



Modifying who is subject to the Premium Rate Services Condition

Statement on amending the PRS Condition to
mirror the remit of PhonepayPlus under its new
Code of Practice

Statement

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Section 1

Summary

Proposals

- 1.1 PhonepayPlus delivers the day-to-day regulation of premium rate services (PRS) through a Code of Practice (the 'Code') approved by the Office of Communications ('Ofcom'). Under the Communications Act 2003 (the 'Act'), Ofcom can set conditions (the "PRS Condition") which specify which providers (with respect to which services) must comply with directions made by PhonepayPlus. Ofcom can enforce a failure by any provider to comply with such directions. This is known as Ofcom's backstop powers. Ofcom set the PRS Condition in December 2003. This has since been subject to a number of amendments and currently applies to a subset of Controlled PRS providers¹ defined as Communications Providers.²
- 1.2 On 1 September 2011 the PhonepayPlus Code of Practice (12th edition) (the 'new Code') will come into force. Under the new Code, PhonepayPlus will, for the first time, hold all Controlled PRS providers responsible for actions that are within their control. The shift in regulatory responsibility marked by the new Code, as well as the new rules governing the content/promotion/operation of PRS, were consulted upon extensively by both Ofcom and PhonepayPlus.
- 1.3 Ofcom signalled when approving the new Code that to ensure its successful implementation it would be appropriate to re-consider who should be legally required to comply with PhonepayPlus directions under the PRS Condition.³ It did this via its consultation "Modifying who is subject to the Premium Rate Services Condition" published on 11 May 2011⁴ in which it proposed that:
- the PRS Condition should be amended to require all Controlled PRS Providers (instead of only a subset as at present) to comply with directions made by PhonepayPlus for the purpose of enforcing the Code of Practice, and
 - the proposed amendment to the PRS Condition gives effect to this intention.
- 1.4 The consultation closed on 22 June 2011. Ofcom received responses from eight stakeholders representing the telecommunications industry and consumers. The responses were supportive of the proposals.

Conclusion

- 1.5 Having carefully considered the responses to the consultation, Ofcom has now decided to proceed with the proposed modifications to the PRS Condition. This statement therefore includes a notification amending the PRS Condition to mirror the regulatory remit of PhonepayPlus under the new Code. All Controlled PRS providers

¹ As defined in the PRS Condition. The current version of the PRS Condition (as amended 20 December 2010) can be found at http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/PRS_Condition_20_Dec_10.pdf

² As defined in the PRS Condition.

³ See <http://stakeholders.ofcom.org.uk/binaries/consultations/ppp/statement/statement.pdf>, paragraph 2.77.

⁴ <http://stakeholders.ofcom.org.uk/binaries/consultations/prs-2011/summary/prs-2011.pdf>

will now be subject to the PRS Condition, providing Ofcom with the power to require such providers to comply with enforcement directions made by PhonepayPlus.

- 1.6 Ofcom considers such an amendment to the PRS Condition to be necessary to ensure the successful implementation of the new Code. Widening the scope of the PRS Condition will strengthen the ability of PhonepayPlus to take enforcement action against those providers that fail to comply with sanctions imposed under the new Code.
- 1.7 Ofcom is also satisfied that the statutory requirements for modifying the PRS Condition are met in respect of the amendment. In that regard, Ofcom believes widening the scope of the PRS Condition is consistent with the principles of transparency, proportionality and non-discrimination.
- 1.8 This modification to the PRS Condition (which is outlined in Annex 2) will be effective from 1 September 2011, the same date that the 12th Edition of the PhonepayPlus Code of Practice comes into force.

Section 2

Background and legal framework

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.⁵ These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS, computers, 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 directory enquiry services.
- 2.2 PRS vary in cost, typically between 6 pence per minute and £1.54 per minute/call for calls from BT landlines (incl. VAT) and up to £10 per call/SMS on mobile shortcodes. In most cases the bulk of the revenue from such a service goes to the company who markets and controls the content. The remainder of the revenue is usually shared throughout the value chain, including with the consumer's telephone company (which retains a portion of the money spent by the consumer), 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 regulatory framework for PRS consists of a hierarchy with three components:
- i) **The Act:** The relevant statutory provisions governing the regulation of PRS are set out under sections 120 to 124 of the Act. These provisions provide Ofcom with the power to set a PRS Condition that binds the persons to whom it applies, for the purpose of regulating the provision, content, promotion and marketing of PRS.
 - ii) **The PRS Condition:** The current PRS Condition requires a subset of PRS providers to comply with directions given by PhonepayPlus;⁶ and
 - iii) **The Code:** The Code outlines wide-ranging rules and processes which PhonepayPlus applies to protect consumers when regulating the PRS industry. The Code is approved by Ofcom under section 121 of the Act and the current version in force is the eleventh edition of Code, as amended in April 2008.⁷ On

⁵ PRS is defined in section 120(7) of the Communications Act 2003 which provides that a service is a premium rate service, if:

- a) it is a service falling within subsection (8);
- b) there is a charge for the provision of the service;
- c) the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
- d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.

