



Modifying who is subject to the Premium Rate Services Condition

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

Consultation

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Section 1

Summary

- 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 which specify which providers (and 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 has set the PRS Condition, which 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 This consultation proposes to amend the PRS Condition to mirror the regulatory remit of PhonepayPlus under the new Code. We are proposing that all Controlled PRS providers 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.
- 1.4 We consider 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 As defined in the PRS Condition.

² As defined in the PRS Condition.

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

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.⁴ These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS, PC, mobile phone downloads or interactive digital TV. Common forms of PRS include TV voting lines, competitions, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes 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;⁵ 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 2008.⁶ On

⁴ 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.

⁵ 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

⁶ 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 section 1 states:

“The Communication Provider shall comply with:

(a) directions given in accordance with an Approved Code by the Enforcement Authority⁷ 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 section 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/>

⁷ 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 section 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 section 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.

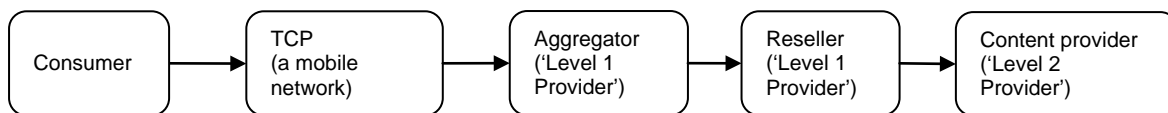
2.12 A failure by a CP to comply with a PhonepayPlus direction can amount to a contravention of the PRS Condition and Ofcom may then take enforcement action under the relevant procedures set out in the Act.⁸ Ofcom’s enforcement powers are sometimes referred to as statutory ‘backstop powers’.

⁸ 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.⁹ 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:¹⁰



- 2.16 Under the Code, PhonepayPlus primarily regulates the activity of the TCP and the aggregator (‘Level 1 Provider’ under the new Code).¹¹ 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.¹² 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:¹³

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

⁹ 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).

¹⁰ 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.

¹¹ 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.

¹² For this specific example we have assumed on the facts that the aggregator and reseller are not providing an ECS or an ECN.

¹³ 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 specifically requires 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.¹⁴ 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.

¹⁴ Rule 2.3.2 of the Code.

Section 3

Proposed change to the PRS Condition

The case for amending the PRS Condition

3.1 We consider 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.

3.2 We discuss both of these issues in turn in this section.

Difficulties in enforcing sanctions and collecting fines

3.3 As noted above at paragraphs 2.14 - 2.20, although PhonepayPlus may not be able to directly enforce its Code against all Controlled PRS providers, it has imposed several obligations on TCPs which enables it to indirectly secure compliance throughout the value chain.

3.4 However, it is relevant to note that there are several scenarios where such an approach is unlikely to be effective:

- i) PhonepayPlus' ability to direct TCPs to withhold revenue to PRS providers depends on it being able to quickly identify instances of consumer harm that would justify issuing such a direction. Where it is unable to quickly identify such cases, or where an alleged breach of the Code is not of a sufficient severity to justify extending the mandatory 30-day withhold rule, then PhonepayPlus may not be able to successfully require a TCP to pay a fine on behalf of their clients;
- ii) although in instances of non-compliance with a sanction PhonepayPlus can direct TCPs to bar network access to a PRS provider, this may not always be sufficient to encourage compliance with PhonepayPlus' Tribunal sanctions. Depending on the scale of any sanction, where the sanction imposed is a fine, there will always be some providers who will find it more cost-effective to exit the industry rather than to pay the relevant fine; and
- iii) PhonepayPlus advises that the obligatory clauses inserted by TCPs into contracts with their clients¹⁵ vary considerably according to TCPs and are in most cases not replicated by their clients in their own contracts with parties further down the value chain, thereby making it difficult or in some cases impossible for PhonepayPlus to rely on this avenue to enforce its sanctions.

