applicant's case in respect of the relevant allegation or decision.

10.11.3 Such written notice may be provided to the Executive at any time up to 10 working days after receipt by the applicant of written notification of a decision by PhonepayPlus or at any time prior to the adjudication being made where the oral hearing is required following an allegation of a breach of the Code.

10.11.4 PhonepayPlus may require at any stage of its processes that an oral hearing be held.

10.11.5 Oral hearings shall take place before **a Tribunal appointed for the purpose**.

10.11.6 The applicant is entitled to appear at the oral hearing in person or to be represented. The Executive will attend the oral hearing in order to put the case against the applicant and may instruct a representative to act on its behalf.

10.11.7 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The applicant may apply in writing to the Chairman of the **Tribunal** ('the Chairman') setting out the grounds on which the sanction should be suspended. Unless the Chairman considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If an applicant has not been granted a suspension of sanction and has not complied with the sanction, the Chairman may stay the oral hearing.

### 10.11.8 *Procedures for hearing*

#### 10.11.8.1 Pre-hearing process

**a** The Chairman will give such directions as he considers necessary for the fair and speedy hearing of the oral hearing.

Such directions may include, for example, directions for:

- the exchange of statements of case,
- the admission of facts before the hearing,
- the disclosure of documents,
- the provision of expert reports,
- the exchange of witness statements,
- the preparation of agreed bundles of documents,
- the submission and exchange of outline arguments,
- the provision of security for the administrative charges of PhonepayPlus.

Directions may be given as to the date by which such actions shall be taken.

Where it appears reasonable in all the circumstances, the Chairman may strike out a case or take such other steps as he sees fit where any direction is not followed.

**b** The Chairman may convene a conference for the purpose of providing directions or may deal with directions by correspondence or phone, as he sees fit.

**c** Not less than 10 working days before the date of the oral hearing, the applicant shall be notified in writing (at the address of the applicant last made known to PhonepayPlus) of the day, time and place of the oral hearing.

**d** Within five working days of receipt of the notice specifying the date of the hearing, the applicant shall inform the Executive in writing of whether he intends to appear in person at the hearing and the name of any person who will be representing him at the hearing.

**e** The Chairman may vary any of the time limits set out in these procedures.

10.11.8.2 If the applicant is neither present nor represented at the hearing, and the ***Tribunal*** has no cause to believe there is a good reason for the applicant's absence, the matter shall be determined by the ***Tribunal*** as it sees fit in the absence of the applicant.

#### 10.11.8.3 The hearing

In respect of alleged breaches of the Code of Practice:

**a** The Executive shall outline the grounds of the case, and call such witnesses and refer to such documents as it is entitled to do.

**b** The applicant shall then be entitled to respond to the case put by the Executive and to call such witnesses or present any written statements or other documents as he is entitled to do.

**c** The Executive shall then be entitled to address the hearing panel.

**d** The applicant shall be entitled to reply.

**e** A witness in person may be cross-examined. A witness who has been cross-examined may be re-examined.

**f** The Chairman of the ***Tribunal*** may question any witness at any time.

In respect of a case concerning an application for permission, the Chairman shall adopt such procedures as he shall deem to be most convenient.

The Chairman of the ***Tribunal*** shall have the power to vary any of these procedures at any time and to adjourn the hearing if satisfied that it is in the interests of justice to do so.

#### 10.11.8.4 Confidential information

The **Tribunal** shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the applicant (or the Executive as the case may be) the source of that information, provided that the other party is given a reasonable opportunity to rebut its substance.

#### 10.11.8.5 Recording

A sound recording shall be made of the oral hearing. Recordings will be made available to the Executive and the applicant.

#### 10.11.9 Public hearing

An oral hearing shall be conducted in private, unless the applicant or the Executive otherwise requires. If an oral hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

#### 10.11.10 Powers of the **Tribunal**

The **Tribunal** shall decide the matter **dealt with in the oral hearing** entirely afresh. For the avoidance of doubt, the **Tribunal**:

**a** may impose a greater or lesser sanction than that imposed by **the Tribunal which dealt with the matter previously**,

**b** may reverse a decision to issue or refuse a permission,

**c** may set such conditions on a permission as it sees fit,

**d** must agree to impose such sanctions, permissions and/or conditions, and administrative charges or otherwise dispose of the matter as may be jointly agreed by the Executive and the applicant and which has been agreed by the **Chairman of the Code Compliance Panel, or if he is unavailable by one of the legally qualified Panel members** ('adjudication by consent').