⁶ The current version of the PRS Condition (as amended 20 December 2010) can be found at http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/PRS_Condition_20_Dec_10.pdf

⁷ 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/>.

30 March 2011, Ofcom approved the new Code, which will come into force on 1 September 2011.

Who is required to comply with the PRS Condition?

2.4 Section 120 of the Act allows Ofcom to set conditions which may be applied either:

- a) *“generally to every person who provides a [PRS]; or*
- b) *to every person who is of a specified description of such persons, or who provides a specified description of such services.”*

2.5 The current PRS Condition, which was published on 20 December 2010, requires Communications Providers involved in the provision of Controlled PRS (‘CPs’) to comply with directions given by PhonepayPlus.

2.6 Specifically paragraph 1 states:

“The Communication Provider shall comply with:

(a) directions given in accordance with an Approved Code by the Enforcement Authority⁸ and for the purposes of enforcing the provisions of the Approved Code; and

(b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.”

2.7 “Communications Provider” is defined in paragraph 2(c) of the PRS Condition as:

“(i) a person who:

- (A) is the provider of an Electronic Communications Service or an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and*
- (B) is a Controlled Premium Rate Service Provider in respect of that Controlled Premium Rate Service;*

(ii) a person who:

- (A) is the provider of an Electronic Communications Service used for the provision of a Controlled Premium Rate Service; and*
- (B) under arrangements made with a Controlled Premium Rate Service Provider, is entitled to retain some or all of the charges received by him in respect of the provision of the Controlled Premium Rate Service or of the use of his Electronic Communications Service for the purposes of the Controlled Premium Rate Service;*

or

(iii) a person who:

- (A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and*

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/>

⁸ PhonepayPlus is currently the Enforcement Authority for the purpose of the PRS Condition.

(B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate Service with a Controlled Premium Rate Service Provider;”

2.8 Importantly, the PRS Condition does not apply to Controlled PRS providers who are neither a provider of an Electronic Communications Services (‘ECS’) nor a provider of an Electronic Communications Network (‘ECN’).

2.9 ‘Controlled PRS Provider’ is defined in paragraph 2(e) of the PRS Condition as

“a person who:

- (i) provides the contents of a Controlled Premium Rate Service;*
- (ii) exercises editorial control over the contents of a Controlled Premium Rate Service;*
- (iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or*
- (iv) makes available a facility comprised in a Controlled Premium Rate Service;”*

2.10 The definition of Controlled PRS as set out in paragraph 2(e) of the PRS Condition currently includes:

- a PRS using a ‘Special Services Number’ (e.g. 0871), which costs more than 5p per minute (excluding 0843/4 numbers);
- a PRS which costs more than 10p per minute;
- a Chatline Service (as defined);
- where Internet Dialler Software (as defined) is operated; and
- a Sexual Entertainment Service (as defined).

2.11 In practice those currently required by the PRS Condition to comply with PhonepayPlus’ directions include Terminating Communications Providers (TCPs) of Controlled PRS and those Controlled PRS Providers who are also providers of an ECS or ECN.

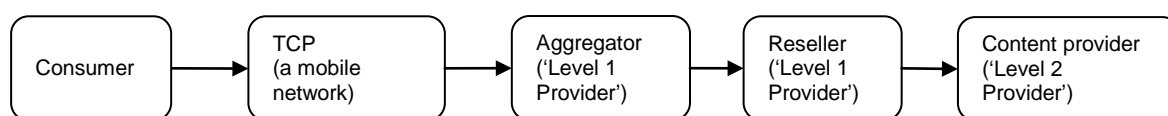
2.12 A failure by a CP to comply with a PhonepayPlus direction can amount to a contravention of the PRS Condition and Ofcom may then take enforcement action under the relevant procedures set out in the Act.⁹ Ofcom’s enforcement powers are sometimes referred to as statutory ‘backstop powers’.