3.5 The successful enforcement of PhonepayPlus sanctions against Controlled PRS providers which are not subject to the PRS Condition therefore largely depends on:

¹⁵ Clause 2.3.2 of the Code.

- a) PhonepayPlus quickly stopping the flow of funds from the TCP to the responsible party, or
 - b) the desire of the party breaching the Code to continue to operate in the PRS industry whereby the prospect of being barred from the market encourages those providers to voluntarily comply with any PhonepayPlus sanction.
- 3.6 Although PhonepayPlus has had considerable success in barring scammers from the PRS industry, it has had to consistently write off the fines imposed on such parties. For example, for the nine months preceding 31 December 2010, PhonepayPlus collected 74% of the fines due from parties found in breach of its Code.¹⁶

The implications of the new Code

- 3.7 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 TCP¹⁷ – and as this party is only one-step removed from the TCP the mechanisms for indirect enforcement noted above are largely effective.
- 3.8 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 and approval of the new Code.¹⁸
- 3.9 Many Level 2 Providers are established businesses and will comply with PhonepayPlus directions under the new Code. However, as noted in Ofcom's statement approving the new Code, on the whole, Level 2 Providers are smaller than Level 1 Providers and, due to the low barriers to entry and exit in the PRS industry, there is a greater risk that Level 2 Providers will choose to exit the industry rather than pay their fines.¹⁹
- 3.10 The changes to the new Code are necessary to allow PhonepayPlus to target those parties that are most often causing consumer harm and were widely supported by the industry as a 'fairer' means of regulation. However, 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.
- 3.11 Ofcom therefore considers that by maintaining the status quo with regards to the PRS Condition, the enforcement difficulties identified above are likely to be exacerbated when the new Code comes into force.

¹⁶ PhonepayPlus 3rd quarter report, February 2011:

http://www.phonepayplus.org.uk/upload/2011_Quarterly_Report_2010_2011_Q3.pdf

¹⁷ Termed a 'Service Provider' under the Code of Practice, or most probably a 'Level 1 Provider' under the new Code.

¹⁸ See <http://stakeholders.ofcom.org.uk/consultations/ppp/> and

<http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf>

¹⁹ See <http://stakeholders.ofcom.org.uk/binaries/consultations/ppp/statement/statement.pdf>, paragraph 4.55.

Proposal

- 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.²⁰ 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 to ultimately 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.²¹
- 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 section 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 are proposing that this text be modified 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.

²⁰ See <http://stakeholders.ofcom.org.uk/binaries/consultations/ppp/statement/statement.pdf>

²¹ Based on the decision of ICSTIS v Liquidators of Allied Communications Limited [2007] EWHC 2307 (Admin), as noted above.

- 3.19 Sections 120(4) and (5) set out the process for modifying the PRS Condition which follows the process set out in sections 47 and 48 of the Act.

Question 1: Do you agree the PRS Condition should be amended to require all Controlled PRS Providers to comply with directions made by PhonepayPlus for the purpose of enforcing its Code of Practice?

Question 2: Do you agree that the proposed amendment to the PRS Condition (see Annex 4) gives effect to this intention?

Section 4

Consultation on the notification of the proposed modification to the PRS Condition

The purpose of this consultation

- 4.1 The relevant procedures for setting, modifying or revoking the PRS Condition are, in accordance with section 120(5) of the Act, set out in section 48 of the Act. Under section 48 of the Act, Ofcom is required to publish a notification of the proposed modification (the "Notification"), and to consult for a period of not less than one month after the day of publication of the Notification.
- 4.2 The Notification and proposed modification are attached at Annex 4.
- 4.3 Ofcom is inviting written views and comments by 5pm on 22 June 2011, on the Notification and proposed modification to the PRS Condition.
- 4.4 Details of how to respond on each of these issues can be found at Annex 1.
- 4.5 Ofcom will give careful consideration to all comments received during the consultation period and in light of the comments received may give effect to the proposals set out in this document, with or without modification, by publication of a Notification and explanatory statement. Ofcom aims to publish this by 1 September 2011.