#### 10.11.11 Decision and publication

The **Tribunal** shall, as soon as is practicable after the hearing, provide a reasoned written decision. All decisions, whether reached through written or oral process, shall be published by PhonepayPlus and may identify any network operator, service provider and information provider concerned. Publication will be effected by placing the written decision on the PhonepayPlus website and in any other way that PhonepayPlus shall determine.

#### 10.12 Administrative charge

All service providers found to be in breach of the Code may be invoiced for the administrative and legal costs of the work undertaken by PhonepayPlus. Non-payment within the period laid down by PhonepayPlus will also be a breach of the Code and may result in further sanctions being imposed. PhonepayPlus may direct that the relevant network operator withholds and passes to PhonepayPlus the sum(s) due from the payments outstanding under the contract between the network operator and the service provider.

## 11 ADDITIONAL PROCEDURES CONCERNING NETWORK OPERATORS

11.1 If it appears to PhonepayPlus that a network operator has failed to comply with its obligations under this Code (whether the subject of a direction or not):

- a PhonepayPlus will set out in writing the details of the apparent failure to comply.
- b The network operator will be given a reasonable time to respond. This response will normally be required within five working days.
- c Upon receipt of the network operator's response or if the network operator does not respond within the time required, the Executive will prepare a report, together with supporting evidence, which will be placed before a **Tribunal appointed to adjudicate upon the matter. The adjudication** will be provided promptly in writing to the network operator.
- d The **Tribunal** may invite the network operator to make informal representations to it in person in order to clarify any matter or the network operator may request the opportunity to make such informal representations to the **Tribunal**.
- e The network operator or the Executive may require at any point in the procedure that the matter be dealt with by means of an oral hearing provided that no requirement for an oral hearing may be made more than 10 working days after the provision of any adjudication made under paragraph 9.1c.

11.2.1 The procedures for hearings and related matters shall be as set out in paragraphs 8.11 and 8.12 as though 'network operator' had been substituted for 'applicant' throughout.

11.2.2 The hearing shall be conducted in private unless the network operator or the Executive otherwise requires. If a hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

11.2.3 The **Tribunal** shall, as soon as practicable after the hearing, provide a reasoned written decision. This written decision shall be published by PhonepayPlus.

11.2.4 If the **Tribunal** determines that the network operator has failed to comply with its obligations under the Code, then the Executive will place before it the network operator's details. These will include a list of any previous determinations of failure to comply, sanctions directed and any other relevant information.

11.2.5 The **Tribunal** may impose, by means of a direction to the network operator imposing a sanction upon it, one or more of the sanctions set out in paragraph 2.6.1, which are:

"2.6.1 Non-compliance by a network operator with any of its obligations set out in this Code shall be dealt with in accordance with Section 9. If PhonepayPlus determines that a network operator is in breach of any of its obligations, then, having taken all relevant circumstances into account, it may make a direction imposing a sanction on the network operator in the form of any or all of the following depending upon the degree of seriousness with which it regards the breach:

- a a reprimand and/or a requirement that the network operator must comply and remedy the consequences of the breach,
- b an instruction to pay an appropriate fine,
- c an instruction to cease to provide its network and/or services for the carriage of any particular type or category of premium rate services for a certain period,
- d an instruction to pay reasonable and valid claims for refunds."

11.2.6 All network operators on whom a sanction is imposed may be invoiced for the administrative and legal costs of the work undertaken by PhonepayPlus. Non-payment within

the period laid down by PhonepayPlus will be a failure by the network operator to comply with its obligations under the Code and may result in the imposition of a further sanction direction.

11.3 A direction or the obligation to comply with any other obligation under this Code is not automatically suspended by the initiation or utilisation of any of the procedures set out **above**. The network operator may apply in writing to the **Chairman of the Code Compliance Panel** setting out the grounds on which a direction or obligation should be suspended. Unless the **Chairman of the Code Compliance Panel** considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If the network operator has not been granted a suspension of the direction or obligation and has not complied with the direction or obligation, the Chairman of any **Tribunal** may stay **an** oral hearing pending compliance.

11.4 A network operator may appeal to the IAB against any **Tribunal** decision which directs that a sanction be imposed.

11.5 If a network operator fails to comply with a sanction direction issued following the process set out in Section 9 (including any appeal to the IAB), PhonepayPlus may (without prejudice to any enforcement action which it may take) refer the matter to Ofcom in accordance with Section 120 of the Act for it to take such action as it shall see fit.