⁹ In 2005 Ofcom opened five investigations into CPs for alleged breaches of the PRS Condition, each of which resulted in subsequent compliance with PhonepayPlus directions or the company ceasing to trade : Allied Communications (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_827/), Telecom One (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_833/), Coulomb Ltd. (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_839/), Talkline Communications Ltd (http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_846/), and a second case against Talkline Communications Ltd

- 2.13 PhonepayPlus can also sue in private law to recover fines that it has imposed for breaches of the Code against PRS providers that are subject to the PRS Condition.¹⁰ This has meant that in practice, PhonepayPlus has not often had to refer non-payment of fines by CPs to Ofcom for enforcement of the PRS Condition itself.

Who is required to comply with the Code?

- 2.14 Although the category of PRS providers that are caught by the PRS Condition is relatively narrow, PhonepayPlus has traditionally applied its Code to a wider range of PRS providers. There is therefore a category of PRS providers whose activities are regulated through the Code but who are not required by the PRS Condition to comply with PhonepayPlus directions.
- 2.15 The following represents a typical value chain for a mobile shortcode PRS that might be subject to the Code:¹¹



- 2.16 Under the Code, PhonepayPlus primarily regulates the activity of the TCP and the aggregator ('Level 1 Provider' under the new Code).¹² Under the new Code, to come into force in September 2011, PhonepayPlus will for the first time be regulating the activities of all PRS Providers, with Level 2 Providers being held responsible for ensuring the consumer outcomes in the new Code are met.
- 2.17 Under the PRS Condition however, only the TCP in the above example is required to comply with PhonepayPlus directions.¹³ Accordingly, although PhonepayPlus may regulate the activities of parties throughout the value chain, Ofcom could only use its back-stop powers if the TCP ignored PhonepayPlus' directions.

How does the remit of the PRS Condition affect PhonepayPlus enforcement?

- 2.18 The narrower remit of the PRS Condition as compared to the Code has been apparent for some time. A description of the legal framework by Ofcom in 2004 remains accurate:¹⁴

(http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_871/).

¹⁰ The High Court confirmed in 2007 that Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS') (now PhonepayPlus) is able to directly sue in private law to recover fines that it has imposed for breaches of the Code against PRS providers that are subject to the PRS Condition, *ICSTIS v Liquidators of Allied Communications Limited* [2007] EWHC 2307 (Admin).

¹¹ The terms 'Level 1 Provider' and 'Level 2 Provider' are used with reference to the definitions contained within clauses 5.3.7 and 5.3.8 of the new Code.

¹² PhonepayPlus may be able to regulate the activities of others in the value chain if the contracts between parties grant PhonepayPlus jurisdiction, as per clause 4.2 of the Code.

¹³ For this specific example we have assumed on the facts that the aggregator and reseller are not providing an ECS or an ECN.

¹⁴ See http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/prs_review.pdf, Annex 3, paragraph 51.

‘... the provisions of the (CoP) [Code of Practice] itself are not directly enforceable by ICSTIS [now PhonepayPlus] or Ofcom. If a content provider failed to comply with the CoP and then failed to pay a fine levied by ICSTIS, there would be nothing that ICSTIS or Ofcom could actually do in the absence of any direction made under the CoP requiring the TCP to do something. In such circumstances ICSTIS would issue directions to the TCP to block access to the relevant services or bar the SP from providing PRS in the UK.’

- 2.19 Regardless, this has not precluded PhonepayPlus under its Code (which has been approved by Ofcom) from regulating the activities of others in the PRS value chain indirectly by securing the co-operation of PRS providers who are subject to the PRS Condition including TCPs. Notably:
- the Code requires all TCPs to withhold outpayments for 30 days and permits PhonepayPlus to direct TCPs to withhold money from their clients. PhonepayPlus is able to direct TCPs to pay this money to settle fines incurred by their clients and/or to pay refunds to consumers on behalf of their clients;
 - PhonepayPlus can direct TCPs to bar network access to specific PRS providers or PRS numbers, which places a strong incentive on all PRS providers to comply with PhonepayPlus directions, regardless of whether Ofcom can subsequently require them to comply with PhonepayPlus’ directions; and
 - All TCPs are currently required to insert into their contracts a requirement that their ‘Service Provider’ client (to be termed a ‘Level 1 Provider’ under the new Code) will comply with the Code and that PhonepayPlus may enforce the terms of that contract.¹⁵ Therefore by the means of the contractual links running through PRS value chains, PhonepayPlus is able to take action to enforce relevant provisions of such contracts.
- 2.20 Although to date this approach has proven largely successful in securing general industry compliance with the Code, the introduction of the new Code makes it necessary to revisit whether the scope of the PRS Condition remains appropriate.

¹⁵ Rule 2.3.2 of the Code.