Impact Assessment

- 4.6 The impact on the vast majority of the PRS industry from this change to the PRS Condition will be negligible as the remit of PhonepayPlus has already been extended under the new Code. This proposed change will only have implications for a narrow category of provider: namely those Controlled PRS Providers not currently subject to the PRS Condition that breach the new Code and then fail to comply with subsequent enforcement directions given by PhonepayPlus.
- 4.7 To date PhonepayPlus has had mixed success in enforcing sanctions against parties that are not subject to the PRS Condition – by either requiring the relevant TCP to pay the fine on behalf of the liable party out of funds that have been withheld, or by relying on the willingness of the PRS provider to voluntarily comply with the direction in order to continue operating in the market. The essence of the proposed change to the PRS Condition is to enable the direct enforcement of sanctions against parties that are found in breach of the new Code. If the proposed change to the PRS Condition goes ahead then both PhonepayPlus and Ofcom will have the ability to take direct legal action against all non-compliant PRS providers (PhonepayPlus to enforce its adjudications and Ofcom to enforce the PRS Condition).
- 4.8 The amendment to the PRS Condition will therefore have a direct impact on those providers that fail to comply with PhonepayPlus directions. In the last nine months of 2010 the PhonepayPlus Tribunal was requested on 14 occasions to consider imposing additional sanctions in relation to non-payment of fines by parties

previously adjudged in breach of its Code (the vast majority of such cases considered whether such a party should be barred from the industry). Should the PRS Condition amendment proceed it is reasonable to assume that in many of these cases PhonepayPlus and Ofcom would consider whether to take additional action in relation to a possible breach of the PRS Condition.

- 4.9 Having to comply with PhonepayPlus directions will therefore impose a cost on such 'non-compliant' PRS providers. We note that for the nine months to December 2010 PhonepayPlus had been unsuccessful in collecting 26% of the fines it had imposed, representing £281,000.²² It is therefore reasonable to assume that PhonepayPlus could potentially seek to recover approximately £300,000 to £500,000 in fines in a calendar year that it may previously have had to write-off.²³ While this will obviously have a direct financial impact on providers who breach the new Code, any fines recovered will help offset the annual PhonepayPlus levy, thereby reducing the costs of regulation for the remainder of the PRS industry.
- 4.10 We do not consider the rest of the PRS industry will face any additional compliance costs from this amendment to the PRS Condition. For the most part this change will not require anyone in the PRS industry to do anything different – those TCPs, Level 1 and Level 2 Providers that PhonepayPlus will apply its new Code to will all need to comply with the new Code and this change does not add anything to any compliance cost that may be associated with the new Code. What this amendment makes clear is that when PhonepayPlus issues a direction for the purpose of enforcing its new Code, all Controlled PRS Providers will have an obligation to comply with that direction.
- 4.11 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice in policy-making. This is reflected in Section 7 of the Communications Act 2003, which states that we generally have to carry out IAs where our proposals would be likely to have a significant effect on businesses or the general public or when there is a major change in Ofcom's activities. As a matter of policy, Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to Impact assessments, see the guidelines Better Policy-Making: Ofcom's Approach to Impact Assessment at http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf.
- 4.12 The analysis presented in this document constitutes an impact assessment for our proposal to amend the PRS Condition. The impact assessment regarding the new Code and the case for PhonepayPlus to regulate the entire PRS value chain can be found in Ofcom's statement approving the new Code.²⁴
- 4.13 As part of our impact assessments, we conduct an equality impact assessment to identify whether our proposals would have particular effects on specific groups within society. We have therefore considered whether we were required to undertake a full equality impact assessment for this review. On the basis of our initial equality impact assessment screening, we determined that this was not required, because the proposed change to the PRS Condition does not raise specific equality issues.