Section 3

Amendment to the PRS Condition

3.1 This section summarises the reasons for amending the PRS Condition and the stakeholder responses.

Amending the PRS Condition

3.2 In the Consultation we explained that there are two main reasons why the PRS Condition should be amended to require a wider category of providers to comply with PhonepayPlus directions:

- i) although PhonepayPlus have been largely successful in indirectly regulating the activities of those Controlled PRS providers subject to the Code but not caught by the PRS Condition, Ofcom is aware that PhonepayPlus has on occasions been unable to collect fines imposed on these providers; and
- ii) the new Code will extend PhonepayPlus' powers to regulate directly Controlled PRS providers further down the PRS value chain where Ofcom's backstop powers do not currently extend.

3.3 The new Code will fundamentally alter how PhonepayPlus regulates the PRS industry. At present the primary responsibility for complying with the Code is placed on the first party in the value chain that contracts with the TCP¹⁶ – and as this party is only one step removed from the TCP, the mechanisms for indirect enforcement are largely effective.

3.4 Under the new Code regulatory responsibility shifts further down the value chain to the party that controls the operation, promotion and content of a PRS (a Level 2 Provider). This change to the regulatory focus of the Code has already been subject to separate consultations held by both Ofcom and PhonepayPlus through the development of and approval process for the new Code.¹⁷

3.5 As regulatory scrutiny will go further down the value chain than under the current Code, an even larger number of PRS Providers ('Controlled Premium Rate Service Provider' under the PRS Condition) will now be subject to the Code while not being subject to Ofcom's backstop enforcement power through the PRS Condition.

3.6 Ofcom therefore considered that it was necessary to propose amendment of the PRS Condition to mirror the remit of the new Code when it comes into force on 1 September 2011.

3.7 The Consultation included an Impact Assessment which showed that the impact on the vast majority of the PRS industry from the proposed change to the PRS Condition would be negligible as the remit of PhonepayPlus is already due to be extended under the new Code. This change would only have implications for a narrow category of provider: namely those Controlled PRS Providers not currently subject to the PRS

¹⁶ Termed a 'Service Provider' under the Code of Practice, or most probably a 'Level 1 Provider' under the new Code.

¹⁷ See <http://stakeholders.ofcom.org.uk/consultations/ppp/> and <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf>

Condition that breach the new Code and then fail to comply with subsequent enforcement directions given by PhonepayPlus.

Responses to the Consultation

- 3.8 The closing date for responses was 22 June 2011. Ofcom received responses to its Consultation from eight stakeholders: five trade associations representing the telecommunications industry, two CPs, and Citizens Advice representing consumers. A list of Respondents can be found in Annex 1.
- 3.9 All respondents agreed with Ofcom that:
- the PRS Condition should be amended to require all Controlled PRS Providers to comply with directions made by PhonepayPlus for the purpose of enforcing the Code of Practice, and
 - the proposed amendment to the PRS Condition gives effect to this intention.
- 3.10 In addition, two respondents, AIME and Action4, suggested that the wording in the Act could benefit from a review as the terminology was now somewhat outdated. Ofcom would advise that the Act will be reviewed under the general Communications Review for the Digital Age being undertaken by the Department for Culture, Media and Sport (“DCMS”).¹⁸
- 3.11 MEF trusted that an extension to the PRS Condition would not result in any additional or unnecessary administrative burden on the industry and welcomed a review of the impact of the change in due course. As discussed in the Impact Assessment in the Consultation, Ofcom does not believe that this amendment will result in any additional compliance costs to the industry as this change will not require anyone in the PRS industry to do anything different.

Ofcom’s conclusion

- 3.12 Ofcom has already approved PhonepayPlus’ widened remit under the new Code to regulate the activities of Level 1 and Level 2 Providers and an impact assessment carried out through the consultation on the new Code supported that change.¹⁹ The issue at hand now is whether this change should be reflected in the PRS Condition by requiring all providers of Controlled PRS to comply with directions given by PhonepayPlus when enforcing its new Code.
- 3.13 We consider that the remit of the PRS Condition should be amended to mirror that of the new Code. Requiring all Controlled PRS providers to comply with PhonepayPlus directions would enable Ofcom ultimately to instigate enforcement action against any Controlled PRS provider that ignored a direction made by PhonepayPlus for the purpose of enforcing its new Code. Most importantly however, Ofcom has an expectation that rather than referring all cases of non-compliance to Ofcom, PhonepayPlus would instead look to take direct legal action to enforce the judgments of its independent Tribunal, including initiating or joining insolvency proceedings.²⁰

¹⁸ See an open letter published by DCMS on 16 May 2011 entitled “A Communications Review for the Digital Age” http://www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf

¹⁹ See <http://stakeholders.ofcom.org.uk/binaries/consultations/ppp/statement/statement.pdf>

²⁰ Based on the decision of *ICSTIS v Liquidators of Allied Communications Limited* [2007] EWHC 2307 (Admin), as noted above.

- 3.14 Ofcom considers that the most effective and efficient means of amending the PRS Condition is to widen the category of providers that must comply with PhonepayPlus directions to include all Controlled PRS providers. The current wording at paragraph 1 states:

“The Communications Provider shall comply with:

- a) *directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and*
- b) *if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.”*

- 3.15 We will therefore modify this text by the addition of the following highlighted text:

*“The Communications Provider **and Controlled Premium Rate Service Provider** shall comply with:”*

- 3.16 Since Communications Providers are not in all cases also Controlled PRS providers, this modification ensures that all Controlled PRS providers as defined in the PRS Condition are captured.

- 3.17 Under section 120(2) of the Act, the PRS Condition may be applied either:

- a) *“generally to every person who provides a PRS; or*
- b) *to every person who is of a specified description of such persons, or who provides a specified description of such services.”*

- 3.18 A Controlled PRS provider falls within the category of PRS providers to whom the PRS Condition can be applied to.

- 3.19 The Electronic Communications and Wireless Telegraphy Regulations 2011 (the “2011 Regulations”)²¹ came into force on 26 May 2011 and include amendments to the Act for the purpose of implementing Directives 2009/136/Ec²² and 2009/140/Ec²³.

- 3.20 Regulation 1 sets out the amendments to the Act by reference to Schedule 1. Paragraph 76 of Schedule 1 removes reference to section 48 of the Act in respect of setting, modifying and revoking a condition under section 120. Paragraph 77 of the 2011 Regulations inserts a new section 120A setting out the procedure for setting, modifying and revoking premium rate services conditions

- 3.21 Regulation 3 sets out the transitional provisions by reference to Schedule 3. Paragraph 16 of Schedule 3 states that paragraphs 76 and 77 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 48(2) of the Act (as applied by section 120(5) of the Act) before 26 May 2011.

- 3.22 Ofcom published a consultation “Modifying who is subject to the Premium Rate Services Condition” on 11 May 2011 which included a notification of proposed modification of a condition under section 48(2) of the Act (as applied by section 120(5) of the Act). This statement amends the PRS Condition as set out in the

²¹ <http://www.legislation.gov.uk/ukxi/2011/1210/made>

²² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:01:EN:HTML>

²³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:01:EN:HTML>

notification. As the notification predates 26 May 2011, the process for modifying the PRS Condition is as set out in the Act unamended by the 2011 Regulations.

- 3.23 Therefore the process for modifying the PRS Condition as set out in sections 120(4) and 120(5) by reference to the process set out in sections 47 and 48 of the Act still applies.

Section 4

Implementation

Tests set out under the Communications Act 2003

4.1 When modifying conditions, Ofcom is required to meet various tests set out in the Act. These tests, and Ofcom's assessment of how these are met in connection with the modification to the PRS Condition are set out below.

Section 3 – Ofcom's general duties

4.2 Section 3(1) of the Act sets out the principal duty of Ofcom. Ofcom is required by this section to carry out its functions in line with this duty. That duty is:

- 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.

4.3 Ofcom considers that the amendment extending the PRS Condition to mirror the remit of PhonepayPlus under the new Code is in line with section 3 of the Act as it extends the consumer protection provided by the PRS Condition to all Controlled PRS providers that are currently not subject to that regulation. The amendment represents a change to the PRS Condition to reflect a previous policy decision to approve the new Code, which was also made in line with section 3 of the Act.

4.4 Ofcom has also considered when carrying out its functions, amongst other things, the requirements in section 3(2) of the Act to secure the availability throughout the UK of a wide range of electronic communications services, and section 3(4) of the Act, namely that in performing its duties Ofcom must also have regard to such of the following as appears to be relevant in the circumstances, in particular:

- the desirability of promoting competition in relevant markets: in that it equalises the position between all PRS providers in relation to the application of PRS regulation. PhonepayPlus will be able to enforce its new Code and rely on Ofcom's backstop powers against all Controlled PRS Providers regardless of where they sit in the value chain, which we consider represents a fairer and more transparent means of regulating the industry. We consider that effective competition can only exist where traders who cause consumer harm are held accountable.
- the desirability of encouraging investment and innovation in relevant markets: in that the change to the PRS Condition, in conjunction with the new Code, will strengthen the regulatory regime by more clearly targeting regulation at those parties in the value chain that are responsible for causing consumer harm. We consider that strengthening the ability of PhonepayPlus to hold PRS providers accountable will promote greater consumer confidence in the PRS market and, as a result, will encourage investment and innovation in the sector

4.5 Ofcom considers that the proposals set out in this document are in line with the above duties and that, in particular, and as set out above, extending PRS regulation

to include all Controlled PRS providers will provide citizens and consumers with greater protection.