²² See PhonepayPlus Quarter 3 Report, http://www.phonepayplus.org.uk/News-And-Events/News/2011/2/~media/Files/PhonepayPlus/News%202011/2011_Quarterly_Report_2011_Q3.pdf

²³ We do not necessarily expect PhonepayPlus to be successful in recovering all fines that are due to it, as some liable providers may instead be made insolvent. It is also relevant to note that the fines imposed by PhonepayPlus can vary significantly from year to year.

²⁴ See <http://stakeholders.ofcom.org.uk/binaries/consultations/ppp/statement/statement.pdf>

Tests set out under the Communications Act 2003

4.14 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 proposed modification to the PRS Condition are set out below.

Section 3 – Ofcom's general duties

4.15 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.

4.16 Ofcom considers that the proposal to extend the PRS Condition to mirror the remit of PhonepayPlus under the new Code is in line with section 3 of the Act. The proposal seeks to extend the consumer protection provided by PRS Condition to all Controlled PRS providers that are currently not subject to that regulation. The proposal represents a technical 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.

4.17 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 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

4.18 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

- 4.19 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

- 4.20 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.
- 4.21 We consider that the proposed modification to the PRS Condition complies with the legal tests set out in section 47(2). We are satisfied that the proposed 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 appropriate and 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.

4.22 We are satisfied that the PRS Condition should therefore be amended to mirror the remit of the new Code. A draft of the amended PRS Condition is attached as Annex 4.

Implementation

4.23 Subject to this consultation exercise, we anticipate the proposed change to the PRS Condition (which is outlined in Annex 4) will be made to coincide with the new Code coming into force on 1 September 2011.

4.24 Should the proposed change to the PRS Condition go ahead then we do not consider it necessary for there to be a specific transitional period. 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 to indirectly 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

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 22 June 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/prs-2011/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email sue.merrifield@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.
- Sue Merrifield
Floor 2
Consumer Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3333
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 5. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Jeff Loan on 020 7981 3761 (before 13 May 2011) or Sue Merrifield subsequently on 020 7981 3719.

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, 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 intend to publish a statement in August 2011.
- 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

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 . 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 Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

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

During the consultation

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

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

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

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

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

After the consultation

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

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- 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/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

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

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

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

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

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

Notification of a proposed modification under section 48(2) of the Act

Proposal for modification of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) of the Act published by OFCOM on 17 October 2006 *The Conditions Regulating Premium Rate Services*

1. OFCOM, in accordance with the procedures in section 48 of the Act hereby makes the following proposal for a modification to the Premium Rate Services (“PRS”) Condition set under section 120 of the Act.
2. The draft 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 sections 3 and 4 of the accompanying consultation document.
4. OFCOM considers that the proposed 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. Representations may be made to Ofcom about the proposal by 5pm on 22 June 2011.
7. Copies of this Notification and the accompanying consultation document 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.
8. In this Notification:
 - (i) “the Act” means the Communications Act 2003; and
 - (ii) “OFCOM” means the Office of Communications;
9. 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.
10. 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.

11. The Schedule to this Notification shall form part of this Notification.
12. The modification set out in the Schedule to this Notification shall take effect immediately with publication of the Notification of the modification under section 48(1) of the Act.

Signed by

Claudio Pollack

A person authorised by Ofcom under paragraph 18 of the Schedule to the Communications Act 2003.

11 May 2011

Schedule

Proposal for modification of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) of the Act published by OFCOM on 20 December 2010, ‘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’

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:
 - (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.

Annex 5

Consultation questions

A5.1 Please find below the questions included in this consultation document:

Question 1: Do you agree the PRS Condition should be amended to require all Controlled PRS Providers to comply with directions made by PhonepayPlus for the purpose of enforcing its Code of Practice?

Question 2: Do you agree that the proposed amendment to the PRS Condition (see Annex 4) gives effect to this intention?