Section 4 – European Community requirements for regulation

- 4.6 Section 4 of the Act sets out the Community duties on Ofcom which flow from Article 8 of the Framework Directive. Ofcom considers that its proposals outlined above promote the interests of all persons within the European Union by ensuring that consumers are adequately protected from the potential of consumer harm arising from Controlled PRS Providers who are not CPs sitting outside the PRS regulatory regime.

Section 47 – Test for setting or modifying conditions

- 4.7 As set out under section 47(1) of the Act, when modifying a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. The test is that the modification of the condition is:
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b) not unduly discriminatory against particular persons or against a particular description of persons;
 - c) proportionate to what it is intended to achieve; and
 - d) transparent in relation to what it is intended to achieve.
- 4.8 We consider that the modification to the PRS Condition complies with the legal tests set out in section 47(2). We are satisfied that the modification meets the tests being:
- **objectively justifiable**, in that it is necessary to extend the reach of Ofcom's backstop powers to support PhonepayPlus enforcement activity taken under the new Code. We consider that the problem of non-compliance with sanctions imposed could be exacerbated under the new Code as PhonepayPlus will be directly regulating many Controlled PRS Providers who are not required by the PRS Condition to comply with PhonepayPlus directions. We are satisfied that amending the PRS Condition to require all Controlled PRS Providers to comply with PhonepayPlus directions is necessary to support the successful implementation of the new Code and to provide effective enforcement powers supporting the new Code.
 - **not unduly discriminatory**, in that all CPs and Controlled PRS Providers will be required to comply with PhonepayPlus directions made for the purposes of enforcing its Code. Ofcom will ultimately have the ability to take action against all such PRS providers who ignore a relevant direction regardless of their position in the value chain.
 - **proportionate** in relation to the central objective of PRS regulation to prevent consumers from the risks of harm that accompany such services. We acknowledge that requiring all Controlled PRS Providers to comply with PhonepayPlus enforcement directions will impose a direct financial burden on those parties that may otherwise be able to disregard such directions. However, we do not consider it appropriate that parties that are subject to the PhonepayPlus Code can be found in breach of the Code but cannot be held

directly accountable if they refuse to comply with subsequent directions regarding that breach (such as the payment of fines). As noted above, under the new Code PhonepayPlus will be regulating a much wider category of PRS providers, which creates a risk that fewer PRS providers may comply with the PhonepayPlus directions than at present. Non-compliance with PhonepayPlus directions not only undermines the integrity of the PRS regulatory regime, but also creates incentives for opportunistic behaviour and direct consumer detriment. We are therefore satisfied that it is proportionate to amend the PRS Condition to mirror the regulatory remit of PhonepayPlus under the new Code.

- **transparent**, insofar as all relevant PRS providers will now be aware that they have a legal requirement to comply with PhonepayPlus directions made for the purposes of enforcing its new Code.

4.9 We are satisfied that the PRS Condition should therefore be amended to mirror the remit of the new Code. The amended PRS Condition is attached as Annex 2.

Section 48 – Procedure for setting or modifying conditions

4.10 Section 48(2) requires Ofcom, before setting, modifying or revoking, to publish a notification setting out the proposed changes, the effect of those changes, the reasons for those changes and specifying a period within which representations may be made to Ofcom about the proposal. Section 48(3) states that the minimum period for receiving representations is no less than one month after the day the notification was published.

4.11 Ofcom has held a separate consultation on the proposed modification to the PRS Condition. This consultation allowed five weeks after the date the consultation was published for representations to be made. The consultation included a draft of the proposed notification and an explanation of the effect of the proposed amendments. Ofcom considers that it has met the section 48 test with regard to the procedure it has followed in proposing a modification of the PRS Condition.

Implementation

4.12 In our consultation we anticipated the proposed change to the PRS Condition to be made to coincide with the new Code coming into force on 1 September 2011. We did not receive any responses suggesting a longer implementation period so we are following our proposal for the change to the PRS Condition (which is outlined in Annex 2) to come into effect on 1 September 2011.

4.13 In any case, the approval of the new Code has already given the PRS industry notice that every party in a PRS value chain will assume new regulatory responsibilities and PhonepayPlus has begun communications activities to ensure this awareness filters through the value chain. Given PhonepayPlus' ability indirectly to regulate a wide category of PRS providers (by requiring contracts between certain PRS providers to include clauses granting it jurisdiction), this change to the PRS Condition should not affect the day-to-day activities of those in the industry.

Annex 1

List of Respondents

The following stakeholders submitted non-confidential responses to our consultation. The responses can be found at <http://stakeholders.ofcom.org.uk/consultations/prs-2011/?showResponses=true>

- Action4
- AIME
- BT
- Citizens Advice
- Colt
- MEF
- Mobile Broadband Group
- UKCTA

Annex 2

Notification of a modification of a Condition under section 120 of the Act

Notification of a modification under section 48(1) of the Act

Modification of a condition under section 120 of the Act which is set out in a notification under section 48(1) of the Act published by OFCOM on 23 December 2003 (as amended).

WHEREAS:-

- A) OFCOM issued a notification pursuant to section 48(2) of the Act on 11 May 2011 ('the Notification of proposed modification');
- B) In the Notification of proposed modification and accompanying consultation document, OFCOM invited representations on the proposals set out therein by 22 June 2011;
- C) The Electronic Communications and Wireless Telegraphy Regulations 2011 (the "2011 Regulations")²⁴ came into force on 26 May 2011 and include amendments to section 120 of the Act setting out a new procedure for setting, modifying and revoking premium rate services conditions for the purpose of implementing Directives 2009/136/Ec²⁵ and 2009/140/Ec²⁶;
- D) Regulation 3 sets out the transitional provisions by reference to Schedule 3. Paragraph 16 of Schedule 3 states that paragraphs 76 and 77 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 48(2) of the Act (as applied by section 120(5) of the Act) before 26 May 2011;
- E) Ofcom published a consultation "Modifying who is subject to the Premium Rate Services Condition" on 11 May 2011 which included the Notification of proposed modification under section 48(2) of the Act (as applied by section 120(5) of the Act). This Notification amends the PRS Condition as set out in the Notification of proposed modification. As the Notification of proposed modification predates 26 May 2011, the process for modifying the PRS Condition is as set out in the Act unamended by the 2011 Regulations;
- F) Therefore the process for modifying the Premium Rate Services ("PRS") Condition as set out in sections 120(4) and 120(5) by reference to the process set out in sections 47 and 48 of the Act still applies;
- G) By virtue of section 48(5) of the Act, OFCOM may give effect to any proposals to modify the PRS Condition as set out in the Notification of proposed modification, with or without modification only if-
 - (i) it has considered every representation about the proposal that is made to it within the period specified in the Notification; and

²⁴ <http://www.legislation.gov.uk/ukxi/2011/1210/made>

²⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:01:EN:HTML>

²⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:01:EN:HTML>

- (ii) it has had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- H) OFCOM received responses to the Notification of proposed modification and has considered every such representation made to them in respect of the proposals set out in the Notification of proposed modification and accompanying consultation document.

Therefore OFCOM notifies the following modification:

1. OFCOM, in accordance with the procedures in section 48 of the Act hereby makes the following modification to the PRS Condition set under section 120 of the Act.
2. The modification is set out in the Schedule to this Notification.
3. The effect of, and OFCOM's reasons for making, the modification referred to in paragraph 1 above is set out in the accompanying statement.
4. OFCOM considers that the modification referred to in paragraph 1 above complies with the requirements of section 47(2) of the Act, as appropriate and relevant to each of the modifications.
5. In making the proposal set out in this Notification, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
6. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission in accordance with section 50(6) of the Act.
7. In this Notification:
 - (i) "the Act" means the Communications Act 2003; and
 - (ii) "OFCOM" means the Office of Communications;
8. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
9. For the purpose of interpreting this Notification:
 - (i) headings and titles shall be disregarded; and
 - (ii) the Interpretation Act 1978 shall apply as if this Notification were an act of Parliament.
10. The Schedule to this Notification shall form part of this Notification.
11. The modification set out in the Schedule to this Notification shall take effect from 1 September 2011.

Amending the Premium Rate Services Condition

Signed by

Claudio Pollack

A person authorised by Ofcom under paragraph 18 of the Schedule to the Act.

29 July 2011

Schedule

Modification of a condition under section 120 of the Act which is set out in a notification under section 48(1) of the Act published by OFCOM on 23 December 2003 (as amended²⁷)

The PRS Condition shall be modified as set out below (the added text has underlined and highlighted in yellow for ease of reference):

1. The Communications Provider and Controlled Premium Rate Service Provider shall comply with:
 - (a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and
 - (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.
 2. In this Condition,
 - (a) "Act" means the Communications Act 2003;
 - (b) "Approved Code" means a code approved for the time being under section 121 of the Act;
 - (c) "Communications Provider" means either:
 - (i) a person who:
 - (A) is the provider of an Electronic Communications Service or an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and
 - (B) is a Controlled Premium Rate Service Provider in respect of that Controlled Premium Rate Service;
 - (ii) a person who:
 - (A) is the provider of an Electronic Communications Service used for the provision of a Controlled Premium Rate Service; and
 - (B) under arrangements made with a Controlled Premium Rate Service Provider, is entitled to retain some or all of the charges received by him in respect of the provision of the Controlled Premium Rate Service or of the use of his Electronic Communications Service for the purposes of the Controlled Premium Rate Service;
- or
- (iii) a person who:

²⁷ The latest version of the PRS Condition was published in the 20 December 2010 statement 'Telephone Numbering: Modifications to the National Telephone Numbering Plan, General Condition 17, the Premium Rate Services Condition and the telephone number application forms within existing numbering policy and to facilitate the increase in VAT from January 2011' http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/PRS_Condition_20_Dec_10.pdf

- (A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and
 - (B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate Service with a Controlled Premium Rate Service Provider;
- (d) “Chatline Service” means a service which consists of or includes the enabling of more than two persons (the participants) to simultaneously conduct a telephone conversation with one another without either:
 - (i) each of them having agreed with each other; or
 - (ii) one or more of them having agreed with the person enabling such a telephone conversation to be conducted, in advance of making the call enabling them to engage in the conversation, the respective identities of the other intended participants or the telephone numbers on which they can be called. For the avoidance of any doubt, a service by which one or more additional persons who are known (by name or telephone number) to one or more of the parties conducting an established telephone conversation can be added to that conversation by means of being called by one or more of such parties is not on that account a Chatline Service, if it would not otherwise be regarded as such a service;
- (e) “Controlled Premium Rate Service” means a Premium Rate Service (other than a service which is only accessed via an International Call) in respect of which:
 - (i) the service is obtained through a Special Services Number (except an 0843/4 number), and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 5 pence per minute for BT customers inclusive of value added tax; or
 - (ii) the service is obtained other than through a Special Services Number, and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute inclusive of value added tax; or
 - (iii) the service is a Chatline Service; or
 - (iv) is Internet Dialler Software operated; or
 - (v) the service is a Sexual Entertainment Service;
- (f) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or an subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989 and the Companies Act 2006;
- (g) “Controlled Premium Rate Service Provider” means a person who:
 - (i) provides the contents of a Controlled Premium Rate Service;
 - (ii) exercises editorial control over the contents of a Controlled Premium Rate Service;
 - (iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or

- (iv) makes available a facility comprised in a Controlled Premium Rate Service;
 - (h) "Dial-up Telephone Number" means the telephone number used by an end user's computer that connects it to the Internet
 - (i) "Enforcement Authority" means, in relation to an Approved Code, the person who under the code has the function of enforcing it;
 - (j) "Facility" includes reference to those things set out in section 120(14) of the Act;
 - (k) "International Call" means a call which terminates on an Electronic Communications Network outside the United Kingdom;
 - (l) "Internet Dialler Software" is software that replaces a Dial-up Telephone Number with a different Dial-up Telephone Number; other than where it is used so that:
 - a) an end-user's existing Internet Service Provider replaces the Dial-up Telephone Number;
 - b) an end-user moves from his existing Internet Service Provider to another Internet Service Provider or is so moved with his consent.
 - (m) "Internet Service Provider" means a person who provides end-users, by means of a Dial-up Telephone Number, with connection to the Internet in the ordinary course of its business.
 - (n) "National Telephone Numbering Plan" means a document published by Ofcom from time to time pursuant to sections 56 and 60 of the Act;
 - (o) "Premium Rate Service" shall have the meaning ascribed to it by section 120(7) of the Act;
 - (p) "Sexual Entertainment Service" means an entertainment service of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies, that the service is of a sexual nature;
 - (q) "Special Services Number" means a telephone number designated by Ofcom in the National Telephone Numbering Plan as Special Services basic rate, Special Services higher rate or Special Services at a Premium Rate;
3. For the purposes of interpreting this Condition, except in so far as the context otherwise requires, words or expressions shall have the same meaning as ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has been ascribed in the Act.